

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

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NORTHWEST ENVIRONMENTAL ADVOCATES, *et al.*,  
Plaintiffs-Appellees/Petitioners,

and

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
Defendant-Appellant/Respondent,

and

THE SHIPPING INDUSTRY BALLAST WATER COALITION,  
Defendant-Intervenor Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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**ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON  
PETITION FOR REVIEW OF NORTHWEST ENVIRONMENTAL  
ADVOCATES, *et al.***

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Northwest Environmental Advocates, San Francisco Baykeeper, and The Ocean Conservancy state that they are not-for-profit conservation organizations and have no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.

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## STATEMENT OF JURISDICTION

Northwest Environmental Advocates, San Francisco Baykeeper, and The Ocean Conservancy (collectively “Petitioners”) filed two actions challenging a Clean Water Act regulatory exemption found at 40 C.F.R. section 122.3(a) (hereinafter “vessel discharge exemption”) and the denial by the U.S. Environmental Protection Agency (“EPA”) of a petition to rescind that exemption. First, Petitioners filed suit against EPA in district court, invoking that court’s federal question jurisdiction pursuant to 28 U.S.C. section 1331. Appellants’ Excerpts of Record (“ER”) 1-8. The district found that it had subject matter jurisdiction over Petitioners’ claims and, on September 18, 2006, entered final judgment on the merits. ER 350-71. This Court has appellate jurisdiction over the direct appeals of that judgment (Case Nos. 06-17187 and 06-17188) pursuant to 28 U.S.C. section 1291.

Second, because EPA had previously argued that the appellate courts have exclusive jurisdiction over Petitioners’ claims pursuant to section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), Petitioners also timely filed, as a protective measure, a Petition for Review in this Court within 120 days of EPA’s denial of the administrative petition to rescind the vessel discharge exemption. Petitioners’ Supplemental Excerpts of Record (“SER”) 552-555. As explained

below, that Petition for Review (Case No. 03-74795) has been consolidated with the pending appeals from the district court. Thus, if this Court concludes that the district court did not have jurisdiction over Petitioners' claims, this Court has original jurisdiction, pursuant to Clean Water Act section 509(b), over Petitioners' pending Petition for Review.

### **ISSUES PRESENTED**

1. Whether the district court properly exercised jurisdiction over Petitioners' Administrative Procedure Act ("APA") claims pursuant to its general federal question jurisdiction under 28 U.S.C. section 1331 because the direct review provisions of Clean Water Act section 509 do not apply.

2. Whether Petitioners timely challenged EPA's unlawful vessel discharge exemption contained in 40 C.F.R. section 122.3(a).

3. Whether that vessel discharge exemption in 40 C.F.R. section 122.3(a), which exempts various discharges incidental to the normal operation of a vessel from the permit requirements of the Clean Water Act, conflicts with the statutory requirements that expressly and unambiguously prohibit any vessel from discharging any pollutant into waters of the United States without a permit.

4. Whether Petitioners' administrative petition to rescind 40 C.F.R. section 122.3(a) sought repeal of the regulatory exemption in its entirety, where

EPA's response to the petition acknowledged that Petitioners sought rescission of the entire regulatory exemption, and where the regulatory exemption is not divisible.

5. Whether the proper remedy for EPA's violation of the Clean Water Act, considering the balance of harms, is to invalidate the vessel discharge exemption found at 40 C.F.R. section 122.3(a), but to delay the effect of that invalidation for two years to allow EPA to develop a replacement regulatory scheme to address vessel discharges using the flexible tools available under the Clean Water Act.

### **STATEMENT OF THE CASE**

For more than thirty years, EPA has categorically, and unlawfully, exempted discharges incidental to the normal operation of vessels from the Clean Water Act's permit requirements. 40 C.F.R. § 122.3(a) (hereinafter, the "vessel discharge exemption"). On January 13, 1999, Petitioners, along with other organizations, petitioned EPA to repeal the vessel discharge exemption on the grounds that it is inconsistent with the plain language of the Clean Water Act and causing significant environmental harm. ER 191-202. EPA did not formally respond to the petition. SER 123. Accordingly, after more than two years of delay, Petitioners filed a lawsuit in the district court seeking to compel a response

from EPA. Id. Rather than respond to the petition, EPA appealed the district court's decision. It was only after this Court ordered the parties into mediation that EPA finally agreed to respond to the petition. See Nw. Env'tl. Advocates v. U.S. EPA, 340 F.3d 853 (9th Cir. 2003). That response denied the petition to repeal the regulatory exemption. ER 14-35.

Petitioners thereafter filed two actions challenging EPA's actions. The first was an APA action in district court seeking declaratory judgment that the vessel discharge exemption violated the Clean Water Act and challenging EPA's denial of the administrative petition to rescind 40 C.F.R. section 122.3(a). ER 1-8. The district court agreed with Petitioners that it had jurisdiction to review the claims and that the vessel discharge exemption violated the Clean Water Act. ER 203-220. EPA did not seek reconsideration of the district court's liability order. The court then invited briefing on the proper selection of remedy, and, after considering the briefs filed by Petitioners, EPA, the Shipping Industry, and eight Great Lakes States, the district court ordered that the vessel discharge exemption will become invalid effective September 30, 2008. ER 351-371.

Shortly after filing their complaint in the district court, Petitioners also filed a protective Petition for Review with this Court, challenging EPA's denial of the administrative petition pursuant to section 509(b) of the Clean Water Act, which

provides for direct review in the court of appeals for a narrow set of specific agency actions. SER 552-555. Petitioners do not believe that the challenge at issue here falls within the limited review provisions of section 509(b); accordingly, they asked this Court to stay the Petition for Review proceedings pending resolution of the parallel proceedings in the district court. SER 556-570. In response, this Court ultimately dismissed the Petition without prejudice to reinstatement. SER 571. Following conclusion of the district court proceedings, Petitioners sought to reinstate the Petition for Review, SER 572-586, and on November 7, 2006, this Court reinstated the Petition for Review. SER 587. The Court subsequently set a consolidated briefing schedule for the appeals filed by EPA and the Shipping Coalition with the Petition for Review, treating the instant brief as both an answering and cross-appeal brief, with the Petition for Review serving as the “cross-appeal.”

### **STATEMENT OF FACTS**

This case challenges EPA’s maintenance of an unlawful regulatory exemption from the core permitting requirements of the Clean Water Act, a comprehensive statute designed to protect and restore the integrity of the nation’s waters. 33 U.S.C. § 1251(a). The primary tool for implementing this statutory mandate is the National Pollutant Discharge Elimination System (“NPDES”)

permit requirement codified in section 402 of the Act. Id. § 1342. The statute provides that “the discharge of any pollutant by any person shall be unlawful” except in compliance with certain statutory provisions, including specifically section 402. Id. § 1311(a). The “discharge of a pollutant” is defined, in turn, as “any addition of any pollutant to navigable waters from any point source.” Id. § 1362(12). A “point source” expressly includes any “vessel or other floating craft.” Id. § 1362(14). Thus, the Clean Water Act provides a clear statutory directive that discharges from vessels are point sources subject to NPDES permit requirements. Since 1973, however, EPA has maintained a regulatory exemption for all “discharge incidental to the normal operation of a vessel” from the Clean Water Act’s requirements. 40 C.F.R. § 122.3(a). Petitioners challenge this exemption as ultra vires and inconsistent with the plain language of the Clean Water Act.

Hundreds of billions of gallons of pollution have flowed through this regulatory loophole, doing permanent and increasing damage to the nation’s waters. Modern ships harbor a wide range of pollutants that are regularly discharged into the environment. As EPA has explained:

Significant environmental impacts to coastal and ocean ecosystems occur via direct pollution from vessels, and as a vector for non-indigenous species. Pollution from recreational, commercial, and military vessels emanates from a variety of sources, and include: gray water, bilgewater, blackwater (sewage), ballast water, anti-fouling

paints (and their leachate), hazardous materials, and municipal and commercial garbage and other wastes.

SER 159. Of the various pollutants in vessel discharges, the most problematic are invasive species, found primarily in the ballast water tanks used to maintain a ship's trim in the water. In port, these tanks are routinely filled or emptied, as necessary, to accommodate changes in cargo loads. In this way, aquatic species living in water around one port are routinely transported around the world and released at other ports, where they can flourish in the absence of natural predators and often outcompete native species filling the same ecological niche. See generally, Andrew N. Cohen and Brent Foster, [The Regulation of Biological Pollution: Preventing Exotic Invasions From Ballast Water Discharged into California Coastal Waters](#), 30 Golden Gate U. L. Rev. 787 (2000); SER 481, 542-551.

The volume of water – and the corresponding number of invasive species – transported via ballast tanks is enormous. A modern seagoing tanker can carry 28 million gallons of water; other cargo ships may carry as much as 5 million gallons. ER 141. EPA estimates that more than 21 billion gallons of ballast water are discharged into U.S. waters every year and that some 10,000 marine species spread around the globe in ballast tanks every single day. Id. Species invasions

via shipping pathways are “increasing at an increasingly higher rate.” Id. See also SER 306 (one new aquatic invasive species established in San Francisco Bay every 14 weeks). For example, up to 88 percent of the invasive species in San Francisco Bay were introduced through ship discharges over the course of a single decade. SER 313.

EPA itself has recognized the devastating impacts posed by vessel discharges. As the agency explained in its 2001 report on the subject, “[t]he ecological damage caused by invasive species can be enormous,” threatening not only the Great Lakes and San Francisco Bay, but also “[c]oral reef ecosystems in the Florida Keys, Gulf of Mexico and wider Caribbean” and “bird and wildlife populations” connected to these aquatic environments. ER 146. Indeed, the federal government has concluded that invasive species are “one of the most serious environmental threats of the 21st century” and constitute “a major or contributing cause of declines for almost half the endangered species in the United States.” SER 493, 500. In another recent report on the health of coastal ecosystems, EPA noted that aquatic invasive fauna, flora and pathogens like cholera have had “harmful, sometimes devastating, ecological, public health, and socioeconomic impacts” on the environment. SER 156-157.

The potential public health effects from invasives are as troubling as the ecological impacts. Epidemiological studies strongly suggest that cholera outbreaks have spread across the Atlantic and the Pacific through ballast water transport. SER 367. One Great Lakes shipping survey found cholera in 15 percent of ships, enterovirus in 18 percent, *Giardia* in 18 percent, hepatitis A in 9 percent, *Cryptosporidium* in 9 percent, and fecal coliform in a full 88 percent. SER 365.

The economic impacts from vessel discharges are equally dramatic. EPA estimates that aquatic invasive species transported principally via ocean-going vessels cause over \$5 billion in economic damage each year. SER 9. For instance, zebra mussels spread through vessel discharges have choked water pipes at power plants and other industrial facilities on the Great Lakes, which must now spend tens of millions of dollars each year to remediate them. See SER 156, 493.

