DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF A COMMERCIAL VESSEL

(110–139)

HEARING

BEFORE THE

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JUNE 12, 2008

Printed for the use of the
Committee on Transportation and Infrastructure

U.S. GOVERNMENT PRINTING OFFICE

42–948 PDF WASHINGTON : 2008

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U.S. House of Representatives
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June 9, 2008

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Water Resources and Environment

FROM: Subcommittee on Water Resources and Environment Staff

SUBJECT: Hearing on "Discharges Incidental to the Normal Operation of a Commercial Vessel"

PURPOSE OF THE HEARING

On June 12, 2008, at 10 a.m., the Subcommittee on Water Resources and Environment will hold a hearing on discharges incidental to the normal operation of a commercial vessel, and the implications of such discharges under the Federal Water Pollution Control Act, more commonly known as the Clean Water Act. The Subcommittee will receive testimony from the Environmental Protection Agency ("EPA"), representatives of State agencies, and other interested stakeholders.

BACKGROUND

Section 301(a) of the Clean Water Act ("Act") provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with a permit issued under the Act. Section 502 of the Act 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." A "point source" is defined as a "discernible, confined and discrete conveyance" and includes a "vessel or other floating craft." The term "pollutant" includes, among other things, "sewage[1], garbage . . . biological materials . . . and industrial, municipal, and agricultural waste discharged into water."

[1] For the purposes of section 312 of the Clean Water Act, the term "sewage" includes graywater discharges from commercial vessels operating in the Great Lakes. "Graywater" is defined in section 312(a)(11) as "galley, bath, and shower water."

Section 402(a) of the Act authorizes EPA to "issue a permit for the discharge of any pollutant, or combination of pollutants" upon certain conditions required by the Act. Section 402 permits are commonly called National Pollutant Discharge Elimination System permits, or NPDES permits. NPDES permits can be either individual permits or less-burdensome general permits when the discharge of pollutants will cause only minimal adverse environmental effects to the environment when discharged separately and will have only minimal cumulative adverse effect on the environment.

In 1973, EPA promulgated a regulation that excluded "discharges incidental to the normal operation of vessels" from NPDES permitting (38 Fed. Reg. 13528, May 22, 1973). After Congress reauthorized and amended the Clean Water Act in 1977, EPA conducted an additional round of public comment on the regulation (43 Fed. Reg. 37078, August 21, 1978). In 1979, EPA promulgated the final revision that established the regulation in its current form (44 Fed. Reg. 32854, June 7, 1979). That regulation identifies several types of vessel discharges as being subject to NPDES permitting (such as trash, garbage, or other discharges related to energy production, mining, or seafood production), but specifically excludes discharges incidental to the normal operation of a vessel. *Note: In February, 1996, Congress enacted separate legal authority to regulate discharges incidental to the normal operation of a vessel of the Armed Forces (see below for further explanation).*

Under EPA regulations, found at 40 CFR 122.3(a), the following discharges did 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. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

In March, 2005, the U.S. District Court for the Northern District of California ruled that the Clean Water Act exemption for "discharges incidental to the normal operation of a vessel" exceeded the Agency's authority under the Act.

This decision, *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, was primarily focused on the authority of the Clean Water Act to regulate discharges of ballast water from vessels. The Court concluded that, because of the potential impact that invasive species pose to receiving waters, the underlying goals of the Clean Water Act to restore and protect the chemical, physical, and biological integrity of the Nation's waters, and the fact that Congress had " 'directly spoken' in the [Clean Water Act] and specifically requires NPDES permits for vessels discharging pollutants in the nation's waters," EPA acted in excess of its authority in "exempting an entire category of discharges" from the NPDES permit program.[2]

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[2] *See Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 2005 WL 756614, at *13 (N.D. Cal. Mar. 30, 2005).

On September 18, 2006, the U.S. District Court for the Northern District of California issued an order vacating (revoking) the regulatory exclusions for "discharges incidental to the normal operation of a vessel" as of September 30, 2008. On November 16, 2006, the United States filed a notice of appeal with the U.S. Court of Appeals for the Ninth Circuit. Oral arguments before the Ninth Circuit Court of Appeals occurred in August 2007, and the decision in this case is currently pending.

According to EPA, a consequence of the *Northwest Environmental Advocates* decision is that all discharges of pollutants from vessels, other than those that are specifically otherwise addressed by the Clean Water Act (i.e., discharges of sewage, oil and hazardous substances, and discharges incidental to the normal operation of a vessel of the Armed Forces under section 312 of the Act), could potentially be required to have a NPDES permit. These NPDES permits could be either individual permits or general permits, and would include discharges of pollutants from all non-military vessels, including recreational boats and commercial vessels. The federal government estimates that, in U.S. maritime commerce, between 8,400 cargo vessels (foreign and domestic) equipped with ballast tanks enter U.S. waters from outside the exclusive economic zones (EEZs) of the United States and Canada and make approximately 86,000 port calls in the U.S. ports each year. In addition, the Coast Guard estimates that there are an additional 81,000 commercial fishing vessels operating in U.S. waters, and another nearly 13 million state-registered recreational vessels in the United States.

EPA has testified that it does not currently possess sufficient information on the nature, extent, and potential environmental harm of discharges from non-military vessels (other than aquatic invasive species in ballast water); however, the agency's experience with the regulation of discharges incidental to the normal operation of vessels of the Armed Forces has demonstrated that such discharges can have a significant impact on the marine environment and water quality.[3]

On June 21, 2007, EPA published a notice of intent/request for comments and information in the *Federal Register* to "make the public aware of this matter and obtain their input, in the form of public comment or relevant information, to further help the Agency in the timely development of an NPDES permitting framework." The Agency has not taken further formal action on this issue, but is continuing to work on the development of an appropriate regulatory mechanism to comply with the Court imposed September 30, 2008 deadline.

[3] See Declaration of James A. Hanlon, found at <http://www.epa.gov/owow/invasive_species/pdf/hanlon_declaration2007.pdf>.

UNIFORM NATIONAL DISCHARGE STANDARDS FOR VESSELS OF THE ARMED FORCES

In February, 1996, Congress approved the National Defense Authorization Act for fiscal year 1996 (Pub. L. 104-106), that included an amendment to section 312 of the Clean Water Act to address discharges from vessels of the Armed Forces. This provision created uniform national discharge standards ("UNDS") to address discharges incidental to the normal operation of over 7,000 vessels of the Armed Forces. [4]

The UNDS provision in section 312 of the Clean Water Act required the Administrator of EPA and the Secretary of Defense to develop uniform national discharge standards to control certain discharges from vessels of the Armed Forces. This provisions requires that UNDS be developed in three phases: (1) a determination for which pollutants it is reasonable and practicable to require control with a marine pollution control device; (2) promulgation of Federal performance standards for control devices, including the potential for differing standards for vessel classes, sizes, and types; and (3) establishment of requirements for the design, construction, installation and use of control devices in vessels of the Armed Forces. After completion of the third phase of UNDS, neither States nor local governments may adopt or enforce any State or local statutes to address pollutants requiring control devices, except to establish "zero-discharge zones" within the waters of the State.

In May, 1999, EPA and the Department of Defense issued a final rule implementing phase 1 of the UNDS provisions of the Clean Water Act.[5] In developing this regulation, EPA and the Department of Defense identified 39 pollutants considered to be "incidental to the normal operation of vessels of the Armed Forces." Of these, the Federal agencies agreed there are 25 pollutants with sufficient potential for adverse impact to the marine environment to require implementation of marine pollution control devices. These include chain locker effluent, clean and dirty ballast water, compensated fuel ballast, deck runoff, gas turbine water wash, graywater, machinery wastewater, and small boat engine wet exhaust. Many of these pollutants identified as having sufficient potential for adverse impact to the marine environment are common to nearly all vessels (both vessels of the Armed Forces and commercial vessels).

EPA and DOD are currently carrying out phase 2 of the UNDS program.

LIMITED INFORMATION ON THE IMPACTS OF DISCHARGES FROM VESSELS

Over the past decade, EPA has conducted limited study on the potential impact of discharges common to vessels of the Armed Forces and cruise ships to the marine environment and water quality.

The first study, completed in 1999, under the authority of the UNDS provisions in section 312 of the Clean Water Act, identified 39 pollutants considered to be incidental to the normal

[4] The UNDS provisions, located at section 312(n) of the Clean Water Act do not apply to commercial vessels; privately owned vessels; vessels owned or operated by State, local, or tribal governments; vessels under the jurisdiction of the U.S. Army Corps of Engineers; vessels owned or operated by other Federal agencies that are not part of the Armed Forces; vessels preserved as memorials and museums; time- and voyage-chartered vessels; vessels under construction; vessels in drydock; and amphibious vessels.

[5] 64 Fed. Reg. 25125 (May 10, 1999).

operation of vessels of the Armed Forces. Of this number, EPA believes that 25 pollutants would be applicable to non-military vessels. In addition, according to EPA, because "commercial and recreational vessels (e.g., cruise ships, cargo vessels, fishing boats) are different in nature than military vessels, EPA expects there could be an additional number of operational discharges from non-military vessels," which EPA does not have a sufficient information.[6]

The second study, entitled "Draft Cruise Ship Discharge Assessment Report," was completed in December of 2007. This study analyzed the nature, amounts, and environmental implications of the following pollutants common to cruise ships: (1) sewage; (2) graywater; (3) oily bilge water; (4) solid wastes; and (5) hazardous wastes. However, the December 2007 study specifically noted that other "waste streams" (such as ballast water, desk runoff, and hull coat leachate) may be generated from commercial vessels, but the environmental implications of such additional waste streams were not analyzed in this report.

No additional Federal studies have been undertaken to assess the environmental or water quality implications of discharges incidental to the normal operation of a commercial vessel.

ADMINISTRATION'S LEGISLATIVE PROPOSAL TO ADDRESS VESSEL DISCHARGES

During consideration of H.R. 2830, the Coast Guard Authorization Act of 2007, the Bush administration formally transmitted to Congress a legislative proposal to address discharges of vessels, including a proposal to address discharges incidental to the normal operation of a non-military vessel.

The administration's proposal would suspend the NPDES requirements of the Clean Water Act for a period of 6 years to allow the Environmental Protection Agency, in consultation with the Coast Guard, to evaluate the types, volumes, and environmental effects of discharges from vessels, including commercial vessels (other than discharges of aquatic invasive species, which are addressed in a separate section of the administration's proposal). This moratorium is consistent with the concerns expressed by the Agency that EPA's information on the nature, extent, and environmental implications of discharges from non-military vessels is "exceedingly limited," and such discharges are likely to be "different in nature" and quantity than vessels covered by the UNDS program.[7]

After completion of this evaluation, the Administrator, in consultation with the Coast Guard, would be required to conduct a rulemaking to "establish an appropriate program" for discharges incidental to the normal operation of a vessel that provides for "enforceable uniform national discharge standards" for discharges from vessels, based on the best available technology (as determined by the Clean Water Act). The administration's proposal states that this program "may be modeled in whole or in part" on the UNDS program contained in section 312(n) of the Clean Water Act.

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[6] See Declaration of James A. Hanlon, found at <http://www.epa.gov/owow/invasive_species/pdf/hanlon_declaration2007.pdf>.

[7] In a legal declaration to the U.S. District Court for the Northern District of California, the Director of the Office of Wastewater Management in EPA's Office of Water testified that EPA "does not have all of the needed information on how to categorize classes of vessels, what types of discharges exist and what they are composed of, and the cost and availability of technologies to address such discharges." See Declaration of James A. Hanlon, found at <http://www.epa.gov/owow/invasive_species/pdf/hanlon_declaration2007.pdf>.

Under the administration's proposal, upon completion of the uniform national discharge standards program for vessels, no Federal or State permit would be required for discharges from vessels meeting the requirements of the new program; however, states would reserve the right to completely prohibit the discharge of one or more pollutants from vessels into state waters.

The administration's proposal contains several exclusions and exemptions to ensure that other Federal statutes are unaffected by this proposal. For example, the proposal would not affect the following discharges from vessels: (1) oil or other hazardous substances (regulated under section 311 of the Clean Water Act); (2) sewage (regulated under section 312 of the Clean Water Act); and (3) discharges of ballast water, sediment, or aquatic nuisance species (subject to the Nonindigenous Aquatic Nuisance Prevention and Control Act). In addition, the proposal would specifically exempt discharges incidental to the normal operation of a recreational vessel that is less than 79 feet in length, and would not affect the UNDS program for vessels of the Armed Forces (subject to section 312(n) of the Clean Water Act).

PRIOR LEGISLATIVE ACTIVITY

On May 24, 2007, Representative Gene Taylor introduced H.R. 2550, the Recreational Boating Act of 2007. This legislation amends the Clean Water Act to exclude from the statutory definition of "pollutant" discharges considered to be incidental to the normal operation of a recreational vessel.

On May 1, 2008, Representative Steven LaTourette introduced H.R. 5949, the Clean Boating Act of 2008. This legislation provides a targeted Clean Water Act exemption for discharges incidental to the normal operation of a recreational vessel, which is defined as "any vessel that is ... manufactured or used primarily for pleasure, or ... leased, rented, or chartered to a person for the pleasure of that person." The definition of recreational vessel specifically excludes a vessel "subject to Coast Guard inspection that ... is engaged in commercial use, or ... carries paying passengers."

H.R. 5949 also amends section 312 of the Clean Water Act to establish management practices for any discharges from a recreational vessel excluded by this Act (other than the discharge of sewage regulated under section 312 of the Act). This provision directs the Administrator to develop "reasonable and practicable" management practices to mitigate the adverse impacts that may result from discharges from a recreational vessel excluded by this Act. Under this provision, the Administrator must complete its evaluation of management practices for discharges excluded by this Act within one year of the date of enactment, and review its evaluation, and revise, if necessary, every 5 years thereafter.

H.R. 5949 also requires the Administrator, in consultation with the Coast Guard, the Department of Commence, and other interested Federal agencies, to develop performance standards for management practices based on the class, type, and size of the vessel., and directs the Coast Guard to conduct a rulemaking governing the design, construction, installation, and use of management practices for recreational vessels as are necessary to meet these performance standards.

Finally, this legislation includes a savings clause to ensure that this Act does not affect existing Clean Water Act prohibitions against discharges of oil or hazardous substances under section 311 of the Act.

Neither legislative proposal was introduced in previous Congresses.

On May 15, 2008, the Committee on Transportation and Infrastructure met in open session, and ordered H.R. 5949 reported to the House by voice vote. During consideration of H.R. 5949, several members of the Committee expressed an interest in addressing discharges incidental to the normal operation of commercial fishing vessels, and potentially other small commercial vessels. During this meeting, Chairman Oberstar committed to scheduling today's hearing before the Subcommittee on Water Resources and Environment to further explore this issue.

DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF A COMMERCIAL VESSEL

Thursday, June 12, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Room 2167, Rayburn House Office Building, Hon. Eddie Bernice Johnson [Chairwoman of the Subcommittee] presiding.

Ms. JOHNSON. The Subcommittee will come to order.

Good morning. Today, the Subcommittee meets to discuss the issue of discharges incidental to the normal operation of a commercial vessel that potentially impact the water quality and the marine environment, and the appropriate regulatory mechanism to address these discharges.

This hearing is the continuation of a discussion that started during the Committee markup of the Clean Boating Act of 2008, legislation that would address and reduce water pollution impacts from recreational boats more aggressively than exists today. During the markup, several Members raised the issue of how best to address discharges from commercial vessels not addressed in the Clean Boating Act. Today's hearing will further explore this issue so that we can have a better understanding of what types of discharges are covered by the term ″incidental to the normal operation of a commercial vessel.″

What is evident from our efforts to put this hearing together is the scarcity of information on exactly what pollutants are discharged during the normal operation of commercial vessels and their potential impact on the Nation's water quality and the marine environment. This is a concern, because we must fully understand the potential range of pollutants that are discharged from commercial vessels and their likely ecological and water quality impacts.

Before we consider mechanisms to address such pollutants, for example, as noted in today's written testimony, from what the Agency could pull together from existing reports, EPA identified 28 discharges incidental to the normal operation of a vessel, including petroleum-based products and other chemicals, that can have a significant impact on water quality and the marine environment.

Although many have tried to paint incidental discharges as harmless, such as storm water runoff from ship decks, discharges incidental to the normal operation of a vessel can include substantial quantities of toxic or otherwise ecologically damaging pollut-

ants, including the release of aquatic invasive species that this Subcommittee has followed for years.

I understand the debate on whether the existing authorities contained in section 402 of the Clean Water Act are the appropriate authorities to address discharges from vessels, and I am certain that this issue will be discussed today. However, for decades, the discharge of certain pollutants was not addressed by the Clean Water Act. Today's hearing gives us the opportunity to better understand the nature of pollutants that are discharged from vessels and how we might address these pollutants in a national, environmentally sound, and uniform manner, including utilizing the Clean Water Act as the statutory mechanism.

I look forward to today's debate, and I yield to my Ranking Member, Mr. Boozman.

Mr. BOOZMAN. Thank you, Madam Chair.

Today, the Subcommittee is meeting to hear testimony on discharges incidental to the normal operation of commercial vessels. This certainly is a very, very important topic. I want to thank you, Madam Chair, Mr. Oberstar and Mr. Mica for helping to bring this forward.

To clarify the reach of the Clean Water Act and to ensure that the EPA is appropriately regulating discharges from recreational vessels, my colleague, Steve LaTourette of Ohio, offered H.R. 5949, the Clean Boating Act of 2008, providing a narrow Clean Water Act exemption for discharges incidental to the normal operation of recreational vessels. This legislation is vital to avoid the unintended consequences of a questionable judicial decision, specifically a 2006 U.S. District Court order from the Northern District of California, that revoked the EPA's Clean Water Act regulatory exemptions for these types of incidental discharges.

Lawsuits filed by special interest groups and the subsequent court decision require the EPA, as of September 30, 2008, to regulate and issue point source discharge permits under the National Pollution Discharge Elimination System, NPDES, for gray water and other incidental discharges from an estimated 18 million State-registered recreational boats, 110,000 commercial fishing vessels, and some 53,000 commercial freight and tank vessels sailing in the U.S. waters. This will lead to a regulatory morass when the owners and operators of recreational boats, commercial fishing boats, and large commercial shipping vessels have to obtain Clean Water Act permits for their activities as simple as merely washing their decks.

Mr. LaTourette's bill, H.R. 5949, takes a more reasonable approach to protecting our waters by providing a targeted Clean Water Act exemption for recreational vessels. Instead of regulating recreational vessels under the Clean Water Act's NPDES program, under section 402, it would instead require EPA to develop under the Clean Water Act's Vessels Discharges program, under section 312, reasonable and practical management practices to mitigate the adverse impacts that may result from incidental discharges from recreational vessels.

In addition, the legislation requires EPA to develop performance standards for management practices based on the class type and size of vessels. However, this legislation does not go far enough, as

it would only exempt from the NPDES permitting incidental discharges from recreational vehicles and not commercial emergency or other similar vessels. The reach of the court decision could include fireboats, barges, vessels that aid barges transiting locks, seaplanes, and maybe even the United States Army Corps of Engineers dredge fleet.

The NPDES permit program is not the appropriate way to address the incidental discharges. Instead, the Committee should look at section 312 of the Clean Water Act for guidance in drafting language for regulating incidental discharges from vessels.

While I support Mr. LaTourette's legislation and was pleased the Committee moved the bill at the previous markup, the Committee needs to go further and take steps to exempt commercial vessels from the NPDES permitting as well. It is more appropriate to provide for the development of national, enforceable, uniform standards for discharges that are incidental to the normal operation of commercial vessels in lieu of the use of NPDES permits.

In the case of fishermen, those who make their living on the water, similar to farmers, miners and loggers, like other natural resource-dependent jobs, fishermen are not easily placed elsewhere in the workforce when bureaucratic red tape or overreaching by the courts forces them out of business. When we lose jobs on the water, we also lose jobs on the land from the boat builders to the ice salesmen.

As for the commercial shippers, they are at the heart of our Nation's interstate and foreign commerce. If we subject vessels visiting ports in more than one State to different permit requirements in each State that they visit, they will be forced to either violate a State's laws or cease making port calls in States where the requirements are inconsistent with the technology that the vessel has installed in response to earlier enacted legislation from another State. There simply is no reason to interfere with interstate and foreign commerce in such ways, particularly when a more sensible and uniform approach is available under section 312.

Congress should reject this overreach by the court and enact sensible legislation that exempts all vessels under the NPDES permitting and, instead, allows for a uniform national approach.

Thank you, Chairman Johnson, again, for allowing us to hold this very important hearing. I really look forward to the testimony of our witnesses.

I yield back.

Ms. JOHNSON. Thank you very much, Mr. Boozman.

The Chair recognizes Mr. Taylor.

Mr. TAYLOR. Thank you, Madam Chairwoman. I want to thank you very much and Chairman Oberstar for holding this hearing. I want to thank our witnesses for coming from across the country to share their views with us.

Madam Chairman, as a result of one ruling by one West Coast judge, this Congress finds itself in a position where we have to enact legislation in very short order, or hope that the Ninth Circuit will overturn a bad decision.

As a result of that ruling, boats that have what is called ″wet exhaust,″ where water is taken from the sea, run through a pump and used to cool the exhaust of an inboard motor; boats that use

a heat exchanger to cool the motor, which include the United States Coast Guard, the United States Navy, most vessels used by the Mississippi Bureau of Marine Resources, any boat that has an air conditioner that utilizes a heat exchanger would have to shut it off.

A boat that has to sink would have to plug it. People who inadvertently catch a wave over the stern and find themselves in danger of sinking would be told, We are sorry, if you bail your boat, you are in violation of this law.

Now, the law was intended to keep large commercial ships from bringing in ballast water that had things like lamprey eels and zebra mussels, from bringing those invasive species to our Nation. It is a well-intended law and a good law. The problem is, this interpretation has taken it to where every boat can't bail, every boat that catches a wave over the stern has to sink and release the diesel fuel to the water for a fear that a little bit of that seawater that just came out of the sea would go back to the sea.

We have got to fix this. I remember a quote from a famous German general who, after a battle that he won, everyone was telling him what a great guy he was, and he said in effect, I don't know who won that battle, but I can tell you who would have got the blame for losing it.

Congress didn't cause this. A bad court ruling caused this. But Congress has got to fix it, or I can assure you we will get the blame, come September when people are issued citations.

So I very much appreciate your having this hearing. I very much appreciate the witnesses—in particular, Dr. Walker, coming up from Mississippi from the Bureau of Marine Resources.

I look forward to solving this problem that was caused by one bad ruling by a judge who made a mistake.

Ms. JOHNSON. Thank you, Mr. Taylor.

Mr. LoBiondo.

Mr. LOBIONDO. Thank you, Madam Chair, very much. I join my colleagues in expressing our appreciation to you and Mr. Oberstar for holding this Committee hearing, but especially Mr. Taylor, who has been very passionate and very knowledgeable on this issue.

Gene, I thank you very much.

I supported the Clean Boat Act when the Committee marked it up a couple of weeks ago because Congress needs to act before every boat owner in this country is slapped with over $30,000 in fines daily for what Mr. Taylor very artfully described as ″incidental discharges″ that really the boat owners have no control over—rainwater runoff and deck wash and things like that.

But that bill had a huge flaw. It failed to treat all boats equally. While the bill did exempt recreational vessels, other small commercial boats like many of the fishing vessels and tour boat operators that I represent would not receive an exemption. It is simply unfair to provide exemptions for certain vessels while refusing to extend them for others that are of equal or, in many cases, smaller size.

In addition, rainwater runoff, bilge water, engine cooling water and other discharges are materially the same, regardless of whether they are discharged from a recreational vessel, a fishing vessel, or a small tour boat.

Since the Clean Water Act's inception in 1973, these discharges have been exempt from the EPA permitting. For 35 years, these exemptions have been accepted by Congress and have stood unchallenged in the courts. More importantly, these exemptions have been applied to all vessels equally.

The commercial fishing industry in my district is the second largest on the East Coast, but it is suffering from increased fuel costs, catch limitations, and the general economic slump. Now the EPA is going to make things even worse by forcing them to abide by costly permits or face tens of thousands of dollars in daily fines, which they cannot afford and which would put many of them out of business.

Meanwhile, this Congress is going to let other boat owners off the hook? I don't think so. It is just not fair. At a time when our economy is experiencing a downturn, it is critically important that Congress move legislation to protect both the recreational and commercial boating industry and the millions of jobs they support from these unfair and costly practices.

A number of us have gotten together. Mr. Young and I have introduced legislation, H.R. 5594, that treats all vessels equally. I hope to work together with you, Madam Chair, with our Committee leadership, and with all Members who are interested, to try to correct this problem.

I thank you very much for the opportunity to speak this morning.

Ms. JOHNSON. Thank you very much.

Mr. McNerney.

Mr. MCNERNEY. I want to thank the Chairwoman for holding this important hearing.

Of course, we all understand the importance of clean water and maintaining healthy waterways for recreation, commerce, and wildlife. My district includes the San Joaquin Delta, which is important for boat recreation and commerce. Because of that and other reasons, I am interested in what the witnesses are going to say this morning. So I am going to reserve any judgments until then.

Thank you for coming out here and speaking to us.

I yield back.

Ms. JOHNSON. Thank you.

Mr. Brown.

Mr. BROWN. Thank you, Madam Chair, for holding this Committee hearing this morning—and Ranking Member Boozman.

Like many decisions by a Federal court in 2006 to require all 16 million vessels in the United States to obtain an EPA permit for incidental discharges, it came as an unpleasant surprise. The longstanding exemption for discharges that occur during the normal operation of a vessel has long worked for both the benefit of the environment and those who operate boats on our Nation's waters.

Thankful for the tens of million recreational boaters in our Nation, this Committee reported legislation to continue those exemptions. However, if that bill were signed into law today, commercial boats such as those used by fishermen, tour operators, and freight providers would still need a permit from the EPA.

Such requirements, the details of which are still unknown by folks like shrimpers in my district, risk put these long-standing family businesses at further risk at a time when they can least af-

ford it. Shrimpers face significant challenges—most dauntingly, low-cost, low-quality imported shrimp that is dumped on domestic markets with the full support of governments like China.

Shrimpers, like Americans of every stripe, are also feeling the impacts of record high fuel costs. Just yesterday, I received a plea from a shrimper in my district that we do something to address energy costs. That plea came in the form of a drill bit sent to my office. It says, Drill, drill, drill.

With low shrimp prices, combined with high fuel, the average shrimper must catch 700 pounds per day just to cover the cost of fueling the boat. That is not a small catch. The costly permits and expensive equipment that will probably be required under whatever regulations EPA comes up with can serve to sink many of these hardworking shrimpers, ending their businesses and impacting a significant part of South Carolina's heritage and economy.

This Subcommittee has the ability to craft an exemption and standard for commercial vessels that would allow the shrimpers in my district, in the gulf coast, the fishermen in Alaska and New Jersey, and other commercial vessel operators across the country to keep working the waters they hold so dear while keeping the waters clean. I am afraid of what will happen if we don't.

Let me paint a picture of what I can see happening. Each will, at the last minute, set up standards for vessels. A large portion of the commercial operators, like shrimpers, decide the cost of the permits and the new equipment are too high so they drop out of the business completely. The remaining shrimpers finally get the attention of Congress, but instead of crafting an exemption like we should have done, we develop a program similar to those that already exist with EPA that provides grants to vessel operators to meet the requirements of the EPA regulations.

A couple of years pass by before we are able to get funding for this program into an appropriations bill, but then it comes under attack as an earmark when the bill is on the House floor, since there are only a few shrimpers left to take advantage of the program.

Instead of setting up this situation where they lose again, we can do the right thing and set up an environmentally responsible exemption and standards for incidental discharge for commercial boats.

I look forward to working with my colleagues to make that happen.

Thank you, Madam Chair. I look forward to hearing from the witnesses.

Ms. JOHNSON. Thank you, Mr. Brown.

Mrs. Drake.

Mrs. DRAKE. Thank you, Madam Chairman.

Madam Chair, I would also like to thank Chairman Oberstar for fulfilling his commitment to hold this hearing and to work with those of us who are interested in this issue. As has been stated, the permit exemptions for certain incidental discharges by small vessels have applied equitably to those vessels, regardless of vessel type or class.

I join in applauding the Committee's work to continue this exemption for recreational boaters by moving H.R. 5949, the Clean

Boating Act of 2008, forward. However, it is simply a matter of fairness to provide these exemptions equitably to the normal operation of commercial fishing vessels and other small vessels.

Incidental discharges are just that, incidental. This includes weather runoff from the deck, engine cooling water, uncontaminated bilge water, all of which are necessary for the operation of a vessel. These discharges are the same, regardless of whether they originate from a recreational boat, a fishing vessel, or a small tour boat.

My district is home to the mouth of the Chesapeake Bay and the entirety of Virginia's Atlantic coastline. Both commercial fishing vessels and recreational boating are extremely popular and important to our communities as well as to our country.

I look forward to exploring this issue further to ensure we maintain the equitable treatment of these vessels.

Thank you, Madam Chairman. I yield back.

Ms. JOHNSON. Thank you very much, Ms. Drake.

Before we begin the witnesses' testimony, I would like to ask unanimous consent to make the statements of the following organizations part of today's hearing record: The National Marine Manufacturers Association and Boat USA, Northwest Environmental Advocates, and the Passenger Vessel Association.

Any objection?

Mr. TAYLOR. Madam Chair I would also ask, I have been asked by Congressman Rick Larsen to have his opening statement included, without objection

Ms. JOHNSON. Without objection, so ordered.

Our witnesses today are Mr. James Hanlon, Mr. Andrew Fisk, Mr. William Walker, Mr. Christopher Reddy, and Ms. Kathy Metcalf, if you will testify in the order in which I called your names.

TESTIMONY OF JAMES HANLON, DIRECTOR, OFFICE OF WASTEWATER MANAGEMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY; ANDREW FISK, Ph.D., BUREAU DIRECTOR, LAND & WATER QUALITY, MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION; WILLIAM W. WALKER, Ph.D., EXECUTIVE DIRECTOR, MISSISSIPPI DEPARTMENT OF MARINE RESOURCES; CHRISTOPHER M. REDDY, Ph.D., ASSOCIATE SCIENTIST, MARINE CHEMISTRY AND GEOCHEMISTRY, WOODS HOLE OCEANOGRAPHIC INSTITUTION; KATHY METCALF, DIRECTOR, CHAMBER OF SHIPPING OF AMERICA, ON BEHALF OF THE SHIPPING INDUSTRY BALLAST WATER COALITION

Ms. JOHNSON. The Director of the Office of Wastewater Management, Mr. Hanlon, U.S. Department of EPA.

Mr. HANLON. Good morning, Madam Chairwoman Johnson, and Members of the Subcommittee. I am Jim Hanlon, Director of the Office of Wastewater Management at the U.S. Environmental Protection Action. My office is responsible for the implementation of the NPDES permitting program. Ben Grumbles, my boss, EPA's Assistant Administrator for Water, could not attend due to a conflicting hearing this morning.

Less than 1 year after the Clean Water Act was enacted, EPA promulgated a regulation excluding discharges incidental to the normal operation of vessels from the NPDES permitting program. First promulgated in May 1973, that regulatory exclusion has undergone only minor changes over the last 35 years.

In December 2003, plaintiffs filed a lawsuit in the U.S. District Court for the Northern District of California seeking revocation of the exclusion. In September 2006, the court issued an order vacating the regulatory exclusion as of September 30th of this year.

Because that order was not limited to just ballast water discharges, it potentially implicates a wide variety of discharges incidental to the normal operation of vessels, not only for the thousands of larger oceangoing ships with ballast, but commercial vessels, barges, recreational vessels, and any other vessel other than vessels of the Armed Forces with discharges incidental to their normal operations into waters of the United States.

The Clean Water Act generally prohibits the discharge of a pollutant without an NPDES permit. If the district court's order remains unchanged, the regulatory exclusion allowing for the discharge of pollutants incidental to the normal operation of a vessel without a permit will be vacated on September 30, 2008.

We respectfully disagree with the district court's decision; and the government, in November 2006, filed a notice of appeal with the U.S. Circuit Court of Appeals for the Ninth Circuit. Oral argument was heard by the court in August, 2007, and a decision on that appeal is pending.

[Ed: the decision of the U.S. District Court for the Northern District of California was affirmed by the U.S. Circuit Court of Appeals for the Ninth Circuit on July 23, 2008—the Court's opinion can be found under Submissions for the Record]

I wish to make clear that the denial of the rulemaking petition and our appeal of the lower court decision does not reflect the dismissal of the significant impacts of aquatic invasive species. Rather, we believe the NPDES program does not currently provide an appropriate framework for managing ballast water and other discharges incidental to the normal operation of vessels. As a general matter, we believe that discharges from such highly mobile sources would be more effectively and efficiently managed through the development of national, environmentally sound, uniform discharge standards.

The number of commercial vessels subject to NPDES permitting as a result of the court decision is very extensive. Our most recent analysis of the existing information indicates that approximately 91,000 domestically flagged and an additional 8,000 foreign-flagged commercial vessels would be affected, as well as up to 18 million recreational vessels.

A wide variety of discharge types are involved, such as deck runoff from routine deck cleaning, bilge water from properly functioning oil/water separators, and ballast water. Based on the information available to us, we have identified a universe of 28 different waste streams incidental to normal operation of commercial vessels. It is listed in Table 1 of my written testimony.

We plan to issue two draft general permits for public comment within the next few days, one focusing on commercial vessels and

the other on recreational vessels. Because it was not prudent to simply await the outcome of the appeal, we are developing NPDES permits with a goal of establishing final permits prior to the September 30 date. Given the complexity of this task, the limited available information, the procedural steps we must follow, and the shear number of vessels and discharges that are implicated, this is an extremely ambitious goal.

The recreational vessel permit focuses on those discharges with the most potential for impacts. For example, oily water discharges, transport and spread of aquatic nuisance species, with the emphasis on the use of commonsense, good boating practices; while in the commercial vessel permit, we necessarily deal with a broader array of discharges and have included more detailed control measures.

Even though the initial round of NPDES permits would be issued by EPA, this cannot assure uniformity across the country. Federally issued NPDES permits are subject to certification by individual States under section 401 of the Clean Water Act with respect to compliance of State water quality standards and other appropriate requirements of State law.

As stated in an April 1, 2008, joint EPA-Department of Homeland Security letter providing technical assistance on Title 5 of H.R. 2830, we strongly support enactment of legislation to strengthen the National Aquatic Nuisance Prevention and Control Act to better prevent, under Coast Guard leadership and in appropriate consultation with the EPA, the introduction of aquatic nuisance species via ballast water and other vessel-related pathways.

We also strongly support enactment of legislation to provide for the appropriate development of national, enforceable, uniform standards for other discharges incidental to the normal operation of commercial vessels in lieu of the use of NPDES permits.

I defer to the Department of Homeland Security for further details on the administration's preferred approach on invasive species.

With respect to other discharges incidental to normal operation of vessels, with respect to H.R. 5949, which only includes those discharges incidental to recreational vessels, the administration proposal more comprehensively manages discharges incidental to the normal operation of all vessels. In particular, in lieu of using NPDES permits, it provides for the evaluation, development, and implementation of environmentally sound, nationally uniform and enforceable, best management practices based on best available technology. It would exclude recreational vessels less than 79 feet in length in this new program, as well as from NPDES permitting, while leaving the States free to regulate those vessels if they deem appropriate.

We believe this approach is preferable to that currently contained in H.R. 5949 as it provides for development of national, uniform, enforceable controls focusing on discharges from commercial vessels, which are more likely to be of concern due to their discharge constituents and volume. My written testimony contains suggested language, legislative text for this purpose.

In closing, Chairwoman Johnson, I would like to thank you for this hearing and would be happy to answer any questions you may have.

Ms. JOHNSON. Thank you very much, Mr. Hanlon.

I failed to ask earlier if you could contain your remarks to 5 minutes. You can put your entire statement in the record.

Ms. JOHNSON. Mr. Fisk, from the Bureau of Land and Water Quality, the Maine Department of Environmental Protection.

Mr. FISK. Good morning, Madam Chair. Thank you very much for the opportunity to speak with you today and, as well, the States. Thank you very much for these deliberations on clarifying the Clean Water Act; the State of Maine is particularly interested in the clarification regarding passenger vessels.

What I would like to do is briefly describe some work that the State of Maine has done with regard to permitting of vessels. But first, I think it is important to describe context.

Since 1989, the State of Maine and coastal communities have spent $118 million fixing combined sewer overflows in our infrastructure. We have 100 percent of our communities in the State of Maine that have mandatory CSO, or combined sewer overflow plans. What this means is, we have reduced annual discharges of CSOs by over 70 percent.

Additionally, we have spent millions of dollars to replace failing septic systems and other types of residential and small commercial wastewater treatment systems that discharge the surface waters. This is a comprehensive and strategic approach so that we cannot only meet the ambitions of the Clean Water Act, but our own ambitions for a vibrant economy around a healthy, natural environment.

When we look at our ports, we also have invested significantly in them, whether that is putting in pump-out stations in marinas up and down the 3,000 miles of our coast for recreational vessels, or putting $20 million into improving the Port of Portland so we can have vessels ranging from the 90-passenger American Eagle to the Queen Mary II come visit our ports.

What this has meant is a very significant boon to our economy. We have over 2,000 shellfish harvesters, over 50 shellfish aquaculture leases. What this means is, we are working for clean water for these jobs. Shellfish harvesting brings in 29 million in direct income and over $59 million in direct income to the State of Maine. As well, cruise ship landings have more than doubled in the last several years, and we have seen 400 jobs and $12 million as a result of the cruise industry coming to Maine.

I want to describe this very briefly to put a framework around recently enacted regulations by the State of Maine. In 2005, we promulgated a general permit for the combined discharge of gray and black water, or just gray water from large commercial passenger vessels, those greater than 250 passengers. We have come up with an appropriate and reasonable framework that we have begun to implement.

This began in 2005, a two-part strategy. The State legislature extensively deliberated on this issue and said, we would like no discharge areas applied in our ports and harbors along the coast and we would like to craft a reasonable set of requirements for these large commercial passenger vessels.

We looked at the State of Alaska and the work they had done 2 years prior. What we realized is, Alaska understood the characteristics of the effluent coming from these commercial passenger

vessels and understood how they were maintained and operated. They had 2 year's worth of information. We evaluated that. We worked with the State of Alaska, and we decided it was very reasonable for these large cruise ships to meet standards that were equivalent to what we asked our municipal, publicly owned treatment works to meet. It was a question of parity.

We knew these cruise ships not only discharged a large amount of gray and combined gray and black water, but the treatment systems were not necessarily monitored, and we could not verify how they performed. So we put this framework in place. Much of this work is referenced on our Web site, and I can direct you to a report that we provided to our State legislature to this end.

What we found with regard to the commercial cruise ships is that the discharges were significant, municipal standards should apply, and we needed verification. So what did that mean? We created four pages of rules that had standards that were familiar to everyone in the industry for the last 30 years, BOD, TSS, and residual chlorine. An 8-page general permit, 14-day turnaround time on the permit, and a $117 annual fee brings you into this program for these vessels. So we feel that large cruise ships can easily do their part to improve the water quality in Maine and add to this comprehensive strategy.

Lastly, I will briefly note that jointly with our Department of Marine Resources we are working with the herring fishery, which lands herring for the lobster fishery as bait to develop some standards for how they offload herring at a number of shore-side facilities because we have had a number of documented and, unfortunately, significant water quality impacts. We believe collaboratively working with the industry, we can create reasonable standards about screening, how the discharge comes off the vessel at an outgoing tide and below the water, et cetera, so we can reasonably meet their expectations for business and protect water quality.

I would be happy to answer any questions you may have.

Ms. JOHNSON. Thank you very much, Mr. Fisk.

Dr. William Walker, Executive Director of the Department of Marine Resources, Biloxi, Mississippi.

Mr. WALKER. Thank you, Chairwoman.

I am Bill Walker, Executive Director of the Mississippi Department of Marine Resources. My department is a governing agency designed to enhance, protect, and conserve marine interests of the State. We manage all marine life, public trust wetlands, adjacent uplands and waterfront areas, and provide for the balanced commercial, recreation, educational, economic uses of these resources consistent with environmental concerns and societal needs.

I am here today on behalf of the commercial and recreational vessel operators of the State of Mississippi. However, the current situation transcends the borders of my State, and if not solved, will have disastrous consequences to all commercial and recreational boaters throughout our great Nation. Thank you for inviting me to testify today regarding this very important issue.

