SCHEDULED FOR ORAL ARGUMENT ON MAY 9, 2011

NO. 09-1001, 09-1010, 09-1076, 09-1115, *Consolidated*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1001, No. 09-1010

LAKE CARRIERS' ASSOCIATION, Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al*., Respondents.

No. 09-1076

CANADIAN SHIPOWNERS ASSOCIATION, Petitioner,

v.

LISA JACKSON, *et al*., Respondents.

No. 09-1115

AMERICAN WATERWAYS OPERATORS, Petitioner,

v.

LISA JACKSON, *et al*., Respondents.

On Petitions for Review of
the National Pollutant Discharge Elimination System Vessel General Permit
Issued Pursuant to Section 402 of the Federal Clean Water Act

Final Brief of Petitioners Lake Carriers' Association, American Waterways Operators and Canadian Shipowners Association

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amicus Curiae*

The following is a list of all parties, intervenors and *amicus curiae* in these consolidated actions.

1. Parties

The Petitioners are the Lake Carriers' Association, the American Waterways Operators, and the Canadian Shipowners Association.

The Respondents are the United States Environmental Protection Agency (EPA) and Lisa Jackson, Administrator of EPA (collectively referred to as EPA).

2. Intervenors

The intervenors are: Northwest Environmental Advocates, Center for Biological Diversity, Natural Resources Defense Council, and People for Puget Sound (all for EPA).

3. Amicus Curiae

The *amicus curiae* is Nutech 03, Inc.

B. Ruling Under Review

This action involves consolidated and transferred petitions for review pursuant to section 509(b)(1) of the Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1), which challenge 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 (VGP)," 73 Fed. Reg. 79473 (Dec. 29, 2008).

C. Related Cases

These consolidated cases have not previously been before this Court. These consolidated cases were previously consolidated with, but have been severed from, Case Nos. 09-1089, 09-1131, 09-1135, 09-1162, and 09-1163.

RULE 26.1 DISCLOSURE STATEMENT OF THE LAKE CARRIERS' ASSOCIATION

The Lake Carriers' Association (LCA) is a "trade association" as that term is defined in D.C. Cir. R. 26.1. LCA is a nonpartisan, Ohio nonprofit trade association representing U.S.-flag vessel operators on the Great Lakes.[1] LCA's members are involved in the transportation of commodities on the Great Lakes, including New York, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin and Minnesota waters. Cargo movement by LCA fleets and other U.S.-flag Great Lakes operators has topped more than 125 million tons in a year. All of LCA's members operate exclusively within the Great Lakes system and do not operate outside of the Great Lakes system or otherwise engage in transoceanic shipping. LCA's members are subject to the VGP and its attendant state conditions, which, for the first time, regulate discharges incidental to the normal operation of LCA's members' vessels. No parent company, subsidiary, or affiliate of LCA has issued shares or debt securities to the public.

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[1] LCA maintains a website at: http://www.lcaships.com/.

RULE 26.1 DISCLOSURE STATEMENT OF THE AMERICAN WATERWAYS OPERATORS

The American Waterways Operators (AWO) is a "trade association" as that term is defined in D.C. Cir. R. 26.1. AWO is a nonpartisan, Delaware nonprofit trade association representing U.S.-flag vessel operators on the Atlantic, Pacific and Gulf coasts, on the inland rivers, and on the Great Lakes.[2] AWO's 300 members operate thousands of tugboats and towboats, as well as tens of thousands of barges, that move more than 800 million tons of cargo annually. AWO's members represent the largest segment of the U.S.-flag fleet. AWO's members are subject to the VGP and its attendant state conditions, which, for the first time, regulate discharges incidental to the normal operation of AWO's members' vessels. No parent company, subsidiary, or affiliate of AWO has issued shares or debt securities to the public.

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[2] AWO maintains a website at: http://www.americanwaterways.com/.

RULE 26.1 DISCLOSURE STATEMENT OF THE CANADIAN SHIPOWNERS ASSOCIATION

The Canadian Shipowners Association (CSA) is a "trade association" as that term is defined in D.C. Cir. R. 26.1. CSA is a nonpartisan, Canadian nonprofit trade association representing the owners of ships trading in the Great Lakes and St. Lawrence Seaway.[3] CSA members' fleet comprises 68 vessels with an annual volume of about 65 million tons in 2006, of which 33.5 million tons – more than half – were carried between Canada and the United States. CSA's members are subject to the VGP and its attendant state conditions, which, for the first time, regulate discharges incidental to the normal operation of CSA's members' vessels. No parent company, subsidiary, or affiliate of CSA has issued shares or debt securities to the public.

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STATEMENT REGARDING JOINT APPENDIX

Pursuant to D.C. Circuit Rule 30(c), and this Court's Order dated October 6, 2010, the parties are utilizing the deferred-appendix option as described in Rule 30(c) of the Federal Rules of Appellate Procedure.

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TABLE OF AUTHORITIES[††]

Constitutional Provisions

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[††] Authorities upon which we rely are marked with asterisks.

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
CWA	Federal Water Pollution Control Act, popularly known as the Clean Water Act
EPA	Refers, collectively, to the United States Environmental Protection Agency (EPA) and Lisa Jackson, Administrator of EPA
IMO	International Maritime Organization
JA	Joint Appendix
nm	Nautical miles
NPDES	National Pollutant Discharge Elimination System
Petitioners	Refers, collectively, to the Lake Carriers' Association (LCA), the American Waterways Operators (AWO), and the Canadian Shipowners Association (CSA)
VGP	National Pollutant Discharge Elimination System General Permit for Discharges Incidental to the Normal Operation of a Vessel, a/k/a the Vessel General Permit

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over Petitioners' challenges to the VGP pursuant to Section 509 of the Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1).

II. STATEMENT OF ISSUES

1. Whether EPA's inclusion of over 100 new substantive requirements in the final VGP is contrary to 5 U.S.C. § 706(2)(D), because EPA failed to give Petitioners any notice or opportunity to comment as required by 5 U.S.C. § 553 before including those new requirements in the final VGP.

2. Whether EPA's failure to consider and address substantial legal and practical issues regarding over 100 new substantive requirements added to the final VGP was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A).

3. Whether EPA failed to conduct an appropriate analysis under the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*., with respect to over 100 new substantive requirements added to the final VGP.

III. PERTINENT STATUTES AND REGULATIONS

Copies of the pertinent statutes and regulations are included in the separately bound addendum to this brief (Addendum).

IV. STATEMENT OF FACTS

A. The Federal Water Pollution Control Act.

The Federal Water Pollution Control Act, popularly known as the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, is the primary federal statute addressing water pollution in the United States. EPA, along with other federal, state and local agencies, administers the numerous programs established under the CWA.

Section 301(a) of the CWA provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with certain other sections of the Act. 33 U.S.C. § 1311(a). The CWA defines "discharge of a pollutant" as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). A "point source" is a "discernible, confined and discrete conveyance" and includes a "vessel or other floating craft." 33 U.S.C. § 1362(14).

1. The NPDES permit system.

In order to comply with Section 301(a), dischargers typically obtain permits through either the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program or the Section 404 dredge-and-fill permit program. *See* 33 U.S.C. §§ 1342, 1344. This matter concerns the NPDES permit program. Section 402 of the CWA requires that an NPDES permit assure compliance with

all CWA requirements applicable to the discharge being permitted. 33 U.S.C. § 1342(a), (b).

The NPDES permit program is largely administered by the states through EPA-approved programs that each state implements and administers. *See* 33 U.S.C. § 1342(b). These state programs are based on minimum standards established by the CWA and EPA's implementing regulations. 33 U.S.C. § 1342(b); 40 C.F.R. Part 123. In most instances, therefore, regulated entities seek their NPDES permit from an authorized state agency, with EPA having authority to review and approve that permit. 33 U.S.C. § 1342(d). If a state does not have an approved NPDES program, or its program does not cover that particular activity, then the NPDES permit is issued directly by EPA. *Id.* at § 1342(a). The procedures that EPA must follow in issuing NPDES permits are found in 40 C.F.R. Part 124.

Permits issued to dischargers under the NPDES program can take one of two forms: an individual or general permit. An individual permit is a permit issued to one facility based on site-specific information related to it. JA 931. A general permit covers an entire group or category of similarly situated but separately located facilities. *Id.*; *see also* 40 C.F.R. § 122.28.

The VGP at issue here is an EPA-issued nationwide (as opposed to regional) general permit. Currently, aside from the VGP, Petitioners believe there is no

NPDES permit program that addresses "mobile" point sources that move from state to state while discharges occur.

