

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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**REPLY BRIEF ON PETITION FOR REVIEW  
OF NORTHWEST ENVIRONMENTAL ADVOCATES, *et al.***

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Northwest Environmental Advocates, San Francisco Baykeeper, and The Ocean Conservancy (collectively, Petitioners) respectfully submit this reply in support of their Petition for Review filed in this Court pursuant to 33 U.S.C. § 1369(b)(1).

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

In 1973, when the Environmental Protection Agency (EPA) first exempted “discharge[s] incidental to the normal operation of a vessel” from the National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act, EPA assumed that vessel discharges “generally cause[] little pollution.” 38 Fed. Reg. 13,528 (May 22, 1973). Thirty years later, when EPA refused to repeal the vessel discharge exemption, EPA could no longer make the same claim. By EPA’s own estimations, the shipping industry annually dumps billions of gallons of ballast water into United States waters and serves as the primary vector for invasive species introductions into aquatic environments. ER 141. These invasive species introductions exact a “devastating” toll on the environment and the economy. SER 156-57. Thus, whatever factual basis EPA may have had for its initial promulgation of the vessel discharge exemption, it no longer exists. The legal basis, of course, never existed at all.

The Clean Water Act expressly prohibits any unpermitted “addition of any

pollutant to navigable waters from any point source” and defines “point source” to include vessels. 33 U.S.C. §§ 1311(a), 1362(12)(A)&(14). The vessel discharge exemption allows vessels to discharge pollutants, including invasive species, heavy metals, oil and grease, and other toxic substances, into the nation’s waters without NPDES permits. ER 141; 40 C.F.R. § 122.3(a). On its face, the vessel discharge exemption conflicts with the Clean Water Act’s express prohibition against unpermitted pollutant discharges. It is therefore unlawful. See Chevron v. Natural Resources Defense Council (NRDC), 467 U.S. 837 (1984). Yet, EPA steadfastly defends the exemption and appears poised to allow it to remain in place indefinitely.

As its first line of defense, EPA tries to shield the exemption from this Court’s review entirely. Having consistently argued this Court has exclusive jurisdiction over Petitioners’ claims,<sup>1</sup> EPA now asserts this Court cannot review the vessel discharge exemption itself. EPA’s arguments, however, squarely conflict with this Court’s precedent. This Court has the power to review the vessel discharge exemption and declare it contrary to law.

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<sup>1</sup> As explained in Petitioners’ Opening Brief (Pet. Br.), Petitioners disagree that Section 509(b)(1), which requires direct appellate court review of a discrete set of agency actions, extends to the categorical vessel discharge exemption. Petitioners have nonetheless preserved their right to seek direct review before this Court under Section 509(b)(1).

EPA next attempts to defend the vessel discharge exemption on the merits. Of course, EPA cannot pretend that the exemption conforms to the express language of the Clean Water Act. So EPA looks elsewhere for indicia of “congressional acquiescence” to the vessel discharge exemption. These indicia, however, do not present the “overwhelming evidence” necessary to demonstrate acquiescence to the exemption. Nor do they demonstrate an irreconcilable conflict between the Clean Water Act and other statutes. See Massachusetts v. EPA, 126 S.Ct. 1438 (2007). No matter how hard EPA tries, it cannot overcome the expressly language of the Clean Water Act. The vessel discharge exemption is, simply put, illegal.

As such, the proper remedy is for this Court to vacate the exemption by a specific date. EPA’s own briefing proves this point. Unless this Court establishes a deadline for vacatur of the vessel discharge exemption, EPA will proceed at its own leisurely pace to address, and perhaps again reaffirm, the ultra vires exemption. Without affirmative action by this Court, unlawful vessel discharges and the harms they cause will continue unabated.

## ARGUMENT

### I. NWEA'S CHALLENGE TO EPA'S VESSEL DISCHARGE EXEMPTION IS TIMELY

If this Court has jurisdiction under Section 509(b)(1) to review EPA's denial of the petition to repeal 40 C.F.R. § 122.3(a), it also has jurisdiction to review the legality of the vessel discharge exemption. As this Court has held, review of agency action under Section 509(b), necessarily encompasses review of an underlying agency action that informs or has a "virtually determinative effect" on the ultimate outcome. Defenders of Wildlife v. EPA, 420 F.3d 946, 955 (9th Cir. 2005), rev'd on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, No 06-340 (Jun. 25, 2007 (slip op.)). Accordingly, since EPA concedes that this Court has jurisdiction to review the agency's denial, it must also concede that the scope of the Court's review extends to the vessel discharge exemption.

However, EPA argues the statute of limitations precludes review of the vessel discharge exemption. EPA Reply Br. at 14. Yet, this Court has held that a challenger may contest the legality of a regulation beyond an otherwise applicable statute of limitations period by petitioning an agency to repeal the illegal regulation and then challenging in court the agency's denial of the petition to repeal. Wind River v. United States, 946 F.2d 710, 715 (9th Cir. 1991); see also

Pet. Br. at 27-29; Legal Env'tl. Assistance Found. ("LEAF") v. EPA, 118 F.3d 1467, 1473 (11th Cir. 1997) ("the regulations upon which EPA relies are contrary to the statute and therefore invalid, regardless of the fact that LEAF's challenge is brought outside the statutory period for a direct challenge to the regulations"); Public Citizen v. Nuclear Regulatory Comm'n, 901 F.2d 147 (D.C. Cir. 1990). Petitioners here petitioned EPA to repeal the vessel discharge exemption and timely challenged EPA's denial. Accordingly, the challenge to the vessel discharge exemption is timely.