As I understand the situation, without congressional action, small commercial and recreational vessel operators will, effective September 30, 2008, be required to obtain a U.S. Environmental Protection Agency National Pollutant Discharge Elimination Sys-

tem permit under the Clean Water Act to be able to discharge materials incidental to the normal operation of their vessels. Regulated discharges would include deck washes, engine cooling water, gray water, and similar materials.

My job as Executive Director of the Department of Marine Resources in Mississippi is to protect our coastal waters and the marine sources that inhabit them and to ensure that the health and safety of residents and visitors who utilize our waters are protected as well. I believe Federal and State regulations currently in place are more than adequate to protect our Nation's coastal waters as required under the Clean Water Act.

Yogi Berra and other wise sages have suggested over the years, ″If it ain't broke, don't fix it.″ Clearly, the provision under the Clean Water Act to exempt small boat operators from having to have NPDES permits to discharge these materials has worked quite well for some 35 years and does not need changing at this time.

If action is not taken quickly to continue the exemption of these small vessels from this NPDES requirement, some 91,000 commercial vessels and 18 million recreational boats currently operating in U.S. waters will be negatively affected.

This Congress has been given very little time to address this situation, and I applaud the work that has been done so far. To my knowledge, at least four bills have been introduced to date. Senator Stevens has introduced S. 2645 that would provide an exemption for commercial fishing vessels less than 79 feet and all recreational boats. Senators Nelson and Boxer have introduced S. 2766 that exempts all recreation boats from the NPDES requirement, and Congressman Steve LaTourette recently introduced the same bill in the House, H.R. 5949. Congressman Don Young has introduced House Resolution 5594 that would exempt commercial vessels less than 125 feet in length and all recreational boats.

Of these four, Congressman Young's is the most comprehensive and the most fair. All small boats, whether commercial or recreational, need to be exempted.

In Mississippi, and I would suggest, across the Nation commercial and recreational fisherman are under duress. The Mississippi shrimp industry has been a vital part of the economy of coastal Mississippi throughout its history. This industry—and while I am using shrimp as an example, this is true of all our fisheries—presently faces increasing fuel prices and continual dumping of foreign shrimp into U.S. Markets, largely without penalty.

Many of these commercial fishermen, after generations of passing the trade down the line, are being forced out of this historical profession. According to NOAA fisheries data, the shrimp fishing effort in the Gulf of Mexico has declined by 78 percent since 2003. In Mississippi, shrimp licenses today are roughly half what they were prior to Hurricane Katrina. Those who remain, do so by the slimmest of economic margins and are ill-positioned to accept additional financial burdens due to unnecessary permit fees.

In terms of all licenses sold in the five Gulf States, total license sales dropped from 6.8 million in 2004 to 5 million in 2006, a reduction of 1.8 million licenses sold. This action is lawsuit-driven,

and the intent of this litigation was never directed at recreational and smaller commercial vessels.

We have heard today that EPA does not support including these vessels under the NPDES requirement. I further believe that EPA has neither the desire nor the budget to develop a system to issue and enforce some 18 million permits to regulate the discharge of materials, most of which are not even considered prudent by the Agency.

In short, it is just good common sense that recreational and smaller commercial vessels continue to be exempt from the NPDES permit requirement, as they have for the past 35 years, and I respectfully urge you to move forward quickly with legislation to make that a reality.

Specifically, I ask that you support legislation that exempts all recreational vessels and commercial vessels less than 125 feet in length from the requirement to possess NPDES permits to discharge materials associated with the incidental operation of their vessels.

Again, I would like to thank you, Madam Chairman and Ranking Member Boozman, for giving me the opportunity to present this testimony and for your leadership on the issue. If I can be of further service to the Committee as you work toward a reasonable solution of this issue, I stand ready to do so.

Thank you.

Ms. JOHNSON. Thank you very much, Mr. Walker.

Dr. Christopher Reddy, Associate Scientist, Marine Chemistry and Geochemistry, Woods Hole Oceanographic Institute, Woods Hole, Massachusetts.

Mr. REDDY. Good morning, Madam Chairwoman Johnson, Ranking Member Boozman, and Members of the Subcommittee. Thank you for the opportunity to speak to you today about the discharges incidental to the normal operation of a commercial vessel.

I am a scientist at Woods Hole Oceanographic Institution in Massachusetts, and as an organic chemist, my field of research is marine pollution. I am currently studying five aftermaths of oil spills, as well as petroleum contamination in some of the most busiest harbors in the United States.

For today's hearing, you had asked me to give an overview of oil inputs to the oceans from human activities with the emphasis on those released by commercial vehicles.

Petroleum, or oil, is a complex mixture of molecules formed from organic debris acted on by geologic processes over millions of years. Practically, you can think about it as the cooking and squeezing of all plankton. These thousands of molecules that compose oil can have widely different properties. Microbes can eat some, others are very toxic, and then some can dissolve in water.

This is an important point, that you cannot assume that all oil is the same. So runoff from one location and runoff from a deck may not be the same. Furthermore, we cannot assume that all oil inputs have the same impacts geologically. In fact, I usually say oil spills are a lot like buying a house, it's location, location, location.

Nevertheless, worldwide, about 190 million gallons of crude oil or refined products enter the coastal waterways due to human activity. It is either released by extreme accidental events, like oil spills,

which is about 19 percent of the total worldwide, or via chronic discharges. These include jettisoned fuel from airplanes, about 1 percent; activities associated with the extraction of petroleum, about 6 percent; air pollution, which is about 8 percent; and runoff from land sources, like automobile motor oil, which is about 21 percent; and finally, shipping operations was at 46 percent.

Hence, it is the latter, the chronic input by shipping operations, which release more oil than accidents like the recent Cosco Busan oil spill that occurred in San Francisco Bay in November, 2007.

However, these estimates come with a high level of uncertainty. Our best knowledge about oil inputs is from the National Research Council's Oil in the Sea III. This book and its predecessors have represented the state of our knowledge about oils inputs and fates, as well as effects on the ocean.

In this book it was estimated that worldwide operational discharge by vessels greater than 100 gross tons was 23 to 210 million gallons per year, with a best estimate of 70 million gallons. Therefore, it is possible there is at least a factor of 10 of what we estimate and what is released into the oceans by these vessels annually. This range is so broad because it is difficult to measure the amount of oil released in each vessel, to estimate the number of vessels at sea, and what percent are in compliance with proper handling of their waste.

For example, the panelists who prepared those values assumed that 5 to 15 percent of the vessels were not compliant. When they were, they assumed it was 100 percent release of fuel sludge. Based on the select studies employing aerial surveillance, such noncompliance is commonplace, but hasn't been appreciably quantified.

Since the publication of this book, I do not know of any concerted effort to improve such estimates. However, these values are lower than early estimates, likely resulting from better technology, education, and enforcement.

Our interest in understanding how much oil is released plays a crucial role in understanding its effects on oceanic ecosystems. While oil has a short-term immediate ecological impact like those seen on television with birds coated with black viscous oil following spills, there are less visually arresting but more chronic and persistent effects.

Numerous studies have shown that mixtures of lubrication—machinery, crude, and fuel oils—leaked or discharged kill thousands of seabirds annually. Canadian researchers have estimated that 300,000 seabirds die annually from chronic oil pollution off the coast of Newfoundland. These highest incidents of bird deaths in the world are attributed to the close proximity of the feeding grounds of these birds in the dense shipping routes between North America and Europe. Most often, the oiling of these birds' feathers leads to death by the diminished capacity to waterproof, insulate and retain buoyance.

With shipping increasing and rapidly industrializing countries adding to more international trade, oil discharges from normal operation of vessels still remains a threat. Additional studies on constraining such input terms and their effects are necessary before a clearer picture of this problem can be achieved.

I thank you.

Ms. JOHNSON. Thank you very much, Dr. Reddy.

Ms. Kathy Metcalf, Director of the Maritime Affairs, Chamber of Shipping of America, Washington, DC.

Ms. METCALF. Good morning, Madam Chair, Members of the Committee. Again, we also thank you for holding this very important hearing on a very challenging and important subject.

Today, I am testifying on behalf of the Shipping Industry Ballast Water Coalition, an informal group of five trade associations—my own, the American Waterways Operators, the Cruise Lines International Association, Intertanko, the Lake Carriers Association, and the World Shipping Council. I mention those because, collectively, these organizations represent members who own or operate over 90 percent of the vessels that trade in and out of U.S. ports, both from domestic trade and international trade. Our goal is to establish a single Federal standard to govern vessel discharges and to prevent a patchwork of overlapping and conflicting Federal and State programs.

In listening to the comments by Members of your Subcommittee and some of my colleagues before me, I began to tick off item points that have already been made, and I found that I should be able to get in well under the 5-minute limit because most of these issues have been already discussed and brought up.

The foundational question here is whether or not the Clean Water Act's NPDES program should be applied to these discharges that, by their very nature, come from mobile sources. We believe the answer to this question is a resounding ″no″ for four reasons. Before getting into those reasons though, I would like to ask that we note that our response is not intended to suggest that these discharges should not be regulated when, in fact, a number of them already are regulated. But rather, the response is intended to convey our belief that the NPDES program is not the appropriate vehicle to do so.

The first reason is that there is a compelling need to create national uniformity in legal requirements relating to all marine vessels in order to adequately address the international and interstate nature of commerce. Shipping is international and, ideally, so also should be its regulation. However, in some cases, national action is necessary to protect national interests. We would only urge that national initiatives provide a consistent and clear structure for regulation.

The Clean Water Act provides predictable standards for facilities that operate in one State's jurisdiction. It works well for these stationary sources because the State in which the facility is located and the discharge occurs within the same area. With vessels, the point source is literally a moving target, and that is why we need a single standard for vessels.

Applying the NPDES program to vessels will weaken, not strengthen, the Clean Water Act and will have a potentially negative impact on trade. The U.S. Supreme Court recognized this—however, our colleagues in the lower court in California did not—that it is not workable in practice to submit a single point source to multiple permitting requirements, a point even more true when the source is a mobile vessel.

The second reason, as I indicated earlier, many of these discharges are already addressed under international treaties, U.S. statutes, and regulation. Application of yet another overlaid program, the NPDES program, could create conflicting law at both the Federal and between Federal and State applications. These laws that currently apply were created with due regard to the realities and diversity of vessel operations of all sizes, and we suggest that that deliberation needs to be taken with regulation of these discharges as well.

The third reason the NPDES system is not appropriate for application is, it was created, as I indicated, to manage point sources. There is no doubt as to its value, but both the technology-based effluent guidelines and the water quality-based effluent limits presume that it is possible to identify a consistent set of discharges over a period of time as applied to specific sources. This obviously fails when applied to mobile sources.

Finally, the NPDES system is unnecessarily complex and too resource-intensive. I will defer to my colleagues from the State and the Federal Government, but we would suggest a potential template would be the Uniform National Discharge Standard for Armed Forces vessels, a program, I might add, still yet to be completed after 17 years of discussion.

In summary, we believe the way forward to address this issue in a scientific and environmentally protective manner is to follow a logical and comprehensive approach. While we think EPA properly exempted these discharges 30 years ago, the court decision found otherwise, and we believe that the commercial vessels should be expressly exempted by statute, and a consistent, comprehensive program of evaluation, assessment, and then as determined necessary, regulation should be applied consistent with Mr. Young and Mr. LoBiondo's proposal of H.R. 5594.

Thank you very much.

Ms. JOHNSON. Thank you very much, Ms. Metcalf.

We will begin our first round of questions. My first question goes to Mr. Hanlon.

Mr. Hanlon, in completing the first phase of a study of discharge from military vehicles, EPA and DOD agreed that 25 pollutants identified in the study had sufficient potential for adverse impact to the marine environment to require implementation of marine pollution control devices.

So, in your opinion, of the 25 pollutants you have identified as common between military and commercial vessels, would some of these also have sufficient potential for adverse impact to the marine environment, and should the Congress address it?

Mr. HANLON. Madam Chairwoman, thank you for that question.

Our current base of understanding in terms of discharges from vessels, as you noted, comes from our working with the Department of Navy under the Uniform Discharge Standard Provision for military vessels, and the information we have collected does indicate that there are waste streams where there is cause for concern in terms of the potential that they represent in terms of local water quality.

Our concern, however, and the reason for the suggestion that we sort of move forward and provide additional study to commercial

vessels is that although many of the operations on military vessels are similar to those on commercial vessels, basically doing a sort of straight-line extrapolation of those waste streams, the concentrations, and then the potential control technologies to commercial vessels, we don't think is appropriate.

So although we would share the conclusion that there is cause for concern, based on the data collected from military vessels, that the next step in terms of then going to control mechanisms, we believe that sort of more information regarding the nature of those waste streams, and then available technologies to manage those waste streams from commercial vessels, would be the appropriate next step; and that is what we had in mind in terms of our construction and representation in terms of the administration's proposal.

Ms. JOHNSON. Thank you very much.

Mr. Boozman.

Mr. BOOZMAN. Thank you, Madam Chair.

Mr. Hanlon, you said EPA believes the NPDES program does not currently provide an appropriate framework for managing the ballast water and other discharges incidental to the normal operation of vessels.

What are some of the concerns, the disadvantages of regulating such discharges under the NPDES program?

The other thing I would like to know is, this is a vast increase in jurisdiction, a vast increase. What are we talking about as far as cost? Who is going to pay the cost? Would you push that down to the States and then charge a permitting fee? Is it going to be an unfunded mandate? How would we go about doing that? How much more staff would you need in order to get that done?

Mr. HANLON. To be honest with you, we haven't done a workload model in terms of what it would take to implement the program that we are about to propose in the Federal Register on Tuesday in terms of the two general permits.

Having said that, your first question is, what are the complications with the NPDES program as applied to vessels. I think members of the panel have sort of addressed it. Mobility, for one; basically, vessels, by their nature, are mobile. And that the Clean Water Act focuses on local water quality standards is the target for all the discharges and how permits are written under the Clean Water permitting program.

So the challenge of using a permitting tool to meet water quality standards for the four States around Lake Michigan may be different, but that vessel would need to sort of meet, potentially, permits issued by all four States; and it would be a complication.

Our initial proposal will be a national permit issued by EPA to cover all potentially covered vessels, that is the way the Clean Water Act is currently structured, individual States could seek authorization to basically run the permit program for vessels in their States. And then I think sort of the potential in terms of the degrees of variability that would be introduced again by different States up and down the coastlines or around inland water bodies, having the authority to issue permits to vessels that enter their water bodies to protect their water quality standard, would be an additional complexity.

Again, as I said, we are concerned about discharges from vessels, both invasive species as well as incidental discharges. But the tool that the Clean Water permitting program represents, we don't believe is the best tool.

Mr. BOOZMAN. Thank you.

Mr. Fisk, you testified to really a pretty narrow group of entities in the sense of 250-plus on the passenger ships and the effluent and things like that. I guess I would like to know a couple of things.

Can you comment as to what you think about—you didn't say 49 passengers or 249. Two hundred fifty is a pretty significant amount, plus. Can you comment a little bit about what you think as far as regulating your oceangoing smaller vessels—I want to compliment you on the tremendous work that you all have done in Maine in getting your point sources under control and stuff; the fishing is coming back and all that—but your fishing boats, your recreational vehicles, and then, again, the 50-passenger cruise ship?

Also, is it reasonable to subject vessels to varying standards from State to State, particularly as the vessels are sailing to different ports?

Mr. FISK. Thank you for your questions. If I miss one, please let me know.

In our State legislature, we spent 2 years creating this program. Yes, it is a narrow class of vessels. It regulates gray and black water. So that is a narrow range of effluence. The problem is not as large as Mr. Hanlon describes. And we don't disagree that when you look at commercial vessels, the problem becomes more complicated.

We came up with the 250-and-greater threshold based on some reasonable information. The legislature said there is cause to regulate these. The technology exists. Maine's position is with regard to recreational vessels, we do not think they belong here, and we very much welcome that clarification. So we have gone through an exercise of saying this is in and this is out.

Again, just with regard to fishing vessels, we do think, as I have noted with some of the herring offloading, we should be able to have some reasonable regulations for them and we can see that through both the existing Code of Federal Regulations and our State law, coming up with something.

And then I think you asked about national standards. Yes, we would support national standards. I think that definitely makes sense.

Mr. BOOZMAN. Mr. Thank you, Madam Chairman.

Ms. JOHNSON. Thank you very much.

Mr. Taylor.

Mr. TAYLOR. Madam Chairman, I again want to thank you for holding this hearing, and the Chairman.

I want to open this up to the panel. Is there anything - let's walk through this. A marine air conditioner in most instances is a heat exchanger. Seawater is pumped through, and the cool seawater is used to cool the air on that vessel.

So, Mr. Hanlon, is there anything on a marine air conditioner on a commercial boat that is inherently a bigger pollutant than on a

recreational boat? I think the answer would be, no. And you all jump in whenever you feel like it.

A heat exchanger that cools the engine water that runs through an engine is seawater, goes through a heat exchanger, never touches the ethylene glycol but cools it and is usually sent out through the exhaust pipe of a boat, which also cools the exhaust so that you don't have to have a dry stack. It is used by the United States Coast Guard, and it is used by the Navy.

It is also used by several vessels owned by the Mississippi Bureau of Marine Resources, Mr. Hanlon.

What I find interesting is why would you exempt military vessels and the Coast Guard? And the Coast Guard is going to be out enforcing this rule on average Joes. The average Joe has got to have a permit; the Coast Guard doesn't. So I guess my question is, if it is clean enough for the United States Coast Guard, why isn't it clean enough for a commercial crabber, a commercial shrimper, a guy running a long line?

Mr. HANLON. I believe the answer is the Congress exempted or put military vessels under the Uniform National Discharge Standard Provision, and we have been working with the Navy since those statutory amendments have been made to sort of work and better understand those waste streams. So, basically, it was that statutory amendment that put military vessels under a different category.

Mr. TAYLOR. Mr. Hanlon, historically has there been a problem with wet exhaust becoming pollutants? Has there been a problem with heat exchangers, off of air conditioners, running through engines, becoming pollutants?

Mr. HANLON. Not that we are aware of. One of the challenges that we have had since the district court decision is better understanding the 28 different waste streams that do come off of vessels. And basically, for most of those, except for the data coming off the UNDS military vessel study, we have very little information on the constituents in any of those waste stations.

For example, and I know this is an analogy of grossly different proportions, but power plants that use cooling towers basically pick up metal from the metal in the cooling—in the heat exchangers. So if you sample the effluent from a cooling tower at a power plant, the chemical parameters of that are different from the water that went in. A heat exchanger on a vessel is a much smaller transaction, I agree, but if you say, is there any difference—in the world of analytical chemistry today, there is no such thing as zero. So I think that one of the challenges of the NPDES program is that we do not have the ability to sort of authorize de minimis discharges, and that would be one of the benefits of you doing a Uniform National Discharge Standard, as has been recommended as part of the administration's proposal.

Mr. TAYLOR. Mr. Hanlon, my observation is that a typical recreational vessel actually has more horsepower than a typical commercial vessel of the same size. The reason being that the guy can afford—he is in a hurry. It is his weekend. He wants to get from here to there in a hurry. So a 50-foot boat, recreational, might have 800 horsepower. A 50-foot boat, commercial, probably has 200 to 300 horsepower because he has got to make a living. So, again, I

am baffled, given the same size vessel, that you would think we ought to require a permit from one and not the other when one is actually creating more heat, using more energy. And, again, I know you didn't cause this ruling, and I do appreciate that you are willing to exempt some people.

What I don't understand is how we are supposed to explain to the American citizens that the Coast Guard that is enforcing this, by your recommendation, is exempt, that vessels that are using less fuel are the ones that in fact have to get the permit, and the vessels using the most fuel don't. Again, it doesn't pass the smell test. It doesn't pass, as Dr. Walker said, the common sense test.

Mr. Fisk, I understand your concerns. Gray water coming off a 1,000-foot cruise ship, that is a lot of gray water. Gray water coming off a 50-foot shrimp boat in no way compares. And what I really miss out of this all is, having been someone who voted for the Oil Pollution Act in 1990, which throws the book at any violator to the point where now people pay the extra money to prevent the spill from ever happening, why is it now that we have a very good law on the books to keep people from any even incidental discharges of an oil or chemical substance into the water, why is it all of a sudden we are worried about the water coming out of their exhaust, off their heat exchanger, of an engine-driven pump that they use to wash off their decks, rainwater coming off their decks, being able to bail their bilge if they inadvertently catch a wave over the stern or if rainwater makes its way into a boat that is not self-bailing. I fail to see why it makes any sense at all for our Nation to come up with a whole new permitting scheme to address things that have not been a problem for the past 35 years. And I would invite anyone on the panel to comment on that.

Mr. FISK. Just to clarify the State of Maine's position on this, I think that we agree with what you are saying. There are a lot of examples that provide a lot of nuance to how you might craft the language to fix the ruling. So recreational vessels, that is easy. If there are additional stipulations or clarifications on commercial vessels, we are very welcome to deliberate on that, and we understand your points and don't disagree with some of them. I am not an expert on some of these other incidental discharges, and we have not dove into the extent that EPA has, but we understand your points and agree that this is requiring deliberation on the commercial side as well.

Ms. JOHNSON. Thank you, Mr. Taylor.

Mr. LoBiondo.

Mr. LOBIONDO. Thank you, Madam Chairman.

Just a quick point to clarify, I hope, for something that Dr. Reddy said, and I thank you for your testimony on the effects of oil spills, Doctor, and I agree with you that your findings—both oil discharges are with your findings. But oil discharges are governed under the Oil Pollution Act of 1990. They are not nor have they ever been incidental discharges, and I just want to make sure, Madam Chairman, that that was clarified.

And for Mr. Hanlon, would you agree that these discharges incidental to vessel operations from a commercial vessel and a recreational vessel are, for all intents and purposes, materially the

same? I think this is what Mr. Taylor was getting at, but would you agree with that or not agree with that?

Mr. HANLON. I think if you compare discharges from commercial vessels for the whole class of commercial vessels, I think there are complexities of the operations that occur certainly on the largest of those commercial vessels that are very different than what you see off a typical recreational vessel.

At the smaller range, as Mr. Taylor was saying, I think sort of they are and could be very similar. But when you take all 98,000 commercial vessels that we believe would be covered by this decision, there are sort of members of that commercial vessel class where the waste streams are much more complex than you would see off of a typical recreational vessel.

Mr. LOBIONDO. So, for many instances with commercial operators that I represent who have a 35-foot commercial vessel, basically what we are telling them is that their rainwater discharge is different than that of the rainwater discharge of the 35-foot sailboat.

And this is the kind of stuff that drives people up a tree at home. They don't get it. They don't understand it, and there is no way that we can look them in the eye and try to tell them that the rainwater is different off of their vessel than it is off a sailboat. Help me out here.

Mr. HANLON. The benefit of the administration's approach in suggesting that commercial vessels, in the management of incidental discharges from commercial vessels, be moved over to a uniform national standard, a section 312-like standard, would basically allow the agency to work through a process to identify for the smaller categories of commercial vessels what those waste streams are and would have the authority to declare those de minimis discharges and not subject to any national standard.

However, as you move up the size scale to the more complex commercial vessels and the more complex waste streams, that it would give the agency, based on data we would collect specific to categories and classes of commercial vessels, what in fact is the nature of those waste streams and what uniform national standards would be appropriate.

Mr. LOBIONDO. But a 35-foot commercial boat as we stand today has got a problem; right?

Mr. HANLON. I would agree with your statement that the rainwater off a 35-foot commercial boat——

Mr. LOBIONDO. So what we are faced with is, if I would try to tell one of my commercial guys what you just said and we were out at sea, they would throw me overboard. I mean, part of the problem that we face here is, while this theory is wonderful inside the beltway, that when we get out in the real world, it has got to work. And what we are doing right now based on this court order is not going to work in the real world where people don't give a hoot about the theory. They are worried about the cost of fuel to get out there. They are worrying about all the other regulations they have got. And then I am going to try to tell them that their rainwater is different than that of off a sailboat.

I mean, this is very difficult. I hope you can sense our frustration.

Madam Chairman, if we get another round, I have got some more questions. Thank you.

Ms. JOHNSON. Thank you very much.

The Chairman of the Full Committee Mr. Oberstar.

Mr. OBERSTAR. Thank you much, Madam Chairman. And I appreciate your investment of time and energy in conducting the hearing which I committed to undertake during markup of our recreational boating legislation a couple weeks ago.

It is important to understand the dimensions of the issue we are dealing with here. And while the discussion is largely about incidental and there is somewhat of a spirit of dismissing incidental discharges, I would just like to recall that in this very Committee hearing room at this table, Thor Heyerdahl in the late '60s testified about his journey from Polynesia across the Pacific to the coast of South America on the Ra II raft, which he described the flotsam and jetsam in the Pacific Ocean, including hundreds and of thousands of tar balls which they collected, at least a sampling, from incidental marine discharges. There were no oil spills on the Pacific, but incidental discharges, grease and petroleum products that collected other items and floated along just slightly alongside of, and he said, ″our raft just barely kept ahead of those tar balls.″ Those do damage to the ocean environment.

When we were fighting the lamprey eel infestation in the Great Lakes that began in 1954 and continues to this very day, there wasn't enough of an awareness of the discharge from ballast water that followed upon opening of the St. Lawrence seaway and bringing vessels from the seven seas into the Great Lakes and along with them zebra muscles, quagga muscles, and spiny echinoderms and the round-eyed European goby and purple loosestrife and a whole host of other invasive species that have flooded the Great Lakes, that have been carried to the inland waters of Wisconsin, Minnesota, Illinois, Indiana, Ohio, and moving their way further west.

And I remember, when I was raising this issue, colleagues on the Committee from the West Coast say, ″not a problem, we don't have a problem with discharges from ballast water,″ until nonnative species from the East China Sea began showing up in the harbors of the West Coast from Southern California to the State of Washington.

So we need to understand better the dimension of the issue you are dealing with in the proposed rulemaking and the nature of and extent of an exemption for commercial vessels, and that starts with the definition of the term ″incidental.″ Incidental is on one end; what is on the other end? What is the opposite of incidental, and how do you measure the two?

Pull your microphone up closer to you so we can hear you better. Thank you.

Mr. HANLON. The administration's proposal in terms of moving the discharges from commercial vessels to a 312-like program would basically have that decision-making process made based on a study of different categories of commercial vessels. So sitting here today, EPA does not have the information that we believe we would need to make those kinds of decisions in terms of the 91,000 U.S. flag commercial vessels, the 8,000 foreign flag vessels that come

into U.S. ports every year, to understand the waste streams that come off of those, the 28 different categories of waste and which are of concern and how to manage those all sort of the incidental waste stream category. Ballast water is a different category that we are sort of working with the Coast Guard on and are not, as I understand it, the subject of the today's hearing.

Mr. OBERSTAR. But you haven't quite addressed the issue I raised. If, on one hand, you are proposing to deal with—and one of the issues raised by those who are concerned about the regulation is incidental discharges. How much is incidental? And how does that compare with what is on the other end of the spectrum of discharges? Is there a major or maximum or a significant? I want to understand the dimension of what you are trying to address in this rulemaking.

Mr. HANLON. As EPA made the decision—the regulatory exclusion that is—and the vacatur of that, that is the subject of the court decision and certainly today's hearing. Since 1973, EPA has regulated a number of vessel-based discharges that we have determined sort of since the early days of the Clean Water Act are, in fact, not incidental and that includes onboard seafood processing, mining, oil drilling, spills, illegal dumping, trash, garbage, et cetera. Those are not incidental; those are sort of not covered.

Mr. OBERSTAR. That is what I am trying to get at. So the rule that you cite in your testimony and I recall very well as I was chief of Committee staff in 1972, and we wrote the Clean Water Act and followed closely all the regulatory promulgations, but the exclusion from 1973 until the recent court case was discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, showers, galley sink wastes, and other discharges incidental to the normal operation, and then you have the regulation specifies what is not incidental: rubbish, trash, garbage, material discharged overboard on the Great Lakes. You can throw dunnage and other items into that. So how are you attempting to cope with the district court decision which is now under review by the circuit court? How are you proposing to deal with that?

Mr. HANLON. On Tuesday, in the Federal Register, we will propose two general permits, one for recreational vessels and one for commercial vessels. And basically, those would be general permits that will be out for public comment for 45 days. We have three public meetings and a public hearing scheduled to receive input, answer questions on the terms of those general permits. But sort of given the structure of the 402 permitting program and the district court decision that EPA has appealed—and our appeal is pending in the Ninth Circuit—that we felt it was prudent to move forward with permit instruments that would allow coverage for all vessels pending either legislative relief or judicial relief with respect to the district court decision.

Mr. OBERSTAR. And that is a prudent and appropriate approach. You just a moment ago alluded to different classes of commercial vessels. Among those classes of commercial vessels, is there one which you would envision a general permit and maintaining the exclusions of the 1973 rule?

Mr. HANLON. Our current thinking is that, given the structure of the Clean Water permitting program, we would. The general

permit covers all commercial vessels but has a tiering system in terms of what their obligations are. For example, there are classes of commercial vessels that would not need to apply to a general permit— through a notice of intent. There would be no required paperwork. They would have a set of best management practices required, and that would be their obligations under the permit.

Mr. OBERSTAR. Would that include the type of vessel that Mr. Taylor a moment ago alluded to or Mr. LoBiondo referred to a moment ago?

Mr. HANLON. In all likelihood, yes.

Mr. OBERSTAR. They would be covered. And how would the general permit process work in practice? How would Mr. Taylor's constituent, who operates—what are they? G-mast, 50-some-foot vessels?

Mr. TAYLOR. Fifty, sixty, seventy.

Mr. OBERSTAR. Sixty to seventy? I think you have a 79-foot category.

How do you envision that working?

Mr. HANLON. First of all, the 79-foot category is for recreational vessels. That is the way that we define recreational vessels for purpose—for the first general permit. The second general permit are all commercial vessels, and for those that are based on sort of the complexity of the operation are really sort of a size, gross tonnage limit as well as those that take on a certain proposed amount of ballast water, I think, is 8 cubic meters. So if a fishing vessel has no ballast water and is over 300 metric tons, basically, their obligation under the general permit would be to abide by some best management practices outlined in the permit. There would be no cost to apply—there is no application, so there is no cost. And their obligation would be to implement those best management practices.

Mr. OBERSTAR. How do they apply for this——

Mr. HANLON. They would not need to apply. There would be no application required for that smaller set—smaller size of commercial vessel.

Mr. OBERSTAR. And what percent of commercial vessels would be covered by that general permit?

Mr. HANLON. Our best estimate right now is about half.

Mr. OBERSTAR. About half. And the other half are a much larger size?

Mr. HANLON. Much larger. And they would be required to submit a notice of intent to be covered under the general permit. And for some specific classes, like cruise ships, they would have an additional set of requirements.

Mr. OBERSTAR. And when do you envision the rulemaking to run its course of the public review and commentary period?

Mr. HANLON. We plan to have it proposed in the Federal Register on Tuesday next week. It will be available on our Web site on Monday for people to take a look at.

Mr. OBERSTAR. A how many day comment period?

Mr. HANLON. A 45-day public comment period, which brings us to about the end of July. There will be a challenge, depending on the number of comments received, and finalize those two general permits by the end of September, but that is our objective.

Mr. OBERSTAR. Would that process accommodate the beginning of fishing season for those commercial fishing vessels?

I know Mr. Young at our hearing insisted that September/October is the time when the ″Deadliest Catch″ starts running on TV.

Mr. HANLON. Our target is driven by the court schedule and the vacatur taking effect on September 30. I think fishing seasons are different sort of depending on where you are at around our coastlines or inland waters, but September 30 is our clear objective to have that permit in place.

Mr. OBERSTAR. Thank you very much.

I have loads of other questions, but there are other Members who have their own issues to pursue here, and I want them to have that opportunity.

Thank you.

Mr. BOOZMAN. Madam Chairman, can I ask unanimous consent that Mr. Young be allowed to join us on the dais?

Ms. JOHNSON. Yes, without objection.

Mr. OBERSTAR. Without objection, absolutely.

I didn't notice that the gentleman had come in, our former Chairman.

Thank you for participating.

Mr. YOUNG. Thank you, Mr. Chairman.

I am very interested in what is going on here, as you know.

Madam Chairman, thank you. And I want to thank you, Mr. Chairman, and, Madam Chairman, for committing to this hearing.

This is a crucially important issue. And what I am concerned with, Madam Chairman, and, Chairman of the Full Committee, is how this affects the fishing industry and what can we do to make sure, if the EPA goes along with the court rulings, that we can make sure that our fishermen still can fish without any undue burden? I don't know exactly, when we go to sizes of ships, whether that will solve our problem because we have such a thing as a brine tank, Mr. Hanlon, which is where we put our fish in. It is on our crab boats. It is on the rest of them. Now, is that considered discharge when they drain the brine tank, and will they have to have permits in doing so, and who will supervise it?

Mr. HANLON. I am not personally familiar with sort of the intricacies of managing a fishing boat other than watching the TV show, as the Chairman mentioned, with my son on a regular basis.

Basically, all discharges, by Clean Water Act definition, are covered. However, the general permits that we are prepared to propose on Tuesday in their first iteration—the permits will be in place for up to 5 years—will basically require commercial vessel operators to implement good boating practice, best management practices, so that if they are sort of in compliance in keeping with sort of what is deemed to be good practice in the industry today, we don't anticipate that their obligations on October 1 will be significantly different than what they need to do on September 30, the day that the vacatur expires.

Mr. YOUNG. Mr. Chairman, that is our biggest problem.

Now, I take your word for it. I think your intent is following the court ruling. I do also think there is a tendency within the agency itself to be somewhat meddlesome sometimes, and I think our job as legislators is to make sure this does not occur in a commercial

endeavor that is really not a polluter but can't meet the requirements of the regulations.

Now, that is easy. They can do it. Well, that is somebody sitting in the beltway and not outside the beltway dealing on the ground with the industry itself. I go back to these brine tanks. This is where we put the fish or the crab, and we haul them so they are still alive, especially the crab and not the fish, but when we drain that, is that considered—would we have to get a permit, and what imposition would that put on the fishermen?

I believe the gentleman from Mississippi has also mentioned the fact, and the gentleman from New Jersey, that we are having enough problems now with the high cost of fuel, et cetera, at meeting even the break-even point. And I don't want the government to do what is not logical.

And the reason I say that, Mr. Chairman, the agency, EPA agency, went into my city of Kenai and arbitrarily, without any science or any backup, required a less amount of arsenic in drinking water than the municipal produces which is natural. It is going to cost $25 million to put in a plant to make the water purer than nature makes it, and I just think that is a ridiculous situation, and there was no science behind it. Somebody here was sitting in Washington, D.C., ″Well, this is not acceptable.″

Now, if it was manmade, I could see it, but this is natural and have been drinking it for 500 years. I can drill a well and drink the water, and there is no problem. But because of the municipality is delivering it, they have to meet the standard. And it has no sense.

And I just hope we don't go through this line, Mr. Chairman, through this so-called regulation of discharged deck water, brine water, storage bins, et cetera, and not be able to recuse or make sure that when we get involved in this that, if you are going to insist upon following the letter supposedly of your regulations and my fishermen are put out of business, then we have to act. We have to take the responsibility to say, you are not using logic, applying it to our fisheries.

Mr. DUNCAN. Will the gentleman yield?

Mr. YOUNG. Yes, I will gladly yield.

Mr. DUNCAN. I know we are running out of time here, so I will just try and say very quickly, if I can, I was impressed with Ms. Metcalf's testimony talking about the practical impossibility of applying these detailed regulations to the 16 million recreational vehicles, 110,000 commercial fishing vessels, 53,000 freight and tank vessels, and the cost of all this.

But what concerns me is, in 1978, in east Tennessee, we had 157 small coal companies. Then we opened up an Office of Surface Mining there, and slowly but surely, all the small companies went out. Then all the medium-sized companies went out. And now you have just a few big giants. And that happens in every industry when you overregulate. And I was concerned, I was impressed with what Mr. LoBiondo said about how these regulations sometimes sound good inside the beltway, but he said his 35-foot fishing vessel operators might throw him overboard.

And what happens when we have these comment periods and these public hearings, most of these small fishing operators are not

lawyers. They generally don't submit or don't even know how to submit comments. Then these public hearings are dominated by academic types and environmental do-gooders that are very wealthy people but who probably never set foot on a small commercial fishing vessel, as Mr. Hanlon said he hadn't. And you've got enough employees over there. Send them out and have them ride on a small commercial fishing vessel a few places around the country and see how these rules would work in the real world.

What I am afraid of is, if we come in, and we do what the court has said and what some of these academic types and environmental radicals would have us do, you are going to see thousands of small commercial fishing operators go out of business. And I don't think that would be a good thing because what it would do, it would drive up the cost of fish, just like the cost of coal has exploded when we have run all the coal operators out.

And I don't know whether Ms. Metcalf has an estimate, but she talks about these State water quality people saying they have a budget shortfall of $700 million to $900 million in 2001, and it would be much higher now. I tell you, I believe it would cost a fortune if you have an overly broad application of the rules that would have to be applied under this NPDES regiment. It would be unbelievable. And those costs would have to be passed on to the consumers in all of these areas, affecting everything that we buy. So we are about to get ridiculous here, and we need a little common sense applied to some of these things.

Thank you for yielding.

Mr. YOUNG. Madam Chairman, I know my time has run out.

But, again, the court made this ruling. So it is up to us as a legislative body to tell the court they are wrong.

I can attack you all I want. And, very frankly, that is your job, and you are doing what you have to do. So I want to make that clear. But I want to make also the point—and I do support the recreational business, but we have got 18 million recreational boats we are exempting and 80,000 commercial fishing boats. And if we didn't want to get into it, if we wanted to compare discharge and discharge, the 18 million boats are far exceeding the 80,000. So if we go forth with this, as I think we should—and don't let the court legislate for us. That is what we are fighting here, ladies and gentlemen, the court. And I think we have a responsibility to those which we represent and those that are in industrial and those that have a commercial license, to make sure that they are defended because they have done no harm. So let us take the court, especially out of California, I believe, and let us do our job, and then EPA doesn't have to worry about it anymore. You don't have to pass all those regulations. You don't have to do all this other nonsense. And, very frankly, it is nonsense. That is what gives government a bad name.

We ought to start using logic. So let us go do our job, and we will try to get this amendment adopted so that it includes the 80,000 commercial vessels.

I yield back, and thank you, Madam Chairman.

And, Mr. Chairman of the Full Committee, too, thank you.

Mr. TAYLOR. Madam Chairman.

Ms. JOHNSON. Just one moment.

I want to ask, Mr. Fisk, if you will submit to the following at a later time. We are trying to close it out before we go for voting.

In your opinion, is there a Federal role in regulating discharges incidental to the normal operation of a commercial vessel? And, also, how are States to protect coastal waters from commercial vessels?

And if you would submit your recommendations to the Committee, I would appreciate it.

And, Dr. Reddy, in carrying out your research on marine pollution, you have identified that the majority of the crude oil and refined products that enter coastal waterways and oceans from human activity comes from commercial shipping operations. However, some have said that the existing international and Federal laws to prevent the release of oil into the coastal waterways is more than adequate to protect the marine environment. In your opinion, is the current regulatory regime working to control the release of oil and other refined products into the marine environment?

If you will submit your response in writing, I would appreciate it.

Mr. Taylor.

Mr. TAYLOR. Thank you, Madam Chairman.

Keeping in mind that we have votes on the floor and a fairly busy schedule on the floor today and the Chairwoman's desire to wrap this up, I would ask unanimous consent that our witnesses be given an additional 5 days to submit any additional remarks that they would like to make to the Committee.

Since we have had our chance to say our piece, I would like to give them one additional opportunity if they feel like there are some follow-up comments that need to be made.

Ms. JOHNSON. Without objection.

Mr. TAYLOR. Thank you, Madam Chairman.

Ms. JOHNSON. Thank you.

The Committee is adjourned. We are not going to be returning today.

Thank you very much to all the witnesses.

[Whereupon, at 11:38 a.m., the Subcommittee was adjourned.]

Hon. John Boozman
Hearing on
"Discharges Incidental to the Normal Operation of a Commercial Vessel"
June 12, 2008

- Today, the Subcommittee is meeting to hear testimony on Discharges Incidental to the Normal Operation of a Commercial Vessel.

- This event continues the recent trend of the Committee by first marking up legislation and then holding the hearing.

