

**NOTICE TO THE JUDICIAL PANEL ON MULTIDISTRICT
LITIGATION OF MULTICIRCUIT PETITIONS FOR REVIEW**

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).

MDL-_____

Pursuant to 28 U.S.C. § 2112(a)(3) and the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, the United States Environmental Protection Agency (“EPA” or the “Agency”) hereby notifies the Judicial Panel on Multidistrict Litigation that two petitions for review of the same final agency action were filed in two different courts of appeals within ten days after issuance of the agency action and received by EPA from the petitioners within the applicable ten-day period. As discussed *infra* in Paragraphs 6 through 8, two additional petitions for review of the agency action were filed but are not embraced within this Notice due to defects in their filing and service on EPA.

1. On December 29, 2008, EPA published in the Federal Register notice

of a final general permit entitled “Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel” (“the Permit”), 73 Fed. Reg. 79,473.

2. During the ten-day period specified by 28 U.S.C. § 2112 and EPA’s regulations (40 C.F.R. § 23.12), EPA received two petitions for review of the Permit filed in two different courts of appeals: *Lake Carriers’ Association v. Stephen L. Johnson, Administrator U.S. Environmental Protection Agency, and the United States Environmental Protection Agency*, No. 09-1010 (D.C. Cir.)¹; and *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, No. 09-0244 (2d Cir.). Jurisdiction over challenges to the Permit lies in the courts of appeals. 33 U.S.C. § 1369(b)(1). When such permits are issued by EPA, unless the Agency expressly provides otherwise in the permit, the permits are deemed “issued” for purposes of 28 U.S.C. § 2112(a)(1) and the judicial review provisions of the Clean Water Act on the date two weeks after their publication in the Federal Register. 40 C.F.R. § 23.2. The Agency did not provide otherwise here; therefore, the Permit was deemed issued on January 12, 2009, two weeks after its December 29, 2008 Federal Register publication. The

¹ EPA has advised the D.C. Circuit that pursuant to Fed. R. App. P. 43(c)(2), EPA Administrator Lisa Jackson should be substituted for former Administrator Stephen L. Johnson as a Respondent in that case.

two petitions identified above were filed with the courts of appeals and received by EPA within ten days thereafter, pursuant to the rules for computing time in Fed. R. App. P. 26(a).

3. Under Rule 25.1(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, EPA is required to notify the Panel that petitions for review of the same agency action have been filed in more than one circuit “within ten days after issuance of the agency order and received by the affected agency from the petitioners within that ten-day period.” Under Panel Rule 17.1, the Panel is then to designate one court of appeals by means of random selection and issue an order consolidating the petitions for review in that court of appeals. See also 28 U.S.C. § 2112(a)(3).

4. Attached to this Notice as Exhibits 1 and 2 are copies of the two petitions for review embraced within this Notice, and a schedule setting forth the information required by Rule 25.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. A proof of service as required by Rule 25.3 is also attached.

5. EPA advises the Panel that two additional petitions for review of the challenged Permit have been filed but are not being submitted by EPA for filing with the Clerk of the Panel. The first of these petitions is captioned *Lake*

Carriers' Association v. Stephen L. Johnson, Administrator U.S. Environmental Protection Agency, and the United States Environmental Protection Agency, No. 09-1001 (D.C. Cir.); the second is captioned *Northwest Environmental Advocates; Center for Biological Diversity; and People for Puget Sound v. EPA*, No. 09-70115 (9th Cir.). With respect to the first of these two petitions, on January 5, 2009, Lake Carriers' Association filed a petition for review in the D.C. Circuit challenging the Permit. That case, captioned *Lake Carriers' Association v. Stephen L. Johnson, Administrator U.S. Environmental Protection Agency, and the United States Environmental Protection Agency*, No. 09-1001 (D.C. Cir.), is now consolidated with the petition for review (cited above in Paragraph 2) that was filed by the same petitioner also in the D.C. Circuit one week later, on January 12, 2009.² This Notice does not embrace the January 5, 2009 petition for review filed by Lake Carriers Association because EPA believes that petition was filed prematurely and prior to commencement of the ten-day period after issuance of the Permit (issued for purposes of judicial review and 28 U.S.C. § 2112 on January 12, 2009). In a letter to EPA dated January 26, 2009, counsel for petitioner Lake

² In its January 12, 2009 petition for review, Lake Carriers' Association stated that its second petition "is intended to relate back to the petition filed by Lake Carriers' Association on January 5, 2009 (No. 09-1001), and is intended as a protective appeal in the event it is determined by the Court that the petition filed on January 5, 2009 was premature."