2. The section 401 process for state certification of EPA-issued NPDES permits.

Section 401 of the CWA provides that EPA may not issue an NPDES permit until the state in which the discharge originates either certifies that the discharge, as permitted, will comply with the relevant sections of the CWA and all applicable state laws and regulations, or waives certification. *See* 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 124.53, 124.55. The appropriate state may deny certification, grant certification unconditionally, or grant certification on condition that the permit be revised to include additional or more stringent provisions. *Id.* EPA is prohibited from issuing a permit where the state denies certification. 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 124.55(a)(1). Under certain circumstances, EPA makes the certification rather than a state.

A state's section 401 certification of an EPA-issued NPDES permit must set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure compliance with the applicable provisions of CWA Sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of state law. *See* 33 U.S.C. § 1341(d); 40 C.F.R. § 124.53(e). Thus, subject to certain limits not relevant here, a state's section 401 certification may contain conditions that are

more stringent than, and in addition to, those in the permit as proposed by EPA. *Id*.

Under the CWA, a state's section 401 certification conditions, if properly established, become requirements of the EPA-issued permit. *See* 33 U.S.C. §§ 1341(a)(1), (d); 40 C.F.R. §§ 124.53(e), 124.55(a)(2). These conditions are, therefore, federally enforceable permit requirements in that state's waters, and potentially severe civil and criminal penalties, including imprisonment, are available if they are not met. *See* 33 U.S.C. § 1319.

B. Regulation of "Discharges Incidental to the Normal Operation of Vessels" under the NPDES Permitting System.

One year after the CWA was enacted, EPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels from NPDES permitting requirements. *See* 38 Fed. Reg. 13,528 (May 22, 1973). That regulation was continuously in effect until 2008 and excluded discharges "incidental to the normal operation of a vessel." It provided:

> The following discharges do not require NPDES permits:
>
> (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes or any other discharge incidental to the normal operation of a vessel.

40 C.F.R. § 122.3(a).

On January 13, 1999, a rulemaking petition was submitted to EPA by a number of parties concerned about the effects of ballast water discharges. JA 750.

The petition asked EPA to repeal 40 C.F.R. § 122.3(a) to the extent it excluded discharges incidental to the normal operation of vessels from the requirement to obtain an NPDES permit. *Id*. The petition asserted, among other things, that ballast water (heretofore excluded as an incidental discharge) must be regulated under the NPDES program because it contains invasive plant and animal species (alleged "pollutants") as well as other materials of concern (*e.g.*, oil, chipped paint, sediment and toxins in ballast water sediment). *Id*. EPA, for a number of reasons, declined to reopen the exclusion for additional rulemaking, and denied the petition on September 2, 2003. Decision on Petition for Rulemaking to Repeal 40 C.F.R. § 122.3(a); JA 168.

After denial, a number of groups filed a complaint in the U.S. District Court for the Northern District of California. The complaint challenged EPA's promulgation of 40 C.F.R. § 122.3(a), an action EPA took in 1973. JA 751. The complaint also challenged EPA's September 2003 denial of the petition to repeal the exclusion for incidental vessel discharges. *Id*.

In March 2005, the district court determined that the exclusion exceeded EPA's authority under the CWA. *See Nw. Envtl. Advocates v. EPA*, No. C 03-05760, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. Mar. 30, 2005). The Court issued a final order in September 2006 providing that "[t]he blanket exemption for discharges incidental to the normal operation of a vessel, contained in 40 C.F.R.

§ 122.3(a), shall be vacated as of September 30, 2008." *Nw. Envtl. Advocates v. EPA*, No. C 03-05760, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. Sept. 18, 2006).

EPA appealed to the U.S. Court of Appeals for the Ninth Circuit, and on July 23, 2008, the Ninth Circuit upheld the district court's decision, leaving the September 30, 2008 vacatur date intact. *See Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008). EPA subsequently petitioned the district court to extend the date for vacatur of the exclusion in 40 C.F.R. § 122.3(a) to December 19, 2008, and the district court granted this request. *See Nw. Envtl. Advocates v. EPA*, No. C 03-05760, 2008 U.S. Dist. LEXIS 66738 (N.D. Cal. Aug. 31, 2008).

C. The VGP and the State Section 401 Certification Process.

As a result of the Ninth Circuit litigation, effective December 19, 2008, discharges incidental to the normal operation of vessels became subject to the discharge prohibition in section 301(a) of the CWA, 33 U.S.C. § 1311(a), unless covered under an NPDES permit. JA 752. EPA had to decide whether, and how, to develop an NPDES permit program regarding incidental discharges like ballast water. JA 931. If it chose not to create a permit system at all, these discharges, some of which inevitably occur (*e.g.*, deck runoff), and others which are necessary to the safe operation of vessels (*e.g.*, ballast water discharges), would be illegal in their entirety under the CWA. *See* 33 U.S.C. § 1301(a); JA 929-30. In effect, absent an NPDES permit to cover the discharges, shipping and other marine

transportation would have come to a complete halt, since vessel operators discharging without a permit could otherwise face potentially severe civil and criminal liability. *See* 33 U.S.C. §§ 1301(a), 1319, 1365; JA 929-31(EPA-HQ-OW-2008-0055-0437)(VGP Fact Sheet, §§ 2.4, 2.6).

EPA decided to propose a nationwide general NPDES permit program for incidental vessel discharges previously covered by the exclusion, rather than issuing vessel-by-vessel individual NPDES permits or having states develop and seek approval of state NPDES permit programs for these discharges. JA 931. Thus, on June 17, 2008, EPA announced the availability of a proposed NPDES VGP in the Federal Register. JA 186. Unlike the majority of NPDES permit programs over which the states have obtained primary authority to administer, the VGP, as proposed and as finalized, is issued and enforced by EPA. JA 758.[5]

As noted above, section 401 of the CWA provides that EPA may not issue an NPDES permit until the state in which the discharge originates or will originate either certifies that the discharge, as permitted, will comply with the relevant sections of the CWA and all applicable state laws and regulations, or waives certification. EPA did not commence or complete the section 401 certification process prior to issuing the draft VGP. *See*, *e.g.*, JA 1342, 1381, 1401. Thus, the

[5] The CWA also contains provisions permitting citizen suits. 33 U.S.C. § 1365.

draft VGP issued by EPA on June 17, 2008, did not contain any requirements imposed by the states pursuant to section 401 of the CWA. JA 186, 229. As a result, the regulated community could not provide comment on nonexistent requirements or on the proposed VGP as a whole, including comment on the interaction of the potential but unknown requirements that might be imposed as a regulated vessel moves from state to state. Additionally, both states and the regulated community raised serious and specific concerns that EPA had failed to afford them enough time to properly complete the section 401 certification process and warned of potentially conflicting section 401 requirements:

> Later this month, EPA is scheduled to issue the (VGP). We understand that EPA intends to incorporate state-specific conditions into the VGP via the certification process. EPA requested that states, including Washington, certify the VGP under Section 401(a)(l) of the Federal Clean Water Act. However, states must follow state-specific procedures for developing these conditions. Once these conditions are developed, states will be responsible for defending any legal challenges to those state-specific conditions. *We are faced with the awkward, unreasonable, and illegal demand from EPA that we base our certification on the draft VGP, and to do so in an extremely short time frame.*
>
> Contrary to the requirements outlined in the Federal Clean Water Act, we were asked to certify the *draft* VGP rather than the proposed final VGP. By requiring certification of the draft permit, states are not provided the opportunity to review and evaluate any changes to the draft VGP that EPA made as a result of public comment. This places us in the impossible position of not knowing exactly what we are certifying. The suggestion that states include all relevant conditions in their certification isn't helpful since it means effectively writing a VGP in our state certification.

> Under Section 401(a)(l) of the Clean Water Act, states are provided one year for acting on a request for Section 401 certification. States were provided very little time to certify the VGP. This is an unexpected, substantial new activity for which we are not funded, and comes at a time when we are facing budget short falls and a hiring freeze. *The VGP is a particularly challenging permit to certify. As you know, the permit covers both a large number of affected permittees and a broad geographic range with moving discharge points. To develop appropriate, but realistic, conditions for inclusion in a certification of the VGP will take time and would require public review and comment.* We simply do not have the staff to devote to this unplanned activity, particularly given the short time EPA has provided to certify this complex, new permit.
>
> *I am also concerned that EPA's current approach will result in inconsistent and possibly conflicting state certifications of the VGP. Given that many vessel operators will be subject to multiple state certifications, it is important there be an opportunity to coordinate the state certifications of this permit among the West Coast states. This will take time, funding, and leadership.* I am requesting that EPA take on the responsibility for bringing the West Coast states together to ensure that individual state certifications arc consistent and resolve any conflicts.

SJA 49 (emphasis added); *see also* JA 553, 1374.