- To clarify the reach of the Clean Water Act and to ensure the Environmental Protection Agency is appropriately regulating discharges from recreational vessels, my colleague Steven LaTourette of Ohio offered H.R. 5949, the "Clean Boating Act of 2008," providing a narrow Clean Water Act exemption for discharges incidental to the normal operation of recreational vessels.

- This legislation is vital to avoid the unintended consequences of a questionable judicial decision, specifically a 2006 U.S. District Court order from the Northern District of California that revoked the Environmental Protection Agency's Clean Water Act regulatory exemptions for these types of incidental discharges.

- Lawsuits filed by special interest groups and the subsequent court decision require the Environmental Protection Agency,

as of September 30, 2008, to regulate and issue point source discharge permits under the National Pollution Discharge Elimination System (NPDES) for deck runoff, graywater, and other incidental discharges from an estimated 18 million State-registered recreational boats, 110,000 commercial fishing vessels, and some 53,000 commercial freight and tank vessels sailing in U.S. waters.

- This will lead to a regulatory morass when the owners and operators of recreational boats, commercial fishing boats, and large commercial shipping vessels have to obtain Clean Water Act permits for activities as simple as merely washing their decks.

- Mr. LaTourette's bill, H.R. 5949, takes a more reasonable approach to protecting our waters by providing a targeted Clean Water Act exemption for recreational vessels.

- Instead of regulating recreational vessels under the Clean Water Act's NPDES permitting program under Section 402, it would instead require EPA to develop, under the Clean Water Act's vessel discharges program under Section 312, reasonable and practicable management practices to mitigate the adverse impacts that may result from incidental discharges from recreational vessels.

- In addition, the legislation would require EPA to develop performance standards for management practices based on the class, type, and size of vessel.

- However, this legislation does not go far enough, as it would only exempt, from NPDES permitting, incidental discharges from recreational vessels, and not commercial, emergency, or other similar vessels.

- The reach of the court decision could include fireboats, barges, vessels that aid barges transitting locks, sea planes, and maybe even the United States Army Corps of Engineers dredge fleet.

- The NPDES permit program is not the appropriate way to address incidental discharges.

- Instead, the Committee should look at Section 312(n) of the Clean Water Act for guidance in drafting language for regulating incidental discharges from vessels.

- While I support Mr. LaTourette's legislation and was pleased the Committee moved the bill at the previous markup, the Committee needs to go further and take steps to exempt commercial vessels from NPDES permitting as well.

- It is more appropriate to provide for the development of national enforceable uniform standards for discharges that are incidental to the normal operation of commercial vessels, in lieu of the use of NPDES permits.

- In the case of fishermen, those who make their living on the water are similar to farmers, miners, and loggers. Like other natural resource-dependent jobs, fishermen are not easily

placed elsewhere in the workforce when bureaucratic red tape or over-reaching by the courts forces them out of business.

- When we lose jobs on the water, we also lose jobs on the land, from the boatbuilders to the ice salesmen.

- As for the commercial shippers, they are at the heart of our nation's interstate and foreign commerce. If we subject vessels visiting ports in more than one state to different permit requirements in each state that they visit, they will be forced either to violate a state's laws or cease making port calls in states with requirements that are inconsistent with the technology that the vessel has installed in response to an earlier-enacted regulation from another state.

- There simply is no reason to interfere with interstate and foreign commerce in such ways, particularly when a more sensible and uniform approach is available under Section 312.

- Congress should reject this over-reach by the court and enact sensible legislation that exempts all vessels from NPDES permitting, and instead allows for a uniform national approach.

- Thank you, Chairwoman Johnson, for holding this hearing and I look forward to hearing from the witnesses.

OPENING STATEMENT OF
THE HONORABLE RUSS CARNAHAN (MO-3)
HOUSE TRANSPORTATION AND INFRASTRUCUTRE
WATER RECOURCES AND ENVIRONMENT SUBCOMMITEE

Hearing on
Discharges Incidental to the Normal Operation of a Commercial Vessel
June 12, 2008
10:00 Rayburn House Office Building

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Chairman Johnson and Ranking Member Baker, thank you for holding this hearing on the discharges incidental to the normal operation of a commercial vessel. I appreciate the witnesses coming to talk to us today about their study and recommendations on this issue.

Nobody can deny that we have the responsibility to make all efforts to protect our water sources. However, the Environmental Protection Agency regulations and the legislative proposal made by the Administration are deeply disconcerting. The EPA's conclusions that National Pollutant Discharge Elimination System permits are not required for the normal operation of vessels reflect irresponsible policy decisions. Evidence shows that these invading discharges raise environmental and economic concerns. Invasive species propagate, and upset the ecological balance in receiving waters. In a 2007 report given to Congress, the EPA testified that just within the Great Lakes, zebra mussel displacements alone are estimated to have cost between $750 million and $1 billion in losses to natural resources and damage to infrastructure between 1989 and 2000. Costs for the treatment and control of zebra mussel impacts on industrial and municipal facilities were estimated at $100 to 200 million annually in the Great Lakes. Given the economic significance of the Mississippi River to my home state of Missouri and its Third Congressional District, it is especially disturbing that the EPA has deemed these permits unnecessary, despite its own evidence indicating such harmful repercussions.

Additionally, the EPA's conclusion that it does not have sufficient information to determine the effects of discharges from commercial vessels has fueled the Administration's legislative proposal to suspend the NDPES requirements of the Clean Water Act for a period of six years. Although the Administration claims this suspension period is necessary to allow for the EPA to extensively evaluate the effects of these discharges, the length of time the proposal requires could potentially harm both the environment and the economy. Therefore, other measures to evaluate the effects of discharges incidental to commercial vessels must be explored. It would be irresponsible for this government to unnecessarily engage in policies which would put our waterways and the economy at risk.

Again, I want to thank the Chairman and Ranking Member for holding this hearing today and look forward to working with each of you as discussion of this issue continues.

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STATEMENT OF
THE HONORABLE JERRY F. COSTELLO
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
HEARING ON DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF A COMMERCIAL VESSEL
JUNE 12, 2008

Thank you, Madame Chairwoman, for holding this hearing on discharges incidental to the normal operations of a commercial vessel and their affect on the Clean Water Act.

The protection and the improvement of water quality are among the greatest responsibilities of this Subcommittee. Recent court decisions and a legislative proposal put forth by the Bush administration have called into question the definition of pollutant discharges, thus raising concerns about how such changes could affect normal operations of commercial vessels.

With the Great Lakes in my home state of Illinois and the commercial vessels using the Mississippi River which borders my congressional district, I am interested in hearing from our witnesses on this issue.

With that, I welcome the witnesses here today, and look forward to their testimony.

LARSON

Thank you, Chairman Oberstar and Chairwoman Johnson, for holding this hearing. I also want to thank my friend and colleague Congressman Gene Taylor for requesting this hearing and for his strong advocacy on this issue.

For more than 30 years the vessel discharges incidental to normal vessel operations have been exempt from NPDES permitting requirements – this includes all vessels of all sizes and uses: recreational use, commercial fishing, whale watch, charter fishing, cargo, and more.

While I thank the Chairman for moving quickly to mark up HR 5949, legislation to address the recent Court decisions and exempt recreational boats from permitting requirements, I am concerned that this legislation does not exempt commercial fishing vessels. Many of the fishing vessels that fish in Alaska are homeported in Seattle, and I have over one thousand commercial fishermen in my district.

Discharges from commercial fishing vessels and recreational vessels are materially the same. These discharges, whether from commercial fishing vessels or recreational vessels, are incidental to normal vessel operations. They include rain water running off a deck, water from a bilge pump, dishwater, and the seawater that is used in re-circulating seawater systems to keep seafood at the proper temperature.

A reinstatement of the prior 30 year exemption is an appropriate action, but it must address the problem for all vessels, not just recreational vessels.

I thank the Chairman for holding this hearing and I ask the Chairman, Ranking Member, and sponsor of the legislation to work with me and other interested members of the Committee to incorporate an exemption for the approximate 150,000 commercial fishing vessels operating in the US.

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
Subcommittee on Water Resources and Environment
6/12/08

--Thank you Madam Chairwoman.

--It has been 35 years since Congress passed the Clean Water Act, and the difference it has made has been enormous.

-- Back in 1972, when the landmark legislation was first enacted, only one-third of our nation's waters met water quality goals. Today, approximately two-thirds of our nation's waters meet these goals.

--That's serious progress, and I think we can all take pride in that.

--The act has proven invaluable to Arizona, a state with limited water resources, and unique environmental challenges.

--The act has long protected our lakes and streams and canals for drinking, irrigation, wildlife and recreation.

--It has not always been easy to balance our commercial and environmental needs, and today's discussion about incidental discharges of commercial vessels is yet another example.

--I look forward to hearing from today's witnesses.

--I yield back.

Statement of Rep. Grace F. Napolitano
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment Hearing
June 12, 2008

I thank Chairwoman Johnson for holding this important hearing. I am very concerned about the threat that invasive species pose to non-native waters. As Chairwoman of the Natural Resources Water and Power Subcommittee, I am holding a hearing later this month on the effects of the invasive Quagga Mussel in western waterways. The Quagga Mussel was introduced into the West from the ballast water of vessels coming from the Great Lakes. The Quagga mussel is a dime sized mussel that clogs water infrastructure, including pumps, intake valves, and pipelines. The Metropolitan Water District of Southern California has spent $25 million on fighting the Quagga Mussel since 2007. We must address the fact that discharges of ballast water carrying deleterious invasive species can cause serious harm to our nation's waters. EPA must fully study the impacts of all discharges from vessels and develop appropriate regulatory mechanisms to address the Environmental damage caused by vessel discharges.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES; THE OCEAN CONSERVANCY, INC.; WATERKEEPERS NORTHERN CALIFORNIA, *Petitioners,* and THE STATES OF NEW YORK, ILLINOIS, MICHIGAN, MINNESOTA, WISCONSIN, AND THE COMMONWEALTH OF PENNSYLVANIA, *Petitioners-Intervenors,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	No. 03-74795 EPA No. 03-5760

On Petition for Review of an Order of the Environmental Protection Agency

NORTHWEST ENVIRONMENTAL ADVOCATES; THE OCEAN CONSERVANCY; SANTA MONICA BAYKEEPER, dba San Francisco Baykeeper; dba DeltaBaykeeper,
Plaintiffs-Appellees,

and

THE STATES OF NEW YORK, ILLINOIS, MICHIGAN, MINNESOTA, WISCONSIN, AND THE COMMONWEALTH OF PENNSYLVANIA,
Plaintiff-Intervenors-Appellees,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellant,

and

THE SHIPPING INDUSTRY BALLAST WATER COALITION,
Defendant-Intervenor-Appellant.

No. 06-17187

D.C. No.
CV-03-05760-SI

NORTHWEST ENVIRONMENTAL ADVOCATES; THE OCEAN CONSERVANCY; SANTA MONICA BAYKEEPER, dba San Francisco Baykeeper; dba DeltaBaykeeper, *Plaintiffs-Appellees,* and THE STATES OF NEW YORK, ILLINOIS, MICHIGAN, MINNESOTA, WISCONSIN, AND THE COMMONWEALTH OF PENNSYLVANIA, *Plaintiff-Intervenors-Appellees,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Defendant-Appellant,* and THE SHIPPING INDUSTRY BALLAST WATER COALITION, *Defendant-Intervenor-Appellant.*	No. 06-17188 D.C. No. CV-03-05760-SI OPINION

Appeals from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
August 14, 2007—San Francisco, California

Filed July 23, 2008

Before: Michael Daly Hawkins, Kim McLane Wardlaw, and
William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher

COUNSEL

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TION, Harrisburg, Pennsylvania, Michael W. Evans, KIRKPATRICK & LOCKHART PRESTON GATES ELLIS, for the plaintiffs-intervenors-appellees.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs in this case are Northwest Environmental Advocates, San Francisco Baykeeper, and The Ocean Conservancy. Plaintiffs-intervenors are the States of Illinois, Michigan, Minnesota, New York, Pennsylvania, and Wisconsin. Plaintiffs and plaintiffs-intervenors challenge a regulation originally promulgated by the Environmental Protection Agency ("EPA") in 1973 exempting certain marine discharges from the permitting scheme of sections 301(a) and 402 of the Clean Water Act ("CWA"). That regulation, 40 C.F.R. § 122.3(a), provides that the following vessel discharges into the navigable waters of the United States do not require permits: discharge of effluent from properly functioning marine engines; discharge of laundry, shower, and galley sink wastes from vessels; and any other discharge incidental to the normal operation of a vessel, including the discharge of ballast water.

The district court concluded that the EPA had exceeded its authority under the CWA in exempting these discharges from permitting requirements. The district court vacated § 122.3(a), effective September 30, 2008. We affirm the decision of the district court.

I. Background

A. The CWA and 40 C.F.R. § 122.3(a)

In 1972, Congress enacted sweeping amendments to the Federal Water Pollution Control Act of 1948. After another

round of substantial amendments in 1977, the statute became known as the Clean Water Act. The CWA declares a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1).

Section 301(a) of the CWA provides that, subject to certain exceptions, "the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a). One of these exceptions is for discharges authorized by a permit granted pursuant to the National Pollutant Discharge Elimination System ("NPDES"), a system set forth in section 402 of the Act. *Id.* §§ 1311(a), 1342. The combined effect of sections 301(a) and 402 is that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit." *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003). The EPA administers the NPDES. 33 U.S.C. § 1251(d).

Obtaining a permit under the CWA need not be an onerous process. For example, in appropriate circumstances a discharge may be allowed under a "general permit" requiring only that the discharger submit a "notice of intent" to make the discharge. As we explained in *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, 1183 (9th Cir. 2002):

> NPDES permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. *See* 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. *See id.* §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. *See id.* § 122.28(a)(2). After

> a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. *Id.* § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. *Id.* § 122.28(b)(2)(iv).

In 1973, the EPA exempted by regulation several categories of vessel discharges from NPDES permitting requirements under the CWA. *See* NPDES, 38 Fed. Reg. 13,528, 13,530, § 125.4 (May 22, 1973). The regulation provides that "[t]he following discharges do not require NPDES permits":

> 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. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation[.]

40 C.F.R. § 122.3(a). The CWA expressly exempts sewage discharges from vessels from the permitting process and regulates these discharges by other means. *See* 33 U.S.C. §§ 1362(6)(A), 1322. Because § 122.3(a) does not itself exempt sewage discharges but instead merely recognizes the statute's exemption of sewage discharges, the sewage clause in § 122.3(a) is not subject to the *ultra vires* claim made here. *See also Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 493 n.13 (9th Cir. 1984) (contrasting the express statutory exemption of sewage with regulation relating to "deballasting" by ships). Therefore, three categories of discharges exempted by 40 C.F.R. § 122.3(a) are at issue in this case: (1)

marine engine discharges; (2) graywater discharges ("laundry, shower, and galley sink wastes"); and (3) "any other discharge incidental to the normal operation of a vessel."

The first proposed draft of the regulation would have excluded only marine engine discharges. *See* NPDES, 38 Fed. Reg. 1362, 1363-64, § 125.4(c) (proposed Jan. 11, 1973). The EPA subsequently added the exclusions for graywater and other discharges incidental to normal vessel operations. When promulgating the final regulation in May 1973, the EPA explained its anticipated effect: "Most discharges from vessels to inland waters are now clearly excluded from the permit requirements." 38 Fed. Reg. at 13,528, (b)(13)(ii). The EPA stated that "[t]his type of discharge generally causes little pollution." *Id.* The EPA stated, further, that the "exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically." *Id.* Decades later, an EPA administrator declared that in 1973:

> [W]e were faced with many, many other much higher priority situations such as raw sewage being discharged, municipal plants having to be built, very large paper mills or steel mills and the like discharging. At the time we thought that was not an important area to deal with. . . . Vessels were not important to the overall scheme of things at that time.

Craig Vogt, EPA, EPA Pub. Meeting #12227, Ocean Discharge Criteria (Sept. 12, 2000, 1 p.m.). The EPA amended the regulation in 1979 in minor respects that do not affect our analysis. *See* NPDES, Revision of Regulations, 44 Fed. Reg. 32,854, 32,902, § 122.4 (June 7, 1979); *see also* NPDES, Revision of Existing Regulations, 43 Fed. Reg. 37,078, 37,079, I(c)(2) (Aug. 21, 1978) (describing the proposed changes).

The text of the CWA does not exempt from NPDES requirements marine engine discharges, graywater discharges,

or other discharges incidental to the normal operation of vessels. However, the EPA contended in 1973, and continues to contend, that it has the power to provide these exemptions by regulation. The Administrator of the EPA prefaced the draft January 1973 regulation with a statement that a discharger could discharge lawfully only if the discharger "possesses a valid permit or is excluded from coverage by law *or regulation*." NPDES, 38 Fed. Reg. at 1362 (emphasis added). The final rules similarly stated that "[a]ll discharges of pollutants . . . are unlawful . . . , unless the discharger has a permit or is specifically relieved by law *or regulation* from the obligation of obtaining a permit." NPDES, 38 Fed. Reg. at 13,531, § 125.11(a) (emphasis added).

The first category exempted by § 122.3(a), marine engine discharges, includes unburned fuel and various kinds of oil. The second category, graywater discharges, can include pathogens such as fecal coliform, enterococci, and E. coli and pollutants such as ammonia, arsenic, copper, lead, nickel, and zinc. *See, e.g.*, EPA Draft Cruise Ship Discharge Assessment Report (Dec. 2007), *available at* http://www.epa.gov/owow/oceans/cruise_ships/pdf_disch_assess/cruiseship_discharge_assessment_report.pdf. The third category, "any other discharge," includes, among other discharges, ballast water from ships. *Cf.* 33 U.S.C. § 1322(a)(12)(A)(i) (defining this broad "other discharge" category for purposes of a different CWA section).

Plaintiffs have made clear, both here and in the district court, that their primary environmental concern stems from the discharge of ballast water. We quote a passage from the district court's order granting plaintiffs' motion for permanent injunctive relief that describes the purpose of ballast water and the effects of its discharge:

> Ballast water is water that is taken on by cargo ships to compensate for changes in the ship's weight as cargo is loaded or unloaded, and as fuel and sup-

plies are consumed. Ballast water may be used for a number of different purposes, such as maintaining stability, maintaining proper propeller and bow immersion, and to compensate for off-center weights. Thus, ballast water is essential to the proper functioning of cargo ships, as well as to the safety of its crew.

Because ballast water is primarily used to compensate for changes in cargo, it is generally taken in or pumped out at the ports along a ship's route. When a ship takes on ballast water, whether freshwater or saltwater, organisms found in that water are typically taken in as well. These organisms are carried in the ballast tanks of the ship until the ship arrives at its next port, where, due to changes in the distribution of the ship's cargo, they may be released into a new ecosystem. Due to the size of ballast tanks on modern cargo ships, and the speed with which these ships can reach their destinations, organisms are increasingly able to survive the journey to a new ecosystem. All told, "more than 10,000 marine species each day hitch rides around the globe in the ballast water of cargo ships." A number of these species are released into U.S. waters in the more than 21 billion gallons of ballast water released in the United States each year.

If these foreign organisms manage to survive and reproduce in the new ecosystem, they can cause severe problems in the natural and human environment. For example, zebra mussels, native to the Caspian Sea region of Asia, were brought into the Great Lakes in the ballast water of cargo ships. "Zebra mussels have clogged the water pipes of electric companies and other industries; infestations in the Midwest and Northeast have cost power plants and industrial facilities almost $70 million between 1989

and 1995." As another example, according to a 2001 EPA report,

> [a]n introduced strain of cholera bacteria, possibly released in the bilge water of a Chinese freighter, caused the deaths of 10,000 people in Latin America in 1991. This cholera strain was then imported into the United States from Latin America in the ballast tanks of ships that anchored in the port of Mobile, Alabama. Fortunately, cholera bacteria were detected in oyster and finfish samples in Mobile Bay . . . and no additional deaths occurred from exposure to this pathogen.

With a lack of natural predators, invasive species can multiply rapidly and quickly take over an ecosystem, threatening native species. Indeed, invasive species "are a major or contributing cause of declines for almost half the endangered species in the United States." Once established, invasive species become almost impossible to remove, leading "[s]cientists, industry officials, and land managers [to] recogniz[e] that invasive species are one of the most serious, yet least appreciated, environmental threats of the 21st century."

In economic terms, invasive species can also have a devastating effect. The Department of Agriculture spends millions of dollars per year to detect and prevent invasive species. One study cited by the [General Accounting Office] concluded that "total annual economic losses and associated control costs [are] about $137 billion a year — more than double the annual economic damage caused by all natural disasters in the United States."

Nw. Envtl. Advocates v. EPA ("*Northwest Environmental Advocates II*"), No. 03-05760, 2006 U.S. Dist. LEXIS 69476, at *10-12 (N.D. Cal. Sept. 18, 2006) (citations omitted; sixth alteration added).

B. Procedural History

In January 1999, plaintiffs petitioned the EPA, asking that the agency repeal 40 C.F.R. § 122.3(a). *See* Petition for Repeal of 40 CFR § 122.3(a) (Jan. 1999) ("Petition for Rulemaking"). Plaintiffs contended that the regulation was not authorized by the CWA and was thus *ultra vires*. Plaintiffs sued the EPA a year and a half later, alleging unreasonable delay in responding to their petition. The district court ordered the EPA to respond to the petition, but the EPA obtained a stay from this circuit. Under a subsequent consent decree, the EPA agreed to "grant, deny, or grant in part and deny any remaining part of NWEA's petition" by September 2, 2003. *Nw. Envtl. Advocates v. EPA*, 340 F.3d 853, 857 (9th Cir. 2003). On the day of the deadline, the EPA denied plaintiffs' petition in its entirety. *See* EPA, Decision on Petition for Rulemaking To Repeal 40 C.F.R. 122.3(a) (Sept. 2, 2003) ("EPA Decision on Petition"); *see also* Availability of Decision on Petition for Rulemaking To Repeal Regulation Related to Ballast Water, 68 Fed. Reg. 53,165 (Sept. 9, 2003) (giving notice of the denial).

Plaintiffs brought suit against the EPA three months later, in December 2003. Their first cause of action alleged that 40 C.F.R. § 122.3(a) is not authorized by the CWA and is thus *ultra vires*. *See* 5 U.S.C. § 706(2)(C). Their second cause of action alleged, based on their *ultra vires* argument, that the 2003 EPA Decision on Petition was "not in accordance with law." *See* 5 U.S.C. § 706(2)(A). At the same time, as a protective measure in the event that the district court lacked jurisdiction, the plaintiffs filed directly with this court a petition for review of the EPA Decision on Petition, pursuant to jurisdictional provisions contained in 33 U.S.C. § 1369(b)(1).

In March 2005, the district court granted summary judgment to plaintiffs on their first cause of action and ordered the EPA to repeal § 122.3(a). *Nw. Envtl. Advocates v. EPA* ("*Northwest Environmental Advocates I*"), No. 03-05760, 2005 U.S. Dist. LEXIS 5373, at *40 (N.D. Cal. Mar. 30, 2005). It is unclear whether the district court reached plaintiffs' second cause of action. Given the court's holding on the plaintiffs' first cause of action, however, it did not need to do so. The district court ordered further proceedings to determine the appropriate remedy. *Id.* The six states intervened as plaintiffs at the remedy stage "to protect their sovereign, proprietary, regulatory, and economic interest in the States' waters." The Shipping Industry Ballast Water Coalition ("Shipping Coalition") intervened as a defendant. In September 2006, the district court vacated the challenged portions of 40 C.F.R. § 122.3(a) as of September 30, 2008. *Nw. Envtl. Advocates II*, 2006 U.S. Dist. LEXIS 69476, at *2.

The EPA and the Shipping Coalition (collectively, "the EPA") appealed the district court's decision to this court. We consolidated their appeal with the petition filed directly in this court.

II. Standard of Review

We review de novo questions of subject matter jurisdiction, *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 924 (9th Cir. 1999); the legal question of whether a statute of limitations applies, *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (as amended); a district court's grant of summary judgment, *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1008 (9th Cir. 2006); and the legal question of whether a plaintiff has exhausted the necessary administrative remedies, *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 961 (9th Cir. 2006).

Under 5 U.S.C. § 706(2)(C), the provision we apply to the plaintiffs' first cause of action, we must "set aside agency

action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." This standard requires the application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See, e.g.*, *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 758 (D.C. Cir. 2003); *Anna Jacques Hosp. v. Leavitt*, 537 F. Supp. 2d 24, 29-30 (D.D.C. 2008) ("To determine if the Secretary exceeded his statutory authority in violation of 5 U.S.C. § 706(2)(C), the Court must engage in the two-step inquiry required by *Chevron*.").

When "reviewing an agency's statutory interpretation under the APA's 'not in accordance with law' standard," *see* 5 U.S.C. § 706(2)(A), the standard applied to the plaintiffs' second cause of action, we also "adhere to the familiar two-step test of *Chevron*." *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002); *cf. Cleveland v. Ohio*, 508 F.3d 827, 838 (6th Cir. 2007) ("Agency action is 'not in accordance with the law' when it is in conflict with the language of the statute . . . .").

We review the district court's remedial order for abuse of discretion. *Biological Legal Found. v. Badgley*, 309 F.3d 1166, 1176 (9th Cir. 2002).

III. Discussion

The EPA argues that the district court lacked subject matter jurisdiction over plaintiffs' suit, and that we therefore have subject matter jurisdiction over the appeal only insofar as necessary to order the district court to dismiss the suit for want of jurisdiction. On the alternative assumption that the district court had subject matter jurisdiction, the EPA argues that the statute of limitations bars the *ultra vires* claim contained in the plaintiffs' first cause of action; that the district court erred on the merits in finding that the CWA did not authorize the exemptions contained in 40 C.F.R. § 122.3(a); and that the district court abused its discretion in choosing its remedy.

A. Subject Matter Jurisdiction

The district court had subject matter jurisdiction over plaintiffs' suit under the general federal question statute, 28 U.S.C. § 1331, unless some other statute divested the district court of jurisdiction. The only statute that could have had that effect is section 509(b)(1) of the CWA. *See* 33 U.S.C. § 1369(b)(1). Section 509(b)(1) specifies seven categories of agency action for which a challenge must be brought as an original proceeding in a court of appeals rather than in a district court. The EPA contends that plaintiffs' *ultra vires* challenge to § 122.3(a) falls within two of these seven categories. If the EPA is right as to either category, the district court did not have subject matter jurisdiction, and we must review the EPA's action by means of plaintiffs' petition for review filed directly in this court.

We do not lightly hold that we have jurisdiction under section 509(b)(1). We have "counseled against [its] expansive application." *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002). "The specificity and precision of section [509], and the sense of it, persuade us that it is designed to exclude" EPA actions that Congress did not specify. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). Indeed, "[n]o sensible person . . . would speak" with such detail otherwise. *Id.*

We address the two potentially relevant categories of section 509(b)(1) in turn, concluding that the agency action falls in neither category. The district court therefore had subject matter jurisdiction over plaintiffs' suit.

1. Section 509(b)(1)(E)

[1] Subsection 509(b)(1)(E) provides for review by a court of appeals of EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311,

1312, 1316, or 1345 of this title." *See* 33 U.S.C. § 1369(b)(1)(E) (referring to sections 301, 302, 306, and 405 of the CWA). The CWA defines an "effluent limitation" as "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . ." 33 U.S.C. § 1362(11); *see also* 40 C.F.R. § 122.2 (same); *cf.* 33 U.S.C. §§ 1311, 1314(b) (establishing a procedure for adopting effluent limitations guidelines).

Section 509(b)(1)(E) authorizes original court of appeals jurisdiction for challenges to regulations that establish numerical limitations and similar limits. For example, in *Natural Resources Defense Council v. EPA*, 673 F.2d 400, 402 (D.C. Cir. 1982) ("*NRDC D.C. Cir.*"), the D.C. Circuit exercised jurisdiction under section 509(b)(1)(E) over a challenge to regulations setting forth "a complex set of procedures for issuing or denying NPDES permits." In upholding its jurisdiction, the D.C. Circuit characterized the regulations as "restrict[ing] who may take advantage of certain provisions or otherwise guid[ing] the setting of numerical limitations in permits," and as constituting " 'a limitation on point sources and permit issuers' and 'a restriction on the untrammeled discretion of the industry' that existed before passage of the CWA." *Id.* at 404-05 (quoting *Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977)).

[2] The regulation in this case can be characterized as "approving or promulgating any effluent limitation or other limitation" only if those words are understood in a Pickwickian sense. The regulations in *NRDC D.C. Cir.* established procedures under which limitations on discharges of effluent would be implemented. Unlike the regulations in that case, 40 C.F.R. § 122.3(a) provides no limitation whatsoever.

[3] We conclude that section 509(b)(1)(E) does not authorize original jurisdiction in the court of appeals in this case. Section 122.3(a) does not involve the approval or promulga-

tion of "any effluent limitation or other limitation," but rather creates the categorical and permanent exemptions of three types of discharges from any limit imposed by a permitting requirement.

2. Section 509(b)(1)(F)

[4] Section 509(b)(1)(F) provides for review by a court of appeals of EPA actions "in issuing or denying any permit under section 1342 of this title." *See* 33 U.S.C. § 1369(b)(1)(F) (referring to section 402 of the CWA).

[5] In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980), the Supreme Court held that section 509(b)(1)(F) also covers EPA actions "functionally similar" to the denial of permits. The facts of the case make clear that the Court understood functional similarity in a narrow sense. The State of California, which had been delegated permit granting authority under the CWA, proposed granting point source permits to pulp mills discharging pollutants into the ocean. *See id.* at 194-95. If California had not been delegated permit-granting authority, the EPA would have granted or denied the permits directly. *See id.* at 196-97. The EPA vetoed the proposed permits. *See id.* at 194. Because the EPA was not the permit-granting entity, the plaintiff contended that the EPA's action was not the issuance or denial of a permit within the meaning of section 509(b)(1)(F). *See id.* at 195. The Court concluded instead that the fortuitous circumstance that this case arose in a state with permit-granting authority should not produce a different jurisdictional result from a case involving a state without such authority. *Id.* at 196-97; *see also Ga.-Pac. Corp. v. EPA*, 671 F.2d 1235, 1238-40 (9th Cir. 1992) (exercising original jurisdiction over denial of a variance); *Pac. Legal Found. v. Costle*, 586 F.2d 650, 655 (9th Cir. 1978) (exercising original jurisdiction over extension of a permit), *rev'd on other grounds*, 445 U.S. 198 (1980).

In *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992), we exercised jurisdiction under section

509(b)(1)(F) over a challenge to an EPA regulation of stormwater discharges from inactive mining operations. The EPA concluded that these discharges required permits because they were "associated with industrial activity" under section 402(p)(2)(B) of the CWA. The challenged regulation therefore required permits for most inactive mines, but, based on temporary permitting delays provided by section 402(p), the regulation exempted "reclaimed" inactive coal mines from the permit requirement until the expiration of a moratorium. *Id.* The Mining Congress, representing inactive mines required to obtain permits, challenged the portion of the regulation *requiring* permits. *Id.* at 764. The Mining Congress used the exemption of reclaimed mines to argue that other inactive mines should receive the same favorable treatment. *Id.* at 764-65. *American Mining Congress* is inapplicable to our case because the Mining Congress challenged the requirement that certain mines obtain a permit, not an exemption.

We have applied section 509(b)(1)(F) in two cases involving challenges to stormwater regulations where those regulations were based in part on exemptions specified in the text of the CWA. In *Natural Resources Defense Council v. EPA* ("*NRDC 9th Cir. 1992*"), 966 F.2d 1292 (9th Cir. 1992), we exercised jurisdiction under section 509(b)(1)(F) over a challenge to a complex set of regulations governing discharges from stormwater runoff. *See id.* at 1296-97. Two statutory provisions formed the basis for the regulations. First, as mentioned above, section 402(p) of the CWA, 33 U.S.C. § 1342(p), "established deadlines by which certain storm water dischargers must apply for permits, the EPA or states must act on permits and dischargers must implement their permits." *NRDC 9th Cir. 1992*, 966 F.2d at 1296. This section required that particularly important categories of discharges be regulated quickly, and exempted less important categories of discharges from regulation until 1992. *Id.* at 1295-96; *see also Envtl. Def. Ctr., Inc. v. EPA, Inc.*, 344 F.3d 832, 840, 843 (9th Cir. 2003) (exercising jurisdiction over challenge to stormwater discharge regulations promulgated under section

402(p)). Second, CWA section 402(*l*)(2), 33 U.S.C. § 1342(*l*)(2), exempted certain stormwater discharges by mining, oil, and gas facilities from CWA permitting requirements. *See NRDC 9th Cir. 1992*, 966 F.2d at 1306-07. The Natural Resources Defense Council argued that the EPA had extended the deadline for storm sewer discharges beyond the dates authorized by CWA section 402(p); that the EPA had defined improperly what constituted certain kinds of storm sewer discharges, so that some discharges were exempted from permitting requirements for a longer period than section 402(p) allowed; and that the EPA had erred in defining what constituted stormwater discharges from mining, oil, and gas facilities, improperly expanding the exemption from the permitting requirement contained in section 402(*l*)(2). *NRDC 9th Cir. 1992*, 966 F.2d at 1299-1309.

In *Natural Resources Defense Council v. EPA* ("*NRDC 9th Cir. 2008*"), 526 F.3d 591 (9th Cir. 2008), we exercised jurisdiction under section 509(b)(1)(F) over a challenge to a regulation exempting certain stormwater discharges from mining, oil, and gas facilities. *Id.* at 601. Two CWA provisions lay behind the regulation. First, section 402(*l*)(2), mentioned above, exempted discharges from mining, oil, and gas facilities. Second, an amendment to the CWA specified that the exemption contained in section 402(*l*)(2) included discharges from construction activities at mining, oil, and gas facilities. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694; 33 U.S.C. § 1362(24) (codifying the amendment to section 402). The Natural Resources Defense Council challenged the regulation as exempting a broader category of discharges than permitted under CWA sections 402(*l*)(2) and 502. *NRDC 9th Cir. 2008*, 526 F.3d at 600-01.

[6] In both of these cases in which we exercised jurisdiction under section 509(b)(1)(F), statutory provisions explicitly provided the underlying exemptions. The challenged regulations sought to define more precisely those discharges that came within statutory exemptions (and thus did not need per-

mits) and those that did not come within statutory exemptions (and thus needed permits). In contrast, the case now before us challenges a regulation providing exemptions not contained in section 402 or in any other section of the CWA. This case thus does not involve the "issuing or denying [of] any permit under Section 402." *See Natural Res. Def. Council v. Train*, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *aff'd sub nom. Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

We conclude by agreeing with the district court's analysis in a suit very similar to the one before us. In *Environmental Protection Information Center v. Pacific Lumber Co.*, 266 F. Supp. 2d 1101, 1108-09 (N.D. Cal. 2003), the court addressed an EPA regulation that permanently exempted an entire class of silvicultural discharges from any NPDES permitting requirement. The district court noted that the court of appeals in *NRDC D.C. Cir.* had upheld original jurisdiction under section 509(b)(1) on the ground that if there were no such jurisdiction, there would be a " 'perverse situation' in which the court 'will be able to review the grant or denial of the permit, but will be without authority to review directly the regulations on which the permit is based.' " *Id.* at 1114 (quoting *NRDC D.C. Cir.*, 656 F.2d at 775). The district court wrote:

> Because [plaintiff] challenges a decision that in effect excludes sources from the NPDES program, the circuit courts will never have to confront the issuance or denial of a permit for these sources. The Ninth Circuit, by virtue [of the regulation], will never have to consider on direct review an action involving the denial of an NPDES permit for pollutant discharges [within the exemption provided by the regulation]. Thus, a district court taking jurisdiction over a challenge to the silvicultural regulation does not create the same awkwardness for a circuit court as that described in [*NRDC D.C. Cir.*].

Id. at 1115-16 (footnote omitted) (upholding its own jurisdiction under 28 U.S.C. § 1331).

[7] We conclude that § 509(b)(1)(F) does not authorize original jurisdiction in the court of appeals in this case. Section 122.3(a) does not involve the issuance or the denial of a permit or a functionally similar action, but rather the permanent exemptions of three types of discharges from any permitting requirement.

B. Statute of Limitations

[8] The applicable statute of limitations provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *See* 28 U.S.C. § 2401(a). The EPA promulgated the final version of 40 C.F.R. § 122.3(a) in 1979. The EPA denied plaintiffs' Petition for Rulemaking in September 2003. Plaintiffs filed suit in December 2003. Whether their first cause of action is barred by the statute of limitations depends on whether their right of action first accrued in the 1970s when the EPA promulgated the regulation or in 2003 when the EPA denied plaintiffs' petition. The EPA conceded in the district court and in its brief to this court that the statute of limitations does not bar plaintiffs' second cause of action. *See Nw. Envtl. Advocates I*, 2005 U.S. Dist. LEXIS 5373, at *22.

[9] Our decision in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), controls our analysis. In *Wind River*, the Bureau of Land Management ("BLM") had classified certain federal lands as Wilderness Study Areas ("WSAs") in 1979. Mining was forbidden in a WSA. *Id.* at 711. In 1986 and 1987, the Wind River Mining Corporation asked the BLM to declare that its decision to create a WSA was invalid. *Id.* The BLM denied the request, and the Interior Board of Land Appeals denied Wind River's administrative appeal in 1987. Wind River filed suit in 1989 alleging that the

BLM's action in creating the WSA was *ultra vires*. *Id.* at 712. We held that the six-year statute of limitations began to run with the final administrative action denying Wind River's request:

> [A] substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application to the specific challenger. . . . The right to bring a civil suit challenging an agency action accrues "upon the completion of the administrative proceedings." The BLM finally rejected Wind River's attempts to have WSA 243 declared invalid in 1987. . . . Wind River's complaint for review was filed less than twenty-nine months later, and therefore was timely.

Id. at 716 (citations omitted); *see also Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997); *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 150-53 (D.C. Cir. 1990); *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 194-97 (D.C. Cir. 1987); *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 601-03 (D.C. Cir. 1982); *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978); *cf. Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (defining what constitutes a "final" agency action).

[10] Our case is indistinguishable from *Wind River*. Plaintiffs asked the EPA to repeal § 122.3(a) in their 1999 Petition for Rulemaking, and the EPA denied that request in 2003. Plaintiffs filed suit a few months after that denial, alleging that EPA had acted *ultra vires* in promulgating § 122.3(a). The EPA's denial of the Petition for Rulemaking in 2003 was thus an "adverse application" of § 122.3(a) within the meaning of *Wind River*. *See* 946 F.2d at 714-16. The date of that decision is the date of first accrual for purposes of the statute of limitations under § 2401(a). We therefore conclude that plaintiffs' suit was timely filed in the district court.

C. *Ultra Vires* Challenge

In their first cause of action, plaintiffs allege that the CWA does not authorize the exemptions of vessel discharges provided in 40 C.F.R. § 122.3(a). According to plaintiffs, the EPA acted *ultra vires* in promulgating § 122.3(a). *See* 5 U.S.C. § 706(2)(C) (covering agency actions "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). If plaintiffs are right, the regulation is invalid. In their second cause of action, plaintiffs allege that the EPA did not act "in accordance with law" when the agency denied the 1999 Petition for Rulemaking asking the EPA to repeal § 122.3(a). *See* 5 U.S.C. § 706(2)(A). As in their first cause of action, the premise of the second cause of action is that the EPA acted *ultra vires* in promulgating § 122.3(a). Because both causes of action present a question of law, we start at step one of *Chevron* and apply the same standard of review. *See, e.g.*, *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999) ("On questions of statutory interpretation, we follow the approach from *Chevron.*").

The EPA makes three arguments. The first is procedural; the second and third are substantive. First, the EPA argues that the 1999 Petition for Rulemaking challenged only the exclusion for ballast water provided by 40 C.F.R. § 122.3(a). Therefore, the EPA argues, plaintiffs are now limited to challenging only this exclusion. Second, the EPA argues that the CWA authorized the EPA to promulgate § 122.3(a), or that at least the statute is ambiguous and therefore this court should defer to the agency's interpretation of the statute. Third, the EPA argues that even if the CWA did not authorize the promulgation of § 122.3(a) when the CWA was enacted, Congress has now acquiesced in its promulgation. We consider these arguments in turn.