Over the years since the vessel discharge exemption was promulgated, it has become increasingly, and painfully, obvious that EPA's original justification for the exemption – that “this type of discharge generally causes little pollution,” 38 Fed. Reg. 13,528 (May 22, 1973) – was spectacularly wrong. Because vessels discharges are, in fact, a major source of aquatic pollution and are not subject to any statutory exemption from the Clean Water Act, Petitioners sought rescission

of the exemption as clearly inconsistent with the plain language of the statute. ER 191-202. After several years of delay and litigation, EPA ultimately denied that petition. ER 14-31. This case followed.

### **SUMMARY OF THE ARGUMENT**

The district court properly exercised jurisdiction over the claims raised in Petitioners' complaint, correctly declared the vessel discharge exemption ultra vires, and appropriately exercised its discretion in setting a deadline by which the vessel discharge exemption becomes invalid.<sup>1</sup>

First, the district court correctly determined that it had jurisdiction over Petitioners' claims. The attempts of EPA and the Shipping Industry to shoehorn this case into the limited review provisions of section 509(b) simply cannot succeed. Section 509(b) provides for direct court of appeals review for a discrete set of agency actions, none of which are at issue here.

Second, contrary to Appellants' arguments, Petitioners timely challenged the vessel discharge exemption. Petitioners petitioned to have the vessel discharge exemption declared invalid, EPA considered and denied the administrative

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<sup>1</sup> Whether this Court acts in its appellate capacity and affirms the district courts' jurisdiction or finds that it has original jurisdiction under Section 509(b) of the Clean Water Act and considers the Petition for Review in the first instance, it can and should address all of the liability and remedy issues raised by the parties. Accordingly, Petitioners do not separate these issues for purposes of briefing.

petition, and Petitioners challenged that denial less than four months later.

Although EPA concedes that Petitioners timely challenged the denial, it nonetheless argues that the vessel discharge exemption is permanently shielded from any judicial review simply because it has existed for more than six years. EPA's arguments, however, contradict this Court's precedents.

Third, the vessel discharge exemption violates the express requirements of the Clean Water Act and therefore fails at step one of the two-step Chevron analysis. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. ("NRDC"), 467 U.S. 837 (1984). Simply put, the Clean Water Act prohibits the unpermitted discharges of pollutants from point sources, and it expressly defines point sources to include vessels. 33 U.S.C. §§ 1311(a), 1362(11) and (12). The regulatory exemption authorizing unpermitted discharges of pollutants from vessels thus flatly contradicts the statute and is ultra vires.

Fourth, Petitioners clearly sought repeal of the vessel discharge exemption in its entirety and thus have not waived their right to challenge the exemption as a whole. EPA clearly understood that the administrative petition to repeal extended to the entire vessel discharge exemption and EPA cannot now claim otherwise.

Finally, the remedy ordered by district court properly balanced the harms and set a reasonable date on which the vessel discharge exemption becomes

invalid. As this Court has repeatedly found, federal courts have the power under the APA “to order ‘mandatory affirmative relief,’ if such relief is ‘necessary to accomplish complete justice.’” Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 680-81 (9th Cir. 2007) (internal citations omitted). Thus, even if this Court determines that it has original jurisdiction over Petitioners’ claims, it should adopt the same remedy and time frame ordered by the district court – vacatur of the exemption in September 2008 – because remand to EPA for further consideration of the petition would serve no legitimate purpose.

## **ARGUMENT**

### **I. The District Court Properly Exercised Jurisdiction Over Petitioners’ Claims.**

Appellants argue that two narrowly tailored provisions under section 509 of the Clean Water Act should extend to provide this Court exclusive jurisdiction over this case. These arguments ignore the plain language of the Clean Water Act and misapply judicial precedent governing the Clean Water Act’s direct review provisions. The district court therefore properly rejected Appellants’ attempts to squeeze the instant case into these narrow review provisions and exercised jurisdiction over Petitioners’ claims. In the event this Court concludes otherwise, it has jurisdiction under section 509(b)(1) to review the claims raised in

Petitioners' Petition for Review. Under either appellate or direct review, this Court should conclude that the vessel discharge exemption conflicts with the plain requirements of the Clean Water Act and establish a deadline its invalidation.

**A. Petitioners' APA Claims Fall within the District Court's General Jurisdiction.**

Petitioners brought suit in district court pursuant to 28 U.S.C. section 1331 and the APA, requesting that the court hold unlawful and set aside EPA's action in promulgating, maintaining and refusing to rescind the unlawful vessel discharge exemption promulgated at 40 C.F.R. section 122.3(a) on the grounds that the exemption is "not in accordance with" and "in excess of EPA's statutory jurisdiction under" the Clean Water Act. ER 1-9 (citing 5 U.S.C. §§ 706(2)(A), (C)). The district court properly exercised jurisdiction over this action in accordance with the APA, which provides for review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

Absent a specific review provision in the underlying statute, jurisdiction for APA claims properly lies in the district court under 28 U.S.C. section 1331.<sup>2</sup> Or. Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842, 851-52 (9th Cir. 1987)

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<sup>2</sup> Section 1331 states that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

(where specific jurisdictional grant of the Clean Water Act did not apply, challenge to EPA action properly brought under APA and 28 U.S.C. section 1331). “In other words, unless Congress specifically maps a judicial review path for an agency, review may be had in federal district court under its general federal question jurisdiction, 28 U.S.C. § 1331.” Owner-Operators Indep. Drivers Ass’n of Am., Inc. v. Skinner, 931 F.2d 582, 585 (9th Cir. 1991) (citing Abbott Lab. v. Gardner, 387 U.S. 136, 140-41 (1967)). Here, the Clean Water Act’s specific judicial review provisions do not apply to the claims brought by Petitioners. The district court thus had jurisdiction to review Petitioners’ challenge to the vessel discharge exemption.

**1. Courts Narrowly Construe the Limited Direct Review Provisions.**

In section 509(b)(1) of the Clean Water Act, Congress enumerated seven discrete types of agency action over which the court of appeals exercises original jurisdiction. See 33 U.S.C. § 1369(b)(1)(A-G). This Court may therefore directly review only those agency actions identified in section 509(b)(1). Petitioners’ claims challenging the legality of a regulatory exemption as ultra vires and inconsistent with the plain language of the Clean Water Act do not, on their face, fall within any of these seven express exemptions to district court jurisdiction.

The district court properly exercised jurisdiction pursuant to 28 U.S.C. section 1331.

This Court, in step with other circuits, has repeatedly admonished that courts must narrowly construe Section 509(b) to exclude any EPA actions that are not expressly enumerated in the statute. 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.); Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1431-32 (9th Cir. 1991) (same); see also Friends of the Earth v. EPA, 333 F.3d 184, 193 (D.C. Cir. 2003) (“Given the specificity of the Clean Water Act’s judicial review provision, we join our sister circuits in holding that the courts of appeals have original jurisdiction to review only those EPA actions specifically enumerated in 33 U.S.C. § 1369(b)(1).”); Bethlehem Steel Corp. v. EPA, 538 F.2d 513, 517 (2d Cir. 1976) (“[T]he complexity and specificity of section 509(b) in identifying what actions of EPA under the FWPCA would be reviewable in the courts of appeals suggests that not all such actions are so reviewable. If Congress had so intended, it could have simply provided that all EPA action under the statute would be subject to review in the courts of appeals, rather than specifying particular actions and leaving out others.”).

Narrow construction of Section 509(b) is also wise policy, as it promotes judicial efficiency. As Longview Fibre noted, judicial review under the Clean Water Act is “gnarled and hazardous” and “a special hazard arises when review is available directly to the court of appeals.” 980 F.2d at 1309. Litigants must “hire a horde of lawyers” to maneuver through the Clean Water Act and expend “tremendous resources in time and money and considerable legal skill . . . into finding out the proper address for an appeal.” Id. at 1314. Expansion of section 509(b) only exacerbates this difficult situation, forcing litigants to engage in the kind of dual filing that Petitioners pursued here to protect their claims. On the other hand, a clear and consistent rule, drawn narrowly to reflect the plain language of the statute, provides certainty to both litigants and reviewing courts.

District courts have consistently, and properly, reviewed stand-alone challenges to categorical exemptions under the Clean Water Act. Indeed, the D.C. Circuit’s landmark decision in NRDC v. Costle, holding EPA’s categorical exemption for stormwater discharges ultra vires, arose from an appeal of a district court decision. 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). Other cases that have considered direct challenges to categorical exemptions have either held or suggested that review is proper in the district courts. See League of Wilderness

Defenders v. Forsgren, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) (reiterating that “this Court has counseled against expansive application of section 1369(b)”); Envtl. Prot. Info. Ctr. (“EPIC”) v. Pac. Lumber Co., 266 F. Supp. 2d 1101, 1113-20 (N.D. Cal. 2003). There is no reason for this Court to depart from that well-charted course.

Appellants nevertheless attempt to stretch two provisions of section 509(b)(1) to argue that EPA’s categorical exemption qualifies either as “the issuance or denial” of a permit under section 509(b)(1)(F) or the “approval or promulgation of effluent limitations” under section 509(b)(1)(E). As explained below, these arguments fail.

**2. The Vessel Discharge Exemption Is Neither an Action “Issuing or Denying a Permit” nor an “Underlying Permit Procedure.”**

Appellants’ attempt to bring this case within section 509(b)(1)(F) is unavailing. Subsection (F) confers appellate jurisdiction over EPA actions “in issuing or denying any permit under section 1342.” 33 U.S.C. § 1369(b)(1)(F). The vessel discharge exemption at issue here involves neither the issuance nor the denial of a permit; rather, it excludes an entire class of discharges from any permit obligations whatsoever. Under its plain terms, section 509(b)(1)(F) does not extend original appellate jurisdiction to exclusions.

Nor does this Court’s precedent extending section 509(b)(1)(F) to “rules that regulate the underlying permit procedures” apply to the vessel discharge exemption. See NRDC v. EPA, 966 F.2d 1292, 1296-97 (9th Cir. 1992). In extending section 509(b)(1)(F) to underlying permit procedures, the Court intended 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.” EPIC, 266 F. Supp. 2d at 1114 (quoting NRDC v. EPA, 656 F.2d 768, 775 (D.C. Cir. 1981)). The concerns addressed by this Court in NRDC simply do not extend to categorical exemptions because, as the district court recognized, “[t]he EPA could never issue or deny a permit for ballast water discharges given that they are exempt from the NPDES permit requirements and absolutely no procedures exist to provide such permits.” ER 212. See also EPIC, 266 F. Supp. 2d at 1115 (“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.”).