Carriers' Association has asserted that, in the Association's view, the Permit was "issued" for purposes of judicial review on December 18, 2008, and that therefore the Association's January 5, 2008 petition (and no other petition) was filed within the applicable ten-day period. The Association's counsel has requested that EPA attach a copy of his January 26 letter to this Notice, and EPA has done so. (Ex. 3).

6. With respect to the second petition that was filed but is not embraced within this Notice, on January 12, 2009, petitioners Northwest Environmental Advocates *et al.* ("NEA") filed a petition for review in the Ninth Circuit challenging the Permit. Although that petition for review was filed within the applicable ten-day period, EPA does not believe it was formally "received" by EPA within that period as required by and within the meaning of Panel Rule 25.1(b) and EPA's regulations. EPA's longstanding regulation, found at 40 C.F.R. § 23.12 and promulgated by EPA pursuant to 28 U.S.C. § 2112(a)(2), provides in pertinent part as follows: "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 applicable 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,^{3/} 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). Here, petitioners NEA did not serve EPA by “certified mail” or “personal delivery” within the applicable ten-day period. NEA’s counsel has confirmed in a letter to counsel for EPA dated February 6, 2009, that NEA served their petition on EPA only via Federal Express, which is not in conformity with EPA’s clear regulation. Further, NEA sent their petition to EPA’s Administrator, not its Office of General Counsel, again contrary to the plain requirements of the applicable regulations.

7. When informed of EPA’s intent to advise this Panel that NEA’s service of its petition for review was defective for the above reasons, counsel for NEA sent a letter to EPA dated February 6, 2009, arguing that NEA’s petition

³ Subsection (b) of 40 C.F.R. § 23.12 provides:

(b) 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 United States Judicial Panel of Multidistrict Litigation of any petitions that were received within the ten day period, in accordance with the applicable rules of the Panel.

(Emphasis added).

nonetheless should be included in the circuit selection process.⁴ NEA argued in their letter that EPA's regulation "merely" states that petitions "should" be sent by "certified mail" and "does not specify a specific mail delivery company"; that there is "nothing special about the U.S. mail"; and that Federal Express delivery was adequate here because it resulted in the creation of an "electronic" return receipt. NEA cites a magistrate's report and recommendation holding that delivery by Federal Express was adequate to meet a Florida statutory requirement that a notice be sent by certified mail. NEA made no effort to argue in the letter that its failure to directly deliver a copy of the petition to EPA's Office of General Counsel – as expressly required by 40 C.F.R § 23.12(a) – satisfied the regulation.

8. NEA's arguments are unconvincing.⁵ NEA ignores that EPA's regulation does not use the word "should" when discussing service in 40 C.F.R. § 23.12(a). It states: "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

⁴ At the request of NEA's counsel, EPA has attached a copy of NEA's February 6, 2009 letter to EPA. (Ex. 4).

⁵ In the event that NEA or the Association files any brief with the Panel in response to this Notice, EPA requests an opportunity to respond in full.