The Council of Great Lakes Governors, consisting of the governors of the States of Illinois, Indiana, Michigan, New York, Minnesota, Pennsylvania, Ohio, and Wisconsin, expressed similar concerns to EPA on August 14, 2008:

> As you know, U.S. EPA has requested that States certify under Section 401 of the Clean Water Act that discharges from vessels covered under U.S. EPA draft general permits will comply with applicable provisions of the Clean Water Act and State law. The request, dated July 8, provided a 45-day deadline.
>
> *For a variety of reasons, this deadline is problematic. In similar instances in the past, a timeframe of up to nine to twelve months has been required for other Section 401 certification decisions. This*

> *timeframe has been needed to fully evaluate complex issues such as the ones currently in question and, importantly, to conduct meaningful public involvement.*
>
> Therefore, the Council of Great Lakes Governors respectfully requests an extension to the proposed deadline.

SJA 1 (emphasis added).

Members of the regulated community, including Petitioners, also stressed that EPA's issuance of the draft permit without the section 401 certification requirements was problematic and urged EPA to establish a more workable approach to incorporating state discharge requirements into the proposed VGP:

> **... we urge EPA to establish a more workable approach to incorporating state discharge requirements into the permit.** *The section 401 certification process is problematic because it will result in the confusing, burdensome and potentially impossible task of vessels having to comply with different requirements as they move between the waters of different states.* While we understand that 401 certification is a requirement of the Clean Water Act and is unlikely to be altered, the higher authority of the U.S. Constitution requires that EPA recognize and establish in the permit process limits on the ability of states to impose contradictory standards on vessel discharges regulated under the permit. [footnote citation to *United States v. Locke*, 529 U.S. 89 (2000)] *We urge EPA to require states wishing to impose additional requirements to propose them through the federal rulemaking process (overseen by EPA) in order to ensure that adequate notice is given to the regulated community and the opportunity for comment is allowed. This is especially critical given that vessels are mobile sources that by their nature move in and out of covered jurisdictions on an irregular basis.*

JA 641 (bold in original, emphasis added); *see also* JA 647, 709, 735.

Members of the regulated community also urged EPA to petition the district court for an extension of the vacatur of the exclusion for vessel discharges,

explaining that it would take several years to perform the in-depth analysis that is required by law prior to promulgation of a final vessel general permit:

> EPA simply does not have enough time to perform the in-depth analysis that is required by law prior to promulgation of a final vessel general permit. This is illustrated by the serious ambiguities and errors in the permit (discussed in more detail below). EPA acknowledges this fact, stating that it lacks the type of information that it normally uses to develop a new permitting regime, and that such a lack of information "obviously increases the chance that any permit program that results may not ultimately ensure effective permitting of discharges incidental to the normal operation of a vessel." Congressional precedent also argues for an extension of the deadline. When the Clean Water Act was passed in 1972, Congress expressly recognized that it would take at least a full two years after its adoption to process and issue permit applications.
>
> . . .
>
> For the reasons above, and because the universe of vessels and discharges covered by the VGP is extremely diverse in type, operation and location, an evaluation of discharges based on vessel type and size needs to be conducted before the proposed VGP is finalized. **We strongly urge EPA to petition the district court for a three-year extension to develop and establish the program, and to allow the industry adequate time to implement it, before the current regulatory exemption is revoked.** Recent Congressional action underscores Congress's understanding of the need for better analysis to underlie an effective program; the recently passed S. 3298 requires EPA to conduct a two-year study analyzing vessel discharges and their impacts before regulating those from fishing vessels and smaller commercial vessels. The scope of the study is not limited to vessels under 79 feet.

JA 640 (emphasis in original); *see also* JA 647, 709, 735.

EPA rejected these concerns, stating that: (a) it had no authority to reject any section 401 requirements even if they were *ultra vires*; (b) it was the state's

obligation, not EPA's, to provide notice and opportunity to comment to the regulated community; and (c) the 79 additional days that EPA had sought from the district court to finalize the permit (rather than the three years suggested by commenters) was "appropriate under the circumstances." No further explanation was provided. JA 1052-92.

Because EPA did not alter its process in issuing the VGP, states were faced with having to hurriedly certify the VGP, waive their right to do so, or potentially risk halting all shipping in their waters. Twenty five states, two tribes, and one territory exercised their section 401 certification authority and provided EPA with over 100 new requirements for the VGP. JA 825-67.

On December 18, 2008, EPA issued the final VGP and the accompanying permit Fact Sheet. JA 757, 758-919, 920-1044.[6] The final VGP had an effective date of December 19, 2008. *Id.*[7] The final VGP, for the very first time, disclosed and included over 100 new requirements applicable to vessels depending on which

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[6] On the December 18, 2008 eve of vacatur of 40 C.F.R. § 122.3(a), a motion was filed with the district court seeking a delay of the vacatur until February 6, 2009. JA 750. That motion was granted. JA 1337.

[7] At that time, EPA did not finalize the VGP for the States of Hawaii and Alaska, because as of that date, EPA had not received section 401 certifications from those states. EPA subsequently received those certifications and, on February 12, 2009, announced that the VGP was "issued" for Hawaii and Alaska as of February 6, 2009. JA 1337. The "issuance" date for the VGP for Hawaii and Alaska corresponded with the date of vacatur of the 40 C.F.R. § 122.3(a) exclusion for discharges incidental to the normal operation of vessels. JA 1337 n.1.

state's waters the vessel happened to be traveling in at the time. According to the record, these requirements were added by EPA up to the day before the final VGP was issued. JA 1272, 1288. Indeed, the draft VGP, which was 91 pages long, was increased by *40 pages* just to accommodate these new requirements. *Compare* JA 229 *with* JA 758.

Parts 2 through 5 of the proposed VGP establish a *uniform* set of nationwide requirements that must be met by every vessel covered by the VGP traveling in waters of the United States. JA 775-824. Thus, for example, the requirements relating to handling of ballast water and graywater[8] do not change as the vessel traverses different state waters. JA 779-84, 788-89.

Unlike Parts 2 through 5 of the VGP, however, Part 6 of the final VGP contains a patchwork of over 100 additional and varying requirements faced by a vessel operator depending on which state's waters the vessel is in at any moment in time.

By way of example, a vessel on a typical Northeast coastal voyage moving petroleum from an oil terminal at the Port of New York/New Jersey to a refinery in Portland, Maine must traverse the waters of six states: New Jersey, New York,

[8] "Ballast water" is water and suspended matter taken on board a vessel for safety reasons to control or maintain, trim, draught, stability or stresses of the vessel, regardless of how it is carried. JA 868. "Graywater" is galley, bath and shower water, as well as wastewater from lavatory sinks, laundry, and water fountains. *Id*.

Connecticut, Rhode Island, Massachusetts, and Maine. The vessel begins in New Jersey and first traverses from the Lower Bay to the Upper Bay, moving through water in which jurisdiction is shared between New Jersey and New York. From there, the vessel transits through Long Island Sound, where jurisdiction is shared between New York and Connecticut. It then passes the coast of Rhode Island, enters Massachusetts waters through Buzzards Bay, takes the Cape Cod Canal to Cape Cod Bay and up the coast of Massachusetts. From there, it traverses the coast of Maine arriving finally at Portland Harbor.

As this vessel transits from one state's waters to another's, Part 6 of the VGP requires that it comply with whatever requirements that apply to the waters of the state through which it passes. On this journey, the vessel must comply with *six different sets of individual state requirements* imposed by Part 6 of the VGP, but *not* imposed in Parts 2 through 5:

New Jersey:

- The discharge of bilge water into embayments, the NY-NJ Harbor, and Delaware Bay is prohibited. JA 843. [such discharges were permitted by the draft and final VGP under certain circumstances. JA 247, 778.]

New York:

- The discharge of treated or untreated graywater is prohibited after January 1, 2012, within 3 nm of the shoreline and within Long Island Sound or New York Harbor. JA 849. [the draft VGP and VGP did not prohibit such discharges. JA 255, 788.]

- By January 1, 2012, vessels operating in New York waters shall have a ballast water treatment system that meets the IMO[9] x 100 standards. Vessels built after 2013 must comply with IMO x 1,000 standard. JA 848. [the draft VGP and VGP did not impose a requirement for installation of ballast water treatment systems or effluent limits for ballast water discharges. JA 248, 779.]

- Vessels with residual amounts of ballast water must perform salt water flushing at least 50 nm from shore and in water 200 feet in depth. Vessels must also measure and maintain salinity levels of at least 30 parts per trillion. JA 847. [the draft and final VGP did not impose such a requirement. JA 248, 779.]

Connecticut:

- All vessels with a ballast water treatment system must treat ballast water to the highest level afforded by the installed system prior to discharge. JA 829. [as noted above, the draft and final VGP did not impose a requirement for installation of ballast water treatment systems or effluent limits for ballast water discharges. JA 248, 779.]