Appellants lean heavily on two inapposite cases in arguing for appellate jurisdiction under 509(b)(1)(F) – NRDC v. EPA, 966 F.2d 1292, and American Mining Congress (“AMC”) v. EPA, 965 F.2d 759 (9th Cir. 1992). Decided on the

same day by the same panel, both cases reviewed aspects of EPA's comprehensive Phase I storm water permitting regulations, which, inter alia, set deadlines by which various discharges must obtain permits, extended the permit requirement to certain discharges, excluded other discharges from permit requirements entirely, and established substantive and procedural permit requirements. See NRDC, 966 F.2d at 1297-1301 (discussing deadlines), 1301-08 (discussing exclusions), and 1308 (discussing substantive and procedural requirements for municipal discharges); AMC, 965 F.2d at 764-66 (discussing permit requirement for inactive mines) and 767-769 (discussing permit requirements and exemptions for reclaimed mines). These cases thus involved substantial agency and judicial parsing of the intricate "rules that regulate" the NPDES stormwater permit "procedures." NRDC, 966 F.2d at 1296-97; AMC, 965 F.2d at 763.

Here, by contrast, 40 C.F.R. section 122.3(a) broadly excludes from the permit program discharges "incidental to the normal operation of a vessel." Unlike in NRDC and AMC, there are no procedural or substantive standards at play here; nor are the intricacies of the NPDES program even implicated. See EPIC, 266 F. Supp. 2d at 1115. Rather, the sole question for judicial review is whether the vessel discharge exemption conflicts with section 301(a) of the Clean Water Act. The district court properly exercised jurisdiction to answer that

question.<sup>3</sup>

**3. The Vessel Discharge Exemption Is Not an “Effluent Limitation or Other Limitation.”**

Even less persuasive are Appellants’ arguments for review under 509(b)(1)(E), which authorizes direct review of agency 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). In promulgating 40 C.F.R. section 122.3(a), EPA expressly relied upon its legal authority under section 1342 of the Clean Water Act, not under sections 1311, 1312, 1316 or 1345. See 38 Fed. Reg. 13,528, 13,530 (May 22, 1973). Thus, on its face, section 509(b)(1)(E) does not apply to the promulgation of the vessel discharge exemption. As this Court noted in Longview Fibre:

It would be an odd use of language to say “any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title” . . . if the references to particular sections were not meant to exclude others. . . . 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. In this case, expressio unius est exclusio alterius.

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<sup>3</sup> Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196-97 (1980), holds only that an EPA veto of a state-issued permit constitutes an agency action “denying a permit.” It does not, contrary to EPA’s claims, authorize direct court of appeals review of categorical exemptions.

980 F.2d at 1313.

Moreover, the one-sentence vessel discharge exemption at issue here cannot, under any conceivable stretch of the English language, be construed as an “effluent limitation or other limitation.” The Clean Water Act defines “effluent limitation” as “any restriction . . . on the quantities, rates, and concentration of chemical, physical, biological or other constituents which are discharged from point sources into navigable waters . . . .” 33 U.S.C. § 1362(11). More generally, a “limitation” is defined as “[t]he act of limiting; the state of being limited” or “a restriction.” Black’s Law Dictionary (8th ed. 2004). Thus, a regulation that exempts an entire class of discharges from NPDES permitting requirements cannot possibly be construed as a “limitation” under section 509(b)(1)(E). *Id.* (defining “exemption” as “[f]reedom from a duty, liability, or other requirement”); *EPIC*, 266 F. Supp. 2d at 1116-18.

The cases that Appellants cite only highlight the weakness of the argument they press. In *NRDC v. EPA*, the D.C. Circuit held that a “complex set of procedures for issuing or denying permits” fell under 509(b)(1)(E) as an “effluent limitation or other limitation” even though the regulations did not impose any numerical limits on discharges. *NRDC v. EPA*, 673 F.2d 400, 402 (D.C. Cir. 1982). The D.C. Circuit based its holding on the fact that some of the regulations

“restrict who may take advantage of certain provisions or otherwise guide the setting of numerical limitations in permits,” thus acting as ““a restriction on point sources and permit issuers’ and ‘a restriction on the untrammelled discretion of the industry’ that existed before passage of the CWA.” Id. at 404-05 (internal citations omitted). In contrast, the vessel discharge exemption here does not guide or independently impose any restrictions on point sources and permit issuers.

Similarly unresponsive is Environmental Def. Ctr., Inc. (“EDC”) v. EPA, 344 F.3d 832 (9th Cir. 2003), a case in which this Court found jurisdiction under section 509(b)(1) to hear a challenge to a regulation requiring NPDES permits for municipal storm sewers and certain construction site discharges.<sup>4</sup> Although one of the twenty-two statutory, constitutional and procedural challenges at issue in EDC addressed an exemption to the permitting requirements, 344 F.3d at 861-62, the stand-alone vessel discharge exemption bears no similarity to EDC’s permitting regulation. As the district court noted, the regulations in EDC quite clearly “limited the amount of storm sewer pollutants, unlike the case before this Court.” ER 209.

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<sup>4</sup> This Court did not specify the exact provision affording jurisdiction, but noted only that section 509(b)(1) “assign[s] review of EPA effluent and permitting regulations to the Federal Courts of Appeals.” Id. at 843.

EPA forwards an even more dubious argument that because the remedy requested in this case (rescission of the unlawful exemption) would lead EPA to develop NPDES regulations for vessel discharges, challenges to which would likely fall under section 509(b)(1)(E), this Court has jurisdiction over the challenge to the exemption as well. This jurisdictional bootstrapping proposition is ungrounded in law and breathtaking in its expansion of statutory grants of review.<sup>5</sup> As this Court noted recently, “[j]udicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms.” Nuclear Info. & Res. Serv. v. DOT Research, 457 F.3d 956, 960 (9th Cir. 2006) (internal quotations omitted). The vessel discharge exemption at issue here clearly falls outside of section 509(b)(1)(E)’s jurisdictional grant. Appellants cannot make it otherwise by speculating this Court may have original jurisdiction over some possible future challenge to action that EPA may someday undertake in

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<sup>5</sup> The cases cited by EPA are inapposite. Maier v. EPA and Olijato Chapter of Navajo Tribe v. Train both stand for the unremarkable proposition that challenges to EPA’s failure to revise pollution standards are subject to the same jurisdictional provisions as direct challenges to those pollution standards. 114 F.3d 1032, 1036-39 (10th Cir. 1997) (wastewater effluent regulations under Clean Water Act); 515 F.2d 654, 657-61 (D.C. Cir. 1975) (air pollution standards under Clean Air Act). Also inapplicable is Public Utility Commissioner v. Bonneville Power Admin., 767 F.2d 622, 626-27 (9th Cir. 1985), which held that challenges – such as a challenge to the constitutionality of the proceeding – that might affect an appellate court’s original jurisdiction over a future action must also go through direct appellate court review.

response to this case.

**B. Alternatively, this Court has Jurisdiction over Petitioners' Timely Petition for Review.**

As explained above, Petitioners timely filed a protective Petition for Review with this Court on December 30, 2003, asserting the same challenge to the vessel discharge exemption that was before the district court. That Petition is now consolidated with Appellants' appeals and squarely before the Court. If the Court affirms the district court's jurisdiction, the Petition for Review may properly be dismissed and the Court may proceed to review the liability and remedy issues in its appellate capacity. If not, this Court may reach and decide each of the liability and remedy issues discussed below in its direct review capacity.

**II. Petitioners' Claims Are Timely and Cognizable.**

Petitioners assert two complementary legal claims based upon a single unlawful agency rule. Their first cause of action alleged that the vessel discharge exemption set forth in 40 C.F.R. section 122.3(a) is ultra vires and in excess of EPA's statutory authority under the Clean Water Act. ER 7. The second cause of action alleged that EPA's denial of Petitioners' petition to repeal the exemption was not in accordance with law because the exemption is ultra vires and contradicts the language of the statute. Id. While conceding that this second

cause of action is timely, see Opening Brief for the Federal Defendant-Appellant (“EPA Br.”) at 22, n.8, EPA contends that the first cause of action is barred by the general federal six-year statute of limitations at 28 U.S.C. section 2401. In so arguing, EPA misconstrues a unanimous body of case law permitting ultra vires challenges, just like the one asserted here, beyond the default federal statute of limitations.

This Court has distinguished between policy-based or procedural challenges to agency rulemaking, which parties must file within six years of the final rulemaking decision, and substantive challenges alleging lack of agency authority, which may be brought beyond the six-year limitation. Wind River Mining Corp. v. United States, 946 F.2d 710, 715-16 (9th Cir. 1991). See also N.L.R.B. Union v. Fed. Labor Relations Auth., 834 F.2d 191, 196-97 (D.C. Cir. 1987) (drawing same distinction).<sup>6</sup> 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

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<sup>6</sup> Courts apply the six-year limitation to policy-based and procedural challenges because “[t]he grounds for such challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision,” and thus the “government’s interest in finality outweighs a late-comer’s desire to protest the agency’s action as a matter of policy or procedure.” Wind River, 946 F.2d at 715.

the adverse application of the decision to the particular challenger.” Wind River, 946 F.2d at 715 (relying on Pub. Citizen v. Nuclear Regulatory Comm’n, 901 F.2d 147, 152 (D.C. Cir. 1990)). The six-year statute of limitations on a facial ultra vires challenge begins to run, therefore, “upon the completion of the administrative proceedings” – in this case, upon EPA’s denial of the petition to repeal the vessel discharge exemption. Id. at 716 (internal quotation omitted).

Courts within the Ninth Circuit have consistently applied this Court’s Wind River holding to allow ultra vires challenges to proceed more than six years after the underlying regulations were adopted. For instance, a district court recently applied Wind River to an ultra vires challenge of an 18-year-old regulation under the Endangered Species Act, finding that the claim accrued to the plaintiffs when the agency issued a biological opinion in reliance on the regulation. Am. Motorcycle Ass’n Dist. 37 v. Norton, 2004 WL 1753366, \*7 (N.D. Cal. Aug. 3, 2004). Similarly, the “as applied” doctrine governed an ultra vires challenge to a 20-year-old regulation under the Marine Mammal Protection Act, because the claim accrued upon issuance of a “small take authorization” based on the old regulation. NRDC v. Evans, 279 F. Supp. 2d 1129, 1148 (N.D. Cal. 2003).

EPA advances two arguments designed to evade this controlling precedent. First, EPA disputes that Petitioners have raised an ultra vires claim at all, arguing

the first cause of action in Petitioners’ complaint “can only be described as a policy-based facial challenge to a regulation brought well outside the limitations period.” EPA Br. at 25. While it is unclear what EPA means by “policy-based,” the complaint itself, which alleges that the vessel discharge exemption “is inconsistent with, and in excess of EPA’s statutory authority under, the Clean Water Act,” demonstrates that the claim raises a purely legal challenge to the exemption. ER7.