personal delivery to the General Counsel.” (Emphasis added.)⁶ Further, although it is true that the EPA regulation does not specify a mail “company,” that is because it is self-evident that the sole carrier contemplated under the provision is the U.S. Postal Service. Only the Postal Service offers “certified mail,” a form of delivery that is expressly mandated in at least one of the Federal Rules. See, e.g., Fed. R. Civ. P. 4(I), which governs service of process on the United States (copy of complaint must be served on the Attorney General “by registered or certified mail”).⁷ Finally, NEA’s reliance on a single magistrate’s report and recommendation to support its contention that the courts accept Federal Express as equivalent to certified mail is misleading. See, e.g., Kim v. United States, 461 F. Supp. 2d 34, 40 n.5 (D.D.C. 2006) (delivery by Federal Express is not the same as certified or registered mail under Rule 4(I)). Relatedly, many courts have concluded that service using Federal Express does not comply with requirements that documents be served by mail. See Prince v. Poulos, 876 F.2d 30, 32 n.1 (5th Cir. 1989) (service using Federal Express did not comply with the mailing

⁶ For the Panel’s convenience, a copy of 40 C.F.R. § 23.12 is attached. (Ex. 5).

⁷ The courts have long recognized the special status of certified mail. See, e.g., Ghounem v. Ashcroft, 378 F.3d 740, 744 (8th Cir. 2004) (“We think it appropriate that a stronger presumption should apply when certified mail is used to send notice because of the extra assurances of effective delivery included in the United States Postal Service’s certified mail system.”).

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 stated that the “few non-appellate federal courts to consider this issue have 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”). In sum, NEA failed to properly serve EPA with their petition within the ten-day period and, therefore, their petition is properly excluded from this Notice.

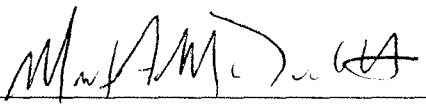
9. In determining which petitions for review qualify for inclusion in the Rule 17.1 random selection process, the Panel requires strict compliance with all governing statutes and rules. See, e.g., In re FERC v. Public Util. Dist. No. 2, 278

F. Supp. 2d 1379 (J.P.M.L. 2003) (multi-circuit petition for review of FERC order held properly stricken where the District of Columbia Circuit petition did not exhibit the requisite circuit court "filed or received" stamp). EPA therefore submits only the two petitions for review described on the attached Schedule.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources
Division

DATED: February 11, 2009

BY: 
MARTIN F. MCDERMOTT
Ill. Bar No. 6183307

Environmental Defense Section
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**SCHEDULE REQUIRED BY RULE 25.2 OF THE
RULES OF PROCEDURE OF THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

EPA's final general permit entitled "Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel" ("the challenged Permit"), 73 Fed. Reg. 79,473 (Dec. 29, 2008), was issued for purposes of judicial review on January 12, 2009, to 40 C.F.R. § 23.2.

The following petitions for review have been filed and received by EPA in accordance with 28 U.S.C. § 2112(a) and EPA regulations:

Case Name	Circuit Court	Docket Number	Filing Date	Date received by EPA
<i>Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency</i>	2d Circuit	No. 09-0244	1/16/09	1/21/09, per EPA OGC/CCU time-stamp
<i>Lake Carriers' Association v. Stephen L. Johnson, Administrator U.S. Environmental Protection Agency, and United States Environmental Protection Agency</i>	D.C. Circuit	No. 0-1010	1/12/08	1/13/09, per EPA OGC/CCU time-stamp

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2009, a copy of the foregoing NOTICE TO THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION OF MULTICIRCUIT PETITIONS FOR REVIEW was served by overnight delivery to the following courts and counsel or, in the case of the Ninth Circuit Court of Appeals, electronically filed in accordance with applicable ECF procedures and then served by overnight delivery to the listed counsel:

Clerks of Court

Molly C. Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
Post Office Box 193939
San Francisco, CA 94119-3939

Mark J. Langer, Clerk
United States Court of Appeals for the District of Columbia Circuit
U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals, Second Circuit
Office of the Clerk of Court
The Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007

***Counsel in Lake Carriers' Association v. Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency, and the United States Environmental
Protection Agency, No. 09-1010 (D.C. Cir.):***

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*Counsel for Northwest Environmental Advocates; Center for Biological
Diversity; and People for Puget Sound*

A handwritten signature in black ink, appearing to read "Martin F. McDermott", written over a horizontal line.