1. Scope of Plaintiffs' 1999 Petition for Rulemaking

The EPA argues that at most we should vacate § 122.3(a) as it applies to ballast water discharges. The agency argues

that we should not address the exemptions for marine engine and graywater discharges or discharges incidental to the normal operation of a vessel other than ballast water because plaintiffs did not object to those exemptions in their 1999 Petition for Rulemaking to the EPA. The district court considered and rejected this argument. *See, e.g.*, *Nw. Envtl. Advocates II*, 2006 U.S. Dist. LEXIS 69476, at *24 ("Plaintiffs have consistently made clear that their overall aim is the repeal of the exemptions contained in 40 C.F.R. § 122.3(a).").

We agree with the district court. It is clear that the plaintiffs always have been most concerned with the environmental effects of ballast water discharges, but it is equally clear that they challenged all three exemptions contained in § 122.3(a) when they petitioned the EPA in 1999. For example, Plaintiffs' Petition for Rulemaking was titled "Petition for Repeal of 40 C.F.R. § 122.3(a)." In that petition, they challenged the exemption in § 122.3(a) of "ballast water discharges and other discharges." In responding to plaintiffs' petition, the EPA stated that its decision addressed a "Petition for Rulemaking to Repeal 40 C.F.R. 122.3(a)." The EPA's denial of plaintiffs' petition quoted the full text of § 122.3(a) and explicitly noted that plaintiffs sought a repeal of the entire regulation. "The record in this case is replete with evidence" that the plaintiffs' position was clear to the EPA. *'Ilio'Ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (as amended).

2. Text of the CWA

Our first substantive inquiry is whether § 122.3(a) is invalid under the plain meaning of the CWA. Our inquiry is guided by *Chevron*. The Court wrote:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the

> end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. at 842-43.

[11] Section 301(a) of the CWA mandates that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). This prohibition is "[t]he 'cornerstone' and 'fundamental premise' of the Clean Water Act." *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 644 (9th Cir. 2007) (citations omitted). Section 402 of the CWA provides that a "point source" can obtain a "permit for the discharge of any pollutant or combination of pollutants." 33 U.S.C. § 1342(a)(1). "[T]he Act categorically prohibits any discharge of a pollutant from a point source without a permit." *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993).

The text of the statute clearly covers the discharges at issue here. A "discharge of any pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). A "point source" is "any discernable, confined and discrete conveyance, including . . . [a] vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14). "[N]avigable waters" are "the waters of the United States, including the territorial seas," which begin near the coast and "extend[ ] seaward a distance of three miles." *Id.* §§ 1362(7), (8). "Pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The term "biological materials" includes invasive species. *See, e.g.*, *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988).

The question before us of whether the CWA authorizes the EPA's regulatory exemptions was answered by the D.C. Circuit more than thirty years ago. *See Natural Res. Def. Council v. Costle* ("*Costle*"), 568 F.2d 1369 (D.C. Cir. 1977). The same year that the EPA issued the regulation in our case, the agency promulgated a different but conceptually identical regulation. *Costle* addressed an *ultra vires* challenge to that regulation.

The regulation entirely exempted several categories of point sources from NPDES requirements:

> all silviculture point sources; all confined animal feeding operations below a certain size; all irrigation return flows from areas less than 3,000 contiguous acres or 3,000 noncontiguous acres that use the same drainage system; all nonfeedlot, nonirrigation agricultural point sources; and separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity.

Id. at 1372. In a unanimous opinion by Judge Leventhal, the D.C. Circuit held that the EPA acted *ultra vires* in promulgating this regulation. *Id.* at 1377, 1382-83.

[12] The analysis of the D.C. Circuit in *Costle*, with which we agree, is dispositive of our case. The only possible textual source of authority for the exemptions at issue in *Costle* (and in our case) is section 402 of the CWA. In relevant part, that section provides that the EPA Administrator

> may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, . . . notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or (B) prior to the taking of necessary implementing actions relating to all such

> requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

33 U.S.C. § 1342(a)(1).

[13] Section 402 uses the word "may," but only in the context of "issu[ing] a permit for the discharge of any pollutant." The Administrator "may" issue a permit under two circumstances: either on the condition that the discharge meets all of the requirements specified in the section; or, prior to implementation of those statutory requirements, on such conditions "as the Administrator determines are necessary to carry out the provisions of [the] Act." That is, section 402 allows the Administrator to issue a permit, but it does not provide that the Administrator may entirely exempt certain categories of discharges from the permitting requirement. As the D.C. Circuit concluded, "The use of the word 'may' in § 402 means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of § 301. This is the natural reading, and the one that retains the fundamental logic of the statute." *Costle*, 568 F.2d at 1375.

The D.C. Circuit confirmed the correctness of its reading of the CWA by consulting the legislative history of the Act. It wrote, "[T]he legislative history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of § 301(a)." *Id.* at 1374. Because the statutory language is unambiguous, we do not need to revisit the legislative history. Congress's intent was clear: "[T]he EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377.

[14] We therefore conclude that Congress expressed "a plain . . . intent to require permits in any situation of pollution from point sources." *Id.* at 1383; *see also N. Plains Res.*

Council, 325 F.3d at 1164; *Sierra Club v. EPA*, 118 F.3d 1324, 1327 (9th Cir. 1997); *NRDC 9th Cir. 1992*, 966 F.2d at 1305, 1310; *Forsgren*, 309 F.3d at 1190. In its argument to us, the EPA does not seriously contest this conclusion. Rather, the EPA's central argument is that Congress has acquiesced in the EPA's *ultra vires* action in promulgating § 122.3(a). We now turn to that argument.

3. Acquiescence by Congress

The EPA argues that even if the CWA as originally enacted did not authorize the EPA to promulgate § 122.3(a), Congress subsequently acquiesced in the agency's interpretation of the CWA. This is a heroic argument, for the standard for a judicial finding of congressional acquiescence is extremely high.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 162 (2001), the Court considered a challenge to an expansive definition of "navigable waters" under the CWA. The Army Corps of Engineers had promulgated a regulation containing that definition in 1977. The Corps argued that Congress had acquiesced in the regulation's definition. *Id.* at 168-69. The Court responded, "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care." *Id.* at 169. The Court continued in a footnote:

> In *Bob Jones Univ. v. United States*, 461 U.S. 574, 595, 600-01 (1983), for example, we upheld an Internal Revenue Service (IRS) Revenue Ruling that revoked the tax-exempt status of private schools practicing racial discrimination because the IRS' interpretation of the relevant statutes was "correct"; because Congress had held "hearings on this precise issue," making it "hardly conceivable that Congress — and in this setting, any Member of Congress — was not abundantly aware of what was going on";

> and because "no fewer than 13 bills introduced to overturn the IRS interpretation" had failed. *Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.*

Id. at 169-70 n.5 (emphasis added); *see also Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality op.) (noting the Court's "oft-expressed skepticism towards reading the tea leaves of congressional inaction"); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (en banc) (finding no acquiescence under *SWANCC*'s "overwhelming evidence" standard).

The EPA points to a number of post-1973 statutes in which Congress has addressed the forms of pollution exempted by § 122.3(a), particularly ballast water. According to the EPA, those statutes satisfy the high standard for acquiescence set forth in *SWANCC*. For the reasons that follow, we disagree and hold that Congress has not acquiesced in § 122.3(a).

a. NDAA and DSHMRA

The EPA relies most heavily on two statutes. The first is the National Defense Authorization Act of 1996 ("NDAA"), Pub. L. No. 104-106, § 325, 110 Stat. 186, 254, *codified at* 33 U.S.C. §§ 1322(a), (j), (n), 1362(6). The second is the Deep Seabed Hard Mineral Resources Act of 1979 ("DSHMRA"), Pub. L. No. 96-283, 94 Stat. 554, *codified at* 30 U.S.C. §§ 1419 *et seq.*

[15] In the NDAA, Congress statutorily exempted discharges incidental to the normal operation of United States military vessels from CWA permitting requirements and established discharge controls specifically tailored to those vessels. Congress was well aware of 40 C.F.R. § 122.3(a) when it enacted the NDAA. Indeed, the statute cited the regu-

lation as a partial aid in defining what the category "discharge incidental to the normal operation of a vessel" did not include. *See* 33 U.S.C. § 1322(a)(12)(B)(iii).

A Senate Report accompanying the Senate Bill explained that discharges from military vessels, like those from other vessels, already were exempted from NPDES permitting requirements by EPA regulation. But the report went on to explain why, nonetheless, a broader exemption was desirable:

> The Navy wishes to clarify the regulatory status of certain non-sewage discharges from Navy vessels. Vessels are point sources of pollution under the Clean Water Act. Any discharge of pollutants from a point source, including a vessel, into the waters of the United States is prohibited unless specifically permitted under section 402 or 404 of the Act. . . .
>
> Although EPA regulations generally exempt non-sewage discharges from vessels from the permit requirements of the Act, some coastal states have imposed regulations or inspection programs that may have application to these types of discharges. A series of events in the waters of several coastal states prompted concern at the Navy as to state authorities to regulate these discharges.

S. Rep. No. 104-113, at 1-2 (1995). The Senate Report explained that § 122.3(a) was the regulatory basis for the exemption of most "non-sewage discharges from vessels." *Id.* at 7. The report did not, however, endorse or otherwise indicate approval of regulatory exemptions for entire categories of marine discharges. If anything, the report may be read to suggest the contrary. The report indicated that, but for the statutory exemption contained in the NDAA, the CWA permitting process would have applied to marine discharges from military vessels: "The effect of [the NDAA] is to remove the stat-

utory requirement for a permit for these point source discharges[.]" *Id.* at 3.

[16] The most that can be said, based on the NDAA, is that Congress was well aware of § 122.3(a) and the exemptions it provided. Congress concluded that the existing statutory provisions and exemptions, including the exemptions provided in § 122.3(a), did not fully address the needs of military vessels. It therefore passed a new statute with provisions specifically tailored to military vessels. In so doing, the NDAA did nothing to endorse § 122.3(a). The NDAA only made § 122.3(a) irrelevant to military vessels except as a definitional tool.

In the DSHMRA, Congress required vessels engaged in deep sea mining and drilling operations to comply with the provisions of the CWA. Congress did so by explicitly extending the CWA's geographical reach over such vessels beyond the otherwise applicable three-mile limit. *See* 33 U.S.C. § 1362(9), (10), (12)(B). In pertinent part, the DSHMRA provided that:

> For purposes of this chapter, any vessel or other floating craft engaged in commercial recovery or exploration shall not be deemed to be "a vessel or other floating craft" under section 502(12)(B) of the Clean Water Act [33 U.S.C. § 1362(12)(B)] and any discharge of a pollutant from such vessel or other floating craft shall be subject to the Clean Water Act.

30 U.S.C. § 1419(e) (alterations in original).

[17] When it enacted the DSHMRA, Congress noted with approval the final sentence of 40 C.F.R. § 122.3(a). This sentence provides that, despite the regulatory exemptions for three categories of marine discharges, CWA permitting requirements would apply to a range of vessels not being used for transportation:

> This exclusion does not apply to . . . discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

40 C.F.R. § 122.3(a). Plaintiffs do not challenge this part of the regulation because it exempts nothing, but instead recognizes ongoing NPDES requirements. *See Nw. Envtl. Advocates II*, 2006 U.S. Dist. LEXIS 69476, at *2-3 nn.1-2.

[18] The Senate Report accompanying the DSHMRA noted with approval the refusal of § 122.3(a) to exempt non-transportation vessels from NPDES:

> [T]he Environmental Protection Agency has concluded that the Congress did not intend to exempt pollutant discharges into ocean waters by vessels when engaged in such activities as mining or drilling for oil, etc. Relying on this interpretation [of the CWA], the Environmental Protection Agency amended [its regulations] to indicate that vessels engaged in ocean mineral exploration, extraction and processing activities are not exempt from permit requirements under section 402. The Committee concurs in this interpretation.

S. Rep. No. 96-360 at 2-3 (1979); *see also id.* at 3 (noting that the DSHMRA merely "clarif[ied] the application of section 402" to these vessels). Thus, the most that can be said of the DSHMRA is that Congress was aware of § 122.3(a) and explicitly approved of the EPA's decision *not* to exempt from the permitting process marine discharges from non-transportation vessels.

[19] We conclude that neither the NDAA nor the DSHMRA comes close to satisfying the *SWANCC* standard of providing "overwhelming evidence of acquiescence" by Congress in § 122.3(a)'s exemption of three categories of marine discharges.

b. NANPCA, NISA, APPS, and Alaska Cruise Ship Legislation

The EPA also relies on four additional statutes. They are the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 ("NANPCA"), Pub. L. No. 101-646, 104 Stat. 4761, *codified at* 16 U.S.C. §§ 4701 *et seq.*; the National Invasive Species Act of 1996 ("NISA"), Pub. L. No. 104-332, 110 Stat. 4073 (amending NANPCA); the Act to Prevent Pollution from Ships ("APPS"), Pub. L. No. 96-478, 94 Stat. 2297 (1980), *codified at* 33 U.S.C. §§ 1901 *et seq.*; and a statute regulating discharges by Alaska cruise ships, enacted as part of the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763, 2763A-209 (enacting Title XIV of Division B of H.R. 5666, §§ 1401-1414, as introduced Dec. 15, 2000) (*see* 33 U.S.C. § 1901 Note for the text of the statute).

[20] NANPCA and NISA address the problem of invasive species released in ballast-water-related discharges. For example, these statutes authorize the Coast Guard to develop voluntary guidelines and regulations for a Great Lakes ballast water program. *See* 16 U.S.C. § 4711(a)-(b). The statutes also require national guidelines for ballast-water-related discharges of nonindigenous species, *id.* § 4711(c), (f)(2)(A)(ii), and establish an Aquatic Nuisance Species Task Force, of which the EPA is a member, *id.* § 4721. Savings clauses provide that the Great Lakes regulations "shall . . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water" under the CWA, and that the national guidelines "shall . . . . not affect or supercede any requirements or prohibitions pertaining to the discharge of

ballast water" under the CWA. *Id.* §§ 4711(b)(2)(C) and (c)(2)(J). These statutes do not demonstrate *SWANCC*'s "overwhelming evidence of [congressional] acquiescence" in the exemptions contained in § 122.3(a). They merely demonstrate a congressional intent to address the serious national problem of ballast water discharges of invasive species, and to do so on multiple, nonexclusive fronts. The Supreme Court recently came to similar conclusions regarding Congress's overlapping mandates to combat greenhouse gas emissions. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1448-49, 1460-62, 1461 n.27 (2007).

The APPS implemented the International Convention for the Prevention of Pollution from Ships of 1973 and the Protocol of 1978 (known collectively as "MARPOL 73/78"). The APPS applies to all U.S.-flagged ships worldwide and foreign-flagged ships in the navigable waters of the United States. 33 U.S.C. § 1902(a). The six annexes to MARPOL 73/78 address vessel discharges of oil, noxious bulk liquid substances, harmful packaged substances, sewage, garbage, and air pollution. The APPS's savings clause provides that "requirements of this [Act] supplement and neither amend nor repeal any other provisions of law, except as expressly provided in this [Act]." 33 U.S.C. § 1907(f). The APPS contains no indication of congressional intent to acquiesce in § 122.3(a).

Finally, the Alaska cruise ship legislation authorizes the EPA to regulate sewage and graywater discharges from cruise ships in specified Alaskan waters. A savings clause provides that "[n]othing in this title shall be construed as restricting, affecting, or amending any other law or the authority of any department, instrumentality, or agency of the Unites States." 33 U.S.C. § 1901 Note § 1411(a); *see* H.R. 5666, § 1411(a). This legislation, too, contains no indication of congressional intent to acquiesce in § 122.3(a).

D. Remedy

After finding that the EPA had acted *ultra vires* in promulgating § 122.3(a), the district court concluded that the best course was to vacate that regulation, effective September 30, 2008. This date gave the EPA a two-year period during which it could work to promulgate a new regulation. The district court also concluded that it would be best to leave the EPA free during this period to do its work in the manner the agency thought best. In so concluding, the district court did not provide to plaintiffs everything they had sought. Plaintiffs had asked the district court to provide only an eighteen-month period, and to engage in close supervision of the EPA's progress during that period.

The district court explained its reasons in a careful twenty-one page order. It wrote, *inter alia*:

> [T]he Court is influenced by the fact that the regulation at issue has stood for the past 30 years, and by the fact that the effects of an immediate vacatur would be so dramatic as to make such an option a practical impossibility. Indeed, not even plaintiffs request an immediate vacatur of the challenged regulation. While the practical implications of the Court's order make the Court wary of imposing a deadline on EPA that is too ambitious, the potential harm that ballast waters represent to our nation's ecosystems leads the Court to conclude that there is an urgency to promulgating new regulations that EPA has not, to this point in the litigation, acknowledged. Thus, the Court must decide upon a time frame for vacating the regulation that balances the need for prompt action against the need to allow EPA adequate freedom to address a complicated issue.
>
> The most substantial question confronting the Court is whether to issue injunctive relief ordering

> EPA to act in accordance with the Court's order by a certain date. In light of the arguments the parties have presented, the Court finds that the preferable route is to give the agency a certain date on which the regulation will be vacated, and to allow the agency freedom to work around that date to find an appropriate solution to the problem of vessel discharges. Indeed, in considering the variety of technical arguments the parties have presented about the appropriate remedy, the Court has been reminded that EPA holds an expertise in this area that the Court cannot approach. Thus, the Court believes that EPA should be given wide latitude, within broad constraints, to address the problem of discharges from vessels. Accordingly, the Court rules as follows: the Court will GRANT plaintiffs' motion for a permanent injunction, and will set aside the challenged regulation as of September 30, 2008. Absent a compelling justification, the Court will not act further to supervise how EPA responds to this order.

Nw. Envtl. Advocates II, 2006 U.S. Dist. LEXIS 69476, at *31-33 (footnotes omitted).

We affirm the district court's decision to vacate the regulation and to remand for further proceedings as a valid exercise of its remedial powers. *See, e.g.*, *NRDC 9th. Cir. 1992*, 966 F.2d at 1305. The district court's order requires the EPA to perform a substantial task — to bring the discharges previously exempted by § 122.3(a) within the permitting process of the CWA. Neither the district court nor this court underestimates the magnitude of the task. But "this ambitious statute is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all." *Costle*, 568 F.2d at 1380; *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 268 69 (1976) ("Allowing such [feasibility] claims to be raised . . . would frustrate congressional intent.").

The EPA informed this court at oral argument that it has been proceeding in accordance with the district court's order. We anticipate that in formulating a new regulation to replace § 122.3(a) the EPA will take advantage of the flexibility of the NPDES permitting process. For example, we take judicial notice of the fact that, in its request for comments, the EPA has indicated that "use of general permit(s) would appear to be an attractive possibility." Development of [NPDES] Permits for Discharges Incidental to the Normal Operation of Vessels, 72 Fed. Reg. 34,241, 34,247 (June 21, 2007).

On July 11, 2008, the Department of Justice informed us by letter that on June 17, 2008, the EPA published in the Federal Register draft "General Permits for Discharges Incidental to the Normal Operation of a Vessel," and that the public comment period on the draft is scheduled to close on August 1. *See* 73 Fed. Reg. 34,296 (June 17, 2008). The letter warns that a final version may not be ready by the September 30, 2008, deadline established by the district court, but the letter stops short of a request to extend the deadline. If the government chooses to request an extension of the deadline, that request should be addressed to the district court.

IV. Petition for Review

Because we hold that the district court had jurisdiction over plaintiffs' suit filed in that court, we hold that we do not have jurisdiction over plaintiffs' petition for review filed directly in this court. We therefore dismiss that petition for lack of subject matter jurisdiction. *See, e.g.*, *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322-23 (4th Cir. 1994) (dismissing the petition for review for lack of subject matter jurisdiction under 33 U.S.C. § 1369(b)(1)); *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 878 (7th Cir. 1989) (same).

V. Conclusion

We hold that the district court had subject matter jurisdiction over plaintiffs' suit alleging that the EPA acted *ultra*

vires in promulgating § 122.3(a). We affirm the district court, holding that the EPA acted *ultra vires* in promulgating § 122.3(a) and that EPA's denial of plaintiffs' 1999 petition requesting the repeal of § 122.3(a) was not in accordance with law. We affirm the district court's remedial order as a proper exercise of its discretion. Finally, we dismiss for lack of subject matter jurisdiction plaintiffs' petition for review filed directly with this court.

AFFIRMED and DISMISSED.

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

Hearing on "Discharges Incidental to the Normal Operation of a Commercial Vessel"
June 12, 2008

House Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure

Testimony of Andrew Fisk, Ph.D.
Bureau Director, Land & Water Quality
Maine Department of Environmental Protection

While the committee further discusses how to handle amendments to the Clean Water Act regarding vessel discharges, I would like to briefly outline some work Maine has done in this regard.

Maine has for at least the last two decades developed and implemented a comprehensive strategy to improve the quality of our coastal waters to meet the requirements of both the Clean Water Act and our own ambitions to build a vibrant economy around a healthy environment. Since 1989 the state of Maine and coastal municipalities have invested over $118 million dollars to meet our combined sewer overflow (CSO) plans. With fully 100% of our communities statewide having approved and enforceable CSO control plans, we have reduced the annual volume of CSO discharges in Maine by almost 70%. We have replaced thousands of failing septic systems and removed many outdated small-scale treatment systems with millions of dollars of voter-approved state grants. One result of all this work is that we have opened thousands of acres of shellfish beds for commercial harvesting that had been closed for years, if not decades.

As well, we have invested significantly in the improvement of our ports and harbors, either by installing sewage pump-out stations at marinas along the coast or rebuilding commercial ports and piers to increase capacity for cruise ships – whether it is the 90-passenger American Eagle or the Queen Mary II – which are increasingly coming to see Maine's beauty. The city of Portland just invested over $20 million in the first phase of port improvements to allow for passenger vessels up to 1,400 feet long to berth shoreside.

Maine's economy continues to have very strong natural resource and tourism sectors. In 2006, the value that our over 2000 shellfish harvesters along with dozens of oyster and mussel farmers brought to the economy was in excess of $29 million in direct labor income and over $56 million in total economic impact.[1] Much of this takes place in our poorest counties which are located in the easternmost part of the country, or what you've heard called "Downeast." You well know these jobs depend on clean water. Based on economic research sponsored by the International Council of Cruise Lines, the cruise ship industry supported over 400 jobs and $12 million in payroll in Maine in 2006, where port calls have more than doubled in the last several years.[2]

I mention this work to put a frame around our recently enacted general permit program for large commercial passenger vessels that regulates the discharge of both gray and black water to practical and achievable standards. Our state legislature has extensively studied and debated how to include commercial passenger

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[1] Athearn, James. 2008. *Economic Value of Maine's Shellfish Industry.* University of Maine, Machias.
[2] CLIA. 2006. *2006 Economic Primer - The Cruise Industry: A $35.7 billion Partner in U.S. Economic Growth.* Found at <www.cruising.org>

vessels in our overall strategy for coastal water quality. In 2005 we embarked on a two part strategy; the first to implement targeted no-discharge areas in harbors along our coast, the second to craft a general permit for cruise ships with more than 250 passengers. The basis of the general permit rested on our understanding of the effluent characteristics of cruise ships. In 2001 and 2002 Alaska conducted effluent and ambient monitoring of cruise ships several years before our program was developed. We not only know that cruise ships can discharge large volumes of treated wastewater (either gray, black, or a combination) because of the number of passengers they carry, but that the treatment standards of the installed marine sanitation devices in many ships are not as protective as what we ask our municipal treatment plants to meet. For example, monitoring data from Alaska showed that for conventional pollutants cruise ships were discharging up to ten times what a typical municipal treatment plant is permitted, and in some instances many thousands of times more bacteria. What Alaska found was that cruise ships that had typical marine sanitation devices were not always performing to the technology standards associated with these devices. There are, however, advanced treatment systems that can meet the appropriate standards, and these have already been installed on some vessels.

This information and more detail is contained in a 2003 report that my department wrote for the Maine legislature, which is available at www.maine.gov/dep/blwq/topic/vessels/report.htm. I would be happy to provide a copy to the committee if that is helpful.

So the end result for Maine, based on these several years of work, was that we were convinced the potential environmental impact from unlicensed cruise ship effluent discharges was significant, that applying comparable standards for municipal effluent limitations would be appropriate, and that we needed verification that standards were being met when large cruise ships were in Maine waters. This meant promulgation of four pages of rules for cruise ship discharges with standards familiar to everyone in the wastewater community for the last 30 years – biological oxygen demand, total suspended solids, and residual chlorine. These standards are referenced in an eight page general permit where you get your permit coverage in 14 days for an annual fee of $117. Coverage is for five years as long you report a certification each year stating conformance with data quality, monitoring, and reporting procedures.

In short, large commercial passenger vessels can easily do their part to maintain and improve the quality of Maine's picturesque and highly productive coastal waters without a cumbersome permitting process.

In closing, I would like to briefly mention that my department is also working cooperatively with our marine resources department and the commercial herring fishery to create a permitting framework for the offloading of herring. Herring is used as bait in the lobster fishery and is landed at numerous ports and harbors along the coast. As a result of several verified complaints of significant discharges of blood, scales, and fish, our two departments evaluated the current off-loading practices and will be working directly with the fishery this fall (once they come off the water) to develop best practicable treatment strategies that consider appropriate screening, the location of discharge pipes below the waterline, and discharging only on outgoing tides. We believe we can find appropriate standards to govern these discharges also using a general permit under NPDES.

Thank you for the opportunity to discuss these issues with you today. I would be happy to answer any questions you may have.

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAVID P. LITTELL
COMMISSIONER

June 30, 2008

Chairwoman Eddie Bernice Johnson
Committee on Transportation and Infrastructure
U.S. House of Representatives
Subcommittee on Water Resources and Environment
2165 Rayburn House Office Building
Washington, DC 20515

Dear Representative Johnson,

Thank you for the opportunity to provide follow-up to the Maine Department of Environmental Protection's testimony at the June 12th hearing. You have asked us to provide additional testimony on two questions:

- Is there a federal role in the regulation of discharges incidental to the normal operation of a commercial vessel?
- How are states to protect coastal waters from commercial vessels?

With regard to the first question, Maine is certainly supportive of a role for the federal government in regulating commercial vessels, given that they are mobile and travel through many different jurisdictions. A sound national framework for the regulation of incidental discharges is something Maine has supported, particularly with regard to standards for ballast water. Absent federal action on the regulation of ballast water we have been working with other states in the Northeast to evaluate ballast water management standards and treatment technologies through the work of the MIT Sea Grant program. We share the concerns of many other states that there is a pressing need to improve our regulation of ballast water discharges and were very concerned that one outcome of the Northwest ruling was the displacement of ballast water regulation from the center stage.

Similarly we would not have created our state program, nor I would hazard a guess would have Alaska, for the regulation of grey water and black water from large commercial passenger vessels had there been similar reasonable national standards for cruise ships. I would note that we would not wish to have State's authority entirely pre-empted from this field as that is an important part of the state – federal partnership in the Clean Water Act.

Maine is supportive of creating appropriate exemptions in any federal program for vessel types where permitting does not make sense. That would include recreational vessels, where providing for continued improvements in marine sanitation devices under section 312 of the Act would be far more appropriate than crafting a general permit, even one that provided automatic coverage without the boat owner having to do anything. At this point we are comfortable that such a standards driven approach is appropriate for recreational vessels, regardless of size. With regard to commercial passenger vessels, we would also support continued improvement in required marine sanitation devices under section 312 for vessels up to a certain size. For larger vessels (as you heard Maine has chosen a 250 passenger cutoff) we think a permit is a reasonable and appropriate vehicle.

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With regard to commercial fishing vessels, we think that the current provision in regulations [40 CFR 122.3 (a)] that allows for permits to be crafted for seafood processing is appropriate. Additional clarifying language that would provide authority to require permits for fishing vessel offloading that required the use of hoses, transfer water, and generated significant quantities of scale, blood, or turbidity would be an appropriate clarification. Such a clarification would be targeted only at particular types of offloading activities and would not broadly affect the commercial fishing industry.

As you have heard in the testimony at the hearing from the EPA they have published draft vessel discharge permits for public review. In any permitting scheme for commercial vessels we would strongly prefer that this be administered by the EPA and not be a delegated program.

Your second question prompts me to reiterate that the states cannot do this without a strong, reasonable, and coherent framework in the Clean Water Act. Blanket exemptions or statutory language that does not provide a prioritization of which types of discharges to address first will leave the states without sufficient controls to solve very real environmental problems including invasive species and insufficient treatment of a variety of incidental discharges such as black water and grey water. While Maine, like Alaska, has struck out on its own to regulate cruise ships a state by state framework of rules is not an appropriate way to proceed.

Again, thank you for the opportunity to address your committee on this issue. I appreciate your thoughtful deliberations and consideration of our views.

Yours sincerely,

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requirements of Maine Law.
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Andrew C. Fisk, Director
Bureau of Land & Water Quality

TESTIMONY OF
James A. Hanlon
Director
Office of Wastewater Management
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE OF THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

June 12, 2008

Introduction

Good morning Chairwoman Johnson and Members of the Subcommittee. I am James A. Hanlon, the Director of the Office of Wastewater Management in the Office of Water at the U.S. Environmental Protection Agency (EPA). Thank you for the opportunity to discuss discharges that are incidental to the normal operation of vessels and the Clean Water Act's National Pollutant Discharge Elimination system (NPDES) program. My testimony will provide updates on our current NPDES permitting activities with respect to commercial vessel discharges. I will begin by first providing a brief overview of EPA's long-standing NPDES exclusion for discharges that are incidental to the normal operation of vessels and the litigation that challenges the validity of that exclusion.

NPDES Permit Exclusion and Related Litigation

Less than one year after the CWA was enacted, EPA promulgated a regulation excluding discharges incidental to the normal operation of vessels from the NPDES permitting program. First promulgated on May 22, 1973, that regulatory exclusion has undergone only minor changes over the past 35 years, and is currently codified at 40 C.F.R. 122.3(a) as follows:

> "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. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other

> discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development."

In January 1999, a number of interested parties submitted a rulemaking petition to EPA expressing concern over discharges of ships' ballast water containing invasive species and other matter and requested that EPA repeal the exclusion. Following EPA's denial of the petition, in December 2003, several of the groups filed a lawsuit in the U.S. District Court for the Northern District of California seeking revocation of the exclusion (*Northwest Environmental Advocates et al. v. EPA*, No. C 03-05760 SI). Despite our arguments defending the validity of the exclusion and requesting that any relief be limited to ballast water alone, in September 2006, the Court issued an order vacating the regulatory exclusion as of September 30, 2008. Because that order was not limited to just ballast water discharges, it potentially implicates a wide variety of other discharges incidental to the normal operations of vessels, not only for the thousands of larger ocean-going ships with ballast tanks, but also, commercial vessels, barges, recreational vessels, and any other vessels (other than vessels of the Armed Forces) with discharges incidental to their normal operations into waters of the United States.

Section 301(a) of the CWA generally prohibits the "discharge of a pollutant" without an NPDES permit. If the District Court's order remains unchanged, the regulatory exclusion allowing for the discharge of pollutants incidental to the normal operation of a vessel without an NPDES permit will be vacated by the Court on September 30, 2008. This means that, as of that date, the regulatory exclusion will no longer exempt such discharges from the prohibition in CWA section 301(a). The CWA authorizes civil and criminal penalties for violations of the prohibition against the discharge of a pollutant without a permit, and also allows for citizen suits against violators.

Because we respectfully disagree with the District Court's decision, the Government, on November 16, 2006, filed a notice of appeal with the U.S. Circuit Court of Appeals for the Ninth Circuit. Oral argument was heard by the Court on August 14, 2007, and at the time this testimony was prepared, a decision on the appeal is pending. Because it was not prudent to simply await the outcome of that appeal, subsequent to the lower court's decision, EPA began developing NPDES general permits to comply, based on available information and within the limited time available prior to the Court's September 30, 2008, vacatur of the existing NPDES exclusion. Our goal is to establish final NPDES general permits prior to vacatur of the existing exclusion (barring success on appeal or Congressional action). Given the complexity of this task, the limited available information, the procedural steps we must follow, and the sheer number of vessels and discharges implicated, this is an extremely ambitious goal.

I also wish to make clear that denial of the rulemaking petition and our appeal of the lower Court's decision does not reflect a dismissal of the significant impacts of aquatic invasive species. Rather, we believe the NPDES program does not currently provide an appropriate framework for managing ballast water and other discharges incidental to the normal operation of vessels, which are highly mobile and routinely move from port to port, state to state, and country to country. As a general matter, we believe that discharges from such highly mobile sources would be more effectively and efficiently managed through the development of national, environmentally sound, uniform discharge standards.

Discharges Incidental to the Normal Operation of Commercial Vessels

The number of commercial vessels subject to NPDES permitting as a result of the Court's decision is extensive. Our most recent analysis of existing information indicates that approximately 91,000 domestically-flagged vessels would be affected by the commercial vessel permit. We also estimate approximately 8,000 foreign-flagged vessels will also be subject to the

requirements of the commercial vessel permit. With respect to recreational vessels, we estimate 18 million such vessels are implicated.

A wide variety of discharge types are involved, such as deck runoff from routine deck cleaning, bilgewater from properly-functioning oily water separators, and ballast water. While developing NPDES permits for these discharges by the Court's September 30, 2008, date for vacatur of the existing NPDES exclusion, we did not have a sufficient amount of time to independently investigate vessel operations and resulting discharge impacts as extensively as we might have wished. Instead, we have relied on the most accurate and up-to-date information available, including articles from the scientific and technical literature, information on vessel discharges solicited from the public in our June 21, 2007, Federal Register notice, information from the CWA § 312(n) uniform national discharge standards (UNDS) program for vessels of the Armed Forces, information from other expert federal agencies, such as the Coast Guard and Maritime Administration, and documents associated with meetings of the International Maritime Organization's Marine Environment Protection Committee.

Based on such information, we have identified a universe of 28 discharges incidental to normal operation of commercial vessels as listed in Table 1 below. I wish to note that depending upon the class and operational characteristics of a given commercial vessel, the presence or absence of some of these discharges will vary, and further wish to note that some of these discharges are not limited to just commercial vessels, but also will be associated with recreational vessels. Additional summaries of these discharges will be available in the fact sheet and administrative record for the upcoming draft NPDES permits, and summary descriptions and characterizations of most of these discharges presently can be found on the Office of Water website for the UNDS program at: www.epa.gov/owow/oceans/regulatory/unds.

TABLE 1

Discharges Incidental to Normal Operation of Commercial Vessels[1]

Deck Washdown and Runoff	Graywater
Bilgewater	Motor Gasoline & Compensating Discharge
Ballast Water	Non-Oily Machinery Wastewate
Leachate from Anti-fouling Hull Coatings	Refrigeration and Air Condensate Discharge
Aqueous Film Forming Foam	Rudder Bearing Lubrication Discharge
Boiler/Economizer Blowdown	Seawater Cooling Overboard Discharge
Cathodic Protection	Seawater Piping Biofouling Prevention
Chain Locker Effluent	Small Boat Engine Wet Exhaust
Controllable Pitch Propeller Hydraulic Fluid	Stern tube oily Discharge
Distillation and Reverse Osmosis Brine	Sonar Dome Discharge
Elevator Pit Effluent	Underwater Ship Husbandry
Firemain Systems	Welldeck Discharges
Freshwater Layup	Graywater Mixed with Sewage from Vessels
Gas Turbine Water Wash	Exhaust Gas Scrubber Washwater Discharge

We received only limited environmental impact data in response to our June 21, 2007, Federal Register notice and have taken that information into account, along with other available information sources, in permit development. Some of the constituents that would be present in these discharges are already subject to regulation under other federal laws (e.g., aquatic nuisance species in ballast water (National Aquatic Nuisance Prevention and Control Act (NANPCA)); oil in bilgewater (CWA § 311; Act to Prevent Pollution from Ships)) and thus are better documented than others as being known to potentially cause adverse environmental impacts.

NPDES Permitting Activities

As mentioned above, in order to assist in the development of NPDES permits, the Agency issued a Federal Register notice on June 21, 2007, seeking information from the public on matters related to vessels and their discharge characteristics as well as potential technologies or practices for discharge control. Approximately 1,600 responses were received by the end of the comment period on August 6, 2007, with the majority of these being from

[1] Note that this list of discharges does not include sewage from vessels within the meaning of CWA section 312 (including graywater from commercial vessels in the Great Lakes), as those discharges are subject to regulation though national, uniform, enforceable standards under CWA §§ 312(a) -- (m), and by virtue of CWA § 502(6)(a) are excluded from NPDES permitting.

individuals concerned about the potential impacts of a permitting regime on recreational and fishing vessels.

We expect issuance of the draft permits for public comment within the next few days. Taking into account the volume of vessels implicated and other relevant factors, we have determined that these permits should take the form of general, rather than individual, NPDES permits. In accordance with the CWA, these permits will be limited to a five-year term from their date of final issuance and therefore, like all NPDES permits, will be subject to periodic reissuance thereafter.

Recognizing the differences in discharge and operational characteristics between commercial and recreational vessels, we have determined that issuance of two general permits, one focusing on most recreational vessels, and the other on commercial vessels and large (over 79-feet) recreational vessels to be appropriate. In both cases, as required by the CWA, the permits will contain effluent limitations based on the Act's technology-based requirements as well as water quality-based limitations. In the case of the recreational vessel permit, we have focused on those discharges with the most potential for impacts (e.g., oily water discharges and transport and spread of aquatic nuisance species), with emphasis on the use of good boating practices to control those discharges. For the commercial vessel permit, we necessarily deal with a broader array of discharges and have included more detailed control measures. The fact sheets for these permits will provide more details and will be available after the draft permits are issued for public comment.

Because the discharges to be covered by these general permits are limited to those vessel discharges that were excluded from NPDES permitting programs under 40 CFR 122.3(a), these general permits initially will be issued by EPA and cover those discharges subject to that exclusion in all states and territories, regardless of whether a state has been authorized to implement other aspects of

the NPDES program within its jurisdiction. The discharges at issue are not considered a part of any currently authorized state NPDES program, and as a result, until states that would like to acquire NPDES permitting authority for such discharges take the necessary steps to obtain program approval for NPDES permitting of discharges incidental to the normal operation of vessels, the authority to issue NPDES permits for such discharges remains with EPA. In light of a number of articles in newspapers and the trade press suggesting there will be fees or that vessel operators will need to "buy" permits, I would like to take this opportunity to clarify that there presently are no issuance or processing fees associated with EPA-issued NPDES permits.

I also wish to emphasize that the above discussion only relates to the states' present ability to issue a NPDES permit for these discharges. States of course remain free to issue other permits under state laws as preserved by CWA section 510, and, once they receive approval from EPA, can issue NPDES permits for discharges incidental to the normal operation of vessels in lieu of EPA.

Although the initial round of NPDES permits for discharges incidental to the normal operation of vessels would be issued by EPA, this would not assure uniformity across the country. This is because federally-issued NPDES permits are subject to certification by the state under CWA section 401 with respect to compliance with state water quality standards and other appropriate requirements of state law. For this reason, although these permits initially are being issued by EPA, the states, through exercise of their 401 certification rights, can impose additional conditions as may be required by state law and also may deny certification (which would prevent issuance of the permits with respect to those waters of the U.S. within the state's jurisdiction).

Administration Views on Legislation

The Administration urges consideration of twofold Congressional action with respect to discharges that are incidental to the normal operation of commercial vessels as follows:

1) Under Coast Guard leadership and in appropriate consultation with EPA, we strongly support the enactment of legislation to strengthen NANPCA to better prevent the introduction of aquatic nuisance species via ballast water and other vessel-related pathways.

2) We also strongly support enacting legislation to provide for the appropriate development of national enforceable uniform standards for other discharges that are incidental to the normal operation of commercial vessels in lieu of the use of NPDES permits.

To further these objectives, and to provide Congress with technical assistance on Title V of H.R. 2830 and on S. 2766, on behalf of the Administration, on April 1, 2008, EPA and the Department of Homeland Security submitted letters commenting on those bills, including an attachment with recommended legislative text specifically focused on both of these points. I hope you will give those recommendations your careful consideration as you pursue these important issues and would be pleased to provide you with more details about their contents or draft assistance, should you so request.

While I defer to the Department of Homeland Security for more details on the Administration's preferred legislative text with respect to ballast water and other vessel sources of aquatic nuisance species (ANS), I do wish to note as a general matter the Administration's long-standing and strong support for enactment of appropriate legislation to better ensure the establishment of environmentally-sound, uniform, federal ballast water discharge standards and requirements under NANPCA, using the basic structure and framework of the February 2004 International Maritime Organization's (IMO) Ballast Water Convention.