Review of such ultra vires rules is "permitted out of necessity." S. Hills Health Sys. v. Bowen, 864 F.2d 1084, 1094 (3d Cir. 1988); Wind River, 946 F.2d at 715 ("The government should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before any one discovered the true state of affairs."). This necessity stems from the nature of administrative rules. As the D.C. Circuit described, in contrast to adjudicative orders, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." Functional Music v. FCC, 274 F.2d 543, 546 (D.C. Cir. 1959). Here, if EPA's arguments were accepted, the vessel discharge exemption

would remain forever shielded from judicial review, despite its plain illegality.

That cannot be the proper result.

Moreover, EPA reopened the vessel discharge exemption to judicial review when it denied the petition to rescind. If an “agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that the rule or policy is contrary to law will not be held untimely because of a limited statutory review period.”

Public Citizen, 901 F.2d at 152. Here, EPA offered entirely different explanations for its refusal to repeal the vessel discharge exemption than it provided when it initially promulgated the regulation. ER 14-20. Whereas the basis for the initial exemption was that “this type of discharge generally causes little pollution,” 38 Fed. Reg. 13,528, EPA’s denial of the petition to repeal hinged on EPA’s belief that Congress acquiesced to the exemption through later legislation. ER 14-20. By providing an alternate rationale, EPA undertook “serious, substantive reconsideration” of the exemption. Compare Nat’l Mining Ass’n v. U.S. Dep’t of the Interior, 70 F. 3d 1345, 1352 (D.C. Cir. 1995) (agency did not undertake “serious, substantive reconsideration” of underlying rule where petition denial used same rationale used in the original rule). EPA therefore reopened the exemption to Petitioners’ timely challenge.

## **II. THE VESSEL DISCHARGE EXEMPTION VIOLATES THE PLAIN COMMANDS OF THE CLEAN WATER ACT**

In its briefing, EPA never refutes that the Clean Water Act prohibits unpermitted pollutant discharges from vessels. 33 U.S.C. § 1311(a). Nor can it, as the statute is clear. EPA instead attempts to infuse the Clean Water Act with ambiguity by turning to other statutes and making policy arguments that appear to ask this Court to ignore Congress' clear intent in favor of agency expedience. Nothing that EPA points to, however, can undermine the express Clean Water Act prohibition against unpermitted discharges of pollutants from vessels into the nation's waters.

### **A. The Clean Water Act Expressly Prohibits Unpermitted Discharges of Pollutants from Vessels**

The Clean Water Act expressly prohibits “the discharge of any pollutant” unless the discharge is permitted. 33 U.S.C. § 1311(a). “[D]ischarge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A). “Point source” means “any . . . vessel or other floating craft.” 33 U.S.C. § 1362(14). The statutory mandate to regulate vessel discharges could not be more clear, and that should end the matter. Chevron, 467 U.S. at 842-43 (“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.”).

### 1. The Clean Water Act Broadly Prohibits Vessel Discharges

EPA, however, argues the Clean Water Act is ambiguous as to “whether every vessel operator must obtain NPDES permits for discharges incidental to the normal operation of the vessel, for instance effluent from a properly functioning marine engine.” EPA Reply Br. at 19. To support this alleged ambiguity, EPA references a single statement in the legislative history regarding “properly functioning marine engines.” EPA Reply Br. at 19-20 n. 11. This brief excerpt of legislative history, however, cannot overturn the Clean Water Act’s expansive discharge prohibition. W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 98-99 (2001) (“The best evidence of [legislative] purpose is statutory text . . . . Where that contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.”).

The Clean Water Act broadly prohibits “any addition of any pollutant . . . from any point source.” 33 U.S.C. §§ 1362(12)(A) (emphases added), 33 U.S.C. § 1311(a). The statute’s repeated use of the word “any” demonstrates that Congress intended for the Clean Water Act to apply to all vessel discharges, other than those that Congress expressly exempted. Massachusetts, 127 S.Ct. at 1460 (“The Clean

Air Act’s sweeping definition of ‘air pollutant’ . . . embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any.’”); Dep’t of Hous. and Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (“‘any’ . . . has an expansive meaning, that is, one or some indiscriminately of whatever kind”) (some internal quotation marks omitted). Congress’ express exemptions of specific vessel discharges from the Clean Water Act’s discharge prohibition also foreclose any argument that other implied exemptions exist. 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.”); 33 U.S.C. § 1362(6)&(12)(B) (exempting specific vessel discharges). There is, in short, no ambiguity regarding the Clean Water Act’s discharge prohibition.

Legislative history referencing “properly functioning marine engines” does not support EPA’s broad vessel discharge exemption in any event. Indeed, the regulation draws a distinction between “properly functioning marine engines” and “other discharges incidental to the normal operation of a vessel.” 40 C.F.R. § 122.3(a). EPA’s blanket exemption of all incidental vessel discharges encompasses discharges of ballast water, bilge water, gray water, and many other pollutants beyond those released from “properly functioning marine engines.”