Martin F. McDermott
Attorney

EXHIBIT 1

Petition for Review
(D.C. Circuit)

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
JAN 12 2009
RECEIVED

D.C. Dawn
UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
JAN 12 2009
CLERK

LAKE CARRIERS' ASSOCIATION,)
)
Petitioner,)
)
v.)
)
STEPHEN L. JOHNSON, Administrator)
U.S. Environmental Protection Agency,)
and THE UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY,)
)
Respondents.)

Case No. 03-1013

2009 JAN 13 AM 9:04

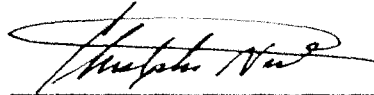
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EPA
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PETITION FOR REVIEW

The Lake Carriers' Association hereby petitions this Court, pursuant to Section 509 of the Federal Water Pollution Control Act, 33 U.S.C. § 1369, and Rule 15(a) of the Federal Rules of Appellate Procedure, to review, remand and vacate, and or defer enforcement of, the United States Environmental Protection Agency's adoption and issuance, pursuant to Section 402 of the Federal Clean Water Act, 33 U.S.C. § 1342, of a National Pollutant Discharge Elimination System (NPDES) Vessel General Permit (VGP) to cover discharges incidental to the normal operation of commercial vessels and non-recreational vessels less than 79 feet in length, 73 Fed. Reg. 79473 (December 29, 2008) (attached). This

petition is intended to relate back to the petition filed by the Lake Carriers' Association on January 5, 2009 (No. 09-1001), and is intended as a protective appeal in the event it is determined by the Court that the petition filed on January 5, 2009 was premature.

Respectfully submitted,



January 12, 2009

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Harrisburg, PA 17101
(717) 231-4500

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKE CARRIERS' ASSOCIATION,)	
)	
Petitioner,)	
)	Case No.
v.)	
)	
STEPHEN L. JOHNSON, Administrator)	
U.S. Environmental Protection Agency,)	
and THE UNITED STATES)	
ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondents.)	

CERTIFICATE OF SERVICE

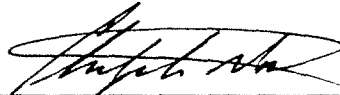
I hereby certify that on the 12th day of January, 2009, a copy of the foregoing Petition for Review was served by hand delivery, upon the following persons:

Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Patricia K. Hirsch
General Counsel (Acting)
Office of General Counsel
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USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
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Honorable Ronald J. Tenpas
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division
950 Pennsylvania Ave., N.W.
Room 2141
Washington, DC 20530

Correspondence Control Unit
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460



Christopher R. Nestor

EXHIBIT 2

Petition for Review
(Second Circuit)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RECEIVED
EPA
OIG/CCU

2009 JAN 21 PM 12:08

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

No. _____

U.S. COURT OF APPEALS
SECOND CIRCUIT
2009 JAN 15 PM 3:31

PETITION FOR REVIEW

Pursuant to 33 U.S.C. § 1369(b)(1), the Natural Resources Defense Council, Inc. (“NRDC”), hereby petitions this Court for review of the final action of the United States Environmental Protection Agency (“EPA”) on December 19, 2008, in which EPA exercised its authority under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, and issued the Vessel General Permit, which regulates discharges of pollutants incidental to the operation of vessels. The Vessel General Permit became effective on December 19, 2008 and a notice of its availability was published in the Federal Register on December 29, 2008, at 73 Fed. Reg. 79,473. Copies of the Federal Register notice and the Vessel General Permit are attached hereto. In accordance with the Federal Register notice and 40

C.F.R. Part 23, the permit is considered issued for the purpose of judicial review on the day two weeks after Federal Register publication, or January 12, 2009.

Petitioner NRDC is a national, non-profit, environmental organization with over 400,000 members. NRDC's mission is to advocate for the preservation and protection of the environment and human health on its members' behalf. NRDC has a substantial interest in the EPA action named in this petition because the action will adversely affect NRDC's and its members' interests in the unique aquatic ecosystems found in the Great Lakes and in other waters of the United States.

Respectfully submitted this 16th day of January, 2009.