Second, EPA argues that the first cause of action cannot be an “as applied” challenge to the vessel discharge exemption because EPA did not “apply” the regulation to Petitioners when EPA denied the petition to rescind the exemption. EPA Br. at 24. This contention runs directly counter to Wind River, where, as here, the only actual “application” of the contested agency decision to the plaintiff was the agency’s denial of the plaintiff’s petition to invalidate the decision as ultra vires.<sup>7</sup> Wind River, 946 F.2d at 711, 716. Moreover, EPA’s interpretation ignores

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<sup>7</sup> In 1986 and 1987, Wind River petitioned to have the Bureau of Land Management (BLM) declare invalid its 1979 decision establishing a wilderness study area, claiming that the area did not meet the statutory requirements for a “wilderness study area.” 946 F.2d at 711. BLM denied Wind River’s request, and a subsequent appeal to the Interior Board of Land Appeals was dismissed as untimely. Id. It was the petition and denial that the Court recognized as the “application” of the BLM’s decision to the plaintiff, permitting a challenge to the decision outside of the six-year statute of limitations. Id. at 716.

this Court’s policy that “[t]he 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.” Id. at 715. Here, adoption of EPA’s arguments would have precisely the effect that the Court attempted to avoid in Wind River – it would forever shield an unlawful regulation from judicial review simply because EPA promulgated the regulation long ago.<sup>8</sup>

Courts have routinely allowed for citizen petitions to create a right of review of existing regulations. In Legal Environmental Assistance Foundation, Inc. (“LEAF”) v. EPA, 118 F.3d 1467 (11th Cir. 1997), the Eleventh Circuit upheld an ultra vires challenge to certain EPA regulations more than six years after the regulations were promulgated, holding that EPA’s denial of the plaintiff’s petition to rescind those regulations gave the court jurisdiction to consider

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<sup>8</sup> For the same reason, the argument of the National Marine Manufacturers Association (“NMMA”) in its amicus curiae brief that Petitioners’ action is untimely is also unavailing. Relying on a D.C. Circuit case, National Mining Association v. U.S. Department of the Interior, 70 F.3d 1345 (D.C. Cir. 1995), NMMA asserts that if this Court has jurisdiction under section 509(b), the vessel discharge exemption is forever shielded from judicial review under section 509(b)’s 120-day limitations period. To the extent that National Mining establishes an absolute bar against challenges to ultra vires regulations beyond the original limitations period, it runs contrary to this Court’s holding in Wind River. 946 F.2d at 715. Moreover, unlike in National Mining, EPA’s response to the petition at issue here triggered the “reopener” doctrine by undertaking a “serious substantive reconsideration” of the vessel discharge exemption. National Mining, 70 F.3d at 1352; ER 14-30 (EPA’s denial of petition).

plaintiff's substantive claim. LEAF, 118 F.3d at 1472-73. See also Pub. Citizen, 901 F.2d at 152 (noting the "long-standing rule" that "a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations"); Advance Transp. Co. v. United States, 884 F.2d 303, 305 (7th Cir. 1989) (same); EPIC, 266 F. Supp. 2d at 1121 (same).

Also without merit is EPA's last-ditch argument that Wind River and related cases have permitted only indirect challenge of the denial of a petition to rescind a regulation, prohibiting direct challenge to an underlying agency action that is contrary to statute.<sup>9</sup> See EPA Br. at 24-25. Contrary to EPA's claim, this Court

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<sup>9</sup> EPA makes this argument because it wrongly believes that, if it can somehow strike Petitioners' first claim, it will benefit from a more deferential standard of review under the second. The D.C. Circuit, however, has made clear that the fact that a party first petitioned an agency to repeal an allegedly unlawful regulation has no effect on the standard of review a court applies in reviewing the legality of that regulation.

It is . . . clear that courts need not defer to an agency's reading of a congressional enactment when, as here, that interpretation raises "a pure question of statutory construction for the courts to decide," rather than a "question of interpretation that arises on each case in which the agency is required to apply [a legal standard] to a particular set of facts."

N.L.R.B. Union, 834 F.2d at 196-97, 198 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446-448 (1987)).

stated quite clearly in Wind River that “[w]e hold that a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency’s application of that decision to the specific challenger.” Wind River, 946 F.2d at 716. The Eleventh Circuit reached the same result in LEAF, holding 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.” LEAF, 118 F.3d at 1473.

Thus, under a straightforward application of this Court’s analysis in Wind River, the district court correctly found that Petitioners’ separate but interrelated claims that the exemption is ultra vires and that the denial of the petition was inconsistent with law were both timely and cognizable.

### **III. The Vessel Discharge Exemption Violates the Clean Water Act.**

The Clean Water Act’s language, structure, policies, and legislative history all demonstrate that the Act unambiguously regulates discharges from vessels. Indeed, Appellants do not dispute this. Rather, Appellants cobble together a series of later-enacted statutes to suggest that Congress somehow acquiesced to EPA’s unlawful exemption. Their attempts to distract the Court from the plain mandates of the Clean Water Act must fail. First, under typical rules of statutory

interpretation, EPA's vessel discharge exemption fails at step one of the Chevron two-step analysis, because the language, structure, purposes and legislative history all demonstrate that the Clean Water Act prohibits unpermitted discharges of pollutants from vessels. Second, Appellants' attempt to inject ambiguity into the Clean Water Act through their heavy reliance on FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), is clearly misplaced. As the Supreme Court recently made clear in Massachusetts v. Environmental Protection Agency, 127 S.Ct. 1438, 2007 WL 957332 (Apr. 2, 2007), the Court's decision in Brown & Williamson does not give agencies license to disregard the plain commands of federal statutes. EPA may not, therefore, ignore the requirements of the Clean Water Act simply because other statutes also address certain vessel discharges. Third, Appellants' assertions that Congress has "acquiesced" to EPA's unlawful exemption similarly fall short, as it takes far more than a mere reference by Congress to an agency's regulation to prove acquiescence. Despite the Appellants' attempts to obfuscate the law, the Clean Water Act mandates that EPA regulate vessel discharges, and EPA's regulations to the contrary must be struck down.

**A. This Court Reviews the Legality of the Vessel Discharge Exemption through Familiar Tools of Statutory Construction.**

The Supreme Court’s opinion in Chevron established a two-step framework for reviewing agency statutory interpretation. The Court explained that 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.

Chevron, 467 U.S. at 842-43 (footnotes omitted, emphasis added). Determining congressional intent is solely for the court, as “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” Id. at 843 n. 9. A court proceeds to step two only if it finds that “the statute is silent or ambiguous with respect to the specific issue,” at which point “the question for the court [becomes] whether the agency’s answer is based on a permissible construction of the statute.” Id. As a result, “[w]here the language of the statute is clear, resort to the agency’s interpretation is improper.” Medtronics, Inc. v. Lohr, 518 U.S. 470, 512 (1996). See also United States v. Mead Corp., 533 U.S. 218, 227 (2001) (explaining that “Chevron-deference” is proper only where there has been an express congressional delegation of authority to an agency to clarify a specific ambiguous statutory

provision).

The Supreme Court has consistently emphasized that in determining congressional intent, “[i]t is well settled that the starting point for interpreting a statute is the language of the statute itself.” Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 56 (1987). See also Massachusetts, 127 S.Ct. 1438. In assessing the text of a statute, courts also examine the law’s structure and underlying purpose. Brown & Williamson, 529 U.S. at 133. Finally, courts look to the legislative history of a statute where necessary to assess Congressional intent. U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

In its opening brief, EPA attempts to deflect attention from these traditional methods of statutory analysis, and replace it with its own novel framework. First, without mentioning the plain language of the Clean Water Act itself, EPA claims that it is “at least ambiguous whether discharges incidental to the normal operation of a vessel must be subject to the prohibitions against discharging without a permit” and that EPA’s interpretation thus receives deference. EPA Br. at 27. Second, EPA attempts to limit this Court’s review solely to the “reasonableness of EPA’s denial of [the administrative] petition,” which EPA presumably

understands to mean that this Court would ignore the statutory language entirely.<sup>10</sup> EPA Br. at 27 n.9. Because EPA’s understanding of the standard of review, and therefore its analysis, skip entirely over the first step of Chevron review, its argument for deference necessarily fails.

**B. The Clean Water Act Prohibits the Discharge of Pollutants from Vessels without an NPDES Permit.**

The Clean Water Act prohibits the discharge of any pollutant from a point source into the waters of the United States, without an NPDES permit. 33 U.S.C. §§ 1311(a), 1362(12). Discharges from vessels squarely fall within this statutory prohibition. Indeed, the language and structure of the Clean Water Act allow for no other conclusion. Moreover, the purposes of the Clean Water Act and the legislative history of its enactment further show that Congress intended for vessel discharges to fall within the discharge prohibition and thus require NPDES permits.

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<sup>10</sup> Like this case, the Supreme Court’s decision in Massachusetts arose from EPA’s denial of a petition asking the agency to take action. In evaluating EPA’s denial, the Court explained that it “may reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and invalidated EPA’s denial because it conflicted with the unambiguous language of the Clean Air Act. 127 S.Ct. at 1463-1464. Thus, for statutory construction purposes, it is irrelevant whether this case arose from a petition denial or through a direct challenge to the regulation. Either way, the EPA regulation fails at Chevron step one.

**1. The Plain Language of the Clear Water Act Prohibits the Unpermitted Discharge of Pollutants from Vessels.**

To “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the Clean Water Act prohibits the discharge of any pollutant from a point source into the waters of the United States without an NPDES permit. 33 U.S.C. §§ 1311(a), 1362(12). Under this statutory scheme, any activity that involves (1) the addition (2) of a pollutant (3) from (4) a point source (5) into the waters of the United States is subject to the NPDES permit system. Committee To Save Mokelumne River v. East Bay Mun. Utility Dist., 13 F.3d 305, 308 (9th Cir. 1993); 33 U.S.C. § 1362(11). The discharge of invasive species and other pollutants from ships into navigable waters of the United States unquestionably satisfies these five elements, and so requires an NPDES permit.

The discharge of ballast, bilge and other vessel water originally obtained from another port constitutes an “addition” to the environment into which it is released. As EPA has argued, and courts have recognized, an “addition” occurs when pollutants are introduced to a water body from some other source. Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001).

Second, the invasive species, metals, oil residues, and other wastes that ship discharges contain are “pollutants” under the Clean Water Act. 33 U.S.C. § 1362(6). The term “pollutant” is broadly defined to “leave out very little,” Sierra Club, Lone Star Chap. v. Cedar Point Oil Co., 73 F.3d 546, 566-568 (5th Cir. 1996), cert. denied, 510 U.S. 811 (1996), and explicitly includes “biological materials,” as well as “garbage,” “sewage,” and “chemical wastes.” 33 U.S.C. § 1362(6). The plants, animals, and other organisms in ballast water constitute “biological materials,” and thus are pollutants that require regulation under the Clean Water Act. 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 Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) (finding that copper and other toxic materials are “pollutants” under the Clean Water Act).

