

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re United States Environmental Protection
Agency, “Final National Pollutant
Discharge Elimination System (NPDES) General Permit
for Discharges Incidental to the Normal Operation of a
Vessel,” 73 Fed. Reg. 79,473 (Dec. 29, 2008).

MCP - 103

**EPA’s Consolidated Opposition to NWEA’s “Motion to Reconsider” the
Panel’s February 19, 2009 Consolidation Order and Response to Lake
Carriers’ Association’s “Response” to NWEA’s Motion**

The United States Environmental Protection Agency (“EPA” or the “Agency”) opposes the Motion to Reconsider the Panel’s February 19, 2009 Order consolidating multiple petitions for review of the above EPA General Permit in the D.C. Circuit (the “Consolidation Order”). The Reconsideration Motion, filed February 24, 2009, by Northwest Environmental Advocates, People for Puget Sound, and Center for Biological Diversity (collectively, “NWEA”), should be denied because EPA’s Notice of Multicircuit Petitions (“Notice”) correctly excluded NWEA’s Ninth Circuit petition for review. There is no genuine dispute that NWEA failed to comply with EPA’s longstanding and unambiguous regulation governing service of such petitions on EPA. That regulation, promulgated at Congress’s direction and published at 40 C.F.R. § 23.12(a), plainly provides that petitions for review must be delivered either by “certified mail, return

receipt requested,” or by “personal delivery” to EPA’s “General Counsel.” The Panel rejected NWEA’s February 16, 2009 motion to strike EPA’s Notice, and NWEA’s current motion offers no good reason why the Panel should reconsider its earlier decision.

EPA also responds herein to the “Response” to NWEA’s Reconsideration Motion filed on March 3, 2009, by the Lake Carriers’ Association, seeking to have its January 5, 2009 petition for review deemed the “only” petition that should have been embraced in EPA’s Notice. That petition was premature under EPA’s regulations. As EPA made clear in the Notice, only Lake Carriers’ second petition, filed on January 12 (also in the D.C. Circuit), was properly embraced in the Notice. However, given that the Panel has already ordered consolidation of the multiple petitions in the D.C. Circuit – the court that Lake Carriers argues for here in its Response – the Panel need never reach Lake Carriers’ arguments if the Panel denies NWEA’s Reconsideration Motion and leaves its Consolidation Order undisturbed.

BACKGROUND

On December 29, 2008, EPA published notice of its “Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel” (the “Permit”) in the Federal Register. 73 Fed. Reg. 79,473 (Dec. 29, 2008). Under the Clean Water Act (“CWA”), jurisdiction over challenges to the Permit lies in the courts of appeals. 33 U.S.C. § 1369(b)(1). Unless EPA explicitly provides otherwise, the permit is deemed “issued” for purposes of 28 U.S.C. § 2112(a)(1) and the CWA’s judicial review provisions on the date two weeks after its publication in the Federal Register. 40 C.F.R. § 23.2. EPA did not provide otherwise here and therefore the Permit was deemed issued on January 12, 2009, two weeks after its December 29, 2008 Federal Register publication. Two petitions were

filed with courts of appeals *and* properly served on EPA within ten days thereafter pursuant to EPA's regulations (40 C.F.R. § 23.12) and the rules for computing time in Fed. R. App. P. 26(a). Those two petitions for review were *Lake Carriers' Association v. Stephen L. Johnson, EPA Administrator*, No. 09-1010 (D.C. Cir.)¹; and *Natural Resources Defense Council, Inc. v. EPA*, No. 09-0244 (2d Cir.)².

Pursuant to 28 U.S.C. § 2112(a)(3) and the Panel's Rules, EPA served the Panel with Notice that the two above-mentioned petitions had been filed in two different courts of appeals within ten days after the Permit's issuance and had been properly served on EPA by the petitioners within that time. EPA also explained in the Notice (¶¶ 6-8) that two additional petitions for review of the Permit had been filed but were not embraced within the Notice due to defects either in their filing or their service on EPA. EPA advised that the first of these excluded petitions was captioned *Lake Carriers' Association v. Stephen L. Johnson, EPA Administrator*, No. 09-1001 (D.C. Cir.); the second was *Northwest Environmental Advocates; Center for Biological Diversity; and People for Puget Sound v. EPA*, No. 09-70115 (9th Cir.). EPA advised that this first petition filed by Lake Carriers (on January 5, 2009) had been consolidated with a subsequent petition that Lake Carriers had filed (also in the D.C. Circuit) on January 12, 2009.³ EPA explained that its Notice did not embrace Lake Carriers' first petition because it was

¹ Pursuant to Fed. R. App. P. 43(c)(2), EPA Administrator Lisa Jackson was substituted for former Administrator Johnson as Respondent. NWEA has moved to intervene in this D.C. Circuit litigation challenging the Permit.