SER 159. A single statement regarding “properly functioning marine engines” simply does not support the expansive vessel discharge exemption.

## 2. Invasive Species are “Pollutants” Under the Clean Water Act

In an apparent effort to force a remand, EPA insists that “the question of whether or in what circumstances invasive species are pollutants under the CWA is not before this Court because EPA has not taken a formal position on the question.” EPA Reply Br. at 30, n.16. Petitioners affirmatively averred in their petition to repeal and in their opening brief before this Court that invasive species are pollutants under the Clean Water Act. ER 196-97; Pet. Br. at 35-36. Despite multiple opportunities, EPA has not refuted Petitioners’ contentions.<sup>2</sup> Its attempts to avoid the issue for the purpose of forcing a remand should fail.

Invasive species undoubtedly fall within the Clean Water Act’s broad definition of pollutant, because they are “biological materials” under the Act. Pet. Br. at 36; see also Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., 299 F.3d 1007 (9th Cir. 2002) (“APHETI”); N. Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155 (9th Cir. 2003) (“Northern Plains”). In

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<sup>2</sup> EPA does not dispute that ballast water discharges include oil and grease, heavy metals, and other substances that undoubtedly qualify as “pollutants.” Pet. Br. at 36.

APHETI, this Court noted that the term “biological materials” was ambiguous as applied to shellfish production, because the Clean Water Act’s goals expressly include protection of shellfish propagation and there was no evidence that the mussel operations were causing aquatic harm. Id. at 1016-17. Unlike the mussel operations in APHETI, the discharges here are not protected by the Clean Water Act’s goals. There is thus no internal statutory ambiguity that would leave the term “biological materials” open to agency interpretation. Northern Plains, 325 F.3d at 1163. Moreover, the species here are discharged as “waste material in [such] significant amounts” that they are wreaking havoc on the biological integrity of waters throughout the country. APHETI, 244 F.3d at 1017; Northern Plains, 325 F.3d at 1161-62 (noting that coalbed methane water alters the water quality of the receiving stream and is therefore a “pollutant”); Pet. Br. at 7-9 (citing ER 146, EPA’s acknowledgment that the “ecological damage caused by invasive species can be enormous”). Accordingly, EPA’s intimations that aquatic nuisance species may not qualify as “pollutants,” even though these species are clearly “biological materials” that cause enormous environmental harm, have no merit.

**B. Congress Has Not Acquiesced to EPA's Vessel Discharge Exemption**

EPA also attempts to infuse ambiguity into the Clean Water Act through its invocation of a novel interpretation of the doctrine of “congressional acquiescence.” To demonstrate congressional acquiescence, EPA must present “overwhelming evidence” that Congress acquiesced to the “precise issue” here. United States v. Rapanos, 126 S.Ct. 2208, 2231 (2006) (J. Scalia, plurality); Morales-Izquierdo v. Gonzales, 486 F.3d 484, 493 (9th Cir. 2007) (“Morales”). EPA has not met that burden.

EPA specifically points to the National Defense Authorization Act (NDAA), Pub. L. No. 104-106, § 325(b)-(c)(1)(3) (1996), and the legislative history underlying its passage, as proof of Congress’ supposed acquiescence. EPA Reply Br. at 28-29. The cryptic references to the vessel discharge exemption in the bill do not provide “overwhelming evidence” of congressional acquiescence. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers (“SWANCC”), 531 U.S. 159, 170 n.5 (2001); Morales, 486 F.3d at 493 (noting that the Supreme Court has drawn a sharp distinction between “Congress’ deliberate acquiescence” and its “failure to express any opinion”). Although Congress mentioned 40 C.F.R. §122.3(a) in NDAA’s legislative history, Congress

never considered the “precise issue” before this court – the validity of the vessel discharge exemption. See Rapanos, 126 S.Ct. at 2231. Instead, Congress “fail[ed] to express any opinion” regarding the exemption. See Morales, 486 F.3d at 493. This falls far short of the overwhelming evidence necessary to demonstrate Congress’ acquiescence.

Indeed, in passing the NDAA, rather than signaling its approval of EPA’s entire vessel discharge exemption, Congress chose to exempt only military vessel discharges. 33 U.S.C. § 1362(6). At the same time, Congress expressly acknowledged that “[v]essels are point sources of pollution under the Clean Water Act. Any discharge of pollutants from a point source, including a vessel . . . is prohibited unless specifically permitted . . . .” S. Rep. No. 104-113, at 1-2 (1995) (emphasis added). Congress therefore created the military vessel exemption “to remove the statutory requirement for a permit” for military vessels. Id. at 3. While Congress did refer to 40 C.F.R. § 122.3(a) in defining the scope of the military vessel exemption, 33 U.S.C. § 1322(a)(12)(B)(iii), Congress chose to exempt incidental discharges only from military vessels. Id. at § 1362(6). This express, limited exemption forecloses EPA’s claim that Congress impliedly exempted all other vessel discharges as well. Smith, 499 U.S. at 167.