Third, the rivers, lakes, harbors, and coastal estuaries into which ships discharge ballast, bilge and other effluents, are “navigable waters” under the Clean Water Act. 33 U.S.C. § 1362(7). Indeed, many of the waterways identified during the district court litigation, including the San Francisco Bay, the Great Lakes, and

the Columbia River, are navigable-in-fact and thus clearly satisfy the Clean Water Act's broad definition of "navigable waters," which extends to all waters of the United States. Id.

Finally, ballast water and other ship discharges arise "from" a "point source." Congress explicitly included "vessel[s] or other floating craft, from which pollutants are or may be discharged" as "point sources" in the Clean Water Act. 33 U.S.C. § 1362(12). The Supreme Court, moreover, has recognized that the Clean Water Act subjects the discharge of pollutants from vessels to the NPDES permit program. 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"). The statute thus plainly prohibits unpermitted discharges of pollutants from vessels into waters of the United States. EPA's vessel discharge exemption, which authorizes such unpermitted discharges, violates the clear requirements of the Clean Water Act.

**2. The Purpose and Structure of the Clean Water Act Further Demonstrate that Congress Intended to Prohibit Unpermitted Vessel Discharges.**

Congress' intent to regulate discharges from ships is even clearer when the relevant provisions are read in the context of the Clean Water Act as a whole.<sup>11</sup> In addition to the plain language of 33 U.S.C. section 1362(6) (including “vessels and other floating craft” in the definition of “point source”), other sections of the Act unambiguously demonstrate that vessel discharges must obtain permits.

First, in addition to defining “vessels and other floating craft” as point sources, the Clean Water Act contains two explicit exemptions for discharges from such point sources. The statute exempts from the definition of “pollutant” “sewage from vessels” and discharges that are “incidental to the normal operation of a vessel of the Armed Forces.” 33 U.S.C. § 1362(6). These two narrow exceptions demonstrate that Congress intended that (1) floating vessels be considered “point sources,” but that (2) sewage discharges from all vessels and all discharges from military vessels are excluded from the otherwise comprehensive scope of the NPDES program.

Where, as here, Congress has carved out an express statutory exemption for one form of an otherwise regulated activity but not another, neither EPA nor the

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<sup>11</sup> EPA is undoubtedly correct that the court “should not confine itself to examining a particular statutory provision in isolation,” EPA Br. at 27, quoting Brown & Williamson, 529 U.S. at 133. However, this does not mean that the agency can skip over the relevant statute entirely in an effort to infuse ambiguity where none otherwise exists.

courts are free to create or imply a similar exemption for point source discharges from non-military vessels. See, e.g., United States v. Smith, 499 U.S. 160, 167 (1991) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied.”); In re Gerwer, 898 F.2d 730, 732 (9th Cir. 1990) (“The express enumeration indicates that other exceptions should not be implied.”). Put differently, because Congress distinguished between sewage discharges and discharges from military vessels on the one hand, and all other vessel discharges on the other, neither EPA nor the courts can ignore this purposeful distinction. See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1165 (9th Cir. 1999) (“Applying that familiar and logical principle, we conclude that 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.”).

Second, by including “vessels or other floating craft” in the statutory list of point sources, Congress recognized that EPA’s authority under the Clean Water

Act might overlap with the Coast Guard’s authority to regulate such vessels. Accordingly, Congress included a provision that requires coordination between EPA and the Coast Guard regarding vessel discharges. 33 U.S.C. § 1342(g).

In short, Congress exempted certain vessel discharges from the NPDES program and included other specific coordination provisions for the rest. EPA cannot upset the precise framework established by Congress by adhering to the vessel discharge exemption that EPA continues to defend.

**3. The Legislative History of the Clean Water Act Further Confirms that Congress Intended to Regulate Vessel Discharges.**

The legislative history of the Clean Water Act serves only to reinforce this plain reading of the statutory language and structure. As the D.C. Circuit explained at length in NRDC v. Costle, committee reports and congressional debate over the adoption of the NPDES permit program in 1972 clearly evidence Congress’ intent to adopt a “tough law that relied on explicit mandates to a degree uncommon in legislation of this type” and that “the basic premise” of the statute is that any discharge of pollutants without a permit is unlawful. 568 F.2d at 1373-1377 (discussing legislative history in detail).

With respect to vessel discharges, floor debate on the legislation that would eventually become the Clean Water Act of 1972 reiterated that “[t]he bill now

under consideration controls the discharge of any pollutant into the ocean from an outfall pipe. . . . Further, this bill controls any discharge of pollutants from a vessel that occurs within the 3-mile limit. Section 402 permits would be required to make either type of discharge legal.” 117 Cong. Rec. 38803 (Nov. 2, 1971) (statement of Senator Boggs; emphasis added). This legislative history only bolsters the plain language of the statute, which unambiguously requires vessel discharges to obtain NPDES permits prior to discharging any pollutants into United States waters.

**C. EPA’s Failure to Regulate Ballast Water Is Contrary To The Plain Language Of The Clean Water Act And Exceeds EPA’s Statutory Authority.**

EPA’s exemption of discharges “incidental to the normal operation of a vessel,” 40 C.F.R. section 122.3(a), flatly contradicts the explicit mandates of the Clean Water Act. While EPA administers environmental laws, it is not free to ignore or rewrite the statutes. See, e.g., Massachusetts, 127 S.Ct. at 1460. Courts have consistently and repeatedly found that EPA does not have the statutory authority under the Clean Water Act to exempt an entire category of point source discharges from the NPDES permit program. See, e.g., NRDC v. Costle, 568 F.2d at 1377 (D.C. Cir. 1977) (“The 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 requirement of [the NPDES program]”); NRDC v. EPA, 966 F.2d 1292, 1305-1306 (9th Cir. 1992) (EPA’s exemption of stormwater discharges from light industry and construction “impermissibly alters the statutory scheme” and is invalid); Forsgren, 309 F.3d at 1190 (“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”); Northern Plains Resource Council v. Fidelity Exploration and Development Co., 325 F.3d 1159, 1164 (9th Cir. 2003) (neither the EPA nor states have “authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process.”). Thus, just as the Supreme Court held in the Clean Air Act context, where “[t]he statute is unambiguous,” the “statutory text forecloses EPA’s [contradictory] reading.” Massachusetts, 127 S.Ct. at 1460. Accordingly, the general vessel discharge exemption at 40 C.F.R. section 122.3(a) is facially illegal and must be invalidated.

**D. EPA Cannot Manufacture Statutory Ambiguity where Congress Has Left None.**

In the face of abundant authority confirming its mandatory duty to regulate vessel discharges, EPA attempts to inject ambiguity into the meaning of “vessel or other floating craft” by cobbling together an argument based on its own invalid regulations and a misunderstanding of Brown & Williamson which the Supreme Court has recently rejected in Massachusetts. The Supreme Court’s opinion in Brown & Williamson does not alter the Clean Water Act’s clarity or create any ambiguity as to EPA’s mandatory duty to regulate vessel discharges. Moreover, unlike the situation in Brown & Williamson, EPA here can readily harmonize the Clean Water Act with other statutes that partially address certain vessel discharges.

**1. EPA Has Misconstrued the Supreme Court’s Decision in FDA v. Brown & Williamson.**

Contrary to EPA’s protestations, the lower court did not “wrongly ignore[]” the Supreme Court’s opinion in Brown & Williamson. EPA Br. at 29. Far from ignoring the opinion, the lower court recognized that this case is not the “analogous factual situation” the EPA wishes it were. Id. While EPA is correct that Congress has decided to address some of the problems presented by vessel discharges with additional statutes, EPA Br. at 36, this by no means indicates that

Congress wants to undo the Clean Water Act.

Indeed, the Supreme Court very recently rejected EPA's attempt to rely on Brown & Williamson to obfuscate another clear statute, the Clean Air Act. In Brown & Williamson, the Supreme Court held that the Food and Drug Administration ("FDA") could not regulate tobacco products under the Food, Drug, and Cosmetic Act ("FDCA"), despite that statute's plain language. 529 U.S. at 135-137. Relying heavily on Brown & Williamson, as it does here, the EPA asserted in Massachusetts that later enacted statutes addressing some issues related to carbon dioxide and global warming indicated that Congress did not intend EPA to regulate the substance through the Clean Air Act. The Court made clear that it had reached its unusual decision in Brown & Williamson for two significant reasons. Massachusetts, 127 S.Ct. at 1461. First, regulation of tobacco by the FDA would have clashed with the "common sense" intuition that Congress never intended the FDCA to ban tobacco products. Id. Second, subsequent statutes made sense only if FDA did not have the authority to ban tobacco, id., while regulation under the FDCA would have necessitated such a ban. 529 U.S. at 133. In this case, in contrast, both the plain language of the Clean Water Act and "common sense intuition" indicate that Congress intended to regulate vessel discharges, and such regulation would neither conflict with other statutes nor

render later enactments meaningless. Thus, as in Massachusetts, no unique circumstances exist here and “[t]here is no reason, much less a compelling reason, to accept EPA’s invitation to read ambiguity into a clear statute.” 127 S.Ct . at 1461.

## **2. No Conflict Exists between the Clean Water Act and Other Later-Enacted Statutes.**

The Brown & Williamson logic only applies when an administrative interpretation would directly conflict with later statutes. Brown & Williamson, 529 U.S. at 133, 137-139; Massachusetts, 127 S.Ct . at 1461-62. There, had the FDA regulated tobacco, it would have had to ban it; but as Congress had “foreclosed the removal of tobacco products from the market” in other legislation, a “ban of tobacco products by the FDA would therefore plainly contradict congressional policy.” Brown & Williamson, 529 U.S. at 139. The direct conflict that FDA’s regulations would create with other, more-recent legislation, led to the “inescapable conclusion is that there is no room for tobacco products within the FDCA’s regulatory scheme.” Id.

Here, just as in Massachusetts, “EPA jurisdiction would lead to no such extreme measures” or any direct statutory conflicts, and thus none of the later enacted statutes to which EPA points foreclose the regulation of ship discharges.

127 S.Ct . at 1461. EPA suggests that regulating vessel discharges through NPDES permits would run afoul of the Nonindigenous Aquatic Nuisance Prevention and Control Act (“NANPCA”), as re-authorized and amended by the National Invasive Species Act of 1996 (“NISA”), and the Act to Prevent Pollution from Ships (APPS). EPA Br. at 36. This argument ignores the fact that NANPCA and NISA both explicitly preserve the Clean Water Act’s jurisdiction over the same discharges. NISA expressly provides that it shall “not affect or supersede any requirement 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). Similarly, the APPS includes a savings clause that makes clear the Act does not amend or repeal the Clean Water Act. 33 U.S.C. §§ 1901(a)(9), 1907(f).