² The Second Circuit transferred this case to the D.C. Circuit on February 26, 2009.

³ Lake Carriers stated that its January 12 petition was "intended to relate back" to its January 5 petition and was "protective" in the event "the Court" deems the earlier petition "premature."

filed prematurely, prior to commencement of the ten-day period after issuance of the Permit (for purposes of judicial review and 28 U.S.C. § 2112) on January 12, 2009.⁴

The second petition not embraced within the Notice was filed by NWEA and is the subject of the present reconsideration motion. EPA explained in the Notice that while NWEA's petition was filed with the Ninth Circuit within the ten-day period, it was not properly served and therefore not formally "received" by EPA within that period as required by and within the meaning of Panel Rule 25.1(b) and EPA's longstanding regulation (at 40 C.F.R. § 23.12), which provides in pertinent part:

For the purposes of 28 U.S.C. 2112(a), a copy of any petition filed in any United States Court of Appeals challenging a final action of the Administrator *shall* be sent by *certified mail, return receipt requested*, or by *personal delivery* to the *General Counsel*.

40 C.F.R. § 23.12(a) (emphases added). Additionally, EPA's regulation provides: "For purposes of determining whether a petition for review has been received within the ten day period under paragraph (b) of this section, the petition shall be considered received on the date of service, if served personally. If service is accomplished by mail, the date of receipt shall be considered to be the date noted on the return receipt card." 40 C.F.R. § 23.12(c) (emphases added).⁵ EPA's Notice advised the Panel that NWEA did not serve EPA by "certified mail" or "personal

⁴ In a January 26, 2009 letter to EPA (Notice Ex. 3), Lake Carriers argued that the Permit was issued on December 18, 2008, and that, therefore, Lake Carriers' January 5 petition was the only one filed within the applicable ten-day period.

⁵ Subsection (b) of 40 C.F.R. § 23.12 provides that if the General Counsel "receives" two or more petitions filed in two or more United States Courts of Appeals for review of any Agency action within ten days of "the effective date of that action for purposes of judicial review (as specified under §§ 23.2 through 23.10 of this part)," the General Counsel will notify the Panel of any petitions that were received within the ten-day period.

delivery” within the ten-day period. NWEA served the petition on EPA via Federal Express, which is not in conformity with EPA’s clear regulation requiring certified mail for petitions that are not personally delivered. EPA further advised that NWEA sent its petition to EPA’s *Administrator*, not EPA’s Office of General Counsel, again contrary to the regulation’s plain requirements. In the interest of full disclosure, EPA’s Notice included a letter from NWEA, dated February 6, 2009 (Notice Ex. 4), in which NWEA argued that notwithstanding the above defects, its petition should still be included in the circuit selection process. EPA’s Notice included a brief response to NWEA’s arguments.

On February 19, 2009, the Panel designated the Court of Appeals for the D.C. Circuit by means of random selection and consolidated the petitions for review in that court. Prior to issuing its Consolidation Order, the Panel had received NWEA’s “motion to strike” the Notice. The Panel struck NWEA’s motion, stating: “Any questions regarding the sufficiency of other petitions for review under rules promulgated by the Environmental Protection Agency are not properly before the Panel or contemplated by 28 U.S.C. § 2112(a)(1) and the rules promulgated thereunder.” (Consolidation Order n.1). On February 24, 2009, NWEA moved for reconsideration, requesting that the Panel order EPA to “re-file” a notice that includes NWEA’s Ninth Circuit petition. EPA now responds to that Motion and to Lake Carriers’ Response.⁶

⁶ NWEA has also filed a motion with the Ninth Circuit to stay any transfer of NWEA’s petition for review to the D.C. Circuit. *See* NWEA’s Motion to Reconsider at 7 n.7. EPA believes that the NWEA’s Ninth Circuit stay motion is improper and should be denied. While the court in which the record is filed may re-transfer the proceedings, 28 U.S.C. § 2112(a)(5) gives the Ninth Circuit no discretion *not* to transfer NWEA’s petition pursuant to the Panel’s Consolidation Order.