Mitchell S. Bernard

(2d Cir. Admission Date: 04/19/1983)

Thomas Cmar

NATURAL RESOURCES DEFENSE COUNCIL

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Tel.: (212) 727-2700

Fax: (212) 727-1773

Counsel for Petitioner

Natural Resources Defense Council, Inc.

Service List

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USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

EXHIBIT 3

Letter from Counsel for
Petitioner in D.C. Circuit
Case

K&L|GATES

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January 26, 2009

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VIA EMAIL ONLY

Mr. Martin McDermott
Senior Trial Counsel
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Re: Lake Carriers' Association v. Johnson, D.C. Circuit Nos. 09-1001, 09-1010 Petitions for Review - National Pollutant Discharge Elimination System ("NPDES") Vessel General Permit (VGP) issued December 18, 2008, 73 Fed. Reg. 79473 (December 29, 2008)

Dear Martin:

As we discussed, our firm represents the Lake Carriers' Association (LCA) in connection with the above referenced petition of review filed in the U.S. Court of Appeals for the D.C. Circuit. As I discussed with you last week, the purpose of this letter is to confirm the Department's intention regarding the filing of the record in the D.C. Circuit in accordance with its obligations set forth in 28 U.S.C. §2112(a)(1), and that the Department will seek to have all other petitions pending in other circuits transferred to the D.C. Circuit.

LCA filed its initial petition (D.C. Cir. No 09-1001) on January 5, 2009. It has also come to our attention that at least two other petitions for review of the VGP have been filed, one in the U.S. Court of the Appeals for the Ninth Circuit on January 12, 2009, and the other in the U.S. Court of Appeals for the Second Circuit on January 16, 2009. See *Northwest Environmental Advocates, et al. v. EPA* (9th Cir. No. 09-70115); *Natural Resources Defense Council, Inc. v. EPA* (2nd Cir. No. 09-0244).

K&L|GATES

Mr. Martin McDermott

January 26, 2009

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As you know, 28 U.S.C. §2112(a)(1) provides:

If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order.

For purposes 28 U.S.C. §2112, the VGP for which review is sought was issued on December 18, 2008. Pursuant Fed. R. App. P. 26, the ten-day period subsequent to that issuance date ended on January 5, 2009. To our knowledge, LCA's January 5, 2009 petition for review of the VGP filed in the D.C. Circuit and served on you on that date, was the only such petition filed on or before January 5, 2009. Accordingly, the Department is obligated to file the record for this appeal in the D.C. Circuit, notwithstanding the filing of other petitions in other circuit courts, and those other petitions (and any future ones filed within 120 days of issuance of the VGP), should be transferred to the D.C. Circuit.

Section 509 of the Clean Water Act ("CWA") provides that judicial review of the VGP may be had by filing a petition for review within 120 days of "issuance" of the permit. 33 U.S.C. §1369. The VGP itself and EPA's website notice specifically and unequivocally provided that the permit was "issued" by EPA on December 18, 2008 and, moreover, became "effective" on December 19, 2008. See http://cfpub.epa.gov/npdes/home.cfm?program_id=350. The agency confirmed this in its Federal Register notice of December 29, 2008. See 73 Fed. Reg. 79473 (Dec. 29, 2008).

After specifically announcing that the VGP was issued on December 18 and effective on December 19, EPA indicated in its December 29, 2008 Federal Register notice that, pursuant to 40 C.F.R. §23.2, the VGP would be issued for purposes of Section 509 of the Clean Water Act at "1:00 p.m. eastern time (standard or daylight, as appropriate) on ... the date that is two weeks after the date when the document is published in the Federal Register" 73 Fed. Reg. 79473. It is untenable for EPA to take the position that it may have a permit that is "issued" and "effective" for the regulated community, yet not "issued" for purposes of judicial review until sometime thereafter. That is, EPA may not, under 40 C.F.R. §23.2 or the CWA in these circumstances, lawfully impose a permit obligation on the regulated community and at the same time, prevent the regulated community or other interested parties from obtaining judicial review of that permit obligation. Additionally, 40 C.F.R. §23.2 provides that its timing provisions do not apply where the Administrator otherwise explicitly provides an issuance date. Here, the Administrator otherwise explicitly provided that it the VGP was issued on December 18, 2008 and effective on December 19, 2009.