EPA also suggests that because “Congress has comprehensively revisited

the CWA three times in the 30 years since it was enacted ” and EPA has “maintain[ed] a consistent regulatory interpretation since 1973,” Congress has acquiesced to the vessel discharge exemption. EPA Reply Br. at 23. The longevity of a regulation, however, does not demonstrate congressional acquiescence. See Morales, 486 F.3d at 493. Indeed, the regulation in Morales had “been a mainstay . . . [for] four decades.” Id. Nonetheless, because there was not “overwhelming evidence” that Congress had considered and endorsed the “precise issue,” the plaintiff could not demonstrate congressional acquiescence. Id. As the Morales court concluded, congressional acquiescence may be found only in “rare instances” where it is clear “Congress [had] considered and approved of an agency’s practice. . . .” Id. (emphasis added). This case is not one of those rare instances.

**C. FDA v. Brown & Williamson Does Not Create a New Doctrine of Acquiescence or Support EPA’s Arguments**

Recognizing the hurdles it faces in presenting the “overwhelming evidence” of supposed congressional acquiescence, EPA claims the Supreme Court’s decision in FDA v. Brown & Williamson Tobacco, 529 U.S. 120, 132-22 (2000), creates a separate avenue for demonstrating congressional acquiescence if EPA can show “tension” between an express statutory command and later legislation

that relates to a similar issue. EPA Reply Br. at 23-27. The Supreme Court, however, has rejected EPA's argument that Brown & Williamson allows an agency to override the express language of one law simply because other laws also address a similar issue. Massachusetts, 127 S.Ct. at 1461. EPA's attempts to distinguish Massachusetts are futile. Moreover, Brown & Williamson does not support EPA's position in any event.

First, EPA claims the underlying laws here differ from those at issue in Massachusetts. EPA Reply Br. at 21. While true, it does not help EPA. Unlike the laws at issue in Massachusetts, the laws here expressly preserve the Clean Water Act. The National Invasive Species Act (NISA) states that NISA shall "not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act." 16 U.S.C. § 4711(c)(2)(J). The Act to Prevent Pollution from Ships (APPS) provides, "[r]emedies and requirements of this Act [] supplement and neither amend nor repeal any other provisions of law."<sup>3</sup> 33 U.S.C. §§ 1901(a)(9), 1907(f). EPA's arguments for acquiescence are therefore even weaker than those

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<sup>3</sup> Legislative history further states APPS "preserves the right of action under other provisions of law, such as the Federal Water Pollution Control Act . . . ." H.R. Rep. No. 96-1224, at 34-35 (1980), reprinted in U.S.C.C.A.N. 4849, 4863 (Aug. 18, 1980) (emphasis added).

in Massachusetts, as they attempt to override the statutory language of not just one, but three, separate statutes.

Second, EPA makes the perplexing assertion that it should bear a lighter burden here to show that the Clean Water Act is ambiguous because, unlike in Massachusetts, EPA admits it has statutory authority to regulate vessel discharges. EPA Reply Br. at 27. EPA somehow believes that its “more nuanced” argument here entitles EPA it to greater deference. EPA Reply Br. at 26. However “nuanced” the agency’s argument may be, it cannot overcome Congress’ express directives. “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.

Finally, EPA’s attempts to draw parallels between the instant case and the facts in Brown & Williamson fall short. While EPA claims there are “tensions” between the Clean Water Act and later-enacted statutes, EPA Reply Br. at 23-25, the examples it provides demonstrate no tensions whatsoever. For instance, EPA claims that the phased-in regulatory approach under NISA is in tension with the NPDES program. EPA Reply Br. at 24. However, the Clean Water Act itself authorizes a phased-in approach in which control requirements become more stringent as technologies improve. Pet. Br. at 65. EPA also contends, oddly, that

the laws are in tension because they all seek environmental protection. EPA Reply Br. at 24 n.19. Since they all have the same goal, the more natural conclusion is that the laws can all work together. See Massachusetts, 127 S.Ct. at 1461 (related laws “do not conflict with any thoughtful regulatory effort; they complement it”). In any event, these so-called “tensions” do not arise to the clear, irreconcilable conflicts in Brown & Williamson. 529 U.S. at 142-43, 148. Even EPA admits that it is “possible for EPA to have established mandatory controls to address ballast water issues that would not have made compliance with the Coast Guard regime impossible.” EPA Reply Br. at 24. Accordingly, just as in Massachusetts, “[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.

**D. The Vessel Discharge Exemption is Not “Reasonable”**

The vessel discharge exemption also fails under a more deferential Chevron step two analysis. Where Congress has given an agency authority to interpret an ambiguous statute, the agency’s interpretation must be reasonable and consistent with the statute’s structure and purposes. See Earth Island Institute v. Ruthenbeck, 2007 WL 1651422 at \*8-9 (9th Cir. June 8, 2007). The vessel discharge exemption is flatly contrary to Congress’ goals under the Clean Water Act, and it therefore cannot survive Chevron step two review.