DISCUSSION

EPA properly excluded NWEA's Ninth Circuit petition for review from the Notice. It cannot seriously be disputed that NWEA failed to comply with the regulation's unambiguous requirements for effecting service on the Agency – either certified mail or hand-delivery to EPA's Office of General Counsel – but NWEA disputes those facts anyway. NWEA continues to press its arguments, contending that EPA has misinterpreted and misapplied its own regulation. NWEA also suggests that even if EPA correctly interpreted its regulation, the regulation need not be complied with because it imposes requirements not set forth in 28 U.S.C. § 2112 and thus is *ultra vires*. Neither argument has any merit.

I. In Excluding NWEA's Ninth Circuit Petition From The Notice, EPA Correctly Interpreted And Applied Its Regulation At 40 C.F.R. § 23.12.

When Congress adopted 28 U.S.C. § 2112 in 1988, it specifically directed agencies to promulgate regulations to implement the statute. Section 2112(a)(2) provides: "Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1)." *See also* S. Rep. No. 263, at 8 (1987) ("Each agency is *required* to designate by rule the office and officer who shall receive the petitions for review" under section 2112(a)(1)) (emphasis added). In response to this clear directive, EPA promulgated its regulation found at 40 C.F.R. § 23.12. *See* 53 Fed. Reg. 29,320, 29,322 (Aug. 3 1988). This decades-old regulation includes several straightforward requirements for serving petitions for review on the Agency. These published requirements are simple and require no great expenditure of time or resources to satisfy. EPA's applicable regulation provides that for the purposes of 28 U.S.C. § 2112(a), a copy of "any petition filed in any United

States Court of Appeals challenging a final action of the Administrator shall be sent by certified mail, return receipt requested, or by personal delivery to the General Counsel.” Here, however, NWEA (1) failed to serve its Ninth Circuit petition on EPA either by certified mail, return receipt requested, or by personal delivery; and (2) failed to serve that petition on the Office of General Counsel. *See* Notice Ex. 4 (NWEA letter to EPA, conceding that NWEA’s petition was served only by Federal Express and on EPA’s Administrator, not on its General Counsel).

Although NWEA goes to great lengths to construct arguments that delivery by Federal Express was somehow authorized in this situation, NWEA makes no effort whatsoever to argue that it complied with the regulation’s express requirement that petitions for review be sent or delivered to EPA’s General Counsel. EPA properly excluded the Ninth Circuit petition on that basis alone, and the Panel need inquire no further. Given that (a) Congress required agencies such as EPA to designate by rule the office and officer who is to receive petitions for review under 28 U.S.C. § 2112, (b) EPA promulgated such a rule, and (c) NWEA concedes it failed to serve its petition on the office and officer specified in the rule (EPA’s Office of General Counsel), there is no reason for the Panel to reach NWEA’s contentions that Federal Express somehow constitutes “certified mail” or that Federal Express delivery is satisfactory notwithstanding the regulation’s express language requiring service by other methods. In any event, however, NWEA’s arguments on these issues lack merit.

First, NWEA’s argument that Federal Express *is* “certified mail, return receipt requested” strains credulity. *See* NWEA Reconsideration Motion at 10-11. The gist of NWEA’s argument here is that the regulation does not specify that petitioners use the United States Postal Service and that any method of delivery that generates a return receipt suffices as “certified mail.”

NWEA relies on a single magistrate's report and recommendation (*Warsteiners Importers*) to support its contention that the courts accept Federal Express as equivalent to certified mail. NWEA is grasping at straws. Federal Express delivery does not even qualify as delivery by "mail" let alone "certified mail." The recent decision in *Kim v. United States*, 461 F. Supp. 2d 34, 40 n.5 (D.D.C. 2006) is instructive. That court held that delivery by Federal Express is *not* the same as certified or registered mail. *See also Prince v. Poulos*, 876 F.2d 30, 32 n.1 (5th Cir. 1989) (service using Federal Express did not comply with the mailing requirement of Fed. R. App. P. 25(a), because the term "mail" was intended to denote delivery by a "public authority," and Federal Express is a private entity). In *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996), the Ninth Circuit reached a similar conclusion when applying the service requirements of Fed. R. Civ. P. 5(b). In *In re Diloreto*, No. 07-15413BF, 2008 WL 141922 (E.D. Pa. Jan. 11, 2008), the court cited federal court decisions that also rejected Federal Express delivery as constituting service by "mail," and held in the context of a Federal Bankruptcy Rules provision requiring service by "first class mail" that the petitioning creditor did not comply with the service requirements of Rule 7004 "when Federal Express delivered the involuntary petition to the putative debtor." *Id.* at *4-5. *See also Continental Sports Corp. v. Department of Labor and Industries*, 128 Wash. 2d 594, 602 (S. Ct. Wash. 1996) ("we are not willing to hold that mail is anything other than postal matter carried by the United States Postal Service").