These savings provisions run precisely contrary to the Appellants’ argument, because they demonstrate that Congress fully intended for all of these statutes to operate together, without conflict.<sup>12</sup> See also 33 U.S.C. § 1342(g)

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<sup>12</sup> EPA also argues that because Congress enacted statutes addressing some aspect of ballast water discharges, it necessarily intended to incorporate the vessel discharge exemption. EPA Br. at 39-41. The Supreme Court has just rejected this approach to statutory interpretation. Environmental Defense v. Duke Energy Corp., 127 S.Ct. 1423 (2007). There, the Court recognized that “Congress’s failure to use such an express incorporation of prior regulations . . . cuts against any suggestion that Congress intended to incorporate” the regulatory definition. Id. at 1434. (internal quotations omitted).

(requiring coordination between NPDES permits and Coast Guard regulations).

As the Supreme Court recognized in Massachusetts, these types of related statutes “do not conflict with any thoughtful regulatory effort; they complement it.” 127 S.Ct. at 1461. Simply because Congress chooses to add to existing regulatory schemes does not imply a repeal of the old scheme. Massachusetts, 127 S.Ct. at 1461 n. 29 (“We are moreover puzzled by EPA’s roundabout argument that because later Congresses chose to address stratospheric ozone pollution in a specific legislative provision, it somehow follows that greenhouse gases cannot be air pollutants within the meaning of the Clean Air Act.”). In fact, even the Coast Guard, which administers NANPCA and NISA, recognizes that the Clean Water Act continues to provide a separate and complementary regulatory scheme for discharges from ships. 33 C.F.R. § 151.1510(c). The regulation of ballast water and other discharges from vessels neither conflicts with other statutes nor renders them meaningless. As a result, EPA must follow the explicit mandates of the Clean Water Act and regulate such discharges.

**E. Congress Has Not Acquiesced to EPA’s Vessel Discharge Exemption.**

EPA’s final argument that Congress has silently approved EPA’s decision to rewrite the Clean Water Act is equally unavailing. Even if the “acquiescence

doctrine” is proper in some cases,<sup>13</sup> the Supreme Court has emphasized that such circumstances are exceedingly rare, and require overwhelming evidence that Congress actually intended to allow an agency’s interpretation to override the plain meaning of a statute. Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers, 531 U.S. 159, 169-170 (2001) (hereinafter “SWANCC”). There is no evidence that Congress in any of its later enactments intended to ratify EPA’s exemption, or that Congress even considered the validity or desirability of the vessel exception. Thus, the plain language must stand.

In SWANCC, the Supreme Court’s most recent and definitive discussion of congressional acquiescence, the Court explained that except in extraordinary circumstances, post-enactment legislative history cannot trump the plain text and meaning of the original statute, because “subsequent history is less illuminating than the contemporaneous evidence” of congressional intent. SWANCC, 531 U.S. at 170. Thus, although the Court has “recognized congressional acquiescence to administrative interpretations of a statute in some situations, [it] has done so with extreme care,” id. at 169, and only when there is extremely persuasive indication

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<sup>13</sup> But see Massachusetts, 127 S.Ct. at 1461, n.27 (citing United States v. Price, 361 U.S. 304, 313 (1960) (holding that “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one); Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (“[P]ost enactment legislative history is not only oxymoronic but inherently entitled to little weight.”).

of such congressional intent because “[a]bsent such overwhelming evidence of acquiescence, [the Court is] loathe to replace the plain text and original understanding of a statute with an amended agency interpretation.” Id. at 170 n.5. The Court found such overwhelming evidence in Bob Jones Univ. v. United States, 461 U.S. 574 (1983), because there “Congress had held ‘hearings on [the] precise issue,’ making it ‘hardly conceivable that Congress . . . was not abundantly aware of what was going on,’” and “‘no fewer than 13 bills introduced to overturn the [agency] interpretation’ had failed.” SWANCC, 531 U.S. at 170, n.5 (quoting Bob Jones Univ., 461 U.S. at 600-601).

The SWANCC opinion demonstrates that the Court approaches this issue through a two-pronged analysis, recognizing acquiescence only when Congress was officially aware of an agency interpretation or regulation (as when Congress has held hearings on the matter) and when Congress has directly addressed the issue (as when Congress fails to pass numerous bills aimed at reversing the agency’s interpretation). Id.; Bob Jones Univ., 461 U.S. at 600-601. As Congress has never considered legislation to approve or disapprove EPA’s vessel exemption, or even held hearings on the exemption, the standard for acquiescence has not been met. Moreover, neither of the two later-enacted statutes that EPA claims “evinced[] congressional acknowledgment and acceptance of EPA’s

regulatory exclusion,” EPA Br. at 31, suggest that Congress acquiesced to EPA’s exemption.

First, nothing in the National Defense Authorization Act for 1996 (“NDAA”), Pub. L. No. 104-106, § 325(b) to (c)(2), suggests that Congress considered the validity of the vessel exemption, or attempted to amend or ratify the exception. Indeed, the vessel discharge exception was not at issue in the NDAA; Congress’s goal was to exempt military vessel discharges from the standard NPDES program, not tinker with other point sources. As the Senate Report from the Committee on Environment and Public Works explained:

The proposed legislation results from an initiative begun by the Navy in 1990. 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 discharges 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). As this and other legislative history make clear, while Congress was aware of EPA’s vessel discharge exemption, it neither expressed support for the exemption nor legislated with the presumption that it was the controlling standard. Indeed, precisely the opposite is true. As the

foregoing quote makes clear, the Committee expressly affirmed that vessel discharges are point sources subject to the NPDES program, and that “[t]he effect of this 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 (emphasis added). The offhand reference to the regulatory exemption falls far short of meeting the burden for acquiescence. See SWANCC, 531 U.S. at 170; Bob Jones Univ. 461 U.S. at 600-601. If anything, the amendments suggest that Congress believed that vessels are point sources to be regulated by NPDES permits.

Similarly, the Deep Seabed Hard Mineral Resources Act of 1979 (“DSHMRA”) gives no indication of congressional acquiescence to EPA’s vessel discharge exemption. In the DSHMRA, Congress clarified a narrow application of the NPDES permitting scheme, and extended the Clean Water Act’s reach beyond the three-mile territorial sea zone for a particular class of point sources. The amendment’s goal was to eliminate a perverse incentive for industrial operations to move just beyond the three-mile zone to avoid regulation. See S. Rep. No. 960360 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.”). In light of this legislative intent, it is clear that, contrary to EPA’s assertion, Congress did not address EPA’s vessel exemption at all. Congress did not have occasion to revisit the agency’s exemption in this context because without the DSHMRA, no point source would be subject to the Clean Water Act beyond the three-mile zone, regardless of EPA regulations.

#### **IV. Petitioners Have Not Waived Their Challenge to the Vessel Discharge Exemption.**

EPA also erroneously argues that Petitioners “waived” any challenge to the regulatory exemption that extends beyond ballast water discharges and that, therefore, the district court should have limited its liability finding solely to ballast water discharges. EPA’s own response to the administrative petition demonstrates that EPA understood that the petition sought repeal of the exemption generally, and not simply repeal of the exemption solely as it applies to ballast water discharges. EPA’s belated attempt to limit the district court’s finding only to ballast water discharges should, therefore, be rejected.

This Court reviews de novo whether a plaintiff has exhausted required administrative remedies. See Bankston v. White, 345 F.3d 768, 770 (9th Cir. 2003). Parties adequately exhaust their administrative remedies where their input

“taken as a whole, provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged.” Native Ecosystems Council v. Dombeck, 304 F.3d 886, 900 (9th Cir. 2002). “Claims must be raised with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met and we must consider exhaustion arguments on a case-by-case basis.” Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 965 (9th Cir. 2002). This Court makes such an assessment using a “lenient” standard. Navajo Nation v. United States Forest Service, 479 F.3d 1024, 1049 (9th Cir. 2007). A party may also satisfy the exhaustion requirements where it can demonstrate that the defendant agency was aware of the claims at issue. IlioUlaokalani Coalition v. Rumsfeld, 464 F.3d 1083, 1092 (9th Cir. 2006) (“[t]he record in this case is replete with evidence that the Army recognized the specific shortfall . . . raised by Plaintiffs here”); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 559-561(9th Cir. 2000). Here, Petitioners adequately notified the EPA that they sought repeal of the regulation, and EPA expressly acknowledged this fact. The petition fulfilled any exhaustion requirements.

The administrative petition plainly sought repeal of the vessel discharge exemption as a whole. The document, in fact, is titled “Petition for repeal of 40

C.F.R. § 122.3(a).” ER 191. Petitioners repeatedly asked EPA to remove the entire regulatory exemption. ER 191 (“The undersigned groups (Petitioners) are writing to formally petition for the repeal of this rule, which is contrary to the express requirements of the CWA.”), 192 (“Because 40 C.F.R. § 122.3(a) runs counter to both the statute and binding judicial authority, we hereby petition EPA to repeal it.”). While Petitioners expressed particular concern with the invasive species introduced through unpermitted discharges of ballast water, the petition argued that the vessel discharge exemption violates the Clean Water Act as a matter of law:

Under the CWA, vessels qualify as point sources. Accordingly, when they discharge pollutants, they are required to have NPDES permits. Although EPA has purported to exempt “discharge[s] incidental to the normal operation of a vessel” from the requirement to obtain a permit, 40 C.F.R. § 122.3(a), the D.C. Circuit has confirmed that nothing in the CWA gives EPA the power to create categorical exemptions. . . . While EPA is given substantial deference in interpreting the CWA, the EPA cannot rely upon regulations that are clearly contrary to express statutory requirements.

ER 197. The petition further argued that “Subsequent Legislative Developments Underscore the Conclusion that Ballast Water Discharges and Other Discharges Incidental to the Normal Operation of a Vessel Require NPDES Permits.” ER 199 (emphasis added). Thus, as the district court properly concluded, the petition sufficiently informed EPA that petitioners sought repeal of the regulation in its

entirety. ER 362 (“Plaintiffs sought from the beginning to invalidate the entire regulation at issue.”).