The exemption allows billions of gallons of polluted ballast water and gray water to enter United States waters each year. ER 141. These discharges exact enormous ecological costs. See Pet. Br. at 7-9 (quoting ER 146). The exemption is clearly at odds with the Clean Water Act’s purpose to “restore and maintain” the integrity of the Nation’s waters. 33 U.S.C. §1251(a). The exemption also indisputably undermines Congress’ intent that all point sources discharges be permitted. See Earth Island, 2007 WL 1651422 at \*9 (an agency’s “attempt to circumvent congressional intent . . . cannot be a permissible interpretation of the [statute]”); see also Pet. Br. at 40-41 (quoting 117 Cong. Rec. 38803 (Nov. 2, 1971)) (Senator Boggs stated that the bill “controls any discharge of pollutants from a vessel that occurs within the 3-mile limit” and would require Section 402 permits). Thus, even under a more deferential analysis, the vessel discharge exemption is unlawful.

### **III. THE PROPER REMEDY IS VACATUR OF THE VESSEL DISCHARGE EXEMPTION BY A DATE CERTAIN**

EPA argues that, if this Court reaches the Petition for Review and resolves the merits in Petitioners’ favor, vacatur of the illegal regulatory exemption on September 30, 2008 is an improper and unreasonable remedy. Yet, since these proceedings commenced in 1999, EPA has never proposed any course of action –

let alone a timetable – for remedying its illegal exemption.<sup>4</sup> Instead, EPA has repeatedly urged, as it does again here, an open-ended and unconditional remand to the agency, without any schedule for compliance or other judicial directive. In essence, EPA maintains that it should be allowed to retain the unlawful exemption indefinitely – and perhaps even deny the underlying administrative petition again based on an “alternative rationale”<sup>5</sup> – notwithstanding a judicial finding that the exemption is facially inconsistent with the Clean Water Act.

**A. This Court Can and Should Invalidate the Discharge Exemption**

EPA acted outside its statutory authority in promulgating the vessel discharge exemption. The exemption is thus a “mere nullity” and must be vacated “to carry into effect the will of Congress as expressed by the statute.” Dixon v.

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<sup>4</sup> Even now, EPA remains silent as to any concrete timeframe, arguing only that the Court “should give EPA more time than until September 30, 2008.” EPA Reply Br. at 49. While EPA recently issued a notice of intent seeking information regarding a future NPDES program for vessel discharges, the document makes no commitments regarding the action EPA will take or the timeframe for that action. EPA, Notice of Intent, “Development of Clean Water Act National Pollutant Discharge Elimination System Permits for Discharges Incidental to the Normal Operation of Vessels,” 72 Fed. Reg. 34,241 (Jun. 21, 2007).

<sup>5</sup> See EPA Reply Br. at 36. EPA’s insistence that it might well deny the petition again on remand proves Petitioners’ point that an unqualified remand is inappropriate and will likely perpetuate the agency’s eight-year delay in addressing this extremely serious ecological issue. It also dispels EPA’s claim that vacating the petition denial will put Petitioners in the same position had EPA granted the petition in the first place. Id.

United States, 381 U.S. 68, 74 (1965) (citations omitted).

This Court has broad equitable authority to fashion injunctive relief. EPA cannot point to any language in the Administrative Procedure Act (APA) or the Clean Water Act that affirmatively limits this Court's authority to grant equitable relief.<sup>6</sup> Indeed, the APA directs courts to "decide all relevant questions of law," and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law . . . ." 5 U.S.C. § 706 (emphases added). The broad scope of review and remedy give the Court all the authority it needs to vacate the unlawful vessel discharge exemption. This Court has ample power to grant the relief Petitioners seek. F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) (absent explicit statutory limitation, court's equitable authority includes "the authority to grant any ancillary relief necessary to accomplish complete justice").

The Ninth Circuit has repeatedly held that federal courts may vacate unlawful agency actions. Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 691 (9th Cir. 2007) (setting aside BPA's unlawful decision and ordering BPA to continue its existing contractual arrangement to fund Fish Passage Center

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<sup>6</sup> The APA's standard and scope of review apply to actions brought under Section 509(b)(1). Defenders of Wildlife, 420 F.3d at 955, 978-79.

(FPC) “unless and until it has established a proper basis for displacing the FPC”); Alsea Valley Alliance v. Dep’t of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004) (“Although not without exception, vacatur of an unlawful agency rule normally accompanies remand.”); Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tegon Indians v. U.S. Dep’t of Energy, 232 F.3d 1300, 1305 (9th Cir. 2000) (APA gives court authority to rescind contract for sale of property and court was not bound to simply remand the issue to the agency for additional investigation); NRDC v. EPA, 966 F.2d 1292, 1305 (9th Cir. 1992) (holding exemption from NPDES permit program unlawful and vacating rule); Sierra Club v. EPA, 346 F.3d 955, 963 (9th Cir. 2003) (vacating unlawful rule and remanding to agency with instructions).

As the D.C. Circuit noted, vacatur of an illegal regulation is particularly appropriate where that regulation is facially unlawful. Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1989) (“We have made clear that ‘[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their individual application to the petitioners is proscribed.’”) (internal citations omitted); see also Earth Island, 2007 WL 1651422, at \*10 (affirming nationwide injunction of facially invalid Forest Service regulations). Contrary to EPA’s claim, this Court

indisputably has power to vacate the vessel discharge exemption.