Mr. Martin McDermott
January 26, 2009
Page 3

No court has ever upheld the application of 40 C.F.R. §23.2 to defer judicial review until after the action being reviewed is already issued and effective. In fact, at least one court has expressly rejected such a notion. In *Virginia Electric Power Company v. EPA*, 610 F.2d 187 (4th Cir. 1979), the agency had promulgated regulations under the CWA, which were subject to judicial review under section 509 of the Act, just as the VGP permit is here. The regulations at issue in *Virginia Power* were deemed by EPA to be issued for purposes of judicial review after they were published in the Federal Register (thus deferring judicial review), but well *before* they became effective. See *Virginia Power*, 610 F.2d at 188; 44 Fed. Reg. 32854 (June 7, 1979). The Fourth Circuit held that EPA's use of the deferral mechanism in *Virginia Electric* was appropriate, because "the exposure to judicial review commenced prior to the stated time at which the regulations were to become effective for substantive purposes." *Id.* Moreover, the Fourth Circuit specifically said that its approval of EPA's use of a deferral mechanism to clarify the start date for a judicial review period "does not imply that an agency may postpone for any period of time past the time of *substantive effectiveness* of regulations their exposure to judicial review." *Virginia Electric*, 610 F.2d at 189 (emphasis added). The deferral mechanism at issue in *Virginia Electric* ultimately was the basis for the current regulation relied on by EPA here. See 50 Fed. Reg. 7268 (Feb. 21, 1985).

Here, given the statements made by the EPA on December 18, 2008, and again in the Federal Register on December 29, 2008, the 120-day judicial review period necessarily started to run on December 18, 2008 – the date the VGP was, in fact, "issued." Applying the timing provisions of Fed. R. App. P. 26, the 10-day period in 28 U.S.C. §2112 expired on January 5, 2009. Because LCA filed its petition for review in the D.C. Circuit on January 5, 2009, and no others were filed on or before that date, the Department has the obligation to "file the record in [the D.C. Circuit] ... notwithstanding the institution in any other court of appeals of proceedings for review of that order." 28 U.S.C. § 2112(a)(1).¹ Under these circumstances, it would be inappropriate for the Department to invoke 28 U.S.C. §2112(a)(3), and notify the Judicial Panel on Multidistrict Litigation that two or more petitions have been filed in different circuits within the initial ten-day period, because that is not the case. Please notify us immediately if the Department disagrees and intends to attempt to invoke 28 U.S.C. § 2112(a)(3), so that we have an opportunity to advise the court of our position. We further request that any notification by the agency be accompanied by this letter notifying the panel of our position.

¹ LCA filed a second, protective petition for review (D.C. Cir. No.09-1010), on January 12, 2009, in the event it is determined that EPA's regulation at 40 C.F.R. §23.2 is applicable.

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Mr. Martin McDermott

January 26, 2009

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Please contact me if you should have any questions or wish to discuss this matter further.

Sincerely,

A handwritten signature in cursive script, reading "Barry M. Hartman", with a long horizontal flourish extending to the right.

Barry M. Hartman
Christopher Nestor

EXHIBIT 4

Letter from Counsel for
Petitioners in Ninth
Circuit Case

February 6, 2009

VIA ELECTRONIC MAIL AND FEDEX
Mr. Martin McDermott
Senior Trial Counsel
Environmental Defense Section
U.S. Department of Justice
Environmental and Natural Resources Division
950 Pennsylvania Avenue, N.W. - Room 2141
Washington, D .C. 20530

Notification to Judicial Panel on Multidistrict Litigation Regarding
Challenges to EPA's Vessel General Permit

Dear Martin:

Thank you for informing us that you likely intend to omit the Petition for Review filed in the Ninth Circuit by Northwest Environmental Advocates, People for Puget Sound, and Center for Biological Diversity ("Petitioners") from EPA's notice to the Judicial Panel on Multidistrict Litigation ("Panel"). Had you let us know sooner of your position, of course, it would have been easier for us to address your concerns. However, as the Petition was properly filed within the ten-day period designated by statute and EPA regulation, it is clear that it properly belongs in the circuit selection process before the Panel, as governed by 28 U.S.C. § 2112.