Although the ballast water discharge standards contained in that Convention are not as stringent as those sought by the U.S. during negotiations, at U.S. insistence, the treaty preserves the ability of Parties to set more protective standards to better safeguard their waters against invasions. Furthermore, because the structure and basic approach of the Convention in many respects reflect successful accomplishment of the United States' negotiating goals, we generally believe its overall framework is a useful model to follow when considering domestic legislation.

In addition, we strongly support an approach which provides for the phasing-in of a ballast water performance standard that is 100 times more stringent than that currently contained in the IMO Convention for the two larger categories of organisms. Although both of these key concepts are contained in Title V of H.R. 2830 and S 2766, the Administration's recommended legislative text builds on and refines many of the existing provisions in those bills to provide more effective, efficient, and practicable implementation.

With respect to other discharges that are incidental to the normal operation of commercial vessels, we also strongly believe that the Administration's alternative legislative text provides the best way forward to establish an appropriate and effective regulatory program to manage discharges, other than ANS, incidental to the normal operation of vessels in lieu of NPDES permitting. The alternative text was patterned after the basic approach Congress has chosen in the past for other vessel discharges under section 312 of the CWA and developed after extensive and thorough inter-agency coordination.

Unlike H.R. 5949 (and its Senate counterpart S 2766), which only include those discharges incidental to the normal operation of recreational vessels, the Administration proposal more comprehensively manages discharges incidental to the normal operation of all vessels. In particular, in lieu of using NPDES permits,

it provides for the evaluation, development, and implementation of environmentally-sound, nationally-uniform and enforceable best management practices, based on the "best available technology" factors of the CWA. It would exclude recreational vessels less than 79 feet in length from this new program, as well as from NPDES permitting, while still leaving the states free to regulate those vessels should they deem appropriate. We believe this approach is preferable to that currently contained in H.R 5949 as it provides for the development of national, uniform, enforceable controls focusing on discharges from commercial and very large recreational vessels, which are more likely to be of concern due to their discharge constituents and volume. To assist you in considering this matter, a copy of EPA's May 21, 2008, letter to the Senate Committee on Environment and Public Works containing such recommended legislative text and commenting on S. 2766 (which is identical to HR 5949), is attached to this testimony.

Conclusion

In closing, Chairwoman Johnson, I would like to thank you and the Subcommittee for inviting me to participate in this hearing. The Administration looks forward to working with you and all of our partners to continue making progress on these important issues. I would be happy to answer any questions you may have.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 21 2008

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Barbara Boxer
Chairman
Committee on Environment
and Public Works
United States Senate
Washington, DC 20510

Dear Madam Chair:

Thank you for considering our comments on S. 2766, a bill to amend the Federal Water Pollution Control Act to address certain discharges incidental to the normal operation of a recreational vessel, which was ordered reported out of your committee today without amendment.

Summary of Bill

S. 2766 would amend § 402 of the Clean Water Act (CWA) by adding a new § 402(r) to exempt discharges incidental to the normal operation of recreational vessels from the National Pollutant Discharge System (NPDES) permitting program. The bill instead would provide for the control of such discharges by adding a new § 312(o) to the CWA.

Under the bill's new CWA § 312(o), the Environmental Protection Agency (EPA), in consultation with the US Coast Guard (USCG), the Department of Commerce, and interested States, would evaluate discharges incidental to the normal operation of recreational vessels, identify those discharges for which it is reasonable and practicable to develop management practices, develop such management practices, and then promulgate performance standards for the management practices. Following EPA promulgation of the performance standards, the USCG would be responsible for promulgation of regulations governing the installation and use of management practices on recreational vessels. Thereafter, the operation of a recreational vessel or any discharge incidental to their normal operation would be prohibited in waters of the US or contiguous zone, unless the vessel owner or operator is using an applicable management practice meeting the EPA performance standards. The bill provides for EPA review (at five year intervals) of the determinations to require management practices and of the performance standards. Unlike other provisions in § 312 (addressing vessel sewage and discharges incidental to the normal operation of vessels of the Armed Forces), new § 312(o) would not preclude the development of management practices or discharge standards by the States for recreational vessels.

General Comment

As a result of a US District Court decision (*Northwest Environmental Advocates et al. v. EPA*, No. C 03-05760 SI, (N.D. Cal., September 18, 2006)), barring judicial or legislative action, as of September 30, 2008, discharges incidental to the normal operation of vessels, both commercial and recreational, will be subject to NPDES permitting. We do not believe that the NPDES program provides the appropriate tools for addressing discharges incidental to the normal operation of vessels, which are highly mobile and routinely move from port- to-port, state-to-state, and country-to-country, and we thus support the objective of the bill, which would exempt discharges incidental to the normal operation of recreational vessels from NPDES permitting.

At the same time, however, we strongly believe that the Administration's alternative legislative text, which was developed after extensive inter-agency coordination, provides the best way forward to establish an appropriate and effective regulatory program to address discharges incidental to the normal operation of vessels. Unlike S. 2766 (and its House counterpart H.R. 5949), which address only those discharges incidental to the normal operation of recreational vessels, the Administration proposal more comprehensively addresses discharges incidental to the normal operation of all vessels. In particular, in lieu of using NPDES permits, it provides for the evaluation, development, and implementation of environmentally sound, nationally uniform and enforceable best management practices, based on the "best available technology" factors of the CWA. It would exclude recreational vessels less than 79 feet in length from this new program, as well as from NPDES permitting, while still leaving the States free to regulate those vessels if they deem it appropriate. This approach is preferable to that in S. 2766 as it provides for the development of national uniform enforceable controls focusing on discharges from commercial and large recreational vessels, which are more likely to be of concern due to their discharge constituents and volume.

A copy of that Administration alternative proposal appears as section 4 of the legislative text attached to the Administration's April 1, 2008, views letter on S. 1578. That attachment also included additional legislative text that would amend the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA) to make important and necessary improvements to the USCG's authority to more strongly regulate discharges of ballast water and other vessel-related vectors of aquatic nuisance species. While we support simultaneous and comprehensive action to better address aquatic nuisance species by the USCG through a strengthened NANPCA and to address other discharges incidental to the normal operation of vessels though national uniform standards developed under separate authority by EPA, we recognize that Congress appears to be proceeding to address these issues in separate legislative vehicles. In light of that, in order to better address the issue of NPDES permitting of discharges incidental to the normal of vessels, we have reformatted § 4 of the Administration

proposal as an amendment to S. 2766, and which, like S. 2766, would place the new program under § 312 of the CWA. A copy of that text is attached for your consideration.

Specific comments on drafting of S. 2766

1) ***Scope of vessels covered***: As noted above, the current scope of S. 2766 is limited to discharges incidental to the normal operation of recreational vessels. We strongly recommend that it also include creation of a regulatory program for discharges incidental to the normal operation of commercial vessels as well, in lieu of NPDES permitting.

2) ***Enforcement***: The current draft of S. 2766 creates a prohibition against discharges incidental to the normal operation of recreational vessels unless an applicable management practice is used. However, the bill does not clearly specify an enforcement mechanism in the event that prohibition is violated. We recommend, at a minimum, amending the second sentence of existing CWA § 312(j) to insert immediately after the reference to subsection (h) an additional specific reference to the bill's new subsection (o).

3) ***Development of regulatory controls***: With respect to EPA actions, the bill in effect provides for a three step process consisting of first, evaluate and identify discharges for which management practices are reasonable and practicable, second, develop management practices, and third, promulgate performance standards for the management practices. It is unclear as to why performance standards are made a separate and third step, and we recommend a more straight forward two step process under which discharges would first be evaluated to determine when controls are reasonable and practicable, and then best management practices (which would include any necessary performance standards), are developed. In addition, we note the bill provides one year time periods for each of its three steps, which is an insufficient timeframe for the activities required by the bill.

4) ***State regulation***: We note that unlike the case for the other discharges subject to § 312, under which States are pre-empted from regulation except through the implementation of no discharge zones, S. 2766 would allow for State regulation as well. It is unclear why this departure from the existing model of CWA § 312 was chosen, or why the federal government would be mandated to develop federal standards for the universe of recreational vessels when they already are, and would remain, subject to State regulation.

5) ***Geographic scope***: We note that the bill's prohibition against discharge extends to waters of the contiguous zone. That is a greater geographic scope than NPDES permitting for vessels being used as a means of transportation, which as a general matter is tied to the three mile outer limit of the territorial sea. See, CWA § 502(12)(B).

6) ***Authorization of Appropriations***: Despite creating a new program for regulation of discharges from upwards of 18 million recreational vessels, the bill contains no authorization of appropriations to EPA or the USCG to carry out these new duties. We recommend that the bill authorize to EPA and the USCG "such sums as are necessary for each of fiscal years 2008 through 2012 to carry out responsibilities assigned by the Act," which is consistent with the approach taken in the Administration legislative proposal.

The Office of Management and Budget advises that there is no objection to the transmission of this letter from the viewpoint of the President's program. Again, thank you for your consideration of these comments. If you have any further questions, please contact me or your staff may contact Ms. Christina J. Moody in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0260.

Sincerely,

Christopher P. Bliley
Associate Administrator

Attachment

cc: James M. Inhofe, Ranking Member

AMENDMENT TO S. 2766

OFFERED BY _____

Strike the text and insert the following:

A Bill

To amend the Federal Water Pollution Control Act to provide for the establishment of nationally uniform environmentally sound standards for certain discharges incidental to the normal operation of vessels, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE

This Act may be cited as the "Clean Vessel Act of 2008".

SEC. 2. PURPOSE

The purpose of this section is to—

(a) provide for the evaluation of, and establishment of nationally uniform, environmentally sound standards for, discharges incidental to the normal operation of vessels; and

(b) establish procedures for designation of no discharge zones as necessary to protect waters within the jurisdiction of a State from the effects of discharges incidental to the normal operation of vessels.

SEC 3. DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.

Section 312 of the Federal Water Pollution Control Act (33 U.S.C. 1322) is amended by adding at the end the following:

"(o) DEVELOPMENT AND IMPLEMENTATION OF STANDARDS FOR CERTAIN DISCHARGES INCIDENTAL TO THE NORMAL OPERATION OF VESSELS. —

"(1) EVALUATION.—Within 3 years after the date of enactment of the Clean Vessel Act of 2008 the Administrator, in consultation with the Secretary of the Department in which the Coast Guard is operating, shall conduct an evaluation of vessel discharges into navigable waters, other than discharges identified in paragraphs (6) and (7) of this subsection, incidental to the normal operation of vessels. The evaluation shall include but need not be limited to—

"(A) a characterization of the various types and composition of such discharges by different classes of vessels;

"(B) the volumes of such discharges for representative individual vessels and by classes of vessels in the aggregate;

"(C) an analysis of technologies or best management practices, and their associated costs, for the control of such discharges;

"(D) an analysis of the extent to which such discharges are currently subject to regulation under existing federal laws or binding international obligations of the United States;

"(E) the locations of such discharges;

"(F) analyses and conclusions as to the nature and extent of potential effects of such discharges on human health, welfare, and the environment; and

"(G) recommendations as to steps, including regulatory changes, together

with a schedule for implementation, that are appropriate to address such discharges.

"(2) INSPECTIONS, MONITORING, AND ENTRY; COOPERATIVE AGREEMENT.—The Administrator may use the authorities provided by sections 308 (a) and (b) of this Act (33 U.S.C. 1318(a)-(b)) whenever required to carry out the objectives of this subsection. The Administrator also may enter into cooperative agreements with other appropriate Federal agencies, with respect to use of their facilities, equipment, or personnel in carrying out activities relating to implementation of this subsection. The Administrator may use the authorities provided in section 309 of this Act (33 U.S.C.1319) to enforce any actions taken under this paragraph.

"(3) PUBLIC COMMENT.—The Administrator shall make a draft of the evaluation available for public comment, including publication of a notice of availability in the Federal Register, and shall complete the evaluation after taking into account any comments received.

"(4) REGULATION OF DISCHARGES.—

"(A) IN GENERAL.—Notwithstanding any other provision of this Act, any requirement to obtain a permit under section 402 of this Act (33 U.S.C. 1342) for a discharge incidental to the normal operation of a vessel subject to paragraph (1) of this subsection is suspended for a period of 6 years from the date of enactment of Clean Vessel Act of 2008. The Administrator, taking into account the evaluation prepared under paragraph (1) of this subsection, in consultation with the Secretary of the Department in which the Coast Guard is operating, shall promulgate a final rule to establish an appropriate program for discharges incidental to the normal operation of vessels into navigable waters. Following promulgation of the final rule

required by this paragraph, no permit under section 402 of this Act (33 U.S.C. 1342) shall be required for discharges incidental to the normal operation of a vessel subject to paragraph (1) of this subsection. The program established under this subsection shall be designed to establish enforceable uniform national discharge standards for discharges warranting such regulation and may be modeled in whole or in part on the regulatory program for vessels of the Armed Forces under subsection (n) of this section (33 US.C. 1322(n)), provided, however, that such standards shall be based upon the best available technology as determined in accordance with section 304(b)(2)(B) of this Act (33 U.S.C. 1314(b)(2)(B)) and its implementing regulations.

"(B) SAVINGS CLAUSE.—Except as expressly provided in this subsection, nothing in this subsection alters any existing requirements of any other federal law, including, but not limited to, section 311 of this Act (33 U.S.C. 1321), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 *et seq.*), and Title XIV, Pub. L. 106-554 (Dec. 31, 2000, 114 Stat. 2763) [Certain Alaska Cruise Ship Operations] (codified at 33 U.S.C. 1901 note).

"(C) ONE TIME EXTENSION.—Following opportunity for public comment, and with 6 months notice in advance to the Senate Committees on Commerce, Science, and Transportation and on Environment and Public Works, and the House of Representatives Committee on Transportation and Infrastructure, the Administrator may extend the deadline in paragraph (4)(A) of this subsection one time for a period not to exceed two years to allow for completion of the regulation specified therein.

"(D) ENFORCEMENT.—Any national uniform discharge standards or

prohibitions under this section shall be enforced by the Secretary of the Department in which the Coast Guard is operating or by a State in the same manner as provided for in subsections (i), (j), (k), (l), and (m) of this section (33 U.S.C. 1322(i), (j), (k), (l), and (m)).

"(E) JUDICIAL REVIEW.—

"(i) An interested person, including any State or other sovereign entity, may file a petition for review of a final action by the Administrator under this subsection in the United States Court of Appeals for the District of Columbia Circuit. Any such petition shall be filed within 120 days from the date of such final action, except that if such petition is based solely on grounds arising after such 120th day, then any petition for review under this paragraph shall be filed within 120 days after such grounds arise.

"(ii) Final action for which review could have been obtained under paragraph (E)(i) is not subject to judicial review in any civil or criminal proceeding for enforcement.

"(5) EFFECT ON STATE AUTHORITY.—

"(A) Notwithstanding any other provision of law, except as provided in this paragraph and section 1411(b) of Title XIV, Pub. L. 106-554 (Dec. 31, 2000, 114 Stat. 2763) [Certain Alaska Cruise Ship Operations] (codified at 33 U.S.C. 1901 note), no State or political subdivision thereof may adopt or enforce any statute or regulation of the State or political subdivision with respect to a discharge incidental to the normal operation of a vessel subject to paragraph (1) of this subsection—

"(i) prior to expiration of the suspension under paragraphs

(4)(A) or (4)(C) of this subsection; or

"(ii) after the promulgation of the final rule specified in paragraph (4)(A) of this subsection.

"(B) If any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit one or more discharges incidental to the normal operation of a vessel, whether or not treated, from all vessels other than those specified in paragraphs (6) and (7) of this subsection, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and effective removal and treatment of the relevant discharges from vessels are reasonably available for such waters. The State shall include in its request to the Administrator such information that the Administrator determines necessary to evaluate the State's request.

"(C) The Governor of any State may submit a petition requesting that the Administrator review the regulations promulgated under paragraph (4)(A) of this subsection if there is significant new information, not available previously, that could reasonably result in a change to the regulation. The petition shall be accompanied by the scientific and technical information on which the petition is based.

"(6) DISCHARGES UNAFFECTED.—Nothing in this subsection shall be interpreted to apply to:

"(A) a vessel of the Armed Forces;

"(B) a discharge of vessel sewage; or

"(C) any discharge not subject to the permit exclusion contained in section

122.3(a) of Title 40 of the Code of Federal Regulations, as in effect on March 29, 2005.

"(7) EXCLUSIONS.—No permit under section 402 of this Act (33 U.S.C. 1342) shall be required for, nor shall any uniform national discharge standard issued under paragraph (4)(A) of this subsection apply to—

"(A) a discharge incidental to the normal operation of a recreational vessel as defined in 46 U.S.C. 2101(25) that is less than 79 feet in length;

"(B) a discharge of vessel ballast water or sediment or a discharge of aquatic nuisance species from other vessel-related sources subject to section 1101 of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. 4711);

"(C) the placement, release, or discharge of equipment, devices, or other material from a vessel for the sole purpose of conducting research on the aquatic environment or its natural resources in accordance with generally recognized scientific methods, principles, or techniques;

"(D) any discharge from a vessel authorized by an On-Scene Coordinator in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601, *et seq.*), the Federal Water Pollution Control Act, (42 U.S.C. 1321), the Oil Pollution Act of 1990 (33 U.S.C. 2701, *et seq.*);

"(E) discharges from a vessel that are necessary to secure the safety of the vessel or human life or to suppress fires onboard or at shoreside facilities; or

"(F) a vessel owned or operated by a foreign nation when engaged only in government non-commercial service.

"(8) AUTHORITY OF ADMINISTRATOR TO PRESCRIBE REGULATIONS.—The Administrator

is authorized to prescribe such regulations as are necessary to carry out his functions under this subsection."

SEC 4. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to the Administrator for each of fiscal years 2008 through 2012 to carry out responsibilities assigned by this Act.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 19 2008

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable John Boozman
Ranking Member, Subcommittee on Water
Resources and Environment
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Boozman:

Thank you for your June 27, 2008, letter to James A. Hanlon, Director of the Environmental Protection Agency's (EPA) Office of Wastewater Management. Your letter provided additional questions for the record with respect to EPA's testimony at the June 12, 2008, hearing before the Subcommittee on Water Resources and Environment regarding discharges incidental to the normal operation of commercial vessels. Please find enclosed our responses to those questions.

Again, thank you for your letter. If you have any further questions, please contact me or your staff may contact Pamela Janifer, in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-6969.

Sincerely,

Christopher P. Bliley
Associate Administrator

Enclosure

RESPONSES TO JUNE 27, 2008, SUPPLEMENTAL QUESTIONS TO JAMES HANLON FROM CONGRESSMAN JOHN BOOZMAN, RANKING MEMBER SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

June 12, 2008 Hearing
Discharges Incidental to the Normal Operation of a Commercial Vessel

Q1. What sorts of data and other information does EPA need to develop appropriate standards for discharges incidental to the normal operation of commercial and recreational vessels?

Answer

The process for development of a permit program for a previously unregulated category of point source discharges (such as vessels) typically consists of two broad phases - the collection of information necessary to understand the industry to be regulated and the development and processing of a permit based on such information.

First, with respect to data collection, the Agency's preferred approach is to (1) develop original data specific to the facilities actually being regulated and tailored to determine the make-up and constituents of the wastestreams to be regulated and (2) identify and evaluate technologies to serve as the basis for appropriate technology-based effluent limitations. The time it takes to develop original data can be quite lengthy and averages between 12 and 30 months, depending on the complexity of the universe of facilities to be regulated, but has taken as long as six years. In this case, given the practical difficulties in accessing and sampling vessel discharges, the wide range of vessels types and classes involved, the variable nature of potential discharges, and the relative paucity of data for commercial and recreational vessels discharges, we would expect original data collection to be complex and time-consuming. This type of data collection requires an Information Collection Request that must be approved by the Office of Management and Budget (OMB) before the Agency can collect the information from 10 or more entities. The public also gets an opportunity to comment on the proposed collection of information before OMB approves it.

Second, the process of developing a general permit for discharges previously not subject to a National Pollutant Discharge Elimination System (NPDES) permit typically begins with the analysis of the data collected for the purpose of developing the permit effluent limitations required by the Clean Water Act (CWA). For example, NPDES permits must incorporate effluent limitations for toxic and non-conventional pollutants that represent application of the "best available technology economically achievable" (BAT). When effluent limitations guidelines and standards do not apply, the proposed permit limitations are developed based on our "best professional judgment" (BPJ). CWA section 402(a) (1) (B). When it is necessary to use BPJ to establish BAT

permit limitations, 40 C.F.R. §125.3(d)(3) requires that we take into account: the age of equipment and facilities involved; the process employed; engineering aspects of the application of various types of control techniques; process changes; the cost of achieving effluent reduction; and non-water quality environmental impacts. In addition, once technology-based effluent limits are established, we must also determine whether any more stringent limitations are necessary to meet water quality standards.

In light of the September 30, 2008, vacatur date set by the District Court in the *Northwest Environmental Advocates v. EPA* lawsuit, we have necessarily been unable to collect the types of original data we would prefer to use, and instead have relied upon such available information as we could collect, including the results of our June 21, 2007, Federal Register notice seeking information from the public for use in developing the permit terms, and information gathered with respect to discharges from vessels of the Armed Forces under the CWA section 312(n) program. For more details on the types of information we typically would use and the process for developing effluent limitations under the CWA, please refer to the EPA declarations filed in the *Northwest Environmental Advocates* litigation, which are available on-line at: http://epa.gov/owow/invasive_species/ballast_water.html.

Q2. Does EPA have the capacity to develop and implement a permitting and enforcement program on board tens of thousands of commercial vessels and millions of recreational vessels by this autumn?

Answer

We issued for public comment two draft general NPDES permits to address discharges incidental to the normal operation of commercial and recreational vessels. Due to recent legislative action under S:2766, the general permit for recreational vessels is no longer required and will not be finalized. The public comment period closed on August 1, 2008. Our ability to finalize the vessel general permit for commercial vessels prior to the District Court's scheduled vacatur of the existing NPDES permit exclusion on September 30, 2008, is affected in considerable part by the nature and number of comments we have received and the results of the state CWA section 401 certification process. To date, EPA has received about 150 comments totaling 2,384 pages of which at least 10 raise significant technical, policy, or legal issues that EPA needs to resolve before issuing the final permit. EPA is still in the process of reviewing and analyzing the comments received. As discussed in EPA's June 12, 2008, testimony before the Subcommittee, given the complexity of the task, the limited available information, the procedural steps we must follow, and the sheer number of vessels and discharges implicated, this is an extremely ambitious goal.

Q3. Is the Coast Guard, rather than EPA, better suited to implement a regulatory and enforcement program on vessels? Doesn't the Coast Guard already take the lead on implementing other regulatory requirements on vessels?

Answer

Both EPA and the Coast Guard possess highly specialized expertise that should be utilized to effectively address vessel discharges, and, depending upon the particular statute involved, both agencies have been assigned roles for implementing regulations that impact vessel operations. EPA has extensive experience and expertise in development of effluent limitations (both technology and water quality based) for pollutant discharges in general, development and implementation of effective measures and strategies for protection of the aquatic and marine environment, and implementation and enforcement of such standards and measures. It also has vessel-specific experience with respect to standards for vessel sewage, graywater from Alaska cruise ships, and discharges incidental to the normal operation of vessels of the Armed Forces. Similarly, the Coast Guard possesses extensive experience and expertise with respect to the design, construction, and operational and safety necessities of equipment installed on vessels. The Coast Guard also has an in-place standards development and enforcement structure related to vessels. It also has experience in environmental regulation of certain vessel discharges under international treaties and domestic law such as the International Convention for the Prevention of Pollution from Ships ("MARPOL"), the Act to Prevent Pollution from Ships, APPS, and the National Aquatic Nuisance Prevention and Control Act (NANPCA), as amended.

The Administration's alternative legislative proposal for vessel discharges (which was transmitted to the full Committee by EPA and the Department of Homeland Security on April 1, 2008) appropriately reflects the need for both agencies to play an active role. In the case of ballast water and other vessel-related vectors for invasive species, the Administration proposal, like NANPCA, generally provides for a Coast Guard lead regulatory role, with consultation with EPA where necessary and appropriate. With respect to other discharges incidental to the normal operation of a vessel, the Administration alternative proposal, like CWA section 312, generally assigns EPA the lead regulatory role, with consultation with the Coast Guard as necessary and appropriate. A copy of that Administration proposal for non-ballast water discharges, reformatted so as to take the form of an amendment to CWA section 312, was attached to EPA's June 12, 2008, testimony before the Subcommittee.

Q4. You indicate that EPA did not have a sufficient amount of time to independently investigate vessel operations and resulting discharge impacts as extensively as EPA might have wished. What does EPA need and how long would it take for EPA to properly get its arms around the issue and come with appropriate standards?

Answer

With respect to non-ballast water discharges, the Administration proposal provides EPA with a six year period to develop a non-NPDES regulatory

regime, to consist of nationally uniform enforceable standards based on BAT, with a one time opportunity for EPA to obtain a two-year extension. A copy of the relevant proposal is attached to EPA's June 12, 2008, testimony before the Subcommittee. As to the types of information we typically use, please refer to the response to Question 1 above.

Q5. EPA has proposed a general permit that would cover commercial fishing and other vessels. While a general permit is much preferred over individual NPDES permits for each and every discharge from each and every vessel, won't it potentially subject commercial fishing vessel operators to Clean Water Act citizen's lawsuits and fines of up to $32,000 per day for violations?

Answer

While it is true that violation of an NPDES permit can result in fines of $32,500 per day per violation and potential citizen suits, issuance of the general vessel permit would not itself create the potential for enforcement actions and citizen suits. In fact, without the EPA general permit, vessels are potentially subject to suit. As explained in EPA's June 12, 2008, testimony before the Subcommittee, section 301(a) of the CWA generally prohibits the "discharge of a pollutant" without an NPDES permit. If the District Court's order in the *Northwest Environmental Advocates* litigation remains unchanged, our 35 year-old regulatory exclusion allowing for the discharge of pollutants incidental to the normal operation of a vessel without an NPDES permit will be vacated by the Court on September 30, 2008. This means that, as of that date, the regulatory exclusion will no longer exempt such discharges from the prohibition in CWA section 301(a). Consequently, in the absence of a permit authorizing vessel discharges, discharges vessels would be subject to the CWA's prohibition against the discharge of a pollutant without a permit and potentially subject to civil and criminal penalties for violations of that prohibition, and citizen suits. On July 31, 2008, the President signed S: 3298, which provides for a 2-year moratorium for all fishing vessel from NPDES requirements pending further study by EPA. Therefore, enforcement penalties do not currently apply to fishing vessels.

Q6. EPA's proposed general permits establish permit requirements for commercial vessels and separate requirements for recreational and uninspected passenger vessels under 79 feet. Several tour boat, dive boat, and cruise boat owners in my district operate U.S. Coast Guard inspected vessels between 25 and 50 feet. These vessels have incidental discharges that are materially the same as recreational vessels of similar lengths. In fact, most of these vessels would normally be recreational vessels if their owners did not decide to carry passengers for hire. Why are these vessels being treated differently than recreational vessels of similar lengths?

Answer

Based on our recognition that recreational vessels of less than 79 feet would typically not have professional crews and often spend only a limited period of

time actually in the water or are relatively infrequently used, we developed two different general permits in an effort to avoid undue burdens on the typical recreational boater. We wish to emphasize that at this stage these permits were issued in draft form for the express purpose of receiving public comment (for reasons noted in the response to Q2, EPA will not finalize the recreational vessel permit). Additionally, on July 31, 2008, the President signed S: 3298, which provides for a 2-year moratorium for commercial vessels under 79 feet from NPDES requirements pending further study by EPA.

Q7. Why shouldn't we exempt the commercial sector just like the recreational sector legislatively, especially if the EPA believes the NPDES permit is not the best model to address this issue? Where are our science and common sense pointing in this instance?

Answer

We agree that use of NPDES permits to regulate discharges incidental to the normal operation of vessels, whether commercial or recreational, is inappropriate. The Administration proposal is attached to EPA's June 12, 2008. testimony, and was patterned after the basic approach Congress has chosen in the past for other vessel discharges under section 312 of the CWA. That proposal was developed after extensive and thorough inter-agency coordination, and we hope it will receive your careful consideration.

In lieu of using NPDES permits, that proposal provides for the evaluation, development, and implementation of environmentally-sound, nationally-uniform and enforceable best management practices, based on the "best available technology" factors of the CWA. It also would exclude recreational vessels less than 79 feet in length both from this new program and NPDES permitting, while still leaving the states free to regulate such recreational vessels should they deem that appropriate.

As stated in EPA's June 12, 2008, testimony before the Subcommittee, this approach avoids the use of NPDES permits and provides for the development of national, uniform, enforceable controls focusing on discharges from commercial and very large recreational vessels, which are more likely to be of concern due to their discharge constituents and volume.

Q8. I am concerned about the ability of EPA to notify shrimpers in Congressman Brown's district about the impact of the proposed permit requirements. Please describe how the EPA plans to notify this group of boat owner/operators during the short time period permitted under the Court's deadline.

Answer

S: 3298 provides a 2-year moratorium for shrimpers from having to obtain an NPDES permit. We agree, if an NPDES permit is issued in the future, that broad dissemination of the proposed and final permits to the regulated community is

important. We would engage in outreach to the regulated community, including commercial fishing industries such as the shrimpers you referred to, in conjunction with our Regional offices, trade press, and trade associations.

Q9. Please provide me with any supplemental or clarifying testimony or comments that EPA may have regarding discharges incidental to the normal operation of a commercial vessel.

Answer

The following EPA websites provide further factual and background information on discharges incidental to the normal operation of vessels:

- General vessel discharge and background information:
  - http://www.epa.gov/owow/oceans/regulatory/vesseldisch.html
- Copies of the proposed permits and supporting documents:
  - http://cfpub.epa.gov/npdes/home.cfm?program_id=350
- Docket for the proposed recreational vessel permit:
  - http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=EPA-HQ-OW-2008-0056
- Docket for the proposed commercial vessel permit:
  - http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=EPA-HQ-OW-2008-0055

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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JUL 29 2008

The Honorable James L. Oberstar
Chairman, Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your June 27, 2008, letter to James A. Hanlon, Director of the Environmental Protection Agency's (EPA) Office of Wastewater Management. Your letter provided additional questions for the record with respect to EPA's testimony at the June 12, 2008, hearing before the Subcommittee on Water Resources and Environment regarding discharges incidental to the normal operation of commercial vessels. Please find enclosed our responses to those questions.

Again, thank you for your letter. If you have any further questions, please contact me or your staff may contact Pamela Janifer, in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-6969.

Sincerely,

Christopher P. Bliley
Associate Administrator

Enclosure

RESPONSES TO JUNE 27, 2008, SUPPLEMENTAL QUESTIONS TO JAMES HANLON
FROM
CONGRESSWOMAN GRACE F. NAPOLITANO
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

June 12, 2008 Hearing
Discharges Incidental to the Normal Operation of a Commercial Vessel

Q1. Mr. Hanlon, the Quagga Mussel is an invasive species that was introduced into the West from the ballast water of vessels coming from the Great Lakes. What is EPA doing to assist states and water agencies in fighting the Quagga mussel which is clogging water infrastructure throughout the West?

Answer

Quagga mussels were introduced into the U.S. from Europe in the late 1980's most likely by ballast water. They have since spread westward and have been found, for example, in Lake Meade and its drainage basins, and more recently in California. One of the likely pathways for this subsequent westward spread is trailering of contaminated recreational boats from waters with quagga mussel infestations to other uninfected waterbodies. One of the ways to reduce the risk of introduction by that pathway is to ensure boat owners inspect and clean their vessels properly, empty live wells or bait wells, and clean equipment before moving their vessels between waterbodies. Section 2.1.4 of EPA's proposed recreational vessel general permit specifies requirements intended to minimize the transport of aquatic organisms between waterbodies by this pathway, including inspection and cleaning of hulls and trailers and draining of bait wells. In addition, State and local organizations are actively involved in boater education campaigns as well as sponsoring or requiring inspection and hull cleaning. Information on activities specific to the State of California can be found on the California Department of Fish and Game website at: http://www.dfg.ca.gov/invasives/quaggamussel/. For information related more generally to the Western US as a region, visit the 100th Meridian website at: http://www.100thmeridian.org/.

Q2. What is EPA doing to address the impact that invasive species pose to non-native waters due to discharges incidental to the normal operation of a vessel?

Answer

EPA is an active participant in the activities of the National Invasive Species Council established under E.O. 13112 and on the Aquatic Nuisance Species Task Force created by the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA). EPA also plays a substantial role in the Coast Guard-led United States delegation to the International Maritime Organization (IMO), and actively participated in the negotiations leading up to the February 2004 IMO ballast water management treaty and subsequent development of implementing guidelines. In addition, EPA has contributed technical expertise and is a cooperating agency on the draft Programmatic Environmental Impact

Statement being developed by the Coast Guard in support of their upcoming ballast water performance standard rulemaking under NANPCA. EPA's Office of Research and Development, through the Environmental Technology Verification (ETV) program, also has worked with the Coast Guard to develop rigorous scientific protocols for the evaluation of ballast water treatment technologies in order to help verify their ability to remove or kill organisms in ballast water under simulated operating conditions. The protocols being developed are now being field-verified by the Navy and Coast Guard at the Naval Research Lab Key West Ballast Water Treatment Facility. The draft ETV protocols also served as the major technical input used by IMO in developing its ballast water treatment system testing guidelines under the February 2004 ballast water management treaty.

Our local and Regional offices also participate in regional activities related to invasive species. For example, our Office of Research and Development's Western Ecology Division is working with the US Geological Survey to develop a comprehensive inventory of estuarine and near-coastal nonindigenous species on the US Pacific Coast and also is working to develop habitat niche models to predict potential distributions of nonindigenous species. The resulting information will be useful in identifying areas at risk and control strategies for the West Coast.

RESPONSES TO JUNE 27, 2008, SUPPLEMENTAL QUESTIONS TO JAMES HANLON
FROM
CONGRESSMAN JAMES L OBERSTAR, CHAIRMAN
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Subcommittee on Water Resources and Environment
June 12, 2008 Hearing
Discharges Incidental to the Normal Operation of a Commercial Vessel

Q1. Mr. Hanlon, much of the discussion on discharges from commercial vessels has focused on commercial fishing vessels or smaller commercial vessels. In your opinion, is there a difference in the types and toxicity of discharges from commercial vessels dependant on the size of the vessel? Is there a difference on the types and toxicity of discharges from vessels of the same size, but different functions, such as charter boats and small commercial fishing vessels of the same length? Can you elaborate?

Answer

We would expect vessel discharge characteristics to be affected by many additional factors besides size. Other factors would include the number of crew and passengers carried, the nature of any cargo and how that cargo is loaded and stored onboard, the size and amount of motor driven or hydraulic equipment onboard, engine size, the age and condition of the vessel, and, in the case of fishing vessels, the nature, frequency, and duration of the fishing operations conducted.

Another factor which can affect the potential for impacts is the amount of time a vessel spends in the water or in actual operation. For example, as explained on page 15 of the Fact Sheet for the proposed recreational vessel general permit, recreational boaters keep their boats in the water an average of 31 days per year, and fewer days in the water means a lower volume of discharge. In contrast, we would anticipate that commercial vessels are likely to spend more time in the water and in actual active operation. When we developed the approach of having two general permits (one for all commercial vessels and those recreational vessels 79 feet more in length, and the other for recreational vessels under 79 feet), our basic objective was to provide a familiar, clearly understandable, and easily determined bright-line cut-off point between the two permits so that vessel owners and operators could clearly understand which permit was applicable to their vessel. These permits were issued in draft form for the purpose of obtaining public comment on such issues, and we will carefully consider all comments received on length and applicability criteria before finalizing the permits.

Q2. In the administration's proposal that was included as part of your testimony, why has the administration recommended a 3 year study on the types of discharges from commercial vessels? Why not amend existing section 312(n) to include commercial

vessels? In this proposal, why does the administration differentiate between recreational vessels greater and or less than 79 feet in length?

Answer

We would use the three year study period to collect and analyze data with respect to discharges from commercial vessels. Our experience is that the time it takes to develop original data to support regulatory activity under the Clean Water Act (CWA) or similar regimes can be quite lengthy and averages between 12 and 30 months, depending on the complexity of the universe to be permitted, but has taken as long as six years. In this case, given the practical difficulties in accessing and sampling vessel discharges, the wide range of vessels types and classes involved, the variable nature of potential discharges, and the relative paucity of data for commercial and recreational vessels discharges, we would expect original data collection to be complex and time-consuming.

With respect to amending CWA section 312(n), the Administration proposal specifically calls for development of a regulatory regime patterned after CWA section 312(n), but using the "best available technology" (BAT) factors of the CWA. Section 312(n) was written to focus on the circumstances of vessels of the Armed Forces with a significant role assigned to the Department of Defense. This would complicate any attempt to amend that section to include commercial vessels. If Congress does choose to undertake direct amendment of CWA section 312(n), however, we would be pleased to offer such technical assistance as may be requested in drafting text that would be suitable in the context of discharges incidental to the normal operation of commercial vessels.

Finally, with regard to the use of a length criteria to differentiate between recreational vessels, our intent was to use criteria that would be familiar and readily ascertainable and also would reasonably approximate the point at which recreational vessels are more likely to have professional crews and to carry more passengers with attendant greater graywater discharges. The 79 foot length in particular reflects a length criterion already in use in the maritime community under Coast Guard safety-related regulations. See 46 CFR Parts 28 and 69.

In addition, one of the goals in developing the Administration proposal was to avoid use of either National Pollutant Discharge Elimination System (NPDES) permitting or the new regulatory regime for discharges incidental to the normal operation of millions of recreational vessels, while leaving the question of whether to otherwise regulate typical recreational vessels to the States. That way EPA can focus its attention on developing national uniform standards for vessels most likely to be of greater concern.

Q3. In the administration's proposal, EPA recommends exempting the regulation of ballast water from the Clean Water Act, provided that it is regulated under section 1101 of the Nonindigenous Aquatic Nuisance Prevention and Control Act. However, existing section 1101 of NANPCA provides for voluntary ballast water exchange (except in the Great Lakes) as the appropriate treatment technology for ballast water. I recognize there

are several legislative proposals to strengthen section 1101, but they are not yet law. So, is the administration's recommendation to exempt the regulation of ballast water from section 402 of the Clean Water Act contingent upon strengthening of the ballast water provisions of NANPCA, or would the ballast water exchange standards of existing law be sufficient?

Answer

Section 1101(f) of NANPCA authorized the Coast Guard, upon certain findings being made as specified in the statute, to convert the voluntary guidelines referenced in your question into a mandatory regulatory program. The Coast Guard has exercised that authority and the formerly voluntary guidelines have been replaced by a national enforceable mandatory ballast water management program, including exchange requirements. 33 CFR Part 151, Subpart D; 69 Fed. Reg 44952 (July 28, 2004).

As stated in EPA's June 12, 2008, testimony before the Subcommittee, the Administration strongly supports enactment of legislation to further strengthen NANPCA to better prevent the introduction of aquatic nuisance species via ballast water and other vessel-related pathways. This includes amending NANPCA to mandate the phase-out of ballast water exchange as the control method of choice and instead phase-in mandatory treatment to meet a ballast water performance standard that ultimately is 100 times more stringent than that currently contained in the International Maritime Organization ballast water treaty for the two larger categories of organisms.

As initially presented to the full Committee in an April 1, 2008, letter from EPA and the Department of Homeland Security, the Administration proposal consisted of text for a single integrated bill that not only contained such strengthening of NANPCA, but also set out separate statutory text to manage the other remaining discharges incidental to the normal operation of vessels through a program using national enforceable uniform standards in lieu of NPDES permitting. Congress, however, is considering these two issues in separate legislative vehicles. For example, Title V of HR. 2830 as passed the House (and includes S. 1578 as reported) includes only ballast water and other vessel-related invasive species vectors, with consideration of other discharges incidental to the normal operation of vessels in separate bills such as H.R. 5949 and H.R. 5594. In light of this legislative approach by Congress, the text from the Administration proposal that was attached to EPA's June 12, 2008, testimony confined itself to the non-ballast water aspects of the Administration proposal to ensure that text received due and timely consideration. We continue to believe that effective Congressional action on both issues is necessary.