EPA’s own response to the petition demonstrates that EPA understood the petition to embrace more than just ballast water discharges. Its title, “Decision on Petition for Rulemaking to Repeal 40 C.F.R. 122.3(a),” proves this fact. ER 14. The response further stated that the petition was “seeking repeal of a regulation” and then quoted the entire regulation found at 40 C.F.R. section 122.3(a). ER 14 (emphasis added). The response then explained that “[t]he Petition expresses particular concern with [the incidental discharge exemption] to the extent it shields ballast water discharges containing non-indigenous aquatic nuisance species from NPDES permit requirements.” Id. (emphasis added). It added that “the balance of the Petition seeks repeal of the normal operation exclusion based on legal arguments about the scope of permitting requirements under the Clean Water Act.” Id. (emphasis added). Further into its response, in providing the bases for its denial of the petition, EPA claimed that “regulation of all discharges incidental to the normal operation of a vessel, including discharges of ballast water, would be a massive undertaking,” that Congress has enacted programs “to address some of the excluded discharges,” and that states may use NPDES permits “to regulate ballast water or other discharges incidental to the normal operation of

a vessel.” ER 22 (emphasis added). Finally, throughout its response, EPA referenced various programs aimed at reducing non-ballast discharges from vessels. See, e.g., ER at 16 and 23 (referencing APPS, which addresses certain discharges of garbage and “hazardous substances,”); ER 23-24 (referencing the Alaska Cruise Ship Legislation, which regulates discharges of sewage and gray water from some cruise ships, and noting that the vessel discharge exemption “extends to such graywater”). In short, EPA’s response reveals that EPA understood that the petition encompassed more than ballast water discharges. It cannot now feign otherwise.<sup>14</sup>

#### **V. The Proper Remedy Is Invalidation of the Vessel Discharge Exemption.**

Upon finding the vessel discharge exemption illegal, the district court issued a remedial order that invalidates the exemption effective September 30, 2008. Invalidation of the exemption is the proper, and indeed the only, remedy that will effectuate the will of Congress, afford Petitioners meaningful relief, and avoid intrusion into EPA’s regulatory affairs. Accordingly, whether this Court reviews Petitioners’ claims through direct or appellate review, it should ensure

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<sup>14</sup> EPA first raised arguments regarding the scope of the petition during the remedial phase of the district court proceedings. The district court rejected these. EPA also raised, for the first time, an argument that it may consider certain non-ballast vessel discharges de minimis and thus exempt from the Clean Water Act’s discharge prohibition. The district court properly rejected EPA’s untimely argument. ER 363-364.

that the vessel discharge exemption is invalidated by the district court's deadline.

**A. Standard of Review and Standards Governing Injunctive Relief.**

This Court reviews a district court's decision to grant a permanent injunction for an abuse of discretion. Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1176 (9th Cir. 2002). However, any rulings of law relied upon by the district court are reviewed de novo. Id. Under the abuse of discretion standard, this Court cannot reverse the district court's decision absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. See SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001).

“The requirements for the issuance of a permanent injunction are (1) the likelihood of substantial and immediate irreparable injury; and (2) the inadequacy of remedies at law.” Dream Palace v. County of Maricopa, 384 F.3d 990, 1010 (9th Cir. 2004). In determining whether it will award injunctive relief, a federal court applies a traditional balance of harms analysis:

The traditional bases for injunctive relief are irreparable injury and inadequacy of legal remedies. . . In issuing an injunction, the court must balance the equities between the parties and give due regard to the public interest. Id.

Idaho Watershed Project, 307 F.3d at 833. “Environmental injury, by its nature,

can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987). Thus, in cases involving environmental injury, “[i]f 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, 390 F.3d at 642 (citing Amoco, 480 U.S. at 485).

**B. The Proper Remedy is Vacatur of the Illegal Vessel Discharge Exemption.**

EPA argues that the only available remedy under the APA is to set aside EPA’s denial of the petition, rather than the ultra vires regulation. In EPA’s view, even if the regulation is ultra vires, EPA should nonetheless “have an opportunity on remand to take a new action on the petition, perhaps denying it in whole or in part on other grounds, or granting it, but on its own, reasonable schedule.” EPA Br. at 48. In other words, EPA believes that, notwithstanding the facial illegality of the regulation, EPA should be able to allow that regulation to remain in effect for an indefinite period of time, while EPA ruminates again on the petition and perhaps once again denies it. The fact that EPA acknowledges that it may indeed once again deny the petition seeking repeal of a regulation that a federal court found contrary to law should be enough to demonstrate that invalidation of the

rule by a date certain is necessary and appropriate.

Federal courts have broad discretionary authority to fashion injunctive relief. Lemon v. Kurtzman, 411 U.S. 192, 200 (1973). In fashioning such relief, however, courts “cannot ignore the judgment of Congress deliberately expressed in legislation.” United States v. Oakland Cannabis Buyers’ Cooperative, 523 U.S. 483, 497 (2001) (internal quotations omitted). Accordingly, where a court determines that an agency regulation is illegal, the proper remedy is to vacate that regulation. See Nat’l Mining Ass’n v. United States Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998); Oregon v. Ashcroft, 368 F.3d 1118, 1129 (9th Cir. 2004) (Courts “must, of course, set aside [agency] decisions which rest on an erroneous legal foundation” (quoting NLRB v. Brown, 380 U.S. 278, 291-92 (1965))).

Contrary to EPA’s belief, a court’s ability to set aside an unlawful regulation does not diminish where a claim arises under the APA. Indeed, the APA makes clear that rules “found to be . . . in excess of statutory jurisdiction” shall be both held unlawful and “set aside.” 5 U.S.C. § 706(2)(C). This Court has held, moreover, that in APA cases, federal courts have power “to order ‘mandatory affirmative relief,’ if such relief is ‘necessary to accomplish complete justice.’” Nw. Env’tl. Def. Ctr., 477 F.3d at 680-81. (internal citations omitted). “Stated

another way, if we conclude that [an agency] violated the APA by acting arbitrarily, capriciously, or contrary to law, we have the ability and indeed the juristic duty to remedy [that] violation.” Id. at 681.

A remand of the petition without invalidation of the underlying exemption would serve no purpose. There is nothing that EPA can do on remand to cure a exemption that squarely conflicts with the plain language of a statute. See Dixon v. United States, 381 U.S. 68, 74 (1965) (“A regulation which . . . operates to create a rule out of harmony with the statute[] is a mere nullity.”). The district court thus properly rejected EPA’s request that the court simply remand the petition back to the agency for further consideration, and this Court should do the same. See Sierra Club v. Env’tl. Protection Agency, 346 F.3d 955, 963 (9th Cir. 2003) (vacating, rather than remanding, order and directing EPA to take specific action, because “the record here has been fully developed, and the conclusions that must follow from it are clear”).

**C. The Balance of the Harms Favors Invalidation of the Exemption Pursuant to the September 30, 2008 Deadline Established by the District Court.**

This Court and the district court have authority to immediately vacate the unlawful vessel discharge exemption. However, to provide EPA the opportunity to take action to fill the regulatory gap that will result from the vacatur, Petitioners

requested below, and again request here, that the court delay vacatur of the regulation for a period of time. This request represents a reasonable accommodation for the agency, while insuring that harmful vessel discharges will soon come under the Clean Water Act's protective regulatory framework.

Federal courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." Alaska Ctr. for the Env't v. Browner ("ACE"), 20 F.3d 981, 986 (9th Cir. 1994). This is particularly true where the public interest is involved. United States v. Akers, 785 F.2d 814 (1986) (citing Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937)). As the Supreme Court has recognized, the Clean Water Act gives a court discretion "to order that relief it considers necessary to secure prompt compliance with the Act." Weinberger, 456 U.S. at 320. Accordingly, a court may require status reports or set deadlines for specific actions to occur. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., \_\_\_ F.3d \_\_\_, 2007 WL 1040032, \*13 (9th Cir., Apr. 9, 2007). Here, invalidation of the vessel discharge exemption by September 30, 2008, will serve the environment and the public interest while giving EPA and the shipping industry sufficient time to prepare for the regulation's vacatur.

**1. Vessel Discharges Cause Enormous Environmental and Economic Harm.**

Documents in the record demonstrate that unabated vessel discharges have resulted in grave harms to aquatic ecosystems across the United States. Ballast water discharges are particularly harmful since they serve as a primary vector for invasive species introductions. Indeed, EPA itself acknowledges that invasive species are one of the leading threats to endangered species and native ecosystems. ER 143, 146.

Once invasive species are introduced into an aquatic ecosystem, they can spread and overwhelm an ecosystem at an alarming rate. In the San Francisco Bay ecosystem, for example, scientists estimate that the rate of invasion is one new species every 14 weeks and that between 53 and 88 percent of the 230 invasive species were introduced within a single decade. SER 306, 313. The United States General Accounting Office noted that invasive species have “had a devastating effect on natural areas” and that “[s]cientists, academicians, and industry leaders are recognizing invasive species to be one of the most serious environmental threats of the 21st century.” SER 493. The former U.S. Office of Technology Assessment acknowledged that invasive species introductions have caused or contributed to species endangerment or extinction and warned that invasive species have caused “fundamental - and perhaps irreversible - changes in the functioning of U.S. ecosystems.” SER 481. EPA itself has described the impacts

of invasive species as “harmful, sometimes devastating” and even “deadly.” SER 156-157.

Invasive species introductions also exact heavy economic costs. The GAO estimated that invasive species in the United States cause “billions of dollars of damage annually to crops, rangelands, and waterways.” SER 493. EPA estimates that aquatic invasive species introduced solely through vessel discharges account for over \$5 billion per year in damage. SER 174. States in the Great Lakes region spend tens of millions of dollars each year in their attempts to remove a single species, the zebra mussel - which was introduced into the Great Lakes via ballast water discharges - from clogged water pipes and the ecosystem. ER 146; SER SER 156.

**2. The Clean Water Act’s NPDES Permit Program Provides the Tools and Flexibility to Regulate Vessel Discharges.**

In the district court proceedings and again on appeal, EPA attempts to portray Clean Water Act regulation of vessel discharges as an administrative and technical infeasibility. EPA’s arguments, however, ignore the fact that Congress designed the NPDES permit program specifically to allow for previously unregulated pollution sources to quickly come under the Clean Water Act’s controls. In so doing, it designed a permit program that provides for a great deal

of flexibility in its initial implementation, but that also increases pollution control over time as technologies improve.

Sections 402 and 301 establish the primary substantive requirements for each NPDES permit. Section 402 operates pursuant to a “cooperative federalism” scheme, under which the federal government may delegate to states the authority to administer the NPDES permit program. 33 U.S.C. § 1342(b). Section 402 requires all permits (whether state or EPA-issued) to meet the requirements under Section 301. 33 U.S.C. § 1342(a) and (b). Section 301, in turn, requires all discharges to adhere to certain technology-based and water quality-based effluent limitations. 33 U.S.C. § 1311(b)(1)(C) and (b)(2). Sections 402 and 301 provide for both uniformity and flexibility and are thus entirely suited to regulate vessel discharges.

First, the technology-based requirements ensure that dischargers are subject to uniform requirements. EPA has primary responsibility for establishing technology-based effluent limitation guidelines for particular categories of point sources. See 33 U.S.C. § 1314(b). In so doing, EPA must consider the available technology controls and the cost of technologies in relation to the pollutant reductions they will achieve. Id. If a technology does not exist or is not economically available, then EPA may not mandate its use. However, EPA must

regularly revisit effluent limitation guidelines, with an eye toward making them more stringent as technologies develop. Id. Thus, while a particular technology may not be available today, the Clean Water Act insures that improved technologies will translate into improved pollution controls over time. Indeed, EPA considers the effluent guidelines program one of its most successful environmental protection programs. See EPA Effluent Guidelines Webpage, <http://epa.gov/guide/304m/2006plan-fs.html>. Once EPA establishes effluent limitations for a particular category, all permitting agencies must include those effluent limitations in permits issued to point sources within that category. These effluent standards thus help establish uniformity among similarly situated dischargers. See NRDC v. Train, 510 F.2d 692, 707 (D.C. Cir. 1975).