NWEA's citation (Reconsideration Motion at 12) to Fed. R. App. P. 25(c) undercuts rather than supports its argument that the Panel should essentially rewrite EPA's regulation at 40 C.F.R. § 23.12 to include service by Federal Express. Rule 25(c)(1)(A) specifies that service of papers covered by that rule may be accomplished in four ways. First is "personal" service

“including delivery to a responsible person at the office of counsel.” While Rule 25(c) is not the applicable rule here – 40 C.F.R. § 23.12 is – subsection (c)(1)(A) is of interest because it includes a requirement also found in EPA’s regulation, *i.e.*, that the office of counsel be served. As noted, NWEA does not even argue that it served EPA’s office of counsel. The second manner of acceptable service under Rule 25(c) is by “mail,” the third is by “third-party commercial carrier,” and the fourth is by “electronic means.” This language demonstrates a clear understanding by the drafters of the Federal Rules of Appellate Procedure that delivery by a “commercial carrier” such as Federal Express is *not* delivery by “mail.” Were it otherwise, there would be no reason for the drafters to specifically authorize delivery by “commercial carriers.”

Even if the Panel were to credit NWEA’s strained argument that EPA’s regulation *could* be read as allowing Federal Express delivery notwithstanding that certified mail is specifically required by the regulations language, that is not how EPA interprets its regulation, and an agency’s interpretation of its own regulation is entitled to “substantial deference.” *Carus Chemical Co. v. EPA*, 395 F.3d 434, 439 (D.C. Cir. 2005).

In short, NWEA’s Ninth Circuit petition for review was properly excluded from EPA’s Notice to the Panel because NWEA manifestly did not comply with two clear requirements of the Agency’s regulation governing service of such petitions.

II. NWEA’s Argument That EPA’s Regulation At 40 C.F.R. § 23.12 Need Not Be Complied With Because EPA’s Interpretation Of The Regulation, Or The Regulation Itself, Is *Ultra Vires* Lacks Merit.

In apparent recognition of the weakness of its argument that it complied with EPA’s regulation at 40 C.F.R. § 23.12, NWEA goes on to argue, in essence, that the regulation is

unlawful and need not be complied with. NWEA Reconsideration Motion at 15. NWEA attempts to avoid a frontal assault on the regulation by claiming that it is only challenging EPA's "interpretation" of its regulation, but since the language of the regulation is unambiguous, NWEA's challenge must be read as a challenge to the regulation itself. *See* NWEA Reconsideration Motion at 7 (asserting that such review by the Panel is "necessary" to ensure that agencies are not "using *improper regulations* or interpretations to exclude properly filed petitions for review from notice to the Panel) (emphasis added).

As an initial matter, a challenge to EPA's regulation is not properly before the Panel. The regulation in question dates back more than two decades. It was promulgated in direct response to Congress's direction that agencies were required to "designate by rule the office and officer who must receive" such petitions. If NWEA believes that the regulation should be revised, it can petition the Agency to do so and, if dissatisfied with the outcome of that process, seek to challenge the Agency's action in the appropriate court.

In any event, however, neither EPA's interpretation of its regulation nor the regulation itself is unreasonable. NWEA attempts to convey the impression that there is something unique about EPA's regulation at 40 C.F.R. § 23.12, but the language of that provision is mirrored in the regulations of a number of other federal agencies. For example, the comparable regulation issued by Department of Health and Human Services ("HHS") states: "In compliance with 28 U.S.C. § 2112(a), a copy of any petition for judicial review filed in any U.S. Court of Appeals challenging the final decision of the secretary must be sent by certified mail, return receipt requested, to the General Counsel of HHS." 42 C.F.R. § 3.548(k)(2). Similarly, regulations issued by the Food and Drug Administration ("FDA") specify: "For the purpose of 28 U.S.C. 2112(a), a copy of any

petition filed in any U.S. Court of Appeals challenging a final action of the Commissioner shall be sent by certified mail, return receipt requested, or by personal delivery to the Chief Counsel of FDA.” 21 C.F.R. § 10.45(h)(1). Congress wanted agencies to issue rules providing road maps for service of petitions, both for the benefit of the public – so it was clear how to serve them and where – and for the benefit of the agencies, large public institutions where records are voluminous and the tasks at hand frequently time sensitive.