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[9] "IMO" is the International Maritime Organization, a specialized agency of the United Nations that sets a variety of standards for the international maritime industry relating to safety and environmental protection. JA 1419; http://www.imo.org. In February 2004, IMO adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments. The IMO Convention sets timelines for the installation of treatment technologies to meet a ballast water treatment standard and includes procedures for the assessment and approval of such technologies. The standard measures the amount of living organisms in the ballast water when it is discharged. Thus, "IMO x 100" means that the discharge must have a concentration of organisms 100 times less than permitted under the IMO standard. The Convention will enter into force 12 months after it has been ratified by 30 countries representing 35% of the world's merchant shipping tonnage. The United States has not yet ratified the IMO Ballast Water Management Convention. *Id.*

- Graywater discharges prohibited effective January 1, 2012. JA 829. [the draft and final VGP did not prohibit such discharges. JA 255, 788.]

Rhode Island:

- Certifies the VGP on the condition that its requirements are consistent with existing Rhode Island state laws and regulations. JA 863.

Massachusetts:

- Graywater discharge is prohibited in Boston Harbor Islands National Recreational Area, the Cape Cod National Seashore, and the Essex National Heritage Area. JA 837. [the draft and final VGP did not prohibit such discharges. For some vessels, graywater discharges are prohibited within 1 nm of shoreline and for others it is permitted but must be minimized and other management techniques undertaken. JA 255, 788.]

- Discharge of untreated graywater within 3 nm from shore is prohibited for vessels greater than 400 GT. Treated graywater must meet graywater treatment standards for large cruise ships in Section 5.1.1.1.2 of the VGP. JA 837. [the draft and final VGP did not prohibit such discharges. For some vessels, graywater discharges are prohibited within 1 nm of shoreline and for others they are permitted but must be minimized and other management techniques undertaken. JA 255, 788.]

- Graywater mixed with sewage may not be discharged in "no discharge" areas. JA 837. [the draft and final VGP did not impose this restriction. JA 259, 792.]

- Ballast water exchange requirements exactly the same as those proposed for Pacific near-shore voyages are required for vessels engaged in coastwise trade on the Atlantic or Gulf Coasts that will discharge to waters subject to the VGP. JA 837. [the draft and final VGP did not impose this requirement. JA 248, 779]

Maine:

- Underwater hull cleaning is prohibited except as part of emergency hull repairs necessary to secure the vessel or saving a life at sea. JA 836. [the draft and final VGP did not impose this restriction. JA 258, 791.]

- Discharging pollutants into Class GPA waters (great ponds, natural ponds, or lakes less than 10 acres in size) or Class SA waters (waters that are outstanding natural resources) is prohibited. JA 836. [the draft and final VGP did not impose this restriction].

These examples illustrate how, under the VGP, a vessel traveling the nation's waters can be subject to dozens of different vessel discharge requirements along a single voyage depending on which state's waters it happens to be traveling in and whether a particular discharge occurs at that time. Petitioners' members' vessels travel through multiple states' waters, and are therefore subject to many of these varied requirements. EPA gave them no notice or opportunity to comment on the VGP with these new requirements included. Thus, Petitioners were never given the chance to explain how and why these varied requirements in the VGP would create very practical compliance issues, the burden that they placed on interstate commerce, and how it might be impossible to comply with one condition without violating another.

The 100+ new requirements added to the final VGP contain potentially conflicting requirements, particularly for Petitioners' vessels traveling in the Great Lakes system. Most obvious are those addressing ballast water treatment requirements for vessels that traverse waters of more than one state. Some of the

Great Lakes states require compliance with IMO ballast water discharge standards. Others require compliance with standards stricter than IMO standards. Still others impose requirements not consistent with IMO standards. JA 831-63 (Compare VGP §§ 6.9 (Illinois), 6.10 (Indiana), 6.15 (Michigan), 6.16 (Minnesota), 6.22 (New York), 6.23 (Ohio), and 6.24 (Pennsylvania)). A chart illustrating these differences is attached hereto as Exh. 1, contained in Final Addendum at ADD-188A.

For example, there appears to be an inherent conflict in the final VGP that makes it impossible for a vessel capable of discharging ballast water to transit New York and discharge in Michigan waters without violating the VGP. For oceangoing vessels traveling in Michigan waters that plan to discharge ballast water, the VGP requires installation of 1 of 4 ballast water treatment systems. JA 838.[10] A vessel is in compliance with the Michigan condition if the chosen treatment system is properly operating. Thus, for example, for a vessel using the chlorine dioxide treatment system, the operator must measure and monitor the

[10] Those systems are: (1) hypochlorite treatment; (2) chlorine dioxide treatment; (3) ultra-violet light radiation treatment preceded by suspended solids removal; and (4) deoxygenation treatment. JA 838. Michigan imposes separate requirements on non-oceangoing vessels covered by the VGP that operate experimental ballast water treatment systems. *Id*. Chlorine products are sometimes used to kill aquatic invasive species.

introduction and discharge of chlorite and ensure that the amount of chlorite does not exceed certain levels. JA 838.

New York, on the other hand, requires, by January 2012, installation of ballast water treatment systems on every vessel that travels its waters that is *capable* of discharging ballast water (regardless of whether the vessel actually discharges ballast water). JA 846. Compliance with the New York requirements is measured using a multiple 100 or 1000 times more stringent than the IMO-based concentration limits – specifically, the amount of living organisms present per cubic feet of water discharged, regardless of what treatment system is used. JA 847.

If a vessel capable of discharging ballast water travels through New York and Michigan waters, but only plans to discharge in Michigan waters as a result of cargo operations (or is forced to do so for the safety of the vessel), the operator must ensure that it does not exceed the chlorite limits set by Michigan, but also needs to ensure that its treatment of ballast water does not result in concentrations of living organisms greater than what New York permits – 100 or 1000 times more stringent than IMO standards, no matter where the discharge occurs. The vessel might need to increase the introduction of chlorite to its ballast water treatment system to meet New York's effluent limits for organisms. But, if it does that, the result could be a violation of Michigan's limits on the amount of chlorite that is

discharged with treated ballast water, while in Michigan waters. Thus, the vessel may well be faced with either discharging ballast water that contains too much chlorite, but that meets the New York organism limits, or discharging ballast water that has limited chlorite, but does not kill enough organisms to meet the New York standard.[11] This is precisely the kind of concern that EPA foreclosed from being raised by not publishing the more than 100 new section 401 conditions (all of Part 6 of the VGP) for notice and comment.

These apparently conflicting section 401 requirements force a vessel operator to pick which federally enforceable state requirement to comply with and which to violate. Either way, the vessel operator is subject to serious potential liability under the CWA unless it ceases operations in both states' waters.

V. SUMMARY OF ARGUMENT

The law and the unique nature of VGP made it imperative that EPA provide notice and an opportunity to comment on the 100+ new section 401 requirements the agency added to the final VGP at the 11th hour. EPA failed to provide the regulated community with any opportunity to review and comment on these new requirements of varying applicability in individual states, both in terms of how the requirements interact with each other and how they relate to the VGP as a whole,

[11] This, of course, assumes that such a ballast water treatment exists that can meet the New York standard, let alone one which uses one of the four treatment methodologies approved by Michigan. No such system exists or is expected to by January of 2012.

before including them as federally enforceable requirements in the VGP. This failure violated Section 553 of the APA, 5 U.S.C. § 553, and is not protected by the "logical outgrowth" rule, because Petitioners had no way of knowing what these requirements would be when EPA published the proposed VGP for comment. Nor is this failure excused by notice and comment provided by a state as to its own added conditions.

EPA also failed to review and address concerns over whether these new requirements added to the final VGP were conflicting, confusing, illegal or unconstitutional. Allowing the specter of multiple states imposing differing requirements on vessels that move through their respective waters creates a formidable, and potentially impermissible, burden on commerce and an impossible burden on the industry. Accordingly, EPA was obligated to consider and address this important aspect of the problem before issuing the final VGP. As a matter of law, EPA's failure to do so renders the decision to include the new requirements in the final VGP arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(A). The CWA does not permit EPA to include and enforce illegal and unconstitutional requirements in the VGP.

EPA also failed to conduct an appropriate Regulatory Flexibility Act analysis with respect to these new requirements. Complying with over 100 requirements to varying degrees depending on which state's waters the vessel

crosses, is certain to impose on small entities substantial costs over and above – or different than – the cost of complying with the original federal requirements of the permit. These costs were never analyzed, either on an individual or aggregate basis. Without appropriate cost estimates, the Administrator's certification was arbitrary and capricious as to Part 6 of the VGP – namely, the section 401 certifications and their requirements.