Q4. Small commercial vessels seemingly discharge fewer pollutants than larger commercial vessels, such as cruise ships. However, has EPA conducted (or is EPA aware of) any research on the aggregate impacts of discharges from recreational vessels

that may discharge in discrete locations, such as marinas? Is there a potential localized water quality impact from such discharges? Would the best management practices outlined in the administration's recreational boating permit proposal address such impacts?

Answer

While we generally would not expect significant widespread or national impacts from recreational vessels, substantial localized impacts in areas with high concentrations of recreational vessels are possible. Some states have identified such localized impacts, such as those identified in the Shelter Island (California) Total Maximum Daily Load for Dissolved Copper. A copy of the relevant technical report is available on-line at: http://www.swrcb.ca.gov/rwqcb9/water_issues/programs/watershed/docs/swu/shelter_island/techrpt020905.pdf.

The best management practices specified in the recreational boating permit are technology based effluent limits which are anticipated to help mitigate such localized impacts. The permit also would include limits to ensure compliance with applicable CWA section 303 water quality standards and is subject to certification by the States under CWA section 401 as to compliance with such standards and appropriate State laws. Neither the existing NPDES exclusion in 40 CFR 122.3(a) nor the Administration alternative legislative proposal attached to EPA's June 12, 2008, testimony would preclude State regulation of localized impacts that might result from recreational vessels.

DISCHARGES INCIDENT TO THE NORMAL OPERATION OF A COMMERCIAL VESSEL

HEARING BEFORE THE

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

TESTIMONY OF

KATHY METCALF

SUBMITTED ON BEHALF OF

THE SHIPPING INDUSTRY BALLAST WATER COALITION

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JUNE 12, 2008

Good morning, Madame Chairman and Members of the Subcommittee. We appreciate the opportunity to provide this testimony today addressing the significant issues associated with application of the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act to commercial vessels.

Madame Chairman, we respectfully request that our testimony be entered into the written record for this hearing.

I am Kathy Metcalf, Director of Maritime Affairs for the Chamber of Shipping of America.

Today I am testifying on behalf of the Shipping Industry Ballast Water Coalition (the "Coalition"), an informal organization comprised of the American Waterways Operators, Chamber of Shipping of America, Cruise Lines International Association, Intertanko, Lake Carriers Association, and the World Shipping Council, which are maritime trade associations that represent member companies that own, operate or charter commercial vessels of all types engaged in both domestic and international trade and represent over 90% of the vessels calling in US ports. The types of vessels owned and operated by coalition members include oceangoing and coastwise containerships, tankers, roll-on/roll-off vessels, bulk carriers, and passenger vessels as well as tug/barge units which operate in oceangoing, coastwise and inland waters. While the testimony we provide today highlights points of agreement by the vast majority of the Coalition, individual members of the Coalition would respectfully reserve their right to provide written comments to this record to provide additional information as they deem necessary.

The Coalition was formed over six years ago by a number of entities that believed resolution of the complex issues associated with management of discharges incident to the operations of marine vessels (including ballast water) required the coordinated efforts of all stakeholders. Since that time, the Coalition has provided testimony and comments to both legislative and regulatory initiatives regarding these discharges and has worked with a number of environmental groups toward creation of a balanced and environmentally protective approach to evaluation of these discharges and, where appropriate, development of management strategies to mitigate their impacts.

One such example of the Coalition's involvement in these issues relates to our work with Congress and federal agencies in the development of a legislative strategy to manage discharges of ballast water from commercial vessels. The Coalition's goal is to establish a single, federal standard to govern vessel discharges and prevent a patchwork of overlapping and conflicting federal and state programs affecting vessel discharges. We understand this hearing is focused on the broader issue of whether the Clean Water Act's NPDES program can or should be applied to all operational discharges incident to the normal operation of all vessel types and thus we will focus our comments in this area as related to commercial vessels. We are also available to respond to any questions on ballast water management issues as well since they are a subset of the discharges at issue here.

As noted, the foundational question to be answered here is whether the Clean Water Act's NPDES program should be applied to incidental discharges from vessels that by their very nature are mobile sources moving in and out of ports and waterways on a variety of itineraries. We believe the answer to this question is a resounding "no" for the following reasons:

1) There is a compelling need to create national uniformity in legal requirements relating to all marine vessels in order to adequately address the international and interstate nature of marine transportation. This is best accomplished by amending the Act To Prevent Pollution From ships, The Oil Pollution Act or similar laws.

2) Many vessel discharges are already addressed in current international agreements to which the US is a party, US statutes and regulations. NPDES application could create conflicting law at the Federal level and between Federal and State applications.

3) The NPDES system is not appropriate for application to mobile sources such as marine vessels as it was created to manage point source discharges from fixed facilities and for other reasons.

4) The NPDES system is unnecessarily complex and too resource intensive to justify application to marine vessels.

It is important to note here that this response is not intended to suggest that some or all of these discharges should not be regulated when in fact a number of them are already regulated under existing international agreements, US statutes and regulations. Rather this response is intended to convey our belief that the NPDES program is not the appropriate vehicle to do so. The Coalition can support the methods suggested in the Vessel Discharge Evaluation and Review Act (H.R. 5594) that provides a strategic roadmap for the collection and analysis of pertinent information relating to vessel discharges.

<u>1) There is a compelling need to create national uniformity in legal requirements relating to all marine vessels in order to adequately address the international and interstate nature of marine transportation. This is best accomplished by amending the Act To Prevent Pollution From ships, The Oil Pollution Act or similar laws.</u>

As indicated above, shipping is international and the regulation of shipping should be also. The Coalition believes that the regulation of shipping through international requirements as established by the International Maritime Organization (IMO) is the optimum way to comprehensively regulate the industry in a clear and consistent manner. However, in cases where US environmental interests are best addressed in national legislation and regulation due to inaction by IMO in a particular area, any national initiatives should provide for a consistent and clear structure by which discharges are regulated.

Because of the structure of the CWA and the NPDES permitting program, vessels visiting ports in more than one state (which is very common in most sectors of the maritime industry) could be subjected to different permit requirements in each state that they visit. To the extent that different states impose different discharge standards and/or require different treatment technologies to be employed, vessels will be unable to comply with these multiple standards.

The United States needs a single standard for vessels to meet so that they can install, if required, the necessary treatment technology or management systems and know that it will be acceptable in whatever U.S. port they call. Vessels are built for a given service but not route and thus vessel builders would have no idea at which U.S. port a vessel would call during its service life making it impossible to match equipment requirements with variable discharge limits set by states.

The CWA provides predictable standards for facilities that operate in one state's jurisdiction. The structure of the CWA and the NPDES permitting system, however, virtually guarantees that a vessel making port calls in multiple states will be called upon to meet different and conflicting standards in each of those states. Under section 402(b) of the CWA (33 U.S.C. § 1342(b)), the EPA Administrator must delegate NPDES program authority to a requesting state unless the Administrator finds that one of the statutory disqualifying conditions exists. Once program authority is delegated, the Administrator loses authority to issue permits within the scope of the state's delegated program. There is no requirement that state programs be consistent with one another. Once a state program has met the minimum standards set by the EPA, the state is free to add additional, more stringent requirements to the permits that it issues.

The Clean Water Act's NPDES system works well for stationary sources, because the state in which the facility and the regulated discharge occur does not change. It has never been applied to international ship operations. With vessels, the point source (i.e., the ship) literally is a moving target. Most vessels serving America's foreign commerce spend most of their time outside the U.S., and when they do arrive, a single voyage may result in port calls in two, three, and sometimes four different states within a matter of weeks or even days. Vessels operating in domestic service also travel to and through the waters of multiple states. The vessel and its equipment cannot change between ports. The vessel is capable of doing only what the vessel is designed and built (or retrofitted) to do. There simply is no mechanism by which differing state requirements can all be met by a single vessel.

Attempting to apply the NPDES permitting system to vessels will weaken, not strengthen, the Clean Water Act and the NPDES system. A Clean Water Act regime would create a system that requires vessels either to violate a state's laws or cease making port calls in states with requirements that are inconsistent with the technology that the vessel has installed in response to an earlier-enacted regulation from another state.

An insistence on regulating vessel discharges under the NPDES program will have a substantial negative impact on international trade. It could cause ports to be dropped from vessel schedules. It would create confusion regarding what technology is required to serve U.S. commerce. It will create confusion and disincentives for those companies trying to develop treatment technologies – companies that need to have an assurance of what treatment standard their product needs to meet.

The issue of having multiple state standards applicable to point sources in the context of the Clean Water Act is not a new one. Addressing the question of whether a state affected by a discharge in another state could maintain a common law nuisance claim under the affected state's law against a NPDES-permitted discharge in the source state, the Supreme Court held that applying multiple standards to a single discharge would be unworkable and would undermine the Clean Water Act:

> **"After examining the Clean Water Act as a whole, its purposes and its history, we are convinced that if affected states were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the "full purposes and objectives of Congress."**

International Paper Co. v. Oullette, 479 U.S. 481, 478 (1987). The particular legal issue in *Oullette* was different, but the practical problem faced there was precisely the same as here: it is not workable in practice to submit a single point source to multiple permitting requirements. That is even more certainly true when that source is by necessity a mobile vessel engaged in interstate or foreign commerce. The practical differences between stationary sources and mobile ship sources require that the two situations be treated differently.

Also, the CWA approach is incompatible with the emerging international legal regime regulating ballast water. In contrast, the Senate's Ballast Water Management Act (S. 1578) is consistent in approach with the "International Convention for the Control and Management of Ships' Ballast Water and Sediments", and it can serve as the United States' implementation of that treaty (the convention allows the U.S. to establish a higher national treatment standard, which S.1578 does). The Clean Water Act's NPDES system would not be compatible with implementation of this treaty.

2) Many vessel discharges are already addressed in current international agreements to which the US is a party, US statutes and regulations. NPDES application could create conflicting law at the Federal level and between Federal and State applications.

A number of the discharges incident to the normal operation of a commercial vessel are already subject to control and management under international conventions/treaties and domestic law, including but not limited to MARPOL, the Act to Prevent Pollutions from Ships, the Oil Pollution Act of 1990 and their implementing regulations. In developing these regulations due regard was taken of the operational realities of

commercial shipping and took into the account the diversity of ship types, routes, available technologies to mitigate these discharges and variations in not only the discharge types but also the diverse discharge profiles of marine vessels and the diverse aquatic ecosystems into which these discharges occur. In evaluating any next steps relating to these discharges, each should be reviewed in the light of what, if any, existing statutes and regulations already manage these discharges. Any new regulations or changes to existing regulations should take the same logical approach which would evaluate the environmental impacts of each discharge type, determine if the impacts are at such a level so as to warrant additional management through application of technologies or discharge limits, and evaluate the suite of available technologies which could be applied to each discharge type.

3) The NPDES system is not appropriate for application to mobile sources such as marine vessels as it was created to manage point source discharges from fixed facilities and for other reasons.

There is no doubt of the value provided in environmental protection that the NPDES program has provided for over 35 years since its inception. However, this value has been provided by its application to stationary sources such as refineries, factories and other fixed industrial facilities which discharge in US navigable waters. Other than one exception relating to commercial fish processing units afloat, the NPDES program has not been applied to mobile sources. The existing NPDES program is structured around stationary point sources that discharge relatively consistent components into a waterbody. Within the NPDES program, both the technology based effluent guidelines and water quality based effluent limits presume the ability to identify and quantify a specific number of predictable discharges and the components of those discharges and then assess the impact of these collective discharges on a particular receiving waterbody. This presumption fails when applied to the operational reality of commercial shipping. Ships are highly mobile sources that move in inland, coastal and international waters. The population and collective operational profiles of ships in a given port over a given period of time is neither predictable nor quantifiable due to the realities of marine operations. While many of these discharges are relatively consistent for a particular ship, they are not consistent across the wide range of ship types and sizes. Based on these operational realities, we believe it is scientifically impossible to conduct the assessments required under the existing NPDES program for mobile marine transportation point sources.

4) The NPDES system is unnecessarily complex and too resource intensive to justify application to marine vessels.

The value of a logical and scientifically based approach cannot be understated or rushed. Sufficient time should be taken to identify, quantify and assess commercial vessel discharges in a deliberate and comprehensive manner. As a potential template for this work and as an example of the need for a deliberate and structured approach, we point out the timeline associated with the promulgation and implementation of Uniform National Discharge Standards (UNDS) for Armed Forces vessels. In 1990, the

Navy began preliminary discussions about developing uniform national discharge standards for discharges incident to the normal operation of Armed Forces vessels.

After much work, Phase I of the UNDS development process was completed in 1999 which resulted in the identification and description of 25 discharges and publication of a final rule which required control of these discharges. The identified discharges run the gamut from the relatively simple to manage as is the case with weather deck runoff (rain water) to the more complex systems and discharges associated with large propulsion systems. Whether simple or complex, each of the 25 discharges requires a focused assessment of management practices and technologies which might be used to minimize their environmental impacts. Phase II of the UNDS process which will establish performance standards based on technical analyses of these 25 discharges was begun in 2000 and based on our review of the UNDS website continues to this day. Phase III which will establish requirements for the installation and operation of marine pollution control devices to control these discharges has yet to begin. All total, it has taken 17 years for the UNDS process to reach its current Phase II stage. Even accepting the fact that a significant portion of the work done under the UNDS process relative to identification of discharges (Phase I) can be applied to commercial vessels, the Phase II process which to date has taken 7 years with all the resources available to the Department of Defense, is no way comparable to the potentially accelerated timeline which some would apply to the commercial shipping industry to complete the same tasks not the least of which is a federal district court decision (US District Court for the Northern District of California, ER-203-220, ER-350) which allotted little more than 18 months to EPA to finalize a regulation and issue permits to all covered vessels which, if including the recreational boating industry, would amount to over 16 million vessels. Meeting this timeline, is not only impractical, but also impossible based on the massive amounts of information that need to be collected and further analyzed to generate the needed assessments for the various discharges.

Furthermore, we believe it is practically impossible to regulate these discharges under the NPDES program based on the large number of vessels which would be regulated under such a program in a relatively short time frame. If applied broadly as would be the case under the court decision, the NPDES program would be applied to over 16,000,000 recreational boats, 110,000 commercial fishing vessels and 53,000 freight and tank vessels trading in US waters. Even removing the recreational vessels from this mix, over 160,000 permitting transactions would need to be completed by September 2008, a virtually impossible task when viewed in the light of the decade long struggle encountered by EPA in implementing the stormwater permitting provisions for a significantly fewer number of point sources. In addition, further support for our position is provided by the recognition that under the existing NPDES permitting program, both the EPA and state agencies, if the program is delegated to the state by EPA, would require a tremendous number of additional resources to administer the program at the federal and state level, counter to the current funding climate which results in less resources to administer these types of programs. As indicated in a report by a Panel of the National Academy of Public Administrators entitled "Understanding What States Need to Protect Water Quality" (2002), states' environmental budgets

have either been static or in decline for many years and as a result of this shortfall, as of the 2001 budget cycle, it was estimated that a budget shortfall of $700,000,000 to $900,000,000 existed for the implementation of state Clean Water Act programs. There is every reason to suggest that this shortfall has become even greater in the 6 years since this report was published.

In summary, we believe the way forward to address this issue in a scientific and environmentally protective manner, is to follow a logical and comprehensive approach to the evaluation of these discharges. The Coalition's goal is to establish a single, federal standard to govern vessel discharges and prevent a patchwork of overlapping and conflicting federal and state programs affecting vessel discharges. While the Coalition believes that EPA properly exempted these discharges by regulation 30 years ago, the decision of the District Court for the Northern District of California which is currently under appeal found otherwise. The Coalition believes that commercial vessels should be expressly exempted by statute from the NPDES program as it is not the appropriate method to regulate discharges incidental to the normal operation of vessels. Rather, the Coalition could support the methods suggested in the Vessel Discharge Evaluation and Review Act (H.R. 5594). We thank you for your efforts in addressing the need for a comprehensive national vessel discharges program and look forward to working with you and your colleagues to ensure enactment of an environmentally protective and technologically achievable program.

Thank you for the opportunity to provide this testimony. I will be happy to answer any questions you may have.

CHAMBER OF SHIPPING OF AMERICA
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August 6, 2007

Submitted via email to: ow-docket@epa.gov AND www.regulations.gov

Water Docket Environmental Protection Agency
Mailcode: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. OW-2007-0483

RE: Development of Clean Water Act National Pollutant Discharge Elimination System Permits for Discharges Incidental to the Normal Operation of Vessels, (Notice of Intent; request for comments and information; Federal Register, June 21, 2007, pgs. 34241 – 34249).

Dear Sir or Madam:

The Chamber of Shipping of America (CSA) appreciates the opportunity to comment on the Notice of Intent and request for comments and information on the Development of Clean Water Act National Pollutant Discharge Elimination System Permits of Discharges Incident to the Normal Operation of Vessels as published in the Federal Register on June 21, 2007 at pages 34241 – 34249.

CSA represents 31 U.S. based companies that own, operate or charter oceangoing tankers, container ships, and other merchant vessels engaged in both the domestic and international trades. The Chamber also represents other entities that maintain a commercial interest in the operation of such oceangoing vessels. For a number of years, the Chamber has been actively engaged in discussions concerning discharges incident to the normal operation of commercial marine vessels, including ballast water, at the international (International Maritime Organization), federal and state levels, including both the development of legislation and regulation on these discharges. In many cases, these discussions have resulted in the adoption and/or enactment of international treaties and conventions as well as domestic legislation and regulation which establish legally binding requirements for the control and management of these discharges from commercial ships.

CSA, as part of the Shipping Industry Coalition, is also a named intervener in *Northwest Environmental Advocates et al. v. EPA*, No. CV 03-05760 SI, on the side of the US government, supporting the legitimacy of the EPA exemption of

discharges incident to the normal operation of a vessel found at 40 CFR 122.3(a) as consistent with the intentions of Congress at the inception of the Clean Water Act further affirmed by Congressional action over the 30 plus years since in the form of multiple Clean Water Act Reauthorizations as well as the enactment of two comprehensive pieces of legislation addressing the management and control of ballast water discharges. Nonindigenous Aquatic Nuisance Species Prevention and Control Act of 1990 and the National Invasive Species Act of 1996. [ADD CITES] In spite of an adverse ruling in the US District Court for the Northern District of California, which the US EPA and the Shipping Industry Coalition is currently appealing, we continue to believe that Congress intended these discharges to be exempted from the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program. We offer comments to this request to further support this position and re-emphasize what we strongly believe is Congress's recognition that the NPDES program, from its inception, was never intended to apply to highly mobile sources engaged in both domestic and international trade.

Before responding to the specific questions posed in this request for information, we would like to make several general points which should be taken into account.

First, the 45 day comment period for this request is an insufficient period of time in which the significant volume of information requested can be compiled. We recommend extending the comment period for at least another 60 days and ideally to the date on which the proposed rule is published. To support the need for this additional time. we point out the timeline associated with the promulgation and implementation of Uniform National Discharge Standards (UNDS) for Armed Forces vessels. In 1990, the Navy began preliminary discussions about developing uniform national discharge standards for discharges incident to the normal operation of Armed Forces vessels. After much work, Phase I of the UNDS development process was completed in 1999 which resulted in the identification and description of 25 discharges and publication of a final rule which required control of these discharges. Phase II of the UNDS process which will establish performance standards based on technical analyses of these 25 discharges was begun in 2000 and based on our review of the UNDS website continues to this day. Phase III which will establish requirements for the installation and operation of marine pollution control devices to control these discharges has yet to begin. All total, it has taken 17 years for the UNDS process to reach its current Phase II stage. Even accepting the fact that a significant portion of the work done under the UNDS process relative to identification of discharges (Phase I) can be applied to commercial vessels, the Phase II process which to date has taken 7 years with all the resources available to the Department of Defense, is no where comparable to the 45 days being allocated to the commercial shipping industry to complete the same tasks. Furthermore, the 11 months remaining until the deadline established in the court case referenced above would essentially require EPA with input from the commercial maritime industry to complete the equivalent of Phase III of the UNDS program which has not yet begun even after 17 years of work by the Department of Defense. Meeting this timeline, is not only impractical, but also impossible based on the massive amounts of information that need to be

collected and further analyzed to generate the needed risk assessments for the various discharges.

Second, as noted above, the existing NPDES program is structured around stationary point sources which discharge relatively consistent components into a waterbody. Both the technology based effluent guidelines and water quality based effluent limits presume the ability to identify and quantify a specific number of predictable discharges and the components of those discharges and then assess the impact of these collective discharges on a particular receiving waterbody. This presumption fails when applied to the operational reality of commercial shipping. Ships are highly mobile sources which move in inland, coastal and international waters. The population of ships in a given port over a given period of time is neither predictable nor quantifiable due to the realities of marine operations. While many of these discharges are relatively consistent for a particular ship, they are not consistent across the wide range of ship types and sizes. With regard to ballast water discharges, vessels enter US ports with ballast water taken up from a wide variety of ports of origin. This ballast water contains a wide variety of organism types from an equally wide variety of ports of origin in widely variable volumes. Based on these operational realities, we believe it is scientifically impossible to conduct the assessments required under the existing NPDES program for mobile marine transportation sources supporting the premise that if these discharges are to be regulated, they should be regulated under a program which reflects the operational realities and takes into the account the diversity of ship types, routes and variations in not only the discharge types but also their compositions among marine vessels as well as the diverse aquatic ecosystems into which these discharges occur

Third, unlike sovereign vessels which are typically exempted from the application of international and national requirements, a number of the discharges incident to the normal operation of a commercial vessel are already subject to control and management under international conventions/treaties and domestic law, including but not limited to MARPOL, the Act to Prevent Pollutions from Ships, the Oil Pollution Act of 1990 and their implementing regulations. Because of this significant difference in the applicability of existing legal requirements between sovereign and commercial vessels and the fact that a number of commercial vessel discharges are already subject to legal requirements, we believe that sufficient time should be taken to identify, quantify and assess commercial vessel discharges in a deliberate and comprehensive manner. Neither the 45 day comment period provided for here or the 11 months remaining until the deadline contained in the court case provide for the necessary deliberation to address these issues in a logical, comprehensive and scientifically defensible manner.

As a basis for further data collection strategies, including preparation of a generic vessel survey form, we have attached at annex, a **preliminary draft** of a vessel discharge inventory, which includes additional information from some discharges incorporated from existing Uniform National Discharge Standards (UNDS) for Armed Forces Vessels documents. Please note, that this inventory and explanatory information is subject to change based on information received during the survey of vessel owners and vessel crews as recommended above.

We now turn to the specific questions posed in the request for information and offer the following responses:

1. Data sources available in categorizing and describing numbers and types of commercial and recreational vessels. **Relative to commercial vessels, a number of data sources are available which can provide this information to some degree, but most are not sufficiently comprehensive to serve as a single source database to respond to this question based on data collection criteria. Relative to data on vessels calling in US ports, we believe one of the best sources for data is the US Coast Guard Notice of Arrivals database which captures vessel arrivals in US ports along with some vessel characteristic data e.g. physical dimensions of vessel, ship type. Another source of vessel data is the Maritime Administration (MARAD). Collected statistics may be accessed at www.marad.dot.gov/marad_statistics. In particular, please see MARAD's May 2007 document, "US Water Transportation Statistical Snapshot" which provides data on US port calls by ship type and port of call. The US Army Corps of Engineers collects diverse data on vessels but will be of somewhat limited assistance since much of the data is focused on US company US flag vessels which represent only a small portion of the total US port calls by large commercial ships. This data may be accessed at www.iwr.usace.army.mil/ndc/index.htm. Global vessel data is collected by the International Association of Classification Societies (IACS) and Lloyd's List, although this source may also be of limited value since the scope of their data is global rather than vessels trading to the US. Finally, port based maritime exchanges normally collect information on vessel operations within their port areas. While this may be one of the most accurate sources, collection of US wide data would require contact with each maritime exchange and a consolidation of the data to provide a complete national perspective.**

1. Best Way to inform vessel owners of need to obtain NPDES permit.

The best way to inform vessel owners of the need to obtain NPDES permits, other than the traditional publication in the Federal Register, is through existing international and national trade associations (International Chamber of Shipping, INTERTANKO, BIMCO, Chamber of Shipping of America, World Shipping Council, American Waterways Operators, American Association of Ports Authorities, American Petroleum Institute, Cruise Lines International Association), maritime publications in global, national and local circulation (Tradewinds, Lloyd's List, Marine Log, port association publications), ship agents, and local maritime exchanges. The examples provided above are intended to provide examples and may not constitute a comprehensive list of entities capable of communicating with vessel owners.

2. Public and Private data sources to identify the types of normal operations that give rise to discharges

The primary source of this data is members surveys by the trade associations named in (1) above. Collection criteria should include at a minimum vessel size (DWT), vessel type, cargo capacity (bbls/metric tons for bulk and tankers, TEUs for container vessels,), crew and passenger complement, trade/voyage characteristics, size and type of main propulsion system, size and type of auxiliary equipment including generators, engines, and input by vessel crew on known discharges from vessel operations as well as the characteristics listed below which must be obtained from surveys of individual ship owners and vessel crew.

Please see the preliminary list of discharges at annex to this document. This draft listing will provide the basis for our survey of member companies and vessel crews to assure that all relevant discharges have been captured and all descriptive information is correct.

   a. Operations or equipment giving rise to discharges
   b. Characteristics of discharges
   c. Operational constraints (safety concerns)
   d. Character of discharges
      i. Volume
      ii. Rate of discharge
      iii. Constituents of discharges

3. Information available regarding potential environmental impact of discharge
   a. Nature, significance and duration of impact
   b. How effect not controlled by existing regulation, standard, guideline, operational practice
   c. Particular category of vessels involved in particular discharge

This information is generally not available at this time for commercial vessels although generic data could be compiled relative to category of vessels involved in particular discharge types and whether or how specific discharges are managed

4. Existing Legislation (federal, state, local) already exist regarding discharge
   a. Type of vessel or discharge covered
   b. Geographic scope of any limitations
   c. Specific nature of limitations
   d. Suggestions on how to include these in NPDES system

We are currently working on compiling such a list of legislative and regulatory sources which currently apply to vessel discharges and will submit this compilation when it is completed.

5. Pollution control equipment / best management practices

a. Methods of operation
b. Include prototype equipment to be used for this purpose
c. Limits on equipment
    i. Flow rates
    ii. Power requirements
    iii. Crew training
    iv. Safety concerns

While not readily available other than in very general form, this information could be collected via ship owner and ship crew surveys.

6. Information available regarding vessel traffic patterns by vessel category
    a. Nature of voyage (domestic v. international (coastal/river/deep sea))
    b. Volume of vessel traffic by port or waterway
    c. Distributions by state or waterway

This information should be readily available from the US Coast Guard as well as other data sources listed in (1) above.

Please also be advised that CSA has instituted an ongoing program to survey its member companies in order to provide validated information to EPA as it becomes available. As such, this comment letter and its annex should be viewed as a start of the expected lengthy process to accumulate the information that will be necessary for EPA to evaluate the subject discharges in the commercial maritime industry.

CSA appreciates the opportunity to comment on this important issue and would be pleased to answer any questions relative to this issue or stimulated by our comments.

Sincerely,

Kathy J. Metcalf
Director, Maritime Affairs

DRAFT – ACCURACY OF INFORMATION SUBJECT TO VALIDATION FROM ONGOING VESSEL OWNER SURVEY (YELLOW HIGHLIGHTED TEXT REQUIRES ADDITIONAL INFORMATION FROM VESSEL OWNER SURVEY RESPONSES)

COMMERCIAL VESSEL DISCHARGES INCIDENT TO THE NORMAL OPERATION OF A VESSEL

Aqueous Film Forming Foam (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge consists of a mixture of seawater and firefighting foam discharged during training, testing, and maintenance operations. Aqueous film-forming foam (AFFF) is one of the primary firefighting agent used to extinguish flammable liquid fires on commercial vessels of all types. AFFF is stored on vessels as a concentrated liquid that is mixed with seawater to create the diluted solution (3-6% AFFF) that is sprayed as a foam on the fire. The solution is applied with both fire hoses and fixed sprinkler devices. During planned maintenance of firefighting systems, system testing and inspections, the seawater/foam solution is discharged either directly overboard from hoses, or onto decks and then subsequently washed overboard. These discharges are considered incidental to the normal operation of vessels. Discharges of AFFF that occur during firefighting or other shipboard emergency situations are not incidental to normal operations and are not subject to the requirements of the rule.

Which vessels generate this discharge? AFFF is discharged from all commercial vessel types.

How often and where is this discharge generated? AFFF discharges generally occur at distances greater than 12 n.m. from shore, and in all cases more than 3 n.m. from shore due to existing operating instructions. Commercial vessels are required by international and US law to test AFF firefighting systems at a frequency of [INSERT SOLAS/US REGS TESTING FREQUENCY]. The only discharge of AFFF which could occur within the 12 n.m. limit are those associated with response to a firefighting or other shipboard emergency situation and thus would not be deemed incident to normal operations.

Alcohol Compatible Fire Fighting Foam (UNDS Not Addressed)

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Blackwater (Sewage) (UNDS Not Addressed)

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge? All vessels generate blackwater with the volume generated directly proportional to the number of individuals aboard the vessel (crew and passengers). [Need more info on volumes, composition and management e.g. MSDs, etc.]

How often and where is this discharge generated? This discharge is continuously generated within and beyond the 12 n.m. limit.

Boiler Blowdown Discharge (UNDS Not Covered)

Description of Discharge

How is this discharge generated? This discharge is the water and steam discharged during the blowdown of a boiler or steam generator, or when a safety valve is tested. Boilers are used to produce steam for propulsion and a variety of auxiliary and hotel services. Water supplied to the boiler system (feedwater) is treated with chemicals to inhibit corrosion and the formation of scale in the boiler and boiler system piping. Periodically, water must be removed from the boiler to control the buildup of particulates, sludge, and treatment chemical concentrations. The term "blowdown" refers to the minimum discharge of boiler water required to prevent the buildup of these materials in the boiler to levels that would adversely affect boiler operation and maintenance. There are four types of boiler blowdown procedures: 1) surface blowdowns for removing materials dissolved in the boiler water and for controlling boiler water chemistry; 2) scum blowdowns for removing surface scum; 3) bottom blowdowns for removing sludge that settles at the bottom of boilers; and 4) continuous blowdowns for removing dissolved metal chelates and other suspended matter. The type of blowdown used is a function of the boiler water chemistry and thus varies among vessel classes. With the exception of continuous blowdowns, boiler blowdowns are discharged below the vessel waterline. Continuous blowdowns are discharged inside the vessel and are directed to the bilge. These are addressed as part of the vessel bilgewater/OWS discharge.

Which vessels generate this discharge? **[Need estimate of vessel population conducting boiler blowdown procedures]**

How often and where is this discharge generated? These blowdowns occur both within and beyond 12 n.m. from shore; although most operating policies prohibit boiler blowdown within 3 n.m. except under emergency circumstances.

Bow and Stern Thruster Fluids

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Cargo Related Consumables (Inorganic) e.g. Dunnage (UNDS Not Addressed)

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Cargo Related Consumables (Organic) – Livestock and Livestock Related Wastes (UNDS Not Addressed)

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Cathodic Protection Discharge (UNDS Not Covered)

Description of Discharge

How is this discharge generated? This discharge consists of the constituents released into the surrounding water from sacrificial anodes or impressed current cathodic protection systems used to prevent hull corrosion.

Steel-hulled vessels require corrosion protection. In addition to anti-corrosion hull paints, these vessels employ cathodic protection which is provided by either sacrificial anodes or Impressed Current Cathodic Protection (ICCP) systems. The most common cathodic protection system is the zinc sacrificial anode. With the sacrificial anode system, zinc or aluminum anodes attached to the hull will preferentially corrode from exposure to the seawater and thereby minimize corrosion of the vessel's hull.

In ICCP systems, the vessel's electrical system passes a current through inert platinum-coated anodes. This current protects the hull in a manner similar to sacrificial anodes by generating current as the anodes corrode. Zinc anodes are approximately 99.3% zinc and contain small amounts of zinc, silicon, and indium (for activation). Aluminum anodes can contain 0.001% mercury as an impurity; mercury is a known bioaccumulator.

Which vessels generate this discharge? **[Need estimate of all vessels with breakdown by sacrificial and ICCP cathodic protection systems]**

How often and where is this discharge generated? The discharge is continuous while the vessel is waterborne and occurs both within and beyond 12 n.m. from shore.

Chain Locker Effluent (UNDS Covered)

How is this discharge generated? This discharge consists of accumulated precipitation and seawater that is occasionally emptied from the compartment used to store the vessel's anchor chain. The chain locker is a compartment used to store anchor

chain aboard vessels. Best management practices require that the anchor chain, appendages, and anchor on vessels be washed down with seawater during retrieval to prevent onboard accumulation of sediment. During washdown, some water adheres to the chain and is brought into the chain locker as the chain is stored. The chain locker sump accumulates the residual water and debris that drains from the chain following anchor chain washdown and retrieval, or washes into the chain locker during heavy weather. Water accumulating in the chain locker sump is removed by a drainage eductor powered by the shipboard firemain system.

Which vessels generate this discharge? All vessels can generate this discharge.

How often and where is this discharge generated? .Most operating policies prohibit discharge of chain locker effluent within 12 n.m.

Clean Ballast Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge is composed of the seawater taken into, and discharged from, dedicated ballast tanks used to maintain the stability of the vessel. Most types of vessels store clean ballast in dedicated tanks in order to adjust a vessel's draft, buoyancy, trim, and list. Clean ballast may consist of seawater taken directly onboard into the ballast tanks or seawater received from the vessel's firemain system. Clean ballast differs from "dirty ballast" and "compensated ballast" discharges in that clean ballast is not stored in tanks that are also used to hold fuel. Most vessels introduce clean ballast into tanks to replace the weight of off-loaded cargo or expended fuel to improve vessel stability while navigating on the high seas. Conversely, discharge of clean ballast occurs when fuel or cargo is taken on and the ballast is no longer needed.

Which vessels generate this discharge? All vessel types can use clean ballast tank systems.

How often and where is this discharge generated? Clean ballast discharges are intermittent and can occur at any distance from shore, including within 12 n.m, although commercial vessels attempt to minimize clean ballast aboard when inbound from sea to minimize the potential for introduction of aquatic nuisance species and for economic reasons e.g. minimize deballasting time upon arrival at berth.

Compensated Fuel Ballast (UNDS Covered)

Description of Discharge

How is this discharge generated? This intermittent discharge is composed of the seawater taken into, and discharged from, tanks designed to hold both fuel and ballast water to maintain the stability of the vessel.

Compensated fuel ballast systems are configured as a series of fuel tanks that automatically draw in seawater to replace fuel as it is consumed. Keeping the fuel tanks full in this manner enhances the stability of a vessel by using the weight of the seawater to compensate for the mass of ballast lost through fuel consumption. During refueling, fuel displaces the seawater, and the displaced seawater is discharged overboard. **[Above description is per Navy analysis. Is this correct or do commercial ships utilize non-automatic compensation procedures to adjust for**

fuel burn-off? Also note that this may vary by ship type and size in that large bulkers and tankers likely utilize clean ballast systems while container ships, cruise lines and towing vessels may use tanks specifically for fuel compensation.]

Which vessels generate this discharge? **[Need vessel type and size specified info here.]**

How often and where is this discharge generated? In most cases, vessels with compensated fuel ballast systems discharge directly to surface waters each time they refuel. Vessels are generally refueled in port; however some commercial vessels under contract to the military may refuel at sea. All at-sea refueling is accomplished beyond 12 n.m. from shore per USN operating policy.

Controllable Pitch Propeller Hydraulic Fuel Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge is the hydraulic fluid that is discharged into the surrounding seawater from propeller seals as part of normal operation, and the hydraulic fluid released during routine maintenance of the propellers.

Controllable pitch propellers (CPP) are used to control a vessel's speed or direction while maintaining constant propulsion plant output (i.e., varying the pitch, or "bite," of the propeller blades allows the propulsion shaft to remain turning at a constant speed). CPP blade pitch is controlled hydraulically through a system of pumps, pistons, and gears. Hydraulic oil may be released from CPP assemblies under three conditions: leakage through CPP seals, releases during underwater CPP repair and maintenance activities, or releases from equipment used for CPP blade replacement.

Which vessels generate this discharge? **[Any estimates of how many calling in US ports?]**

How often and where is this discharge generated? Leakage through CPP seals can occur within 12 n.m., but seal leakage is more likely to occur while the vessel is underway than while pierside or at anchor because the CPP system operates under higher pressure when a vessel is underway. Blade replacement occurs in drydock under controlled conditions, in port on an as-needed basis when dry-docking is unavailable or impractical, resulting in some discharge of hydraulic oil.

Deck Runoff Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? Deck runoff is an intermittent discharge generated when water from precipitation, freshwater washdowns, wave action, or spray falls on the exposed portion of a vessel such as a weather deck or flight deck. This water is discharged overboard through deck openings and washes overboard any residues that may be present on the deck surface. The runoff drains overboard to receiving waters through numerous deck openings.

Which vessels generate this discharge? All vessels produce deck runoff.

How often and where is this discharge generated? This discharge occurs whenever the deck surface is exposed to water, both within and beyond 12 n.m.

Deck Seal Discharge (tankers)

Description of Discharge

How is this discharge generated? The deck seal serves as a water barrier to prevent cargo tank flammable vapors (in the event of an IG Failure) from entering the machinery spaces via the IG piping. This is accomplished by maintaining a level of water in the Deck Seal which is above the piping coming from the IG fans. Continuous flow of sea water to the deck seal ensures that the water level in the seal remains above the inlet piping coming from the IG fans. Excess water drains overboard.

Which vessels generate this discharge? Tankers when operating their IG systems.

How often and where is this discharge generated? The IG system is operated in conjunction with cargo discharge. The majority of the deck seal discharges occur in port. Occasionally, when necessary to purge or re-inert at sea, this discharge will occur beyond 12 nm from shore.

Dirty Ballast Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This intermittent discharge is composed of the seawater taken into, and discharged from, empty fuel tanks or other tanks to maintain the stability of the vessel. The seawater is brought into these tanks for the purpose of improving the stability of a vessel during rough sea conditions. Where fuel tanks are used, prior to taking on the seawater as ballast, fuel in the tank to be ballasted is transferred to another fuel tank or holding tank to prevent contaminating the fuel with seawater. Some residual fuel remains in the tank and mixes with the seawater to form dirty ballast. Dirty ballast systems are configured differently from compensated ballast and clean ballast systems. Compensated ballast systems continuously replace fuel with seawater in a system of tanks as the fuel is consumed. Clean ballast systems have tanks that carry only ballast water and are never in contact with fuel. In a dirty ballast system. water is added to a fuel tank after most of the fuel is removed **[Is this still a practice with commercial vessels? Suspect yes for smaller coastal vessels and towboats but not a general practice with large commercial vessels e.g. bulkers, tankers, containerships unless storm ballast uptake is required in extreme weather conditions.]**

Which vessels generate this discharge? Product tankers occasionally discharge dirty ballast resulting from tank cleaning and line draining operations necessary to prepare cargo tanks for the next product to be loaded or in preparation for tanks for entry for maintenance purposes. This dirty ballast is discharged overboard beyond 12 n.m. through the oil discharge monitoring system.

How often and where is this discharge generated? The larger of these vessels discharge the dirty ballast at distances beyond 12 n.m. from shore, while the smaller

vessels discharge**[where? shoreside reception?]** In all cases, vessels are required by law to monitor the dirty ballast discharge with an oil content monitor. If the dirty ballast exceeds 15 parts per million (ppm) oil, it is treated in an oil-water separator prior to discharge.

Distillation and Reverse Osmosis Brine Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This intermittent discharge is the concentrated seawater (brine) produced as a byproduct of the processes used to generate freshwater from seawater. Distillation and reverse osmosis plants are two types of water purification systems that generate freshwater from seawater for a variety of shipboard applications, including potable water for drinking and hotel services, and high-purity feedwater for boilers. Distillation plants boil seawater, and the resulting steam is condensed into high-purity distilled water. The remaining seawater concentrate, or "brine," that is not evaporated is discharged overboard. Reverse osmosis systems separate freshwater from seawater using semi-permeable membranes as a physical barrier, allowing a portion of the seawater to pass through the membrane as freshwater and concentrating the suspended and dissolved constituents in a saltwater brine that is subsequently discharged overboard.

Which vessels generate this discharge? Distillation or reverse osmosis systems are installed on approximately **[any estimates for commercial vessels?]**.