Where EPA has not yet established nationally applicable effluent limitations for a particular category, permitting agencies must establish technology-based effluent limitations on a case-by-case basis using the agency's "best professional judgment." 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. §§ 125.3(a)(2)(B) & (c)(2). In exercising this judgment, permitting agencies must apply the same factors that EPA uses in establishing national effluent limitations. 40 C.F.R. §§ 125.3(c)(2) & (d). Thus, case-by-case effluent limitations require dischargers to achieve certain technology-based controls, which are set pursuant to uniform requirements.

Second, while states have discretion in establishing their own water quality standards, they do so pursuant to federal regulations and EPA oversight. Water quality standards establish the water quality goals for a water body and serve as the basis for the establishment of water quality-based controls over point sources. 40 C.F.R. § 131.2. States develop water quality standards for waters within their boundaries, but must receive EPA approval before state standards take effect. 33 U.S.C. § 1313(c). In developing water quality standards, states must conform to certain statutory and regulatory requirements governing the levels of protection that water quality standards must afford. 40 C.F.R. Part 131, 33 U.S.C. § 1313(c)(2)(B). EPA helps ensure consistency between state water quality standards by developing water quality criteria that describe the latest scientific knowledge regarding the biological needs of designated uses and the impacts of pollutants on these uses. 33 U.S.C. § 1314(a).

Accordingly, even though most states administer the NPDES permit program, EPA's role under the Clean Water Act provides it with the ability to ensure that regulated entities face similar permit requirements. Technologically may set national limits that all states must follow. In addition, EPA oversight and participation in the standard establishment process ensures general consistency. To the extent that one state has more stringent permit requirements than other

states, dischargers may account for that disparity by ensuring compliance with the most stringent state's requirements.

Finally, general permits under the Clean Water Act promote agency efficiency and allow states and the EPA considerable administrative flexibility in issuing permits to similar dischargers. See NRDC v. Costle, 568 F.2d at 1381-82. See also 42 Fed. Reg. 6846 (Feb. 4, 1977) (promulgating regulations to allow general permits); 40 C.F.R. § 122.28 (establishing general permit requirements). A general permit acts as a one-size-fits-all NPDES permit that establishes the requirements for all point sources that fall within the scope of the permit's coverage. 40 C.F.R. § 122.28(a)(2). Once established, a general permit allows an agency to regulate multiple sources through a single, uniform permit scheme.

Despite the flexibility of the Clean Water Act, EPA raises various arguments regarding the impracticability of regulating vessel discharges under the NPDES program. EPA's arguments here mimic the same arguments that the D.C. Circuit rejected decades ago in NRDC v. Costle. There, the court invalidated regulations that exempted storm water sources from the NPDES permit system. The court rejected the argument that requiring NPDES permits "would place unmanageable burdens on the EPA," 568 F.2d at 1374, and identified many of the options EPA had under the Clean Water Act. The court thus concluded that "this

ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all.” Id. at 1380. The court’s message from thirty years ago rings particularly true today, as EPA has demonstrated that it can in fact regulate various storm water point sources under the NPDES program.<sup>15</sup>

### **3. Invalidation of the Vessel Discharge Exemption by September 30, 2008 Is Appropriate.**

Due to the ongoing environmental and economic damage that vessel discharges are causing, the balance of equities strongly favors a quick deadline for invalidation of the vessel discharge exemption. As the Supreme Court has noted, environmental harm by its nature is often “at least of long duration, i.e., irreparable, and the balance of harms usually favors issuance of an injunction to protect the environment.” Amoco, 480 U.S. at 545. The public interest also favors issuance of the requested relief. Invasive species have already cost the United States economy billions of dollars. Moreover, vacatur of the vessel discharge exemption “invokes a public interest of the highest order: the interest in having government officials act in accordance with law.” Public Serv. Co. v.

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<sup>15</sup> Of course, under Petitioners’ requested remedy and the district court’s order, EPA has no obligation to do anything at all. In that event, states would issue permits pursuant to their delegated permit programs.

Andrus, 825 F. Supp. 1483, 1509 (D. Id. 1993) (citing Olmstead v. United States, 277 U.S. 438, 485 (1928)).

In contrast, EPA and the Shipping Industry's concerns do not outweigh the proven harms that vessel discharges cause. Importantly, the remedy ordered by the district court (and the remedy Petitioners seek here) imposes no affirmative obligations on EPA whatsoever. Should EPA choose to take no action while the vessel discharge exemption expires, it would be well within its rights to do so. If, on the other hand, EPA chooses to respond proactively to the impending invalidation of the vessel discharge exemption, the Clean Water Act's regulatory framework provides the agency and regulated entities with sufficient tools and flexibility to implement that response.

As for the shipping industry, it has already benefitted from more than 30 years of weak regulation. Its claims of harms here turn on the incorrect assumptions that vessels will either need to immediately cease all discharges or meet technologically infeasible requirements. The Clean Water Act mandates neither result. Moreover, any harms that the Shipping Industry may realistically face are clearly outweighed the harms its discharges are causing.

EPA has had more than seven years since receiving the petition to rescind the vessel discharge exemption and develop a plan for regulating vessels under the

Clean Water Act. It has had more than two years to take action in response to the district court's order declaring the vessel discharge exemption unlawful. By the time the discharge exemption is invalidated, EPA will have had nearly ten years since Petitioners filed their petition to rescind the exemption. In 2001, EPA stated that it could establish regulations to govern ballast water discharges within two to three years. ER 172. EPA cannot now reasonably claim that a September 2008 deadline is unworkable.

**D. The District Court Did Not Abuse its Discretion in Establishing a September 30, 2008 Deadline for Vacatur of the Vessel Discharge Exemption.**

The district court's remedy order clearly demonstrates that the district court considered all relevant factors and made all necessary findings in developing an appropriate remedy. The court's opinion catalogs many of the admitted harms that vessel discharges cause. ER 146, 355-356, 493, 500, 497. Based on these harms, the district court concluded that the "broad and significant effects that invasive species have on their new environment, combined with the generally impossible task of [invasive species] removal . . . easily satisfies the threshold requirement of irreparable injury." ER 366. The district court next concluded that "other remedies are inadequate to address this injury" and expressly rejected EPA's arguments that other regulations provide sufficient controls for vessel discharges.

ER 366. Finally, the district court considered, but rejected, EPA and the Shipping Industry's claims of injury from invalidation of the regulation. ER 367-68. Based on an understanding of the Clean Water Act, the court concluded that "EPA has the tools at its disposal to comply with the September 30, 2008 deadline." ER 368. It thus considered all the relevant factors and made all necessary findings to support its remedial order.

EPA nonetheless claims that the district court failed to make certain factual findings and failed to consider the regulatory burden that EPA will face in the event that EPA establishes a regulatory scheme to replace the illegal vessel discharge exemption. A review of the district court's order belies EPA's claims and demonstrates that the district court's order is "reasonably calculated to remedy an established wrong" and thus not an abuse of discretion. NRDC v. Southwest Marine, Inc., 236 F.3d 985, 1000 (9th Cir. 2000).

First, EPA's challenge to the district court's findings of harm has no merit. See EPA Br. at 50-51. EPA wrongly states that the district court based its decision solely on findings of past harms and failed to account for other existing regimes. EPA Br. at 51. The district, in fact, considered these regimes, but it found that "other remedies are inadequate to address" harms caused by the vessel discharge exemption. ER 366. The district court did not base this conclusion on a mistaken

belief that “regulations remain voluntary,” as EPA contends. EPA Br. at 51.<sup>16</sup> Rather, the district court found the regulations to be “incomplete” and “not completely effective at addressing the problem.” *Id.* Moreover, the district court had no obligation to find that every single type of discharge will independently result in irreparable harm. The challenged regulation categorically exempts all incidental vessel discharges from regulation, and the district court properly focused on the most harmful discharges - those from ballast water - in determining that the categorical exemption results in irreparable harm. ER 356, 365-366.

Second, contrary to EPA’s assertion that the district court ignored the administrative burden on the agency and the potential burdens on the industry, the record shows that the district court considered EPA’s arguments on those points, but found them to be “dramatically overstated.” ER 367. The district court did not “fail[] to recognize EPA’s lack of information,” EPA Br. at 52; rather it found that “[EPA] is intimately familiar with the problem.” ER 367. The district court did not “fail[] to take into consideration the unique complexity of regulating a universe of point sources that move into and out of ports,” EPA Br. at 52; rather, it

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<sup>16</sup> The district court expressly noted that some of the Coast Guard regulations became mandatory in 2004. ER 356 (“These regulations, voluntary at first, were made mandatory in September 2004.”). To the extent EPA is trying to give this Court the impression that the district court did not understand the regulatory framework, see EPA Br. at 51, the district court’s careful and accurate opinion shows otherwise.

determined that existing regulatory regimes “demonstrate that ballast water discharges can be regulated in a straightforward manner,” and that EPA has “numerous tools” under the Clean Water Act that establish a “flexible approach to controlling water pollution, allowing EPA to adjust its regulations as new technologies appear and existing technologies improve.” ER 368. Thus, the district court did not “ignore” the evidence that EPA submitted, as EPA asserts; it simply did not agree with EPA’s characterizations. EPA’s challenge to the district court’s order therefore fails.

### **CONCLUSION**

For the reasons stated above, Petitioners respectfully ask this Court to uphold the district court’s judgment in its entirety. Alternatively, if the Court concludes that it has original jurisdiction over Petitioners’ claims, Petitioners respectfully request that the Court declare the vessel discharge exemption unlawful and order the vessel discharge exemption invalidated as of September 30, 2008.

April 19, 2007

Respectfully submitted

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**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 16,487 words, exclusive of tables and cover sheet.

Date: April 11, 2007

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Deborah A. Sivas

## **STATEMENT OF RELATED CASE**

Counsel for Plaintiffs-Appellees Northwest Environmental Advocates, et al. Are aware that there are three related cases in this matter, including Case Nos. 03-74795 (Plaintiffs' Petition for Review), 06-17187 (Federal Defendants' Appeal) and 06-17188 (Shipping Industry Ballast Water Coalition's Appeal).

## PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On April 19, 2007, I served the foregoing **ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON PETITION FOR REVIEW OF NORTHWEST ENVIRONMENTAL ADVOCATES, *et al.*** on all other parties to this action by placing two true and correct copies thereof for Federal Express next-day delivery service, addressed as follows:

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I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed April 19, 2007 at Stanford, California.

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