VI. STANDING

Petitioners meet the associational standing requirements. At least one member of each association would have standing to sue in its own right, the interests they seek to protect are germane to their purpose, and neither the claim asserted nor the relief requested requires that an individual member participate in this action. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

A member of each Petitioner has Article III standing to bring this case in its own right if it: (1) suffers or will suffer an "injury in fact" that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Here, Article III standing is self evident, as Petitioners' respective members are the primary target of the VGP, which is enforceable against them. *See Sierra Club*, 292 F.3d at 899-900 ("if the complainant is an

object of the action (or forgone action) at issue ... there should be little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will address it") (internal quotation marks and citations omitted).

The VGP applies to vessels owned and operated by Petitioners' respective members. *See* Rule 26.1 Disclosures, *supra*; *see also* JA 637, 709, 735. Petitioners and their members all offered extensive comment on the draft VGP when published by EPA. *Id*. (Petitioners' comment letters). There is more than a "substantial probability" that EPA's decision will impose actual, concrete and particularized harm on Petitioners' respective members. *Id*. EPA's incorporation of the more than 100 section 401 requirements in the final VGP makes them federally enforceable against Petitioners' respective members, and prohibits covered incidental vessel discharges without complying with those requirements. These injuries will be redressed by a ruling of this Court setting the section 401 requirements aside and remanding the VGP to EPA for further notice and comment.

The second element for associational standing is met because the interests sought to be protected are germane to the purposes of Petitioners' respective organizations. *See* Rule 26.1 Disclosures, *supra*; *see also* JA 637, 709, 705. In promoting the common interests of their respective members, Petitioners place

special importance on legislative and regulatory matters, as evidenced by their comments submitted to EPA in connection with the VGP. *Id*. The VGP imposes unlawful burdens on the Petitioners' members, impacting their ability to provide reliable, efficient and competitive services nationwide. *Id*.

The third element for associational standing is met because the claims asserted do not require participation of individual members, as they do not require individualized proof. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1997). As Petitioners seek a remand of the VGP to EPA for further notice and comment, rather than damages, individualized participation is not necessary for the relief requested. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 554 (1996).

VII. ARGUMENT

A. The VGP Is Contrary to Law Because EPA Failed to Provide Notice and Opportunity to Comment on Over 100 New Substantive Requirements Included for the First Time in the Final VGP.

Under Section 706(2)(D) of the APA, 5 U.S.C. § 706(2)(D), this Court must set aside an agency action that is made "without observance of procedure required by law." EPA must provide the public with notice and opportunity to comment before it issues NPDES permits. *See* 5 U.S.C. § 553(b)-(c); *see also* 40 C.F.R. §§ 124.6(d), 124.10(a)(1)(ii); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engrs.*, 417 F.3d 1272, 1284-85 (D.C. Cir. 2005) (Army Corps general permits

under Section 404 of the CWA are rules under the APA); *NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) (applying the notice and comment requirement to NPDES permitting procedures); *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (same).

The APA's notice and comment requirements are designed to: (1) ensure that agency regulations are tested via exposure to diverse public comment; (2) ensure fairness to affected parties; and (3) give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting *Int'l Union, UMW v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)).

An agency satisfies the APA's notice and comment requirements, and need not conduct a further round of public comment beyond that which was provided for a proposed rule, as long as its final rule is a "logical outgrowth" of the rule it originally proposed. *Int'l Union*, 407 F.3d at 1259-61. A final rule is a logical outgrowth of the proposed rule "only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Id*. at 1259 (internal quotations omitted). However, "a final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would *not*

provide commentators with their first occasion to offer new and different criticisms which the agency might find convincing." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (citation and internal quotation marks omitted, emphasis added). Notice of the agency's intention is crucial to "ensure that agency regulations are tested via exposure to diverse public comment, ... to ensure fairness to affected parties, and ... to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union*, 407 F.3d at 1259.

Thus, this Court has refused to allow agencies to "use the rulemaking process to pull a surprise 'switcheroo' on regulated entities." *Envtl. Integrity Project*, 425 F.3d at 996. In *Int'l Union*, for example, the agency's proposed rule provided that "[a] *minimum* air velocity of 300 feet per minute must be maintained" to ventilate underground coal mines. The final rule, however, provided that "the *maximum* air velocity in the belt entry must be no greater than 500 feet per minute, unless otherwise approved in the mine ventilation plan." Although "there were some comments during the hearings urging the Secretary to set a maximum velocity cap," this Court vacated the final rule because the Agency "did not afford a ... public notice of its intent to adopt, much less an opportunity to comment on, such a cap." *Int'l Union*, 407 F.3d at 1261; *see also Envtl. Integrity Project*, 425 F.3d at 998 (rejecting EPA's argument that it had satisfied its notice-

and-comment obligations by "repudiat[ing] its proposed interpretation and adopt[ing] its inverse" in the final rule); *Fertilizer Inst.*, 935 F.2d at 1312 (D.C. Cir. 1991) (holding that administrative exemptions contained in final rule cannot be logical outgrowth of proposed rulemaking where EPA's notice was not sufficient to advise interested parties that comments directed to creation of administrative exemptions should be made).

As explained by the Ninth Circuit in *NRDC v. EPA*, a case in which it held EPA erred by adding a new state certification condition to an NPDES general permit without prior adequate notice:

> The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft permit. In determining this, one of the most salient questions is *whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments* that could persuade the agency to modify its rule.

NRDC, 279 F.3d at 1186 (internal quotation marks and citations omitted).

In *NRDC v. EPA*, the Ninth Circuit ruled that EPA failed to meet public notice requirements when it granted an NPDES general permit for the disposal of woody debris into the marine waters of Alaska. *See* 279 F.3d at 1182. Under the woody debris general permit, Alaska proposed that a one-acre "zone of deposit" be allowed. *Id*. at 1184. EPA gave public notice of Alaska's proposal and provided the public with an opportunity to comment. *Id*. Moreover, EPA requested that Alaska certify, pursuant to section 401 of the CWA, that the general permit

proposal was in compliance with state water quality standards before the proposals were finalized. *Id*. at 1185.

Alaska submitted three certification drafts to EPA, with the final one amending the zone of deposit to the size of the "project area," instead of the one-acre zone of deposit originally proposed. *Id*. EPA subsequently issued a general permit containing the "project area" zone of deposit requirement. *Id*. EPA, however, gave no public notice of this final permit requirement and sought no comments from the public of this change proposed by Alaska. *Id*. At 1187. For this reason, several environmental organizations sought review of EPA's permit order in the Ninth Circuit.

Because the initial draft permit contained references to patchy distributions of woody debris outside the zone of deposit, EPA argued that the public should have had notice that the woody debris discharge areas could extend further than the proposed one-acre zone of deposit. *Id*. at 1188. The Ninth Circuit rejected this argument, concluding that EPA's change from a one-acre zone of deposit to a project area zone of deposit was a "fundamental policy shift, rather than a natural drafting evolution." *Id*. at 1188. It relied upon the fact that "the public was never notified that Alaska was proposing to redefine the allowable zone of deposit, nor was the public afforded the opportunity to comment on the proposed change, either at the state or federal level." *Id*. at 1187. This was particularly evident in the

"contents of the instant petition for review, which raises for the first time numerous issues about the proposed change in the conception of zones of deposit. *These are precisely the type of comments that should have been directed in the first instance to the EPA, but which understandably were not because of the inadequate notice*." *Id*. at 1188 (emphasis added). Thus, the Ninth Circuit ruled that no reasonable person could have expected EPA's shift to a larger zone of deposit because "interested parties did not know that a fundamental change in the zone of deposit definition was 'on the table.'" *Id*. As a result of EPA's failure to provide for a second public notice and comment opportunity, the Ninth Circuit granted the petition and remanded the general permit so the agency could meet the public notice requirements.

EPA's failure here is analogous to, but far more egregious than, its failure in *NRDC*. In *NRDC* the agency put the single, initial state condition out for public comment, and then at the state's request, changed it in the final permit, which change was not put out for comment. Here, EPA put *none* of the 100+ requirements out for any prior notice or comment, and simply added them to the final VGP. While Petitioners were generally aware that EPA would seek section 401 certification of the VGP, they could not have possibly anticipated the substance of a patchwork of more than 100 additional, varying and more stringent requirements, the impact and interrelationship of which had never been examined

by anyone, including EPA. Petitioners had no idea that the agency would impose concentration-based effluent standards for ballast water in some waters, best management practices in others, and four specific technology-based standards in yet another, and that it would require that a vessel operator meet those standards even if discharge of ballast water was not occurring. Nor did Petitioners know that EPA would change its final rule on graywater management to completely prohibit it in certain areas that the agency had proposed to allow it. Indeed, the requirements as they appear in the final VGP, all presumed by EPA to be grounded in applicable state law, were solicited *following* EPA's issuance of the proposed VGP and never even existed prior to being submitted by the states to EPA for inclusion in the *final* VGP. JA 1342, 1381, 1401. Nor can it be suggested that these 100+ new conditions are the "natural evolution" of the draft permit. EPA admitted on the record that it included all of these conditions, regardless of their content, only because it claimed it had no authority whatsoever to reject them. JA 1052-92. Thus, the final VGP, to the extent it contains the more than 100 new requirements, cannot be the "logical outgrowth" of the proposed permit, and EPA denied the regulated community a meaningful opportunity to comment. *See, e.g.*, *NRDC*, 279 F.3d at 1188.