How often and where is this discharge generated? This discharge can occur in port, while transiting to or from port, or while operating anywhere at sea (including within 12 n.m.). Distillation plants on steam-powered vessels may be operated to produce boiler feedwater any time a vessel's boilers are operating; however, operational policy limits its use in port for producing potable water because of the increased risk of biofouling from the water in harbors and the reduced demand for potable water. Steam-powered vessels typically operate one evaporator while in port to produce boiler feedwater; most diesel and gas-turbine powered vessels do not operate water purification systems within 12 n.m.

Elevator Pit Effluent Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge is the liquid that accumulates in, and is occasionally discharged from, the sumps of elevator wells on vessels. Most large ships have at least one type of elevator used to transport supplies, equipment, and personnel between different decks of the vessel. These elevators generally can be classified as a closed design in which the elevator operates in a shaft. Elevators operating in a shaft are similar to the conventional design seen in many buildings. For these elevators, a sump is located in the elevator pit to collect liquids entering the elevator and shaft areas. Elevator equipment maintenance activities are the primary sources of liquids entering the sump. On some vessels, the elevator sump is equipped with a drain to direct liquid wastes overboard. On others, piping is installed that allows an eductor to pump the pit effluent overboard. However, most vessels collect and containerize the pit effluent for disposal onshore or process it along with their bilgewater.

Which vessels generate this discharge? Most large commercial vessels have

at least one elevator. Passenger vessels are likely to have multiple elevators, while small coastal vessels including towboats do not have elevators.

How often and where is this discharge generated? The discharge of elevator pit effluent is controlled by operating procedures and the international and domestic requirements applicable to bilgewater discharges.

Firemain Systems Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge is the seawater pumped through the firemain system for firemain testing, maintenance, and training, and to supply water for the operation of certain vessel systems. Firemain systems distribute seawater for firefighting and other services aboard ship. Firemain water is provided for firefighting through fire hose stations, sprinkler systems, and foam proportioners, which inject aqueous film-forming foam (AFFF) into firemain water for distribution over flammable liquid spills or fire. Firemain water is also directed to other services including ballast systems, machinery cooling, lubrication, and anchor chain washdown. Discharges of firemain water incidental to normal vessel operations include anchor chain washdown, firemain testing, various maintenance and training activities, bypass flow from the firemain pumps to prevent overheating, and cooling of auxiliary machinery equipment (e.g., refrigeration plants). **[Are wet firemains used in any commercial application e.g. passenger ships??? If not, can delete references to wet systems.]**

NPDES does not apply to discharges of firemain water that occur during firefighting or other shipboard emergency situations, because they are not incidental to the normal operation of a vessel. Firemain systems aboard commercial vessels are classified as either wet or dry. Wet firemain systems are continuously charged with water and pressurized so that the system is available to provide water upon demand. Dry firemains are not continuously charged with water, and consequently do not supply water upon demand. Dry firemain systems are periodically tested and are pressurized during maintenance or training exercises, or during emergencies.

Which vessels generate this discharge? With the exception of some small vessels, all commercial vessels use firemain systems, principally of the dry system variety.

How often and where is this discharge generated? Firemain system discharges may occur both within and beyond 12 n.m. from shore; however typical operating policies mandate testing of the firemain system beyond the 12 n.m. limit. Flow rates depend upon the type, number, and operating time of the equipment and systems using water from the firemain.

Freshwater Layup Discharge (UNDS Not Covered)

Description of Discharge

How is this discharge generated? This discharge is the potable water that is periodically discharged from the seawater cooling system while the vessel is in port, and the cooling system is in a lay-up mode.

Seawater cooling systems are used onboard some vessels to remove heat from main propulsion machinery, electrical generating plants and other auxiliary equipment. These are single-pass, non-contact cooling systems whereby the seawater enters the hull, is

pumped through a piping network and circulated through one or more heat exchangers, then exits the vessel. On certain vessels, the seawater cooling systems are placed in a standby mode, or lay-up, when the machinery is not in use. The lay-up is accomplished by blowing the seawater from the condenser with low-pressure air. The condenser is then filled with potable water and drained again to remove residual seawater as protection against corrosion. Then, the condenser is refilled with potable water for the actual lay-up. After 21 days, the lay-up water is discharged overboard and the condenser refilled. The condenser is discharged and refilled on a 30-day cycle thereafter. The volume of each condenser batch discharge is approximately 6,000 gallons.

Which vessels generate this discharge? **[Is this even done with commercial vessels? If so with what frequency and in what numbers?]**

How often and where is this discharge generated? Generally, the cooling system is only placed in a lay-up condition if the vessel remains in port for more than three days and the main steam plant is shut down.

Garbage (UNDS Not Addressed)

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Gas Turbine Water Wash Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? Gas turbine water wash consists of water periodically discharged while cleaning internal and external components of propulsion and auxiliary gas turbines.

Which vessels generate this discharge? **[Need estimates for number of vessels with gas turbine systems for main and auxiliary systems.]**

How often and where is this discharge generated? Gas turbine water wash is generated within 12 n.m. and varies by the type of gas turbine and the amount of time it is operated. Because the drain collecting system is limited in size, discharges may occur within 12 n.m. On most gas turbine ships, gas turbine water wash is collected in a dedicated collection tank and is not discharged overboard within 12 n.m. On ships without a dedicated collection tank, this discharge is released as a component of deck run off, well deck discharges, or bilgewater.

Graywater Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? Section 312(a)(11) of the CWA defines graywater as "galley, bath, and shower water." Recognizing the physical constraints of commercial vessels and the manner in which wastewater is handled on these vessels, graywater is

more broadly defined for the purposes of the NPDES program. For the purposes of this analysis, the graywater discharge consists of graywater as defined in CWA section 312(a)(11), as well as drainage from laundries, interior deck drains, water fountains and miscellaneous shop sinks.

Which vessels generate this discharge? All vessels generate graywater on an intermittent basis, in volumes relative to vessel operations and crew size.

How often and where is this discharge generated? Graywater discharges occur both within and beyond 12 n.m. from shore. **[Need descriptive text to explain how the wide variety of commercial vessels manage graywater e.g. discharge overboard, holding tank with discharge at sea, discharge to shore. Text per UNDS document is as follows: "Most Armed Forces vessels collect graywater and transfer it to shore treatment facilities while pierside. Some vessel types, however, have minimal or no graywater collection or holding capability and discharge the graywater directly overboard while pierside. Less than half of all graywater discharged within 12 n.m. occurs pierside from vessels lacking graywater collection holding capability. The remainder of the discharge in coastal waters occurs during transit within 12 n.m. from shore."]**

Hull Coating Leachate Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge consists of constituents that leach, dissolve, ablate, or erode from hull paints into the surrounding seawater. Vessel hulls that are continuously exposed to seawater are typically coated with a base anti-corrosive coating covered by an anti-fouling coating. This coating system prevents corrosion of the underwater hull structure and, through leaching action releases antifouling compounds. Ablative coatings allow the paint surface to erode or dissolve to release antifouling compounds. These compounds inhibit the adhesion of biological growth to the hull surface.

Which vessels generate this discharge? The coatings on most commercial vessels are either copper-or tributyl tin (TBT)-based, with copper-based ablative paints being the most predominant coating system. The commercial vessel industry has been phasing out the use of TBT paints, and currently it is found only on a small percentage of commercial vessels. **[Need to add MARPOL anti-fouling text re: phase out of TBT including total phase-out deadline]**

How often and where is this discharge generated? Hull coating leachate is generated continuously whenever a vessel hull is exposed to water, within and beyond 12 n.m. from shore.

Hydraulic Deck Machinery Fluids

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Inert Gas Scrubber Discharge (tankers) (UNDS Not Addressed)

Description of Discharge

How is this discharge generated? This discharge consists of water that is used to clean (scrub) and cool the inert gas generated through a flue gas or diesel fired system prior to the inert gas reaching the fans for discharge into cargo tanks. Scrubbing consists of removing carbon and other impurities caused by combustion of the fuel. Once scrubbed and cooled the inert gas passes through demisters which remove the moisture and this residual water is drained overboard.

Which vessels generate this discharge? Any oil tankers fitted with Inert Gas systems.

How often and where is this discharge generated? This discharge normally occurs within 12 nm of land when the tanker is in port discharging cargo. Occasionally it will occur outside the 12 nm limit when tanks are purged or re-inerted prior to cargo loading/discharge operations.

Jacking Gear Discharge (UNDS Not Addressed)

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Non-Oily Machinery Wastewater Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This intermittent discharge is composed of water leakage from the operation of equipment such as distillation plants, water chillers, valve packings, water piping, low- and high-pressure air compressors, and propulsion engine jacket coolers. Few commercial vessels have dedicated on-oily machinery wastewater systems and thus this type of wastewater drains directly to the bilge and is part of the bilgewater discharge.

Which vessels generate this discharge? All vessels generate non-oily machinery wastewater. Management of these discharges vary by vessel size, propulsion type and whether a dedicated system is installed. Vessels with non-dedicated systems management these discharges as bilgewater subject to the same restrictions.

How often and where is this discharge generated? Non-oily machinery wastewater is discharged in port, during transit, and at sea. This discharge is generated whenever systems or equipment are in use, and varies in volume

according to ship size and the level of machinery use.

Photographic Lab Drains Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This intermittent discharge is laboratory wastewater resulting from processing photographic film. Typical liquid wastes from these activities include spent film processing chemical developers, fixer-bath solutions and film rinse water.

Which vessels generate this discharge? Commercial vessels generally do not have photographic labs with the exception being passenger vessels

How often and where is this discharge generated? Photographic laboratory wastes may be generated within and beyond 12 n.m. from shore, although current practice is to collect and hold the waste onboard within 12 n.m. The volume and frequency of the waste generation varies with a vessel's photographic processing capabilities, equipment, and operational objectives.

Portable Damage Control Drain Pump Discharge(UNDS Not Covered)

Description of Discharge

How is this discharge generated? This discharge consists of seawater pumped through the portable damage control drain pump and discharged overboard during periodic testing, maintenance, and training activities.

Portable damage control (DC) drain pumps are used to remove water from vessel compartments during emergencies or to provide seawater for shipboard firefighting in the event water is unavailable from the firemain system. Discharges from drain pumps being used during onboard emergencies are not incidental to normal vessel operations, and therefore are not within the scope of this rule. These pumps are, however, periodically operated during maintenance, testing, and training, and pump discharges during these activities are within the scope of this rule. To demonstrate that the pumps are functioning properly, the suction hose is hung over the side of the vessel and the pump operated to verify that the pump effectively transfers the seawater or harbor water. This pump effluent is discharged directly overboard during this testing.

Which vessels generate this discharge? **[Is this still done/required on today's commercial vessels?]**

How often and where is this discharge generated? **[Await response to question directly above. If applicable to commercial vessels, can modify UNDS text which reads "As part of equipment maintenance, testing, and training, the pumps are operated both within and beyond 12 n.m. from shore. Navy, Army, and MSC vessels operate portable DC drain pumps for approximately 10 minutes per month and an additional 15 minutes per year to demonstrate working order and condition. Coast Guard vessels operate their portable DC drain pumps for approximately 30 minutes per month for maintenance and testing."]**

Portable Damage Control Drain Pump Wet Exhaust Discharge (UNDS Not Covered)

Description of Discharge

How is this discharge generated? This periodic discharge is seawater that has mixed and been discharged with portable damage control drain pump exhaust gases to cool the exhaust and quiet the engine.

Portable, engine-driven pumps provide seawater for shipboard firefighting in the event water is unavailable from the firemain. Two models of these portable damage control (DC) drain pumps are used one of which operates on gasoline and one which operates on diesel fuel. For the gasoline operated pump, part of the seawater output from these pumps is used to cool the engine and quiet the exhaust. This discharge, termed wet exhaust, is typically routed overboard through a separate exhaust hose and does not include the main discharge of the pump which is classified separately as Portable Damage Control Drain Pump Discharge. Fuel residuals, lubricants, or their combustion byproducts are present in the gasoline powered engine exhaust gases, which condense in the cooling water stream, and are discharged as wet exhaust. The diesel powered pump engine is air-cooled and no water is injected into the exhaust of the pump, although a small amount of water contacts the engine during pump priming. Up to one-seventh of a gallon of water may be discharged during each priming event. This water discharged during the pump priming process is considered part of the portable DC drain pump wet exhaust.

Which vessels generate this discharge? **[Does commercial industry use these types of pumps?]**

How often and where is this discharge generated? Portable DC drain pump wet exhaust discharges occur during training and monthly planned maintenance activities both within and beyond 12 n.m. from shore. During monthly maintenance activities, the pumps are run for approximately 10 to 30 minutes. The use of portable DC drain pumps during onboard emergencies is not incidental to normal operations, and therefore not within the scope of this rule.

Refrigeration/Air Conditioning Condensate Discharge (UNDS Not Covered)

Description of Discharge

How is this discharge generated? This discharge is the drainage of condensed moisture from air conditioning units, refrigerators, freezers, and refrigerated spaces. Refrigerators, refrigerated spaces, freezers, and air conditioning units produce condensate when moist air contacts the cold evaporator coils. This condensate drips from the coils and collects in drains. Condensate collected in drains above the vessel waterline is continuously discharged directly overboard. Below the waterline, condensate is directed to the bilge, non-oily machinery wastewater system, or is retained in dedicated holding tanks prior to periodic overboard discharge.

Which vessels generate this discharge? All vessels generate these types of discharges.

How often and where is this discharge generated? The condensate may be discharged at any time, both within and beyond 12 n.m. from shore.

Rudder Bearing Lubrication Discharge (UNDS Not Covered)

Description of Discharge

How is this discharge generated? This discharge is the oil or grease released by the erosion or dissolution from lubricated bearings that support the rudder and allow it to turn freely. Vessels generally use two types of rudder bearings, and two lubricating methods for each type of rudder bearing: 1) grease-lubricated roller bearings; 2) oil-lubricated roller bearings; 3) grease-lubricated stave bearings; and 4) water-lubricated stave bearings. Only oil-lubricated roller bearings and grease-lubricated stave bearings generate a discharge.

Which vessels generate this discharge? **[Need estimate of number of vessels calling in US ports equipped with rudder bearings type (2) and (3) above]**

How often and where is this discharge generated? The discharge occurs intermittently, primarily when a vessel is underway or its rudder is in use, although some discharges from oil-lubricated roller bearings could potentially occur pierside even when the rudder is not being used because the oil lubricant is slightly pressurized.

Seawater Cooling Overboard Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge consists of seawater from a dedicated system that provides noncontact cooling water for other vessel systems. The seawater cooling system continuously provides cooling water to heat exchangers, removing heat from main propulsion machinery, electrical generating plants, and other auxiliary equipment. The heated seawater is discharged directly overboard.

Which vessels generate this discharge? With the exception of some small vessels, all vessels discharge seawater from cooling systems.

How often and where is this discharge generated? Typically, the demand for seawater cooling is continuous and occurs both within and beyond 12 n.m. from shore.

Seawater Piping Biofouling Prevention

Description of Discharge

How is this discharge generated?

Which vessels generate this discharge?

How often and where is this discharge generated?

Small Boat Engine Wet Exhaust (UNDS Covered)

Description of Discharge

How is this discharge generated? This discharge is the seawater that is mixed and discharged with small boat propulsion engine exhaust gases to cool the exhaust and

quiet the engine. Small boats are powered by either inboard or outboard engines. Seawater is injected into the exhaust of these engines for cooling and to quiet engine operation. Constituents from the engine exhaust are transferred to the injected seawater and discharged overboard as wet exhaust.

Which vessels generate this discharge? Few, if any, commercial vessels generate this discharge during routine operations. These engines are found on commercial vessel lifeboats. International and domestic law require testing of lifeboat engines once per **[insert SOLAS and domestic testing frequency and duration of test]**

How often and where is this discharge generated? This discharge is generated when operating lifeboat engines during routine testing which occurs within 12 n.m. from shore and most frequently while the commercial vessel is pierside.

Stern Tube Seals and Underwater Bearing Lubrication Discharge (UNDS Not Covered)

Description of Discharge

How is this discharge generated? This discharge is the seawater pumped through stern tube seals and underwater bearings to lubricate and cool them during normal operation.

Propeller shafts are supported by stern tube bearings at the point where the shaft exits the hull (for surface ships and submarines), and by strut bearings outboard of the ship (for surface ships only). A stern tube seal is used to prevent seawater from entering the vessel where the shaft penetrates the hull. The stern tube seals and bearings are cooled and lubricated by forcing seawater from the firemain or auxiliary cooling water system through the seals and over the bearings.

Strut bearings are not provided with forced cooling or lubrication. Instead, strut bearings use the surrounding seawater flow for lubrication and cooling when the vessel is underway.

Which vessels generate this discharge? Almost all classes of vessels have stern tube seals and bearings that require lubrication.

How often and where is this discharge generated? These discharges are continuous.

Vessel Bilgewater and OWS Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? Vessel bilgewater/OWS discharge consists of a mixture of wastewater and leakage from a variety of sources that are allowed to drain to the lowest inner part of the hull, known as the bilge. An additional source of bilgewater for commercial vessels is water from the continual blowdown of boilers (i.e., boiler blowdown). On surface vessels, bilgewater is usually transferred to an oily waste holding tank, where it is stored for shore disposal or treated in an oil-water separator (OWS) to remove oil before being discharged overboard. Most vessels also have an oil content monitor (OCM) installed downstream from the OWS to monitor bilgewater oil

content prior to discharge. Vessels with OCMs have the capability to return bilgewater not meeting a preset oil concentration limit to the OWS for reprocessing until the limit is met. Oil collected from the OWS separation process is held in a waste oil tank until transferred to shore facilities for disposal.

Which vessels generate this discharge? All vessels produce bilgewater and most of the larger vessels have OWS systems.

How often and where is this discharge generated? Bilgewater accumulates continuously; however, vessels do not discharge untreated bilgewater. Under current policy, bilgewater treated by an OWS can be discharged as needed within 12 n.m., while untreated bilgewater is held for transfer to a shore facility for treatment. For vessels with an OWS and OCM, oil concentrations in the treated bilgewater must be less than 15 ppm prior to overboard discharge.

Underwater Ship Husbandry Discharge (UNDS Covered)

Description of Discharge

How is this discharge generated? The underwater ship husbandry discharge is composed of materials discharged during the inspection, maintenance, cleaning, and repair of hulls and hull appendages performed while the vessel is waterborne. Underwater ship husbandry includes activities such as hull cleaning, non-destructive testing, and in water repairs...

Which vessels generate this discharge? Underwater ship husbandry discharge is created occasionally by commercial vessels.

How often and where is this discharge generated? Ship husbandry operations are normally conducted pierside; however, most operations of this type are performed in drydock.

Well Deck Discharge (UNDS Covered)

[Does this apply to Lashes/Seabees? Other vessel types? If yes, UNDS text may be modified to describe]

Description of Discharge

How is this discharge generated? This discharge is the water that accumulates from the seawater flooding of the docking well (welldeck) of a vessel used to transport, load, and unload cargo and from the maintenance and freshwater washings of the welldeck and equipment stored in the welldeck.

To load or unload cargo, vessels may need to flood the welldeck by taking on ballast water and sinking the aft (rear) end of the ship. Water that washes out of the welldeck contains residual materials that were on the welldeck prior to flooding. Other welldeck discharges are created by routine operations such as washing equipment with potable water. Additionally, the U.S. Department of Agriculture (USDA) requires washing welldecks, vehicle storage areas, and equipment upon return from overseas locations. The washing is required to ensure that there is no inadvertent transport of nonindigenous species to land. USDA-required washes of welldecks and cargo or vehicle storage areas occur pierside. Effluent from such shipboard activities drain to

unflooded welldecks and are discharged directly overboard.

Which vessels generate this discharge? **[Need estimates, if any, on number of vessels with well decks]**

How often and where is this discharge generated? This discharge is released both within and beyond 12 n.m. from shore.

Wire Mooring Line Surface and Underwater Discharges

How is this discharge generated? Mooring wires require preservative to inhibit the wire rusting and weakening from exposure to rain or sea water. Some of these preservatives, (while advertised to be non-pollutant) still may leave a sheen. Surface discharge is caused by rain or sea water washing off preservative while the mooring wires are being utilized in port. Underwater discharge occurs when the mooring wires are being paid out or brought home during mooring/unmooring operations and the wire itself is submerged causing washing off of the preservative.

Which vessels generate this discharge? Any vessels utilizing wire moorings.

How often and where is this discharge generated? In port primarily. Discharge could also be generated at sea during offshore mooring operations (lightering).

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July 9, 2008

The Honorable John Boozman
Ranking Republican Member
Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure
US House of Representatives
Washington, DC 20515

Dear Representative Boozman:

Thank you for allowing us to respond to additional questions you have posed in your letter of June 27, 2008 relative to discharges incidental to the normal operation of commercial vessels. Thank you for allowing us to respond to additional questions you have posed in your letter of June 30, 2008 relative to discharges incidental to the normal operation of commercial vessels. As you are keenly aware, the issue of how discharges incident to the normal operation of vessels are managed in an operational and environmentally sound manner is one of the most challenging environmental issues the marine industry faces. We appreciate your leadership on this issue and are certain that a collaborative effort by the legislative and executive branches and industry will result in development of a legal structure that provides certainty and consistency to the maritime industry, provides appropriate environmental protection to the marine ecosystem and moots the unfortunate decision by the Federal District Court for the Northern District of California in the NW Environmental Advocates et al vs. EPA which as you know is has been appealed to the 9th Circuit Court of Appeals which has yet to render its decision.

Please note that while my written and oral testimony provided at the June 12, 2008 subcommittee hearing was given on behalf of the Shipping Industry Ballast Water Coalition (Coalition), due to time constraints, the responses to your questions have not been cleared with the Coalition prior to submission to you although the responses are conceptually in line with prior positions advocated by the Coalition. We are providing the Coalition copies of this document and have suggested that if any of the Coalition members wish to add to these responses, they may do so no later than June 18, 2008.

To facilitate your review of our responses, we have reproduced the text of your questions in full which are followed by our responses in bold italic text.

1. Why is it so important for commercial vessel owners and operators to have national uniformity in regulatory requirements for vessel discharges?

   While the industry strongly supports the implementation of international standards through the International Maritime Organization (IMO), we recognize that in some cases, the creation of national standards is necessary for protection of the marine environment. Since IMO has not yet addressed, in a comprehensive manner, the full range of discharges incident to the normal operation of vessels, we can support the creation of national standards where an impacts analysis identifies negative environmental impacts from these discharges. In some cases, discharges incident normal to the operation of vessels are or will be managed through the installation of costly technologies which manage a particular discharge through a control and monitoring system that meets a certain discharge standard. Furthermore, vessels subject to these control provisions often trade internationally and even those that engage in only the domestic trades, do so through and in several states. A national standard provides the much needed consistency and predictability of requirements through the development of enforceable national uniform standards to control such discharges without the use of NPDES permits. If individual states or regions were allowed to create their own and likely different standards, vessels would find themselves in the legally impossible situation where they would have to comply with different standards which could require installation of duplicative and costly technologies that manage the same discharge albeit to different discharge standards. The situation in the marine industry where mobile sources are being asked to meet certain environmental discharge standards is analogous to that in the automotive industry where, but for the "California car", the creation of a federal emission standard was seen as crucial to assuring the legal and logistical movement of vehicles from one state to another without requiring a vehicle owner to procure a state-specific certification that their emissions met a unique state emissions limit. As with any mobile source engaged in interstate commerce, it is critical that one federal standard be applicable to marine vessels to assure that they may freely move from one state to another with the confidence that onboard systems meet the protective environmental discharge standards established by federal law.

2. What sorts of operational realities and vessel differences need to be taken into account in addressing vessel discharges?

   Marine vessels vary widely in the types and volumes of discharges incident to the normal operations of vessels. These variations are a result of vessel type, propulsion system type, the number of persons aboard the vessel and the routes specific vessels travel. For example, while the types of discharges may be similar, a vessel with 20 persons aboard as crew presents a very different discharge profile than a passenger vessel with 4000 persons aboard particularly with regard to graywater (galley, bath and shower water). Likewise, deck runoff profiles for a bulk carrier would vary greatly from a vessel which carries its cargo in sealed containers. As another example, vessels which trade to ports which have adequate reception facilities would have less need to discharge while underway than those that trade to ports without adequate reception facilities. Any future impacts assessment of discharges incident to the normal operation of vessels must necessarily take into account these variations.

3. Does EPA currently have the data and other information it needs to develop appropriate standards for discharges incidental to the normal operation of commercial vessels? What sorts of data and other information is EPA currently lacking?

   While we would certainly defer to EPA for a determinative answer to this question, we believe that EPA and the industry have properly identified the types of discharges which should be assessed. However, we know the maritime industry and believe that EPA does not have sufficient data on spatial and temporal distributions of these discharges nor do we have a sense for the relative volumes from individual vessels as well as collectively from marine vessels in a given waterbody. These spatial and temporal distributions as well as volumes of individual and collective discharges are critical in determining environmental impact of these discharges and thus in identifying best available technologies which should be applied to control and manage these discharges, though a process similar to that underway under the Uniform National Discharge Standards (UNDS) program for Armed Forces Vessels. As we indicated in our written testimony, the UNDS program was first discussed in 1990 and has yet to be fully implemented in the 17 years since then. As we believe EPA will confirm, it is impossible to believe that the US EPA had sufficient time to gather the necessary data on discharge types, spatial and temporal distributions and available control technologies in the little over 18 months since the federal court decision vacated the current NPDES program exempt. Clearly, sufficient time needs to be provided to the EPA and the regulated community to gather the necessary information critical to development of a reasoned and scientifically defensible control and

management program for discharges incident to the normal operations of vessels.

4. In what ways would a patchwork of overlapping and conflicting Federal and State programs regulating vessel discharges impact vessel owners and operators?

   As indicated in 1. above, allowing states to set their own unique standards for discharges incident to the normal operation of a vessel would establish an insurmountable, technological, economic and legal nightmare for vessel owners. The industry has already experienced this challenge in the case of varying ballast water discharge programs established by states on the West Coast, where in some cases, different reporting templates require ships to submit multiple formats of reports with the same information as well as meet different standards for management programs. Furthermore, a federal standard for these discharges will assure that ports in one state will not be favored over ports in a neighboring state with different and perhaps more stringent standards.

5. In what ways would commercial vessel owners and operators be negatively impacted if they are regulated under the NPDES permitting program?

   Under the existing NPDES program, "front end" technology requirements could be applied to vessels. However, "back end" water quality assessments and other NPDES program criteria would allow individual states and in some cases regions as small as ports, to apply their own unique sets of discharges standards creating the patchwork quilt of requirements noted in 4. above relative to substantive control and management provisions as well as varying legal frameworks within each state.

6. Why is the NPDES permitting system not appropriate for application to mobile sources such as marine vessels?

   The NPDES permitting program was designed for application to stationary sources sited on a given waterway and which produce a relatively predicable discharge profile over time and space. Such is not the case for mobile sources like ships whose discharges collectively are not consistent over time and space. While the "front end" application of technology could be applied to vessel operations with varying degrees of success, the "back end" water quality standards would be impossible to apply to marine vessels due to the variation in vessel discharge profiles and volumes over time and space.

7. Why would incidental discharges from vessels be more effectively and efficiently managed through the development of a national uniform standard under Section 312 of the Clean Water Act?

   Incidental discharges would be more effectively and efficiently managed through a Section 312 national uniform standard program because creation of such a program, as is the case with the UNDS program noted above, would take into account the logistical and technology variations in vessel operations due to vessel type, propulsion systems, discharge profiles and volumes and other criteria important to assessing the impact of these discharges on the marine environment. Upon completion of the necessary impacts analysis which would naturally include steps as provided for in HR 5594, Section 3 (1) through (8) and as suggested in the Administration's proposal which to the best of our knowledge has yet to be introduced, informed decisions could be made as to which discharges warranted further controls which would then be implemented on a consistent national basis.

8. Is the Coast Guard better suited to implement a regulatory and enforcement program on vessels? Doesn't the Coast Guard already take the lead on implementing other regulatory requirements on vessels?

   The Coast Guard is certainly better suited to implement a regulatory and enforcement program on vessels and does take the lead in implementing current regulatory programs on vessels. However, in some cases, states have decided to take a more active role in assuring vessel compliance and providing these state programs work in coordination with Coast Guard programs, we do not object to them. However, problems do occur when an extensive Coast Guard inspection is concluded with no violations found and then shortly thereafter a state agency boards the vessel to conduct the same inspections. Safety and security responsibilities of the vessel dictate that these boarding parties be escorted and obviously repeated boardings by different agencies for the same purposes require assignment of vessel crew for this function rather than for assuring the safe, efficient and environmentally sound conduct of cargo operations. Within the context of this discussion, we do recognize the expertise of the EPA in the assessment of environmental impacts of discharges on the marine environment and do support the collaboration between the Coast Guard and EPA in this respect, with the Coast Guard established as the lead agency.

9. What recommendations would you give Congress to fix this situation legislatively? Are exemptions based on vessel length a fair way to proceed and if so, what length of vessel should be exempt? Are there other factors or vessel characteristics that should be taken into account?

In our testimony to the subcommittee, we voiced our support for the substantive provisions of HR 5594 as it reflects in Section 3, the process for evaluating and reviewing discharges other than ballast water through the tasks outlined in subsections (1) though (8) similar to the UNDS program. We responded to HR 5594 since that is the introduced legislation that contains the critical elements of the type of management program we support. We did not respond to the administration's proposal since it was not introduced legislation at the time of our testimony. On our review of the administration's proposal, we believe that the administration's proposal in more general terms is very similar to the provisions of HR 5594 in end result and thus the Coalition can certainly support the enactment of these provisions in lieu of HR 5594. In our over 10 years of dealing with various legislative vehicles to create a national ballast water management program and now for other discharges incident to the normal operations of vessels, our primary goal has been to promote the enactment of substantive provisions leading to the creation of a national program that will then be implemented through regulations. We certainly have and continue to defer to others more experienced in the legislative process as to the appropriate legislative vehicle to achieve this very important end result. Regardless of legislative vehicle, we believe the end result would be the promulgation of Coast Guard and EPA regulations to implement the substantive provisions of the statute whether through a stand-alone bill or by amendment of pending related legislation.

Since our Coalition generally represents large commercial ocean-going vessels, we do not believe we have the expertise to establish an exemption based on vessel length, although the 79 foot length established in the EPA's proposed general permit seems reasonable as explained in the preamble of that proposal. There are certainly other criteria that should be taken into account in deciding which discharges should be subject to particular levels of control. These criteria include voyage/route (inland, coastal, international), vessel type (tanker, container, passenger vessel, tug/barge), vessel complement (crew, passengers, manned/unmanned), discharge profiles including volumes and relative risk of a given discharge to the marine environment e.g. impacts assessment which includes provisions for de minimis designations for those discharges with little or no impact on the marine environment.

10. Please provide me with any supplemental or clarifying testimony or comments that you may have regarding discharges incidental to the normal operation of a commercial vessel.

For further information, we have attached in PDF format our submission to the EPA docket which requested comment on the creation of permits for vessels under the NPDES system which contains relevant information on the complexities of identifying and assessing the types of discharges incident to the normal operation of vessels.

Respectfully submitted,

Kathy J. Metcalf

Kathy J. Metcalf

CHAMBER OF SHIPPING OF AMERICA

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WASHINGTON, DC 20036

202.775.4399

July 17, 2008

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
US House of Representatives
Washington, DC 20515

Dear Chairman Oberstar:

Thank you for allowing us to respond to additional questions you have posed in your letter of June 30, 2008 relative to discharges incidental to the normal operation of commercial vessels. As you are keenly aware, the issue of how discharges incident to the normal operation of vessels are managed in an operational and environmentally sound manner is one of the most challenging environmental issues the marine industry faces. We appreciate your leadership on this issue and are certain that a collaborative effort by the legislative and executive branches and industry will result in development of a legal structure that provides certainty and consistency to the maritime industry, provides appropriate environmental protection to the marine ecosystem and moots the unfortunate decision by the Federal District Court for the Northern District of California in the NW Environmental Advocates et al vs. EPA which as you know has been appealed to the 9th Circuit Court of Appeals which has yet to render its decision.

Please note that while my written and oral testimony provided at the June 12, 2008 subcommittee hearing was given on behalf of the Shipping Industry Ballast Water Coalition, the responses to your questions have not been cleared with the coalition prior to submission to you although the responses are conceptually in line with prior positions advocated by the Coalition. We have provided the Coalition copies of this document and have suggested that if any of the Coalition members wish to add to these responses, they should do so prior to the June 18, 2008 deadline in your letter. To facilitate your review of our responses, we have reproduced the text of your questions in full which are followed by our responses in bold italic text.

1. One of my concerns is the over-simplification of existing regulatory authorities related to discharges from commercial vessels.

In you testimony, you state that "a number of discharges…are already subject to control and management" under international or domestic laws. While this is true for some pollutants, it is not true for all pollutants.

For example, unless a commercial ship is operating in the Great Lakes or Alaskan waters, there is no regulatory authority to control the discharge of graywater from vessels. Yet, EPA has conducted a study of graywater discharges from cruise ships that demonstrates elevated levels of pathogens, heavy metals, hazardous substances and oil by-products in untreated graywater discharges.

Should Congress establish a regulatory structure to ensure that all potentially harmful pollutants discharged from a commercial vessel are addressed in an environmentally sound manner?

Absolutely yes. We have always supported creation of a federal program that addresses discharges from vessels with due regard to the operational realities of marine vessels and which provides a nationally consistent program of requirements. As is the case with the Uniform National Discharge Standards (UNDS) program for Armed Forces vessels, a similar program for commercial vessels would provide this much needed consistency through the development of enforceable national uniform standards to control such discharges without the use of NPDES permits. As you suggest by the wording in your question by referring to "potentially harmful pollutants", this process would identify all discharges from commercial vessels and then, based on an impacts assessment, create standards for those discharges which are determined to have negative impacts on the marine environment.

2. In your testimony, you state the support of the Shipping Industry Ballast Water Coalition for the regulatory structure contained in HR 5594, which is an amendment to the Nonindigenous Aquatic Nuisance Prevention and Control Act.

   In your opinion, why is an amendment to a statute aimed at addressing invasive species a preferable approach than creating a management structure for certain commercial vessels modeled after the Uniform National Discharge Standards program of the Clean Water Act – as suggested by the administration's proposal?

   In our testimony to the subcommittee, we voiced our support for the substantive provisions of HR 5594 as it reflects in Section 3, the process for evaluating and reviewing discharges other than ballast water through the tasks outlined in subsections (1) though (8) similar to the UNDS program. We responded to HR 5594 since that is the introduced legislation that contains the critical elements of the type of management program we support. We did not respond to the administration's proposal since it was

not introduced legislation at the time of our testimony. On our review of the administration's proposal, we believe that the administration's proposal, although in more general terms, is very similar to the provisions of HR 5594 in end result and thus the Coalition can certainly support the enactment of these provisions in lieu of HR 5594. In our over 10 years of dealing with various legislative vehicles to create a national ballast water management program and now for other discharges incident to the normal operations of vessels, our primary goal has been to promote the enactment of substantive provisions leading to the creation of a national program that will then be implemented through regulations. We certainly have and continue to defer to others more experienced in the legislative process as to the appropriate legislative vehicle to achieve this very important end result. Regardless of legislative vehicle, we believe the end result would be the promulgation of Coast Guard and EPA regulations to implement the substantive provisions of the statute.

3. In your testimony, you state that "[Sufficient] time should be taken to identify, quantify, and assess commercial vessel discharges in a deliberate and comprehensive manner." What would the end-goal be for such a study? If such a study concluded that commercial vessel discharges were having an impact on water quality, how would you propose that these discharges be addressed?

   The end-goal for a comprehensive and deliberate study of commercial vessel discharges would be the development of enforceable national uniform standards to control such discharges where specific discharges are determined to have a negative environmental impact. Management and control of these discharges would be addressed by the creation of specific performance standards in enforceable regulations applicable to vessels based on the impacts analysis of the comprehensive study.

4. In its testimony, the Environmental Protection Agency refers to a number of discharges incidental to the normal operation of a commercial vessel, including exhaust gas scrubber washwater discharge, elevator pit effluent, chain locker effluent, and controllable pitch propeller hydraulic fluid. These discharges were also identified under the UNDS program, and discharges of these (and other) pollutants are required, by law, to be regulated because of their demonstrable impact on water quality.

   Since there is no question in this text, we assume that the questions in 5. below relate to the text in 4. above.

5. Do you believe that the discharge of these pollutants from commercial vessels should be regulated under US law? In what form would you recommend that such regulation take place? Do you believe there should be an on-board testing regime for pollution control devises for these discharges? Do you believe that on-board testing and sampling of these discharges should be conducted to make

sure that appropriate pollution control devises are working, and are providing sufficient treatment of effluent to meet discharge limits?

Ideally, due to the international nature of marine transportation, we believe that in the perfect scenario, the International Maritime Organization (IMO) should establish the requirements for the industry on a global basis. In this respect, we support the US ratification of all recently agreed to IMO instruments relating to environmental protection, namely the ballast water convention, anti-fouling convention, and Annex VI to MARPOL addressing air emissions from marine vessels (original agreed to in 1997 and amendments proposed in 2008). However, we recognize the fact that in some cases, the speed with which IMO acts is not at a sufficient pace to satisfy the environmental concerns of many of its member countries and thus national action is warranted. While IMO has addressed the ballast water issue in its recently adopted Convention, it has not yet addressed the issue of identifying and assessing in a comprehensive manner, all discharges incident to the normal operations of vessels.

We believe that these discharges should be regulated under US law and regulation since the environmental impact of some of these discharges has already been recognized by existing regulations while others have not been subject to any environmental impacts assessment which is a critical step in deciding which of these unregulated discharges should be subject to mandatory legal requirements. Regulation of those discharges found to have negative impact to the marine environment should be in the form of enforceable national uniform standards that preserve the maximum flexibility for individual ship owners on how best to meet these standards taking into account available control technologies, unique characteristics of the ship type and voyage and fundamental practices in the areas of pollution prevention and waste minimization.

The final two questions in this item assume that installation of onboard control technologies is the only compliance strategy which would be available to the regulated community. While this is a likely scenario for management of some discharges, application of pollution prevention and waste minimization principals may be an alternate control strategy for others. For example, the discharge of graywater (galley, bath and shower water) is directly proportional to the number of persons aboard a vessel, the capability (or lack thereof) to store the graywater while in coastal and inland waters and the route of the vessel in question. In many cases, vessels with adequate storage capability and small numbers of persons aboard, as is typically the case with a non-passenger commercial marine vessel, which trade outside the territorial sea can discharge the relatively small volumes of graywater generated onboard while underway and offshore such that it has little or no environmental impacts. On the other hand, it may be necessary for vessels with larger complements of people

and/or with limited storage capacity which trade within the territorial sea or inland waters, to either limit the discharge by volume and/or location, install onboard control technologies or make arrangements for discharge to shore reception facilities.

Responding to the two questions on onboard capabilities for testing and sampling we offer the following perspective. Certification of environmental technologies that indicate these technologies meet a particular discharge standard is critical prior to installation aboard a ship. It is not in the best interests of the maritime industry or the marine environment to force a vessel owner to install a costly system only to find out post-installation that the equipment cannot meet an established discharge standard. Consistent with other requirements for onboard equipment, this pre-installation certification can then be supplemented by a post-installation operational trial and certification that the equipment, as installed, operates in the manner intended and meets a specific discharge standard.

Keeping in mind that vessel crews are professional mariners and not analytical scientists, the issue of onboard verification over time presents a challenge, albeit a surmountable one through the implementation of a three tiered program. First, consistent with other required equipment, requirements should be created which require proper maintenance and operation of pollution control equipment consistent with manufacturers' requirements. Second, continuous monitoring of systems could be integrated into some, if not all, system designs that provides instantaneous data to vessel crew which indicates that the equipment is properly operating. A system failure would be indicated to vessel crew instantaneously and the discharge could be stopped until corrective action was taken to return the equipment to proper operating order. Finally, system and equipment inspection requirements could be integrated into existing inspection and survey programs which require oversight of these systems by the Coast Guard and classification societies on an annual, intermediate (approximately every 2.5 years), or special (5 year) survey basis.