Vacatur is particularly appropriate where the record supporting that regulation has been fully developed and “the conclusions that must follow from it are clear.” Sierra Club, 346 F.3d at 963. In Sierra Club, the Ninth Circuit vacated the agency action because there was “no possibility” that EPA could reach any conclusion other than the one the Court itself had reached as a result of litigation. Id. Likewise, in American Petroleum Institute v. EPA (“API”), the D.C. Circuit vacated an ultra vires regulatory exemption and remanded for further rulemaking consistent with the court’s opinion. 906 F.2d 729, 742 (D.C. Cir. 1990). The same remedy is appropriate here, as vacatur will eliminate a facially illegal regulation, while still providing EPA ample discretion to develop appropriate regulations and guidance for vessel discharge permits.

Recent Supreme Court cases do not support EPA’s request for a remand without vacatur. EPA Reply Br. at 37 (citing Gonzales v. Thomas, 126 S.Ct. 1613 (2006)). In Gonzales, the Supreme Court held that the Ninth Circuit was required to remand an asylum petition to the Bureau of Immigration Appeals because, “[w]ithin broad limits[,] the law entrusts the agency to make the basic asylum eligibility decision.” 126 S.Ct. at 1615 (citing INS v. Orlando Ventura, 537 U.S. 12, 18 (2002) (“Ventura”). The Supreme Court remanded to the agency because

the eligibility decision required the agency to gather additional evidence, make factual findings, and decide whether those facts met statutory terms. Ventura, 537 U.S. at 18; Gonzales, 26 S.Ct. at 1615. Similarly, in Massachusetts, the Supreme Court remanded the petition for rulemaking to EPA to make a factual judgment about whether greenhouse gas emissions threaten public health and welfare. 126 S.Ct. at 1462. Here, in contrast, no amount of factual development can salvage the vessel discharge exemption. Remand without vacatur would only further delay resolution of the 8-year old petition as harmful vessel discharges continue unabated.<sup>7</sup>

**B. Vacatur of the Illegal Exemption in September 2008 Is an Entirely Reasonable and Appropriate Remedy**

Petitioners have proposed a reasonable modification to the usual remedy of immediate vacatur for an illegal agency action. The district court held the vessel exemption unlawful in March 2005. ER 203-20. Recognizing that EPA would

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<sup>7</sup> EPA argues that the Court should remand to allow EPA to determine whether various discharges qualify for a de minimis exception to the discharge prohibition. EPA mistakenly believes that it can make de minimis findings “without needing to engage in new notice and comment rulemaking.” EPA Reply Br. 38. However, de minimis findings will change the application and underlying basis of an existing rule and must therefore undergo notice and comment procedures. Se. Alaska Conservation Council v. U.S. Army Corps of Engineers, 486 F.3d 638, 653-54 (9th Cir. 2007). Thus, the efficiencies that EPA seeks through a remand without vacatur are unavailable to it as a matter of law.

need some amount of time to replace the exemption with appropriate regulatory controls, Petitioners did not seek immediate vacatur. Instead, Petitioners proposed an 18-month delay to provide EPA the opportunity to act as the agency saw fit. ER 359. In September 2006, the district court adopted a two-year schedule for vacatur of the exemption, thereby effectively providing EPA with nearly three and a half years, in total, to come into compliance with the court's earlier ruling. ER 351-71. This timeframe is entirely consistent with EPA's own September 2001 statement that "[i]t would take between two and three years for EPA to revise its NPDES requirements for ballast water." EPA, Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options (Sept. 2001), ER 172.<sup>8</sup>

Six years after making that statement, EPA insists it still "lacks the type of information it typically acts upon when beginning new permitting regimes" and that "there is simply not enough time to develop that data and make use of it in the

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<sup>8</sup> EPA tries to distance itself from this report. EPA Reply Br. at 44 (acknowledging statement in the 2001 report that EPA can complete the necessary rulemaking procedures within this timeframe, but arguing that "EPA did not suggest [in the 2001 report] that it could also have the necessary permits in place in that time period"). However, EPA's calls for additional time are premised on the unfounded assumption that EPA must have complete knowledge about all vessel discharges before it develops controls for any of them. As discussed below, this is not so.

permitting process.” EPA Reply Br. at 40-41.<sup>9</sup> EPA’s claims here, however, falter when one examines EPA’s own documents that describe the wealth of information that EPA and other federal agencies have collected regarding the volumes, types, and impacts of ballast water discharges, as well as the potential technologies and practices to control them.<sup>10</sup> Moreover, to the extent EPA truly needs additional information, the Clean Water Act provides EPA with numerous tools it can employ to phase in regulatory requirements while collecting information it needs to improve regulation over time.

**1. EPA Has Sufficient Information to Develop a Regulatory Framework for Ballast Water Discharges and Other Discharges from Large Commercial Vessels**

For years, EPA has gathered information and participated in regulatory processes regarding controls of ballast water discharges. Indeed, in its September

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<sup>9</sup> Significantly, EPA never actually argues that it cannot promulgate a vessel discharge permitting framework by September 2008, only that “the September 2008 deadline would force EPA to forego the development of original data tailored specifically to the needs of the NPDES program that EPA typically undertakes . . . .” EPA Reply Br. at 41 (emphasis added).