EPA rejected concerns over whether it would provide notice and opportunity to comment on section 401 requirements by simply saying that it is the individual

state's obligation to provide the regulated community with *some* opportunity to comment regarding its section 401 requirements prior to submission to EPA. JA 1052-92. This rationale must be rejected for at least two reasons. First, a state offering notice and opportunity to comment under its law is not a surrogate, or substitute, for EPA's compliance with Section 553 of the APA. *See, e.g.*, *NRDC*, 279 F.3d at 1185-86. Each state that may have provided notice and opportunity to comment with respect to its requirements only did so with respect to the requirements it was considering, and not with respect to how those requirements interact with others being proposed by other states. Unlike in *NRDC*, where EPA at least put the proposed state condition out for comment with the proposed permit, here, the regulated community was never offered any opportunity to comment on the entire VGP permit package containing these new and additional requirements. *Compare* JA 229-324 *with* JA 758-919.

Second, from a practical perspective, EPA's contention would mean that vessel owners and operators were obligated to learn about and track simultaneously the individual section 401 certification process of every state, offer comments during each state's certification process and, if necessary, commence litigation in each state to challenge each problematic condition. The states themselves told EPA this was an absurd and impossible task. *See, e.g.*, SJA 48. EPA never provided any explanation for why it rejected these concerns.

The unique nature of the VGP[12] makes it imperative that EPA provide notice and an opportunity to comment on the 100+ requirements the agency added to the final VGP at the 11th hour.[13] Petitioners believe this is the first time the agency has: (a) sought to regulate mobile point sources that travel from state to state under the NPDES permit program; and (b) sought to require mobile point sources to comply with varying federal rules as they pass through waters of particular states. EPA acknowledged in 2003 that requiring vessels to meet varying and differing requirements when traversing the waters of particular states could be seriously problematic:

> EPA reasonably interprets the CWA to authorize the exclusion of discharges incidental to the normal operation of a vessel because *otherwise every vessel engaged in interstate commerce would be required to apply for and obtain a different, and potentially conflicting, NPDES permit for each of the various State waters through which they travel. There is no provision under the CWA that would enable EPA to issue any type of general permit to establish consistent, nationwide standards for vessels in State waters*. Under Section 303 of the CWA, States have adopted varying water quality standards. 33 U.S.C. § 1313. Given the structure of the CWA permitting and standards provisions, and the nature of incidental discharges from vessels, *EPA's interpretation of the CWA not to require an NPDES permit for every discharge from a vessel that simply operates normally as a means of transportation in the*

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[12] Petitioners believe that EPA's use of a *nationwide* general NPDES permit as a permitting vehicle in a circumstance like this is unprecedented.

[13] As noted above, EPA was adding these requirements to the final VGP permit as late as the day before it published the final permit. JA 1272-88. In fact, it changed the effective date to accommodate yet more requirements added by two states after the VGP was issued. *See* p. 13, *supra*.

> *navigable waters avoids the burden of different, and potentially conflicting, requirements from every State through which such a vessel passes.*

JA 168. The comments EPA received from both states and the regulated community, *see supra*, Section IV.C., echoed these concerns and the VGP demonstrates the concerns were justified.

B. If EPA Wants to Regulate Discharges from Mobile Vessels Through a Nationwide General Permit, Then EPA Must Make the Section 401 Certification Itself.

EPA's failure to comply with Section 553 of the APA arose from its inability to reconcile its past use of the section 401 certification process, which the agency has only ever used when there was a fixed discharge point and a single state from which a certification is needed, and the instant situation, where there are *multiple* states' certifications of an EPA-issued NPDES permit for mobile point sources, potentially creating conflicting, confusing and problematic state requirements.[14] To remedy that underlying problem, EPA's only option was to provide adequate notice and opportunity to comment and then do the section 401 certification itself, as directed by the CWA.

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[14] EPA has itself questioned whether the CWA, in its current form, is the proper statutory vehicle for regulating discharges incidental to the normal operation of vessels. *See* Section IV.B., *supra*. Petitioners are not at this time challenging EPA's use of a CWA nationwide general permit for such discharges. Petitioners' challenges, instead, focus on the procedure followed by EPA in issuing the VGP and the section 401 requirements added at the 11th hour by the agency without notice and an opportunity to comment.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist*., 541 U.S. 246, 252 (2004); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[I]n any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.") (internal citation and quotation marks omitted).

Under section 401, an applicant for a federal license or permit to conduct any activity which may result in any discharge into the navigable waters of the United States must obtain a certification from "*the State* in which the discharge originates or will originates, or, if appropriate, from *the* interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate," that any such discharge will comply with certain water quality requirements of the CWA. 33 U.S.C. § 1341(a)(1) (emphasis added). Section 401 goes on to state that "in any case where *a State* or interstate agency has no authority to give such a certification, such certification shall be from the Administrator." *Id*. (emphasis added).

Section 502 of the CWA defines "State" as "*a* State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the

Trust Territory of the Pacific Islands." 33 U.S.C. § 1362 (emphasis added). The term "interstate agency" means "*an* agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator." *Id*. The structure of section 401 and the definitions in section 502 demonstrate that Congress envisioned that there would be a *single* State or interstate agency, and not multiple States or interstate agencies, making the section 401 certification for an EPA-issued NPDES permit.

The conclusion that section 401 does not authorize EPA to include requirements from multiple states that impose potentially conflicting certification requirements on an NPDES permit for the same discharge point that moves from state to state, is further bolstered by other provisions of section 401 of the CWA. For example, section 401(a)(2) provides that states downstream of the jurisdiction where a discharge originates do *not* have section 401 certification authority; instead, those neighboring states are provided only with an opportunity to object to, and make recommendations for, EPA-issued permits. *See* 33 U.S.C. § 1341(a)(2) (emphasis added); *see also* EPA General Counsel Opinion 78-8 (only one state may be the certifying state for a discharge). Specifically, if the EPA Administrator determines that a discharge subject to section 401 certification "may

affect" the water quality of other states, EPA is required to notify those other jurisdictions whose water quality may be affected. 33 U.S.C. § 1341(a)(2). The other jurisdictions are then provided an opportunity to submit their views and objections about the proposed license or permit and associated section 401 certification. *Id*. They may also request that the federal permitting or licensing agency hold a hearing, at which "the [EPA] Administrator shall … submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency." *Id*. The federal licensing or permitting agency "shall condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements." *Id*. Recommendations from neighboring jurisdictions *do not* have the same force as requirements from a section 401 certifying state. While the federal agency must develop measures to address the downstream jurisdictions' concerns, the agency may develop its own measures and does not need to adopt the downstream state's specific recommendations without modification, as it would were they from the section 401 certifying state. *Id*.

Because the VGP is designed to regulate the same discharge point as it moves from place to place, and is intended to apply across state and tribal boundaries, there is no single state in which the discharge originates. Accordingly, no individual "state" may issue the section 401 certification. In this circumstance,

section 401 is clear: certification is to come from the Administrator of EPA. *See* 33 U.S.C. § 1341(a) ("In any case where *a* State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. ...") (emphasis added). Thus, if EPA wants to proceed by way of a nationwide general permit for vessels, it must make the certification decision itself, with input from affected states, as described above.

C. The VGP Is Contrary to Law Because EPA Failed to Review and Reconcile Potentially Conflicting Section 401 Requirements.

1. EPA failed to address serious practical and legal issues associated with the more than 100 new requirements.

Despite numerous comments from Petitioners, states and the regulated community regarding the hurried section 401 process for the VGP, the potential for conflicting state certification requirements, and the substantial need for more time to perform the in-depth analysis that is required by law prior to promulgation of a final vessel general permit, EPA did not alter the process. *See* Section IV.C., *supra*. Rather, EPA simply issued the final VGP with a patchwork of over 100 additional, varying and more stringent requirements that must be met by vessel operators moving from state to state. *Id*. EPA never afforded Petitioners an opportunity to explain how and why these varied requirements in the VGP would create very practical compliance issues, and perhaps even make it impossible to comply with one condition without violating another. *Id*.