NWEA asks the Panel to order EPA to deviate from its unambiguous rules for NWEA’s singular benefit. But NWEA’s failure to comply is not due to flaws in the regulation but to NWEA’s apparent failure to consult the regulation prior to serving its petition on the Agency. Almost lost amidst NWEA’s arguments is the fact that it is not being deprived of an opportunity to challenge the Permit. It has a forum, randomly selected by the Panel – the D.C. Circuit – for its challenge. What NWEA wants, notwithstanding its noncompliance with the rules, is to be treated the same as those who *did* comply with the rules – in this case Petitioners Natural Resources Defense Council (who filed in the Second Circuit) and Lake Carriers (who filed in the D.C. Circuit). According NWEA with such *ad hoc* and special treatment would be unfair to those who complied and would undermine the integrity of the regulation, essentially rendering compliance with its terms optional.⁷

⁷ NWEA implication that EPA is catering to “inside interests” (NWEA Reconsideration Motion at 3) is misguided. The Agency’s approach here has been even-handed. Where an environmental group’s (Natural Resources Defense Council’s) petition was served in compliance with the regulation, it was embraced in the Notice. Where an industry group’s petition was premature (Lake Carriers’ January 5, 2009 petition), it was excluded. Similarly, NWEA’s suggestion that EPA “affirmatively chose to wait” before informing NWEA of the defects in its service is also misguided. EPA is a large organization and those involved here did not become aware of the defects until after the 10-day period had expired. Responsibility for NWEA’s failure here rests with NWEA, alone.

That other parties here – an environmental group (Natural Resources Defense Council) headquartered in New York⁸ and a trade association (Lake Carriers) were able to fully comply with EPA’s regulation further undermines NWEA’s contention that the regulation presents an improper barrier to parties seeking to participate in the Panel’s random selection process. It is also telling that NWEA, itself, was able to comply with the regulation when it properly served on EPA’s Office of General Counsel a second Ninth Circuit petition involving the Permit. *See* NWEA Reconsideration Motion at 5 (a copy of NWEA’s February 13, 2009 Ninth Circuit petition was “personally delivered” to the General Counsel’s office the day it was filed).

NWEA goes on to argue that if the regulation means what it says, it is at odds with 28 U.S.C. § 2112 because it is expensive to comply with. *See* NWEA Reconsideration Motion at 14 (asserting that complying with the regulation imposes “substantial financial cost.”). NWEA has advised undersigned counsel that the cost of such personal delivery on February 13, 2009 was approximately \$220. Assuming the accuracy of that statement, that amount cannot be considered so great that it obviates compliance with the regulation. In fact, it is less than one-half the cost of the initial \$450 Ninth Circuit filing fee for the petition for review.

NWEA also asserts that certified mail must be avoided because mail to the government is subject to being irradiated in Washington, D.C. NWEA Reconsideration Motion at 13. However, according to the National Archives, mail that is “insured, registered, or certified” is “not irradiated.”⁹

⁸ Natural Resources Defense Council’s website states that its headquarters are located at 40 West 20th Street, New York, NY. *See* <http://www.nrdc.org/about/default.asp>.

⁹ *See* <http://www.archives.gov/records-mgmt/faqs/irradiated-mail.html> .

NWEA also asserts that “a strict reading” of EPA’s regulation “threatens to undermine the ability of a more distant challenger” to comply with 28 U.S.C. § 2112. There is no such obstacle, as demonstrated by NWEA’s demonstrated ability to accomplish proper service on EPA of NWEA’s second Ninth Circuit petition. But even if it were true that the regulation might impose a modicum of difficulty for a small, out-of-town petitioner, NWEA has no standing to press that argument here. The Center for Biological Diversity, one of the three petitioners in the Ninth Circuit case (along with NWEA and the People for Puget Sound) has an office in Washington, D.C.¹⁰ NWEA makes no argument that its co-petitioner’s Washington, D.C. staff was unavailable to assist in making personal service.