Petitioners have complied with both the letter and the goal of the law, and thus the Ninth Circuit, where Petitioners filed their Petition for Review, must be included in EPA's notice to the Judicial Panel on Multidistrict Litigation. Petitioners properly and timely filed their Petition for Review with the Ninth Circuit, did so within the ten-day window described in 28 U.S.C. § 2112(a)(3) and EPA's rules and Federal Register Notice, immediately notified EPA by mailing a copy of the Petition with the court's time and date stamp to the agency via overnight Federal Express, and obtained a signature verifying that EPA received the Petition the day after it was filed (see enclosure). As we understand your position, you believe that this was not sufficient, however, because Petitioners did not use the U.S. Mail. In our view, this position is simply untenable.

First, the governing statute, 28 U.S.C. § 2112, specifies how multidistrict litigation is to be managed. It states:

If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer *shall* proceed in accordance with paragraph (3) of this subsection.

28 U.S.C. § 2112(a)(1) (emphasis added). Congress was clear: if an agency received a copy of petition for review of the agency's action within the ten-day period in more than one circuit, the agency *shall* notify the Judicial Panel on Multidistrict Litigation of that petition. In this case, it is undisputed that EPA did, in fact, receive Petitioners' Petition for Review within the ten-day period. As a result, EPA must include the Ninth Circuit in its notice to the Panel.

You have suggested that an EPA regulation has added a requirement to the notification procedure in 28 U.S.C. § 2112, mandating that petitioners send their petitions via U.S. Mail. This argument must fail. First, the regulation you cited, 40 C.F.R. § 23.12, does not specify the need to use U.S. Mail to notify EPA. Rather, it merely states that petitions should be sent by certified mail, with a return receipt, or via personal delivery. The regulation does not specify a specific mail company. Indeed, the inclusion of "personal delivery" as an option for notification further demonstrates that there is nothing special about the U.S. Mail in notifying the EPA of filed petitions. The purpose of EPA's regulation is not to support the U.S. Mail, but to ensure that EPA acknowledges receipt of the petition, and establishes a verifiable time of the petition's receipt. *See also Warsteiner Importers Agency, Inc. v. Republic Nat. Distributing Co.*, 2008 WL 4104568, at *6 (M.D.Fla. July 31, 2008) (finding that plaintiff's use of Federal Express was adequate to meet Florida statutory requirement that notice be sent via certified mail). In this case, because Federal Express required EPA to sign for receipt of the Petition, and then provided Petitioners with an electronic "return receipt" that includes the date and time of delivery at EPA, Petitioners have fulfilled the requirements of EPA's regulation.

The sufficiency of Petitioners' service on EPA is even more apparent in light of paragraph (c) of the regulation, which provides that "[f]or purposes of determining whether a petition for review has been received within the ten day period....the date of receipt shall be considered to be the date noted on the return receipt card." In this case, the date on the Federal Express electronic notice of receipt is January 13, 2009. Thus, because the ten-day period began on January 12, 2009, the Petition meets all of the requirements to be included in the notice to the Panel.

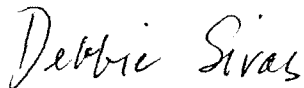
In light of this discussion, we trust that you will agree that the Ninth Circuit must be included in EPA's notice to the Panel. If, however, you intend to leave Petitioners'

Mr. Martin McDermott
Senior Trial Counsel
February 6, 2009
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Petition for Review out of EPA's notice, please notify us immediately, so that we may advise the Panel of our position. Further, if you decide to omit Petitioners from your notice to the Panel, we request that you include this letter in the notice, in order to alert the Panel of our position.

Please let us know if you have any further questions.