EPA, moreover, did not conduct any analysis of the interrelationship between these new requirements on its own. JA 1052-92. EPA failed to do so despite specific comments from the regulated community and the agency's own earlier, express acknowledgment that if such discharges were subject to the NPDES permit program, "every vessel engaged in interstate commerce would be required to apply for and obtain a different, and potentially conflicting, NPDES permit for each of the various State waters through which they travel." JA 179. While EPA prevented Petitioners from commenting on the actual requirements it planned to include from the section 401 certification process, it did have before it concerns over the prospect that those requirements would be likely to present serious problems.

Where an agency has failed to address significant concerns raised by commenters, reviewing courts have held such action arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency decision is arbitrary if the agency "failed to consider an important aspect of the problem"); *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1079 (D.C. Cir. 2003) (remanding rule to agency where agency failed to address substantive comments). The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result, *see Fed. Election Comm'n v. Rose,* 806 F.2d 1081,

1088 (D.C. Cir. 1986), and respond to "relevant" and "significant" public comments. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977); *United States Satellite Broad. Co. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984) (agency must respond in reasoned manner to significant comments received). "For an agency's decisionmaking to be rational, it must respond to significant points raised during the public comment period." *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 1018 (2001); *accord La. Fed. Land Bank Ass'n*, 336 F.3d at 1079 (remanding rule to agency where agency failed to address substantive comments); *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C. Cir. 1980) (remanding standards based, in part, on EPA's failure to respond to significant comments).

Subsumed in the right to comment is the expectation that the comment will be considered. "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public. A response is also mandated by *Overton Park*, which requires a reviewing court to assure itself that *all relevant factors* have been considered by the agency." *Home Box Office*, 567 F.2d at 35-36 (emphasis added); *see also State Farm*, 463 U.S. at 43 (an agency decision is arbitrary if the agency "failed to consider an important aspect of the problem").

The substantial concerns raised by the regulated community, states *and the agency itself* regarding the section 401 process as it pertains to an unprecedented

and nationwide NPDES permit for mobile point sources that move from state to state are relevant and significant. EPA's scant treatment of those concerns demonstrates that the agency has failed to consider an important aspect of the problem.

As it turned out, the new requirements that were imposed present quite serious issues.[15] The most obvious problems, as explained above, are those addressing ballast water treatment requirements for vessels that traverse waters of more than one state. Some states require best management practices, one requires use of four specific treatment methods, others require compliance with IMO ballast water discharge standards, while still others require compliance with standards 100 or 1000 times more stringent than IMO standards, but also different from each other. JA 1831-63 (*Compare* VGP §§ 6.9 (Illinois), 6.10 (Indiana), 6.15 (Michigan), 6.16 (Minnesota), 6.22 (New York), 6.23 (Ohio), and 6.24 (Pennsylvania)); Exhibit 1, Addendum at ADD-188A. Moreover, as explained above, there is an apparent conflict between the Michigan and New York requirements for ballast water discharges. *See* Section V.C., *supra*. Other differing requirements present significant burdens as well. *Id*.

[15] Of course, this example is for illustrative purposes only and does not represent all of the substantive concerns that the final VGP raised, had Petitioners been given the opportunity to comment.

EPA's failure to consider this important aspect of the problem, and the resulting patchwork created by the varying section 401 requirements, run afoul of the uniformity principles of federal maritime law that trace their roots to Medieval times and the Laws of Oleron. The Supreme Court, in *The Lottawanna*, 88 U.S. 558 (1875), recognized that as a matter of the structure of our government, uniformity is key to the application of the maritime law.

> One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. ... The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader or (it may be added) narrower than the judicial power may determine those limits to be.

88 U.S. at 575-76. State law "cannot be used to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations." *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-18 (5th Cir. 1987), *rev'd on other grounds* 486 U.S. 140 (1988). *See Just v. Chambers*, 312 U.S. 383 (1941) (state action may "not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime

law, nor interfere with its proper harmony and uniformity in its international and interstate relations.").

The Supreme Court made clear the limitations of state regulation of maritime environmental standards in *United States v. Locke*, 529 U.S. 89 (2000). The Court concluded that Washington State laws enacted in the wake of the *Exxon Valdez* oil spill, which established certain vessel design, operations, and personnel requirements as a condition to entering Washington's waterways, were largely preempted by Titles I and II of the Federal Ports and Waterways Safety Act of 1972, as amended by the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701, *et seq.*, despite the existence of a savings clause in Title I.[16]

In holding that most of the Washington regulations were preempted, the Supreme Court first emphasized that "[t]he State of Washington [had] enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established." *Locke*, 529 U.S. at 99. The ordinary presumption against preemption does not apply, the Court said, with respect to such an area. *Id*. at 108. The Court also noted that particularly in the maritime arena – an area historically and predominantly regulated by the federal

[16] "Nothing in this Act ... shall in any way affect, or be construed to affect, the authority of ... any State ... to impose additional liability or additional requirements ... relating to the discharge, or substantial threat of a discharge, of oil." 33 U.S.C. § 2718.

government – state regulations cannot conflict with federal ones such that following both is physically impossible or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Id*. at 109. The Court recognized that when a federal statute delegated the authority to a federal agency to find a solution to a recognized problem dealing with vessel operations in the nation's waterways, state laws to achieve the same ends must address local and state-specific issues and should not create effects that extend beyond the boundaries of the state's jurisdiction. *Id*. at 112. Nor does it matter whether the state legislation seeks to achieve or further the same purpose as the federal law. As stated in *Locke*:

> The Court observed this principle when Commerce Clause doctrine was beginning to take shape, holding in *Sinnot v. Davenport,* 22 How. 227 (1859), that Alabama could not require vessel owners to provide certain information as a condition of operating in state waters even though federal law also required the owner of the vessel "to furnish, under oath ... all the information required by this State law." *Id*., at 242. The appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation. On this point, Justice Holmes' later observation is relevant: "[W]hen Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

Locke, 529 U.S. at 115.

For the same reasons relied on by the Supreme Court, reasons that maritime law has vigorously preserved for centuries, allowing the specter of multiple states imposing differing requirements on vessels that move among and between various state waters creates a formidable burden on commerce and an impossible burden on the industry. Accordingly, EPA was obligated to study this important aspect of the problem before issuing the final VGP. The agency completely failed to do so.

2. Section 401 does not excuse EPA from meeting its obligations under the Administrative Procedure Act.

EPA justified its failure to conduct any analysis of the interrelationship of the new section 401 requirements added in the final VGP by asserting that it lacked authority to reject them. JA 1052-92. The issue here, however, is not to the legality of each condition under applicable state law, or whether the state requirements violate the CWA. Rather, the issue is the process used by EPA in issuing the VGP and the validity of the entire package of requirements, where, as illustrated above, they are varying, confusing, and potentially inconsistent, and cannot be meaningfully reviewed in any state forum after incorporation into the VGP.

Whatever limitations EPA may claim section 401 of the CWA may impose on the agency's ability to *reject* state certifications, those limitations do not authorize EPA to construe and apply section 401 in a manner that violates the U.S. Constitution. *See, e.g., Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. &*

Constr. Trades Council, 485 U.S. 568, 574-75 (1988) (constitutional avoidance canon of statutory interpretation trumps *Chevron* deference); *Cont'l Air Lines, Inc. v. DOT*, 843 F.2d 1444, 1455-56 (D.C. Cir. 1988) (administrative agencies implementing congressional enactments must do so in a manner that is consistent with the First Amendment; "[I]t cannot be gainsaid that, in carrying on its interpretive function, an agency must be mindful of the higher demands of the Constitution."); *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987) (an administrative agency may be influenced by constitutional considerations in the way it interprets or applies statutes). There are at least two ways in which the section 401 state requirements when considered as a whole create significant constitutional issues, none of which EPA considered.

First, the VGP appears to require that some regulated entities violate one provision of the permit in order to comply with another, a conundrum prohibited by fundamental principals of due process. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (noting the right to be free from arbitrary and irrational government decisions). *See* Section IV.C., *supra* regarding Michigan and New York.