<sup>10</sup> See e.g., EPA “Invasive Species” Webpage (available at [http://www.epa.gov/owow/invasive\\_species/](http://www.epa.gov/owow/invasive_species/)); EPA “Useful Links to Ballast Water Information” Webpage (available at [http://www.epa.gov/owow/invasive\\_species/bal\\_links.html](http://www.epa.gov/owow/invasive_species/bal_links.html)); U.S. Coast Guard “Ballast Water Management Program” Webpage (available at <http://www.uscg.mil/hq/g-m/mso/bwm.htm>); U.S. Coast Guard “Aquatic Nuisance Species” Webpage (available at <http://www.uscg.mil/hq/g-m/mso/ans.htm>).

2003 denial of the petition to repeal the vessel discharge exemption, EPA touted its integral role in “working closely with the Coast Guard to develop supporting documents for ballast water regulations.” ER 32. EPA highlighted its work with other federal agencies and international organizations to increase awareness and capabilities of ballast water control programs, host national workshops on the subject, foster research and development of new control technologies, and participate in international control efforts. ER 20-21. “Of greatest relevance,” EPA explained, were its 2001 and 2003 agreements with the Coast Guard to assist in the development of ballast water treatment technologies and performance standards. ER 21, 36-50. EPA’s acknowledged work on ballast water undermines its efforts to persuade this Court that a 2008 deadline is unreasonable.

In fact, EPA concedes the Coast Guard’s preliminary efforts provide EPA the information it needs to establish the initial NPDES permitting framework for ballast water discharges. Declaration of James Hanlon (“Supp. Hanlon Decl.”) at ¶¶ 10-11. The Coast Guard regulations impose certain ballast water exchange requirements and various recordkeeping and reporting requirements. ER 21, 32; 68 Fed. Reg. 44,691 (July 30, 2003); 67 Fed. Reg. 9632 (Mar. 4, 2003) (Advanced notice of proposed rulemaking to adopt “Standards for Living Organisms in Ship’s Ballast Water Discharged to U.S. Waters”); see also 69 Fed. Reg. 44,961 (July 28,

2004) (establishing mandatory mid-ocean ballast water management program).

EPA's current plan is therefore to incorporate the now-mandatory Coast Guard ballast water management practices as technology-based permit limitations and to establish general NPDES permits for ballast water discharges. Supp. Hanlon Decl. at ¶¶ 10-11. While EPA will ultimately need to do more, over time, to improve the technology-based controls and bring ballast water discharges into compliance with the Clean Water Act, EPA cannot dispute that the Coast Guard regulations provide a first step in regulating these sources.<sup>11</sup>

By this late date, EPA cannot – and in truth, does not – seriously contest its ability to put in place a set of basic permitting requirements for ballast water discharges by September 2008. Indeed, EPA acknowledges that it has a strategy

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<sup>11</sup> EPA also has several years of work invested in researching and developing preliminary controls over the global fleet of more than 230 cruise ships, which likely represent the second most important source (after ballast water discharges) of pollution from commercial vessels. See EPA "Cruise Ship Water Discharges" Webpage (available at [http://www.epa.gov/owow/oceans/cruise\\_ships/disch\\_assess.html](http://www.epa.gov/owow/oceans/cruise_ships/disch_assess.html)). Indeed, cruise ship discharges have been extensively studied. See, e.g., U.S. EPA, Cruise Ship White Paper (2000) (available at [http://www.epa.gov/owow/oceans/cruise\\_ships/disch\\_assess.html](http://www.epa.gov/owow/oceans/cruise_ships/disch_assess.html)); CRS Report to Congress, Cruise Ship Pollution: Background, Law and Regulations, and Key Issues (Updated Oct. 6, 2006) (available at <http://www.ncseonline.org/NLE/CRS/abstract.cfm?NLEid=153>); U.S. GAO, Marine Pollution – Progress Made to Reduce Marine Pollution by Cruise Ships (2000) (available at <http://www.gao.gov/archive/2000/rc00048.pdf>). Therefore, as with ballast water discharges, EPA has no legitimate excuse for continued delay in permitting these important sources.

to address ballast water discharges. There is therefore no reason for this Court to delay vacatur beyond September 30, 2008.

**2. The Clean Water Act Provides EPA the Tools It Needs to Phase In Regulatory Requirements, Streamline Administrative Processes, and Account for Technological Uncertainties**

EPA argues that it lacks sufficient information for other types of vessel discharges, specifically information from recreational vessels, to develop a full permitting program. EPA therefore argues that it should not be required to regulate any vessel discharges by any mandatory deadline. Yet, as the district court noted, initial NPDES permits need not be perfect; they need only begin the process of bringing vessel owners and operators into the regulatory system mandated by Congress. ER 368, 369-70.

Where EPA lacks information about particular discharges or regulatory controls, EPA has tools at its disposal to address data gaps within the NPDES framework. For instance, in 1996, EPA put into place an “interim” permit approach for first-round storm water general permits that required only the use of best management practices and monitoring precisely because EPA lacked the “information on which to base numeric water-quality based effluent limitations.” 61 Fed. Reg. 43,761 (Aug. 26, 1999). EPA explained that “[t]his interim

permitting approach provides time, where necessary, to more fully assess the range of issues and possible options for the control of storm water discharges for the protection of water quality.” Id. The monitoring requirements incorporated into these first-round permits were intended to “gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits.” Id. EPA has never explained why it cannot use a similar approach with vessel discharges.