Sincerely,



Deborah A. Sivas
Environmental Law Clinic
Stanford Law School

Allison LaPlante
Daniel P. Mensher
Pacific Environmental Advocacy Center
Lewis & Clark Law School

Counsel for Petitioners

DAS:lfj
Enclosure

Lynda F. Johnston

From: TrackingUpdates@fedex.com
Sent: Tuesday, January 13, 2009 10:57 AM
To: lyndaj@stanford.edu
Subject: FedEx Shipment 797243618590 Delivered

This tracking update has been requested by:

Company Name: STANFORD LAW SCHOOL ENVIRONMEN
Name: Lynda Johnston
E-mail: lyndaj@stanford.edu

Our records indicate that the following shipment has been delivered:

Reference: 11150 Ballast III
Ship (P/U) date: Jan 12, 2009
Delivery date: Jan 13, 2009 1:53 PM
Sign for by: D.MADDOX
Delivered to: Receptionist/Front Desk
Service type: FedEx Standard Overnight
Packaging type: FedEx Envelope
Number of pieces: 1
Weight: 2.00 lb.
Special handling/Services: Deliver Weekday
Tracking number: [797243618590](https://www.fedex.com/track/797243618590)

Shipper Information	Recipient Information
Lynda Johnston	Stephen L. Johnson, Administrator
STANFORD LAW SCHOOL ENVIRONMEN	U.S. ENVIRONMENTAL PROTECTION AGENC
559 Nathan Abbott Way	1200 PENNSYLVANIA AVE NW; ARIEL RIOS BUILDING
STANFORD	WASHINGTON
CA	DC
US	US
94305	20460

Please do not respond to this message. This email was sent from an unattended mailbox. This report was generated at approximately 12:57 PM CST on 01/13/2009. To learn more about FedEx Express, please visit our website at fedex.com.

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To track the latest status of your shipment, click on the tracking number above, or visit us at fedex.com. This tracking update has been sent to you by FedEx on the behalf of the Requestor noted above. FedEx does not validate the authenticity of the requestor and does not validate, guarantee or warrant the authenticity of the request, the requestor's message, or the accuracy of this tracking update. For tracking results and fedex.com's terms of use, go to fedex.com.

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February 6, 2009

Dear Customer:

The following is the proof-of-delivery for tracking number **797243618590**.

Delivery Information:

Status:	Delivered	Delivery location:	WASHINGTON, DC
Signed for by:	D.MADDOX	Delivery date:	Jan 13, 2009 13:53
Service type:	Standard Envelope		

Shipping Information:

Tracking number:	797243618590	Ship date:	Jan 12, 2009
		Weight:	2.0 lbs.

Recipient:
WASHINGTON, DC US

Shipper:
STANFORD, CA US

Reference 11150 Ballast III

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EXHIBIT 5

EPA Regulation

40 C.F.R. § 23.12

C

Effective:[See Text Amendments]

Code of Federal Regulations Currentness

Title 40. Protection of Environment

Chapter I. Environmental Protection Agency (Refs & Annos)

Subchapter A. General

Part 23. Judicial Review Under
EPA--Administered Statutes (Refs & Annos)

→ § 23.12 Filing notice of judicial review.

(a) 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. The petition copy shall be time-stamped by the Clerk of the Court when the original is filed with the Court. The petition should be addressed to: Correspondence Control Unit, Office of General Counsel (2311), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(b) 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 United States Judicial Panel of Multidistrict Litigation of any petitions that were received within the ten day period, in accordance with the applicable rules of the Panel.

(c) 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.

[53 FR 29322, Aug. 3, 1988; 66 FR 34376, June 28, 2001]

SOURCE: 50 FR 7270, Feb. 21, 1985; 53 FR 29322, Aug. 3, 1988; 70 FR 33359, June 8, 2005, unless otherwise noted.

AUTHORITY: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j-7(a)(2), 300j-9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 28 U.S.C. 2112(a), 2343, 2344.

40 C. F. R. § 23.12, 40 CFR § 23.12

Current through January 30, 2009; 74 FR 5796

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