Second, conflicts aside, EPA may not allow states to do *indirectly* via the section 401 certification process what the dormant aspect of the Commerce Clause of the U.S. Constitution precludes them from doing directly. The Commerce

Clause of Article I of the U.S. Constitution provides that "[t]he Congress shall have Power…[t]o regulate Commerce …among the several states." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has long recognized that it has a dormant aspect, which "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

A state's laws must not interfere with interstate transportation into or through its territory beyond what is necessary for self-protection. *See*, *e.g.*, *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769-770 (1945) (Arizona law limiting the length of trains within the State for purported safety "materially restrict[ed] the free flow of commerce across state lines," because most trains across the country were operated with more cars than Arizona permitted, thus creating a barrier at the Arizona border.); *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 999 (1996) ("even in the absence of preemptive legislation, [the Commerce Clause] bars state regulations that unduly burden interstate commerce"). The dormant Commerce Clause prohibits states from adopting laws that unduly burden interstate commerce, even where such actions are not discriminatory against out-of-state interests. *See*, *e.g.*, *S. Pac. Co.*, 325 U.S. at 769-770; *Kassel v. Consolidated Freightways*, 450 U.S. 662, 678 (1981) (Iowa law setting truck length struck down because diverting semis around Iowa engendered inefficiency and added expense; a state "cannot

constitutionally promote its own parochial interests by requiring safe vehicles to detour around it."); *Raymond Motor Transport. Inc. v. Rice*, 434 U.S. 429, 440 (1978) ("the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce"); *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520, 529 (1959) ("state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must ... bow").

While Congress may permit states to burden interstate commerce by "unambiguous" expression of intent, *see, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992), Congress did not do so in the CWA. To the contrary, the scheme of cooperative federalism created by the CWA and, in particular, section 401's certification process is designed to "*preserve* state authority," not to expand it. *S. D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (emphasis added); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (CWA anticipates a partnership between the states and the federal government); 33 U.S.C. § 1251(b) (highlighting the general CWA policy "to recognize, *preserve*, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution") (emphasis added). Thus, section 401 is not an unambiguous expression of Congressional approval for states to burden interstate commerce. States, in short, have no more authority under section 401, and the CWA generally, to burden interstate commerce than they previously possessed prior to passage of the

CWA. In this circumstance, EPA may not permit states to do indirectly that which the dormant Commerce Clause prohibits them to do directly, by claiming it has no authority to prevent Commerce Clause violations.

A state's section 401 certification, which is necessarily based on state law, has the potential to affect a large number of vessels that move through interstate waters and thus place a substantial burden on interstate commerce. *Locke*, 529 U.S. at 109 (state laws which affect international maritime commerce should be consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce). Coastal and Great Lakes ports and inland waterways serve as the nation's gateway to the global economy and thousands of exporters and importers across the country rely on them as their primary entry for trade. JA 637, 709, 735. A state's 401 certification necessarily impacts vessels that are highly mobile and routinely move from port to port, state to state, and country to country. As a result, a vessel discharge requirement set forth State A's section 401 certification that is far more stringent than those certifications issued by States B and C can have major repercussions. For example, when a vessel that does not usually visit ports in State A suddenly finds the need to do so, it will not be able to enter the waters of State A due to the risk of non-compliance with State A's unique and onerous requirements. That vessel would not be able to offload cargo in State A's ports, creating an unreasonable

burden on interstate commerce. This nationwide, and arguably global, impact of the state section 401 certification process magnifies the Supreme Court's recognition in *Locke* regarding the paramount federal interest in "uniformity of regulation for maritime commerce."

Accordingly, EPA has an obligation to review the requirements submitted by the various states to ensure that the state requirements incorporated into a final NPDES permit do not violate the Constitution.

D. Part 6 of the VGP Is Contrary to Law Because EPA Failed to Comply with the Regulatory Flexibility Act.

The VGP's incorporation of new requirements through the section 401 certification process is also arbitrary, capricious and contrary to law because the EPA failed to comply with the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq.*, with respect to Part 6 of the VGP. *See Allied Local & Reg'l Mfrs. Caucus*, 215 F.3d at 79 ("we may consider [the Agency's compliance with the RFA] in determining whether EPA complied with the overall requirement that an agency's decisionmaking be neither arbitrary nor capricious."). EPA's RFA analysis of the VGP, which culminated in a certification by the Administrator that the VGP is "not likely to have a significant economic impact on a substantial number of small entities," failed entirely to consider the potential impact of any of the 100+ new requirements added to the final VGP, much less the cumulative impact of those

requirements operating together on the regulated community. Therefore, EPA's RFA certification lacks a reasoned basis, and must be set aside.

When issuing a proposed rule, the RFA requires agencies to prepare an initial regulatory flexibility analysis, which compares the objectives of the proposed rule to the potential effect on small entities. 5 U.S.C. § 604(b). The initial regulatory flexibility analysis must also contain a "description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 604(c).

When promulgating a final rule, the RFA requires agencies to prepare a final regulatory flexibility analysis, which again weighs the rule's objective against the effect on small entities, and also responds to relevant comments. 5 U.S.C. § 604(a).

Importantly for this matter, agencies may avoid the initial and final regulatory flexibility analyses entirely if the head of the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 604(b). Such determinations are judicially reviewable under 5 U.S.C. § 611 and the APA.[17] *See, e.g., Harlan Land Co. v.*

[17] Under the RFA, judicial review is available to "a small entity," including a small business, "that is adversely affected or aggrieved by final agency action." 5 U.S.C. § 611(a). The Administrator of the Small Business Administration has

U.S. Dep't of Agriculture, 186 F. Supp. 2d 1076 (E.D. Cal. 2001) (agency action arbitrary and capricious where certification of no significant impact on small entities was based on unreliable risk assessment); *No. Car. Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998) (agency action arbitrary and capricious where certification ignored readily available data and failed to consider the relevant affected communities); *Texarkana Livestock Comm'n v. Dep't of Agriculture*, 613 F. Supp. 271 (E.D. Tex. 1985) (agency action arbitrary and capricious where certification was unsupported by evidence).

In this case, the Administrator's certification for both the proposed VGP and final VGP was based on two economic analyses dated June 9, 2008 and December 18, 2008 respectively. JA 327, 1093. There is very little difference between the initial analysis and the final analysis, both of which were relied upon by the Administrator to conclude that the median cost per vessel for compliance would range from $4 to $1,598 per vessel (in the proposed rule) and $1 to $1,967 per vessel (in the final rule). *Id*. The final economic analysis never considered the

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determined pursuant to 15 U.S.C. § 632(a)(2) that an entity involved in water transportation is a "small business" if it employs fewer than 500 persons. *See* U.S. Small Business Administration, "Table of Small Business Size Standard Matched to North American Industry Classification System Codes," Subsector 483 at 18 (effective Aug, 22, 2008), *available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf* (last visited Oct. 27, 2010). Many members of LCA and AWO are small businesses as defined by law and thus have standing to assert these claims.

100+ new requirements added to the final VGP in any respect. As discussed elsewhere in this brief, complying with over 100 requirements to varying degrees depending on which state's waters the vessel crosses, is certain to impose substantial costs over and above – or different than – the cost of complying with the original single set of federal requirements. These costs were never analyzed, either on an individual or aggregate basis.

For example, EPA noted in the Final Economic Analysis that certain state laws existed prior to the promulgation of the VGP, and that, in analyzing the economic impact of the VGP, industry was presumed to already bear the cost of complying with these state laws. *See* JA 1097. However, this does not relieve EPA from conducting an appropriate analysis with respect to conditions added to the final VGP that did not previously exist under state law. For example, the Final Economic Analysis only acknowledged existing ballast water regulations in six states (California, Oregon, Washington, Maryland, Michigan and Virginia), *see Id*., and failed to discuss the impact of additional conditions on the discharge of ballast water imposed by Minnesota, New York, Ohio, or other states. Similarly, while the Final Economic Analysis acknowledged Maine and California statutes limiting or prohibiting the discharge of graywater, *see Id*., it does not discuss the impact of additional conditions on the discharge of graywater in Connecticut, Illinois, Massachusetts, or other states. Stated differently, the Final Economic Analysis

failed to consider additional conditions contained in Part 6 that were not preexisting obligations under state law.

The cost estimates relied on by the Administrator are, therefore, necessarily erroneous. Without appropriate cost estimates, the Administrator's certification was arbitrary and capricious as to Part 6 of the VGP – namely, the section 401 certifications and their requirements.

VIII. CONCLUSION AND PRAYER FOR RELIEF

Petitioners, for the foregoing reasons, pray that this Court issue its Order:

1. Declaring that Part 6 of the VGP is arbitrary, capricious and inconsistent with law.
2. Enjoining EPA from enforcing Part 6 of the VGP.
3. Remanding Part 6 of the VGP to EPA for further notice and opportunity to comment.
4. Remanding Part 6 of the VGP to EPA for analysis of the interrelationship between the more than 100 new requirements added to the final VGP.
5. Remanding Part 6 of the VGP to EPA for an appropriate Regulatory Flexibility Act analysis.
6. Granting such other relief as the Court may deem necessary or appropriate, including attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 29th day of March 2011.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,630 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

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