In addition, although EPA dismisses the use of compliance schedules in a footnote, EPA Reply Br. at 46, n.25, the agency has frequently used such interim or phased-in permitting requirements, coupled with information collection efforts, under the Clean Water Act and other laws. See, e.g., 70 Fed. Reg. 4958 (Jan. 31, 2005) (announcing opportunity for animal feeding operations to enter into an air compliance agreement, in lieu of a Clean Air Act permit, coupled with a two-year monitoring study designed to yield data for future emissions controls); 40 C.F.R. §§ 125.94-125.95 (providing a four-year schedule of compliance in NPDES permits for existing facilities subject to new Clean Water Act section 316(b) “best technology available” performance standards to evaluate impacts and demonstrate compliance); 63 Fed. Reg. 18,504, 18,604-08 (Apr.15, 1998) (establishing a 15-

year compliance schedule for pulp and paper mills to meet ultimate technology-based performance standards). As EPA explained in its 1998 pulp and paper mill NPDES permit rulemaking:

Moving toward the elimination of pollutant discharges in stages is also consistent with the overarching structure of the effluent limitations guidelines program . . . . [L]ike other agencies, EPA has inherent authority to phase in regulatory requirements in appropriate cases. For example, EPA recently phased in, over two years, TSCA [Toxic Substance Control Act] rules pertaining to lead-based paint activities.

Id. at 18,607. While EPA does not have unfettered discretion to issue compliance schedules, EPA's suggestion that its hands are completely tied with regard to vessel discharges is unfounded.

Other arguments EPA advances in support of an unlimited remand similarly fall short. For example, while EPA suggests that the existence of 45 delegated state programs favors a delay in federal permitting regulations, EPA Reply Br. at 42, the opposite is in fact true. As EPA explained in its denial of the petition to repeal, nothing in the Clean Water Act prohibits states from adopting their own vessel discharge standards now. ER 22. Indeed, frustrated by EPA's inaction, the State of Michigan has already adopted its own state permitting program for ballast discharges.<sup>12</sup> Thus, contrary to EPA's assertions, continued delay will only

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<sup>12</sup> See Press Release, Michigan Dept. of Env'tl. Quality, Ballast Water Permits Now Available - Program Will Fight Against Invasive Species (Oct. 16,

increase state disparities. The quicker EPA acts to provide uniform national guidance and controls, the less likely it is that vessels will be subject to varying state requirements. EPA's concerns about potential liability for vessels discharging without a permit are similarly misdirected. EPA Reply Br. at 34. The sooner that EPA develops an NPDES permit framework, the sooner vessels can obtain permit coverage and the NPDES "permit shield," under which compliance with an NPDES permit is deemed compliance with other sections of the Clean Water Act. 33 U.S.C. § 1342(k). Without an NPDES program in place, unpermitted dischargers are in fact exposed to much greater liability.

Undoubtedly, a comprehensive NPDES permitting program with robust technology-based performance standards for all potential sources of vessel discharges will take some time to develop and fully implement. But that fact only supports Petitioners' claims that EPA must begin immediately to address these discharges by establishing the basic permitting framework for vessel discharges. Then, EPA may revise and strengthen the performance standards over time, just as the agency has done for many other complex industries and just as the Clean Water Act requires.

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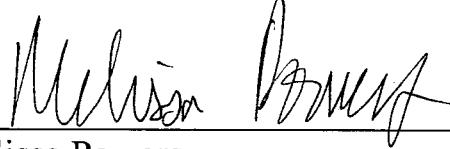
2006) available at <http://www.michigan.gov/deq/0,1607,7-135--154144--,00.html> (last visited June 18, 2007) ("Without action at the federal level, we must work together to effect the Great Lakes from this threat.").

**CONCLUSION**

For the reasons stated above, this Court should declare the vessel discharge exemption found at 40 C.F.R. § 122.3(a) unlawful and vacate the vessel discharge exemption effective September 30, 2008.

DATED June 27, 2007

Respectfully submitted,



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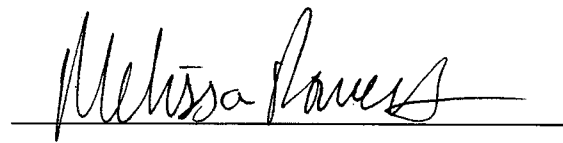
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**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

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 6,994 words, exclusive of tables and cover sheet.

Date: June 27, 2007

A handwritten signature in cursive script, reading "Melissa Powers", is written over a solid horizontal line.

Melissa A. Powers

**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 Defendant's Appeal) and 06-17188 (Shipping Industry Ballast Water Coalition's Appeal).

PROOF OF SERVICE

MELISSA A. POWERS declares:

I am over the age of eighteen years and not a party to this action. My business address is 10015 S.W. Terwilliger Boulevard, Portland, Oregon 97219-7799.

On June 27, 2007, I served the foregoing **REPLY 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 Oregon) that the foregoing is true and correct, and that this declaration was executed June 27, 2007 at Portland, Oregon.

  
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