In sum, NWEA did not comply with the regulation, and neither EPA’s reading of the plain language of its regulation nor the regulation itself is *ultra vires*. Reconsideration of the Consolidation Order is not warranted.

III. Lake Carriers’ January 5, 2009 Petition For Review Was Premature Because It Was Filed Prior To Commencement Of The Ten-Day Period After Issuance of the Permit For Purposes Of Judicial Review.

In its Response (at 1), Lake Carriers argues that its January 5, 2009 petition for review was the “only” petition filed within the ten-day period after issuance of the Permit and that, therefore, EPA should have filed its record in the D.C. Circuit and “never should have filed a notice with the Panel requesting a lottery to begin with.” Unless it agrees with NWEA and grants reconsideration of its February 19, 2009 Consolidation Order, the Panel need not reach the

¹⁰ According to the Center’s website, that office is located at 1601 Connecticut Ave. N.W., Suite 701, Washington, D.C. Also according to the Center’s website, one of the Center’s attorneys, Michael Senatore, is described as a “Legal Director” who “focuses on endangered species litigation and policy from Washington, DC.” See <http://www.biologicaldiversity.org/about/staff/index.html>

arguments asserted by Lake Carriers. Previously, the Panel randomly selected the D.C. Circuit – the Circuit that Lake Carriers advocates for – to hear this case, and, therefore, assuming that the Panel denies NWEA’s Reconsideration Motion, the end result would be the same regardless of whether the Panel granted or denied Lake Carriers’ request that EPA be “ordered to file its record in the D.C. Circuit.” (Lake Carriers’ response at 8).

Although the Panel need not reach Lake Carriers’ arguments, EPA reiterates here that Lake Carriers’ January 5, 2009 petition for review was filed one week too soon. EPA’s longstanding regulation (at 40 C.F.R. § 23.2) specifies the date an EPA action normally becomes available for judicial review. The regulation provides that unless the EPA Administrator otherwise “explicitly” provides, the time and date of the Administrator’s action *for purposes of judicial review* under Clean Water Act section 509(b) “shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date that is two weeks after the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.” Notwithstanding references to the permit being “issued” that appeared in the Permit or in a staffer’s PowerPoint presentation, the only “explicit” statement of EPA’s position as to when the permit was “issued for the purposes of judicial review” appears in the published Federal Register notice, which stated that the Permit would be issued for purposes of judicial review on January 12, 2009. That Federal Register notice stated:

In accordance with 40 CFR Part 23, this permit shall be considered issued for the purpose of judicial review on the day 2 weeks after **Federal Register** Publication.

73 Fed. Reg. 79,473, 79,474 (Dec. 29, 2009) (emphasis in original). Lake Carriers was aware of this published notice when it filed its protective petition for review prematurely, one week before

the two-week period had ended. Lake Carriers then proceeded to file a timely petition on January 12, 2009, which EPA included in the Notice.

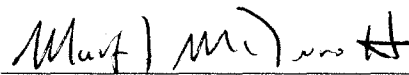
Finally, the concern that Lake Carriers cites in its motion – that, conceivably, parties *could* have been regulated by (and subject to sanctions for alleged violations of) the Permit prior to it being deemed issued for purposes of judicial review – simply did not occur here. Due to the unique circumstances of this case, although the Permit was technically designated “effective” on December 19, 2009, all vessels potentially subject to the Permit continued to be *exempt* from permitting requirements until February 6, 2009, 25 days *after* the January 12, 2009 date that the Permit was deemed issued for purposes of judicial review. *See* 73 Fed. Reg. at 79,474 (explaining that under the circumstances here, “the regulated community *need not* comply with the terms of today’s permit” until February 6, 2009) (emphasis added). Therefore, the present situation is a far cry from the purely hypothetical situation that Lake Carriers claims to be concerned about. EPA has not subjected the regulated community to any requirements of a new permit while simultaneously precluding judicial review.

The Panel should either decline to reach the arguments raised by Lake Carriers or, in the event the Panel were to reach them, defer to the Agency’s application of its longstanding regulation and reject Lake Carriers’ contentions.

Respectfully submitted,

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DATED: March 4, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this March 4, 2009, a copy of EPA's Consolidated Opposition to NWEA's "Motion to Reconsider" the Panel's February 19, 2009 Consolidation Order and Response to Lake Carriers' Association's "Response" to NWEA's Motion was served by U.S. mail to the following counsel.

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