With the above programs in place, we do not support the imposition of on board testing or sampling requirements. The onboard testing provisions would be adequately addressed by the three tiered system described above. The sampling requirements are problematic for a number of reasons not the least of which is the inability of ships' crew to sample some of these discharges which occur below the waterline and the possibility that the samples may undergo change over time and thus provide misleading results from the actual sample taken versus the sample analyzed when it is received at a shore based analytical laboratory. This would not of course preclude regulatory authorities from taking samples

where good cause is shown to suggest that equipment is not operating consistent with its post-installation certification.

Again, we thank you very much for allowing us the opportunity to provide testimony to the Subcommittee as well as this additional information based on your request. If you have any further questions or issues you would like to discuss further, please do not hesitate to contact me.

Respectfully submitted,

Kathy J. Metcalf

Kathy J. Metcalf

WRITTEN TESTIMONY OF
CHRISTOPHER M. REDDY, Ph.D.
WOODS HOLE OCEANOGRAPHIC INSTITUTION*

HEARING ON
Discharges Incidental to the Normal Operation of a Commercial Vessel

BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 12th, 2008

Introduction

Good morning Chairperson Johnson, Ranking Member Boozman and members of the Subcommittee. Thank you for the opportunity to speak with you today on discharges incidental to the normal operation of a commercial vessel. My name is Chris Reddy, and I am a scientist at the Woods Hole Oceanographic Institution in Woods Hole, MA. As an organic chemist, my research focuses on marine pollution. I have published more than 70 peer-reviewed scientific journal articles and several book chapters on this and related subjects. I am currently studying the aftermaths of five oil spills that have occurred from 1969 to eight months ago as well as petroleum contamination in some of the busiest harbors in the United States.

For today's hearing, you have asked me to give an overview of oil inputs to the ocean from human activities with an emphasis on those released by commercial vessels.

Petroleum Inputs and effects

Petroleum or oil is a complex mixture of molecules formed from organic debris acted on by geologic processes over millions of years[1]. The thousands of molecules that compose oil can have widely different properties. Microbes can eat some, others are very toxic and then some can dissolve in water at appreciable levels.

Worldwide, about 190 million gallons of crude oil or its refined products enter the coastal waterways or oceans due to human activity. It is either released by extreme, accidental events like oil spills (19% of the total spilled) or via chronic discharges. These include jettisoned fuel from airplanes (1%), activities associated with the extraction of petroleum (6%), air pollution (8%), runoff from land sources like automobile motor oil (21%), and then shipping operations (46%)[2]. Hence, it is the latter, chronic inputs by shipping operations, which release more oil into the ocean than accidents like the recent

* The views expressed here do not necessarily represent those of the Woods Hole Oceanographic Institution

Cosco Busan oil spill in San Francisco Bay in November 2007. However, these estimates come with a high level of uncertainty.

Our best knowledge about oil inputs is from the National Research Council's *Oil in the Sea III*[2].This book and its predecessors have represented the state of our knowledge about oil's inputs and fates as well as effects on the ocean.

In *Oil in the Sea III*, it was estimated that worldwide operational discharge by vessels greater than 100 gross tonnes was 23 to 210 million gallons per year with a best estimate of 70 million gallons. Therefore, it is possible that there is at least a factor of ten difference of what we estimate and what is released into the oceans by these vessels annually. This range is so broad because it is difficult to measure the amount of oil released from each vessel, to estimate the number of vessels at sea, and what percent are in compliance with proper handling of their waste. For example, the panelists preparing *Oil in the Sea III* argued that 5 to 15% of the vessels are non-compliant and, if so, discharge 100% of their fuel sludge. Based on select studies employing aerial surveillance, non-compliance is commonplace[3]. Since the publication of *Oil in the Sea III*, I do know of any concerted effort to improve such estimates. However, these values are lower that earlier estimates likely resulting from better technology, education, and enforcement.

Our interest in understanding how much oil is released plays a crucial role on understanding its effects on oceanic ecosystems. While oil has short-term immediate ecological impacts like those often seen on television with birds coated with black viscous oil following spills, there are also less visually arresting, but more chronic and persistent effects that are more difficult to investigate[4].

Numerous studies have shown that mixtures of lubrication, machinery, crude, and fuel oils leaked or discharged from ocean-going vessels kill thousands of seabirds annually[5-7]. Canadian researchers have estimated that 300,000 seabirds die annually from chronic oil pollution in the North Atlantic Ocean off the coast of Newfoundland. These highest incidents of bird deaths in the world are attributed to the close proximity of the feeding grounds of the birds and the dense shipping routes traveled between North America and Europe. Most often, the oiling of the bird's feathers leads to death by their diminished capacity to waterproof, insulate, and retain buoyancy.

With shipping increasing and rapidly industrializing countries adding to more international trade[8], oil discharges from the normal operation of a vessel still remains a threat. Additional studies on constraining such input terms and their effects are necessary before a clearer picture of this problem can be achieved.

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Testimony of William W. Walker, Ph.D.
Executive Director
Mississippi Department of Marine Resources
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BEFORE THE
HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON WATER RESOURCES AND THE ENVIRONMENT

Mr. Chairman, Honorable Ranking Member Mica, Madam Chairwoman, Honorable Ranking Member Duncan, and distinguished Committee Members, I am Bill Walker, Executive Director of the Mississippi Department of Marine Resources. The Mississippi Department of Marine Resources is a governing agency designed to enhance, protect and conserve marine interests of the state. We manage all marine life, public trust wetlands, adjacent uplands and waterfront areas, and provide for the balanced commercial, recreational, educational and economic uses of these resources consistent with environmental concerns and societal needs.

I am here today on behalf of the commercial and recreational vessel operators of the State of Mississippi. However, the current situation transcends the borders of my state and, if not solved, will have disastrous consequences to all commercial and recreational boaters throughout our great nation. Thank you for inviting me to testify today regarding this very important issue.

As I understand the situation, without Congressional action, small commercial and recreational vessel operators will, effective September 30, 2008, be required to obtain a U.S. Environmental Protection Agency (EPA) National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA) to be able to discharge materials incidental to the normal operation of their vessels. Regulated discharges would include deck washes, grey water, and similar materials.

My job as the Executive Director for the Department of Marine Resources in Mississippi is to protect our coastal waters and the marine resources that inhabit them, and to ensure that the health and safety of residents and visitors who utilize our waters are protected as well. I believe federal and state regulations currently in place are more than adequate to protect our nation's coastal waters as required by the Clean Water Act. Yogi Berra and other wise sages have suggested over the years, "If it ain't broke, don't fix it." Clearly, the provision under the Clean Water Act to exempt small boat operators from having to have NPDES permits to discharge materials incidental to the operation of their vessels has worked quite well for some 34 years and does not need changing at this time. If action is not taken quickly to continue the exemption of small vessels from this NPDES requirement, some 81,000 commercial fishing vessels and 18 million recreational boats currently operating in U.S. waters will be negatively impacted.

This Congress has been given very little time to address this situation, and I applaud the work that has been done so far. To my knowledge, at least four bills have been introduced to date. Senator Ted Stevens has introduced S. 2645 that would provide an exemption for commercial fishing vessels less than 79 feet in length and all recreational boats. Senators Bill Nelson and Barbara Boxer have introduced S. 2766 that exempts all recreational boats from the NPDES requirement, and Congressman Steven LaTourette recently introduced the same bill in the House (H.R. 5949). Finally, Congressman Don Young has introduced H.R. 5594 that would exempt commercial vessels less than 125 feet in length and all recreational boats. Of these four, Congressman Young's bill is the most comprehensive and fair. All small boats, whether commercial or recreational, need to be exempted.

In Mississippi, and I suggest across our nation, commercial and recreational fishermen are under duress. Mississippi's shrimp industry has been a vital part of the economy of Coastal Mississippi throughout its history. This industry, and while I am using shrimp as an example, this is true for ALL of our fisheries, presently faces increasing fuel prices and the continued dumping of foreign shrimp into U.S. markets largely without penalty. Many of these commercial fishermen, after generations have passed the trade down the line, are being forced out of this historical profession. According to NOAA Fisheries data, the shrimp fishing effort in the Gulf of Mexico has declined by 78% since 2003. In Mississippi, shrimp licenses today are roughly half what they were prior to Hurricane Katrina. Those who remain do so by the slimmest of economic margins and are ill-positioned to accept additional financial burdens due to unnecessary permit fees. In terms of all licenses sold in the five Gulf states, total license sales dropped from 6.8 million in 2004 to 5.0 million in 2006, a reduction of 1.8 million licenses sold.

My perception is that this action is lawsuit-driven and that the intent of this litigation was never directed at recreational and smaller commercial vessels. Further, I doubt very much that EPA supports including these vessels under the NPDES requirement, and I further suggest that EPA has neither the desire nor the budget to develop a system to issue and enforce some 13 to 18 million permits to regulate the discharge of materials that are not even considered pollutants by the Agency. In short, it's just good common sense that recreational and smaller commercial vessels continue to be exempted from the NPDES permit requirement, as they have for the past 34 years, and I respectively urge you to move forward quickly with legislation to make that a reality.

Specifically, I ask that you support legislation that exempts all recreational vessels and commercial vessels less than 125 feet in length from the requirement to possess NPDES permits to discharge materials associated with the incidental operations of these vessels.

Again, I would like to thank the Chairman, Honorable Ranking Member Mica, Madam Chairwoman and Honorable Ranking Member Duncan for giving me the opportunity to present this testimony and for their leadership on this issue. If I can be of further service to the Committee as you work toward a reasonable solution of this issue, I stand ready to do so.

STATE OF MISSISSIPPI
Haley Barbour
Governor

MISSISSIPPI DEPARTMENT OF MARINE RESOURCES
William W. Walker, Ph.D., Executive Director

July 21, 2008

The Honorable John Boozman
Ranking Republican Member
Subcommittee on Water Resources
and Environment
U.S. House of Representatives
Washington, DC 20515

Congressman Boozman,

Thank you again for the opportunity to testify before the Subcommittee on "Discharges Incidental to the Normal Operation of a Commercial Vessel." And thank you for the opportunity to answer a few additional questions from some of the Republican members of the Subcommittee. My responses follow:

1-2. Is there a need to regulate discharges incidental to the normal operation of recreational and smaller commercial vessels at all under the Clean Water Act? If so, would it be more effective and efficient to manage incidental discharges from vessels through the development of national uniform standards under Section 312 of the Clean Water Act instead of under the NPDES permitting program?

There is, of course, the need to eliminate or significantly reduce the discharge of hazardous materials from all vessels, commercial and recreational, into the waters of the U.S. It is unclear, however, whether or not discharges incidental to the normal operation of these vessels constitutes a discharge of hazardous materials. It is at least premature at present to regulate these discharges through the NPDES permitting process. I understand that Senators Murkowski and Nelson may today introduce legislation provide a two-year moratorium on permits for all commercial fishing vessels of any size and for all other commercial vessels of 79 feet or less and also require EPA to conduct a 15-month study to evaluate the impacts of various discharges from these vessels. Enacting this legislation, together with S. 2766 (Clean Boating Act) is a win-win resolution of this critical and difficult issue. I have asked Mississippi's senators to support this

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legislation. If the EPA study determines that incidental discharges from these vessels does pose an environmental hazard, then appropriate methods to regulate them can be implemented. Should regulation be deemed necessary, the development of national uniform standards appears to be a sound approach.

3-4. In what ways would commercial and recreational vessel owners and operators be negatively impacted if they are regulated under the NPDES permitting program?

Some discharges need to be returned to the sea. Recreational vessels routinely take on water during storms and otherwise normal operation, and this water needs to be discharged either through bilge pumps or manual bailing. Commercial vessels like shrimp boats, normally rinse their catch on their decks with seawater for sanitary purposes and this water must be returned to the sea. Further, in efforts to reduce bycatch mortality, shrimp boats routinely return bycatch to the sea, another necessary and prudent practice. Operators of these vessels simply do not need to be regulated in this regard.

5. What are some of the practical problems that EPA would face in issuing and enforcing the NPDES permits on board tens of thousands of commercial vessels and millions of recreational vessels by this autumn?

I do not believe that there is any way that the EPA can put a program in place by autumn to either issue the permits or enforce compliance. This is a massive undertaking, even for an agency as large as EPA. And, as indicated above, we don't even know if what we are proposing to regulate should be regulated.

6. How will the permitting requirements specifically impact the shrimping industry?

The shrimping industry in this nation is presently at the point of collapse. Faced by increasingly high fuel prices and the continued importation of foreign product, many shrimpers are simply getting out of the business. In Mississippi, our commercial shrimping licenses are down roughly 50% compared to 2005. NPDES permits eliminating discharges incidental to the normal operation of their vessels will drive many others out of business. If they cannot wash their catch, return bycatch, and discharge grey water, they will be unable to use shrimping techniques currently in place, techniques which have not been shown to be detrimental to the natural environment.

7. What percentage of commercial fishing boats are under 79 feet?

In Mississippi, probably 70% of our commercial fleet is under 79 feet. The remainder are in the 100-foot range.

8. How does your state conduct outreach and assistance to the shrimping community?

We routinely conduct workshops and meet with our shrimping community, alerting them to current rules and regulations and informing them of new techniques and gear design that may be of benefit to them.

Thank you very much for the opportunity to provide additional information on this critical issue. If I can be of further service to you, please let me know.

Sincerely,

William W. Walker, Ph.D.
Executive Director

ASIWPCA

Association of State and Interstate Water Pollution Control Administrators

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November 15, 2007

Linda Boornazian
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 4203M
Washington, DC 20460

RE: Vessel Discharges

Dear Ms. Boornazian,

First let me express my appreciation for your attendance at the 2007 ASIWPCA Annual Meeting in Sturgeon Bay, Wisconsin. In particular, we appreciated the update on the Northern District of California court decision, *Northwest Environmental Advocates et al. v. EPA.*

As the principle implementers of this nation's clean water programs, the members of ASIWPCA are very concerned about the broad implications of this decision that could place millions of vessels within the NPDES program for discharges incidental to their normal operation. Upon further review of this case and the timing of its appeal, we believe EPA must be prudent in responding to the concerns of District Court while not overburdening themselves, the States, or the American public.

Ballast water discharges from vessels containing aquatic invasive species, particularly oceangoing vessels, have damaged water quality and continue to threaten the environment throughout the United States. Aquatic invasive species prey on local organisms or compete with native species for food and habitat, alter aquatic ecosystems, and cause significant economic disruptions. Economic impacts associated with aquatic invasive species and their ecological damage and control costs run into the billions of dollars every year.

It is also well established that States are substantially under-resourced to fully implement NDPES programs already in place. States simply cannot take on another major new burden without jeopardizing the effectiveness of present programs. Further, the fact that many vessels operate across Federal/State and State/States boundaries would make permitting at the State level very difficult to administer consistently across jurisdictional

lines, even if resources were not an issue. Although the District Court chose to eliminate the entire exclusion for discharges incidental to vessel operation, plaintiffs clearly were focused on invasive species and ballast water discharges, an area States have also expressed concerns about over the years.

We wish to make clear our position that in moving forward to address the District Court's decision, USEPA should take a common sense approach. Any national permit program for vessels must initially be administered at the federal level and should start with ballast water discharges, keying in on invasive species as the pollutant of concern. This should be a collaboratively developed permit program with States as co-regulators providing input. ASIWPCA has put together a workgroup to assist with this endeavor and is available for dialogue at your earliest convenience.

There is precedent in the NPDES program for phasing in larger facilities first and then smaller discharges over time. Once a program has been put in place that addresses the largest vessels with the largest discharges, and more information has been gathered relating to the environmental impacts of smaller vessels and other related incidental discharges, States and USEPA can then determine the appropriate approach to address these incidental discharges, including whether the NPDES program is the appropriate tool. If an NPDES approach is taken, this program should also initially be administered nationally but if a State requests authorization to administer and demonstrates the ability to do so, USEPA should consider developing a program which allows approval of that authorization as the Clean Water Act intends.

ASIWPCA will be pleased to participate with you and others in further discussions on this matter.

Sincerely,

Harry T. Stewart
President

CC: Jim Hanlon
Deb Nagle
ASIWPCA Members

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National Marine
Manufacturers Association

June 11, 2008

The Honorable Eddie Bernice Johnson, Chair
Subcommittee on Water Resources & Environment
Committee on Transportation & Infrastructure
U.S. House of Representatives

Dear Madam Chair:

The National Marine Manufacturers Association (NMMA) and the Boat Owners Association of the United States (BoatU.S.) are writing to applaud you for holding a hearing scheduled for June 12, 2008 on "Discharges Incidental to the Normal Operation of a Commercial Vessel." We also again commend you and the Members of the Committee for unanimously reporting H.R. 5949, the Clean Boating Act of 2008, sponsored by Reps. Steve LaTourette and Candice Miller.

H.R. 5949 represents a genuine bipartisan, good-government effort to spare the nation's boaters and sportsmen the unnecessary burden of unprecedented regulation for the incidental, everyday overboard water discharges from their pleasure boats under the National Pollutant Discharge Elimination System (NPDES). As your Committee recently affirmed, NPDES was never intended to, and should not, apply to pleasure craft. Your efforts to create a separate examination of the implications of permitting requirements for commercial craft are also appreciated, while the legislation for 18 million recreational boats and small charter fishing boats continues to move forward in the House and Senate.

NMMA represents nearly 1,700 boat builders, engine manufacturers, and marine accessory manufacturers who collectively produce more than 80 percent of all recreational marine products made in the United States. BoatU.S., with over 650,000 members, is the nation's premier advocate for recreational boaters, providing savings, service and representation to millions of boat owners nationwide since 1966. Today BoatU.S. acts as the "AAA" for boaters, providing towing, insurance, financing, discounts, consumer protection, safety and environmental education, and a unified voice for the boating consumer. With almost 73 million boaters nationwide and 18 million recreational boats in operation, recreational boating has a $108 billion dollar annual impact on the American economy. Direct spending totals $39.572 billion and indirect trip spending by boaters totals $68.492 billion. Spending by recreational boaters is responsible for 990,000 jobs in the United States.

The NPDES permit deadline of September 30, 2008 looms large for America's boaters and anglers and the American recreational marine industry. Together, and on behalf of the recreational boating community, we strongly request that you move quickly to enact this simple, bipartisan legislation that will keep recreational boating safe, simple and fun for American families, protect American marine manufacturing jobs and the environment. We urge you to move quickly and in a manner that ensures expeditious passage of the Clean Boating Act this summer.

Sincerely,

Margaret B. Podlich
Vice President, Government Relations
BoatU.S.

Scott B. Gudes
Vice President, Government Relations
NMMA

Cc: The Honorable James Oberstar, Chairman
The Honorable John Mica, Ranking Member
Members of the Subcommittee

Testimony of
Nina Bell, J.D.
Executive Director of Northwest Environmental Advocates

before the

Subcommittee on Water Resources and Environment,
Committee on Transportation and Infrastructure
U.S. House of Representatives

June 12, 2008

Chairwoman Johnson and members of the Subcommittee. Thank you for your invitation to testify before the Subcommittee on Water Resources and Environment. I am the Executive Director of Northwest Environmental Advocates, the plaintiff in the lawsuit against the U.S. Environmental Protection Agency (EPA)[1] concerning the agency's exemption of discharges incidental to vessel operation from regulation under the Clean Water Act.

There is great concern about the outcome of this lawsuit. My testimony today is intended to address that concern in several ways. First, I will explain why the court found the Clean Water Act was always intended to regulate the discharges from vessels. Second, I will review the environmental significance of the volume and content of vessel discharges and their adverse impact on the nation's waters and the world's oceans by way of demonstrating why they require the kind of regulation assured by the Clean Water Act. Third, I will establish that in the absence of court orders or explicit Congressional restrictions – much more than Congressional authorization or even legislative mandates to agencies to develop regulations and programs – the federal regulatory agencies have repeatedly failed to make significant progress in regulating any type of vessel discharges. This argues for several outcomes: that Congress leave intact the CWA permitting program ordered by the court and that any additional regulatory steps be explicitly established by statute rather than left to the agencies to determine. Fourth, despite the many fears associated with the Clean Water Act's permitting program, I will discuss why this is a program that is eminently flexible, adaptable to many types of discharges and pollution sources, and one that evolves with increasing knowledge while providing protection to both public waters and to the dischargers covered by the permits. It is, in short, well suited to regulating vessel discharges in a time of evolving knowledge and developing treatment technology. Last, I note that the carefully crafted and comprehensive Clean Water Act has met with extraordinary success in protecting and maintaining the quality of our public waters.

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[1] *Northwest Environmental Advocates v. U.S. EPA*, No. 03-05760 (N.D. Cal., Sept. 18, 2006) (ordering that EPA's regulatory exclusion from Clean Water Act permitting for "discharge incidental to the normal operation of a vessel" will be vacated on September 30, 2008), *appeal pending*, Nos. 03-74795, 06-17187, 06-17188 (9 Cir.).

I. The Clean Water Act, EPA's Regulation Exempting Discharges Incidental to the Operation of a Vessel from the Clean Water Act, and a Brief History of *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*

In 1972, Congress significantly amended the Federal Water Pollution Control Act, creating what we now know as the Clean Water Act (CWA). The statute is intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] Among other provisions, the CWA prohibits the discharge of any pollutant from a "point source" into navigable waters of the United States without an NPDES permit. The term "point source" includes a "vessel or other floating craft."[3] "Discharge of any pollutant" is defined as "any addition of any pollutant to navigable waters from any point source."[4] The term "pollutant" includes "biological materials."[5] Pursuant to Section 312 of the Act, EPA established treatment requirements governing Marine Sanitation Devices (MSD) used to treat or hold vessel sewage. And, pursuant to Section 311 of the Act, EPA promulgated regulations for the discharge of oil from vessels. But beyond these narrowly-tailored regulations mandated by the statute, EPA declined to regulate vessel discharges or to establish minimum technology requirements for treatment of vessel discharges.

More specifically, shortly after passage of the CWA, EPA promulgated a regulation that expressly exempted "discharges incidental to the normal operation of a vessel" from the requirement that a discharger obtain an NPDES permit. The regulation provides in relevant part:

> 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. . . .[6]

EPA's expressed basis for this broad exemption was that vessel discharges do not present a significant environmental threat.[7] For 25 years EPA relied upon this regulation as the basis for not issuing permits to vessels or authorizing States to do so.

In January, 1999, Northwest Environmental Advocates, 11 other environmental organizations, and the Association of California Water Agencies filed a petition with the EPA requesting that the agency repeal its regulation at 40 C.F.R. § 122.3(a) on the grounds that it conflicts with the plain language of the CWA. Following a first round of litigation to compel a response to the

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[2] 33 U.S.C. § 1251(a).

[3] 33 U.S.C. § 1362(14).

[4] 33 U.S.C. § 1362(12).

[5] 33 U.S.C. § 1362(6).

[6] 40 C.F.R. § 122.3(a).

[7] 38 Fed. Reg. 13530 (May 22, 1973).

petition, EPA eventually denied the petition and, in 2003, the petitioners filed suit in the federal District Court of California, San Francisco, seeking to have EPA's regulation declared *ultra vires* under the CWA. Six Great Lakes States – New York, Michigan, Wisconsin, Minnesota, Illinois, and the Commonwealth of Pennsylvania – intervened on behalf of the petitioners. The Court agreed with plaintiffs and on March 31, 2005 granted summary judgment in plaintiffs' favor. In September, 2006 the court subsequently ruled on the remedy, ordering that the first sentence of the regulation at 40 C.F.R. § 122.3(a) will become null and void as of September 30, 2008. The delayed remedy provided EPA with more than two years to develop a permitting system for vessel discharges.

II. The Clean Water Act's NPDES Permitting Program and Vessel Discharges

The Clean Water Act is the nation's primary law for protecting U.S. waters, and represents the most comprehensive and well-coordinated set of policies in U.S. law for addressing point source discharges. The CWA already requires EPA, the nation's preeminent water quality authority, to develop and regularly revise uniform minimum treatment standards based on technology; assures protection of public health and the environment by requiring discharge permits to meet State water quality standards; requires discharge permits be renewed every five years, at which time States, EPA, and the public can re-evaluate treatment levels, monitoring results, and compliance; and has an enforcement scheme that allows States, EPA, and citizens to bring actions against sources discharging without a permit or in violation of permit conditions. The CWA has 35 years of agency experience, public support, and judicial history that make it the most desirable of regulatory platforms to address pollution sources. It is also a demonstrably flexible statute.

A. NPDES Program Elements

NPDES permits are issued by States, if authorized to do so by EPA, or by EPA where a state has not been authorized. Under what is termed a "cooperative federalism" scheme, EPA establishes the minimum requirements that must apply to all entities regulated under the CWA, and states may adopt more stringent standards where they see fit. NPDES permits generally require the gathering and reporting of information and restrictions on the amount of pollutants allowed to be discharged. There are two methods by which these allowable levels are established: technology-based regulations and water quality-based requirements. The technology-based restrictions establish certain minimum treatment equipment or processes regardless of the discharge's impacts may have on the receiving water. In this way, all similar sources are expected to curtail their pollution outputs as a matter of policy. One such technology-based requirement is the use of the "best available technology economically achievable."[8] The water quality-based approach, on the other hand, is based on the water quality standards which are established by States on the basis of permissible level of pollution necessary to protect human health and aquatic life in State waters. The more stringent of the two approaches governs the discharges of the permitted source. NPDES permits are issued for a period not longer than five years, ensuring that the information that has been gathered by the permit holder, and any developments in treatment technology can be incorporated into subsequent permits.

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[8] 33 U.S.C. § 1311(b)(2)(A).

1. Individual and General NPDES Permits

There are essentially three types of permits EPA and/or the states can issue under the NPDES program. First are individual NPDES permits, issued by States with authorized programs or by EPA where States are not authorized. Individual NPDES permits are not contemplated for any vessel discharges, at least in the foreseeable future. Neither EPA nor States have the resources or inclination to issue such permits to any group of sources that have essentially similar discharges, including vessels. The second type of permit is a general NPDES permit, which EPA created as a method for efficiently handling the regulation of largely similar sources with largely similar discharges. General permits are issued by a State or EPA and thereafter any entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. General permits cover such stationary discharges as fish hatcheries, industrial stormwater, and food packing plants and such mobile sources such as truck washing and suction dredge mining operations. A general permit can allow a source to discharge upon the agency's receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a confirmation.

2. General NPDES Permits by Rule

The last method was established by EPA to provide the most streamlined and efficient issuance of general permits. The provisions of EPA's rule 40 C.F.R. § 122.28(b)(2)(v) allow the agency to authorize discharges under a general permit without the discharger submitting an application (notice of intent). This approach is the most appropriate for large numbers of dischargers, such as vessels of certain types.

B. Discharges Incidental to Vessel Operation

Discharges incidental to the operation of a vessel are many, varied, and significant in their environmental impacts. Such discharges include the following pollution streams: gray water (water that has been slightly used, such as water from laundries, showers, sinks, kitchens, and bathing), bilge water (water that has collected on the inside of a vessel, frequently contaminated with oil, grease, and other contaminants and is pumped out), blackwater (sewage), and ballast water (water taken on and discharged to maintain vessel stability in changed cargo and weather conditions and frequently contaminated with invasive species picked up from foreign waters or from previously established populations of invasive species in domestic waters). Vessels discharge polluted water generated by routine maintenance and cleaning. For example, hull surface cleaning and treatment as well as paint removal and application, results in discharges of heavy metal debris, paint effluent, anti-foulants, solvents, oil and grease, fuels, cleaning agents and flush down water and sand-blasting substances. In addition, vessels discharge detergents containing oil dispersants and nutrients, used to break down oils and grease, and strong acids and bases used for vessel cleaning. Commercial and recreational vessels, particularly fishing vessels and cruise ships, dump a variety of debris overboard including plastics, food wastes, nets and lines, and fish cleaning wastes. Many vessels use a wide variety of solvents for maintenance, repairs, and degreasing as well as antifreeze, all of which ends up in vessel discharges. The UNDS program has generated a list of Armed Forces vessel discharges, some of which are

relevant to the NPDES program for regulated incidental discharges from commercial vessels.[9] EPA has the discretion to determine which vessel activities constitute a discharge from a point source of environmental consequence.

C. NPDES Permits Are Routinely Issued In the Absence of Sufficient Information

The NPDES permitting program is premised on the regulatory agencies not having sufficient information. While this is hardly desirable, it is as true today as it was decades ago. There are many reasons. First, permitting takes place against an ever-changing regulatory backdrop. Not only does EPA revise the minimum technology requirements to reflect increasingly more effective and economical treatment methodologies, but the CWA requires that States review their water quality standards every three years to determine if scientific understanding on the impacts of pollution has changed sufficiently to warrant updating the standards. In this way, dischargers are expected to reduce the pollutant loads introduced into public waters as information changes and technologies improve. But dischargers with NPDES permits are not held to restrictions that could not have anticipated or that they have not had the time to implement.

The second reason permits are routinely issued with inadequate information is that agencies do not have a complete understanding of many sources' discharges as well as adequate monitoring of the receiving water's quality. For this reason, many permits require dischargers to collect information that will be used to improve permit conditions in the future. EPA and the States issue compliance schedules to allow time for dischargers to come into compliance with permit terms, balancing the assurance of future compliance with necessary improvements in technology and reductions in pollutant levels with the practical and economic considerations associated with sources installing or updating pollution controls.

The same would be true with regard to vessel discharges. As pollution control technology improves, as information on discharges is better characterized, as the impacts of those discharges on the environment is better understood, NPDES permits for discharges incidental to vessel operation will be revised to respond to emerging information. Initially one could expect permits to be primarily information gathering tools, requiring technology currently required by and mandated, for example, international protocols, with less emphasis on pollution controls. Over

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[9] The UNDS program determined the following 25 discharge types require treatment: Chain Locker Effluent, Elevator Pit Effluent, Hull Coating Leachate, Photographic Laboratory Drains, Surface Vessel Bilgewater/Oil Water Separator, Underwater Ship Husbandry, Weather Deck Runoff, Aqueous Film Forming Foam, Catapult Water Brake, Tank and Post-Launch Retraction Exhaust, Clean Ballast, Compensated Fuel Ballast, Controllable Pitch Propeller Hydraulic Fluid, Dirty Ballast, Distillation and Reverse Osmosis Brine, Firemain Systems, Gas Turbine Water Wash, Graywater, Motor Gasoline Compensating Discharge, Non-Oily Machinery Wastewater, Seawater Piping Biofouling Prevention, Small Boat Engine Wet Exhaust, Sonar Dome Discharge, Submarine Bilgewater, Welldeck Discharges. http://www.epa.gov/owow/oceans/regulatory/unds/batchruleprocess.html#1.

time, pollution controls based on emerging technology would become a more important aspect of vessel discharge permits.

D. Why the NPDES Permit Program Provides Substantial Protections to Dischargers

Not only are permit limits established on the basis of known information but a permit acts as a "shield" against enforcement for pollution discharges that an agency chose not to regulate. While, for example, EPA and citizens may seek enforcement action against a source that discharges without a permit, such enforcement actions against a permit holder are limited to enforcing permit terms and conditions. Thus, for example, if the agency does not deem a wave washing over the bow of a vessel to be a discharge of a pollutant from a point source, the permit will contain no prohibitions on waves washing over bows and there will be no such permit term to be enforced by any entity.

Likewise, EPA still retains significant discretion to judge what constitutes a discharge that requires regulation in the first place. EPA itself raised the issue that some vessel discharges produce only *de minimis* pollution and therefore do not warrant regulation under the NPDES permit program. The District Court declined to rule on this argument because EPA raised at the remedy portion of the case, after briefing and too late in the court proceedings. However, the court noted that "EPA may consider whether any vessel discharges produce only *de minimis* pollution on remand from this Court."

III. Vessel Discharges are Significant in Volume, Pollutants, and Environmental Impacts.

Vessel discharges are a significant source of pollution to the nation's lakes and rivers and to the ocean both individually for large ships and cumulatively for all vessels. Contained in these discharges from vessels are a wide variety of waste streams, each with its own wide variety of pollutants.

A. Oil, Oily Wastes, Oily Sludge and Bilge Water Discharges

All motorized vessels discharge oil and other petroleum products to rivers, lakes, and the ocean. Oil from on-board fuel processing, tank washing, engines and equipment, and cleaning – among many other sources – makes oil a ubiquitous pollutant from vessels of all sizes. Large vessels have numerous waste streams that contain sludge, waste oil, and oily water mixtures, including fuel oil sludge, lubricating waste oil, and cylinder oil, that end up in the bilge. Ships burn so-called bunker fuel, or No. 6 fuel oil, which is highly contaminated and must be constantly purified on-board, producing oily sludge. No. 6 fuel oil contains hazardous and persistent toxic chemicals such as polycyclic aromatic hydrocarbons (PAHs), alkyl PAHs, and metals.[10] The production of sludge is usually at least 1-2 percent of the heavy fuel oil consumed on board. In addition to fuel oil, there are others oils such as lubricating oil for the ship's engines and cylinder

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[10] http://www.atsdr.cdc.gov/toxprofiles/tp123-c3.pdf at 22.

oil comes from the engine cylinder walls. Waste oils are drained to a sludge tank but can and frequently do also contaminate bilge water.

Oil comes from a variety of other sources within ships: oil tankers routinely wash residual oil and oily sludge from cargo tanks. Oil residues from washing are held in slop tanks and discharged at sea. Lubrication and other oils spilled during ship operations and used for cleaning purposes may also be stored in the slop tanks or discharged. In theory, all oily water is processed in an oily water separator which gauges the amount of oil present in the water and prevents excessive oil from entering the ocean.[11] However, there are strong indications that equipment is routinely undersized, that crew are insufficiently experienced to properly run equipment, and that equipment often fails. Moreover, as a spate of criminal prosecutions by the EPA and U.S. Department of Justice against shipping and cruise companies and crew demonstrate, there are powerful incentives to simply bypass all of this equipment and dump the oil into the ocean.[12]

All sizes of vessels are a source of oil and oily waste from running, maintaining, and cleaning engines and other equipment. In 2002, the National Academies' National Research Council estimated that nearly 85 percent of the 29 million gallons of petroleum that enter North American ocean waters each year from human activities comes from land-based runoff, polluted rivers, airplanes, and small boats and jet skis. The report recommended that federal agencies work with State and local environmental agencies to document pollution sources.

Much of this oily waste enters the bilge. Bilge water is water that has collected on the inside of a vessel, and is frequently contaminated with oil, grease, and a wide range of other contaminants before it is pumped out. In the context of cruise ships, EPA has described bilge water as follows, demonstrating the wide range of pollutants that make their way to the bilge:

> [b]ilge water is the mixture of water, oily fluids, lubricants, cleaning fluids, and other similar wastes that accumulate in the lowest part of a vessel from a variety of different sources including the engines (and other parts of the propulsion system), piping, and other mechanical and operational sources. It is not uncommon on ships for oil to leak into the bilge from engine and machinery spaces or from fittings and engine maintenance activities. These leaks, along with onboard spills, wash waters generated during the daily operation of a vessel, and

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[11] Within twelve miles of shore, regulations prohibit the discharge of oil unless it is passed through an oil-water separator, and does not cause a visible sheen or exceed 15 ppm. 33 C.F.R. § 151.10. Beyond twelve miles, oil or an oily mixture may be discharged while proceeding en route if the oil content of the effluent without dilution is less than 100 ppm. Vessels are required to maintain an Oil Record Book, which records, among other things, the disposal of oily residues and the discharge or disposal of bilge water. 33 C.F.R. § 151.25.

[12] *See, e.g.*, "Fine for ocean pollution costs shipper $2 million: The chief engineer of the Spring Drake, which dumped waste at sea, gets one month in jail," The Oregonian, March 9, 2004.

> waste water from operational sources (e.g., water lubricated shaft seals, propulsion system cooling, evaporators, and other machinery), collect in the bilge. In addition to containing oil and grease, bilge water may contain solid wastes such as rags, metal shavings, paint, glass, and a variety of chemical substances (EPA, 1997). Bilge water may contain various oxygen-demanding substances, volatile organic compounds, semi-volatile organics, inorganic salts, and metals. Bilge water also may contain other contaminants such as soaps, detergents, dispersants, and degreasers used to clean the engine room. These cleaning agents create an emulsion and prevent separation of oil and water. Moreover, they are often incompatible with Oily Water Separators and Oil Content Monitors. Due to the various sources that contribute to the production of bilge water, the composition of bilge water varies from vessel to vessel, and from day to day. Other waste streams discussed in this report, such as graywater and sewage, are typically contained within their own systems and might only be present in bilge water as a result of leaks.[13]

The routine discharge of oil from vessels due to poor engine design, inadequately separated oily bilge water as a result of a faulty or malfunctioning oily water separators, human error, malfunctioning bilge monitors, and deliberate equipment by-pass exposes marine organisms to petroleum hydrocarbons that can result in mortality due to acute toxicity, physical smothering, or chronic effects. Petroleum hydrocarbons have long-term impacts including: impaired survival or reproduction; chronic toxicity of persistent components; and habitat degradation.[14] Oil, even in minute concentrations, can kill fish or have various sub-lethal chronic effects, such as changes in heart and respiratory rates, enlarged livers, reduced growth, fin erosion, and various biochemical and cellular changes. It can severely damage coral reefs. Oil ingestion by birds leads to their starvation, disease, and predation. For example, a Canadian study has estimated that 300,000 seabirds are killed annually in Atlantic Canada from this type of routine discharge of oily vessel waste. Bunker fuel can contaminate ocean floor and coastal sediments, causing long-term impacts to benthic habitats. [15] Marine mammals can experience skin and eye lesions and interference with swimming ability when they come in contact with oil; gastrointestinal tract hemorrhaging, renal failure, liver toxicity and blood disorders from ingestion of oil; and inflammation of mucous membranes, lung congestion, pneumonia and nervous system disturbances from inhalation of volatile petroleum hydrocarbons.

B. Ballast Water Discharges

Ballast water is taken on or discharged by ships in order to accommodate changes in weight

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[13] Draft Cruise Ship Assessment Report, EPA, December 20, 2007 at 4-1, http://www.epa.gov/owow/oceans/cruise_ships/pdf_disch_assess/section4_ bilgewater.pdf.

[14] *See, e.g.*, Exxon Valdez Oil Spill Impacts Lasting Far Longer Than Expected, Scientists Say, ScienceDaily (Dec. 23, 2003), http://www.sciencedaily.com/releases /2003/12/031219073313.htm.

[15] *Id.* at 4-8.

when cargo is loaded and unloaded. Ships hold ballast water in a variety of locations, ranging from dedicated ballast water tanks to empty cargo and fuel tanks. A tanker ship in the Great Lakes can contain as much as 14 million gallons of ballast water, which would be discharged at port when the ship takes on cargo. Seagoing tankers can have double the amount of ballast water. It is estimated that 21 billion gallons of ballast water are discharged into U.S. ports each year[16] and that globally, over 10,000 organisms may be transported via ballast water on a daily basis.[17]

Ballast water is responsible for carrying foreign aquatic species over long distances, transmitting them to U.S. ports where they can contaminate local ecosystems and infect seafood. The rate at which invasive species are taking root is increasing.[18] The threat posed by invasive species to the U.S. environment and the economy is well established, in particular raising concerns about impacts to threatened and endangered species and commercial and recreational fishing. In addition, there are human health concerns. In 1991, the human cholera bacteria, *Vibrio cholerae,* was found in ships entering the Port of Mobile, Alabama from South America and was later tied to contaminated seafood in the Mobile Bay area.[19] Other forms of bacteria and pathogens that make their way to U.S. coastal waters through ballast water are *Cryptosporidium parvum* and *Giardia duodenalis* (both which cause stomach upset), and enterovirus, which can cause respiratory illness and hand, foot, and mouth disease.[20] Other reports of ballast water contamination include the 1998 strain of *V. parahaemolyticus* which affected oyster beds in the Galveston Bay area of Texas and caused a diarrheal epidemic.[21] Ballast water is also responsible for releasing oil into surrounding waters: more than one source claims that "the discharge of oil from dirty ballast tanks, engine room waste and slops results in more oil entering the sea than the

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[16] James T. Carlton, Donald M. Reid, Henry van Leeuwen, "Shipping Study–The role of shipping in the introduction of nonindigenous aquatic organisms to the coastal waters of the United States (other than the Great Lakes) and an analysis of control options," U.S. Coast Guard Report no. CG-D-XX-92, 1992.

[17] Dr. Jim Carlton, "Invasive species in ballast water," presented at MEPC 43, June 27, 1999, London, England.

[18] Cohen, Andrew and Jim Carlton, "Accelerating invasion rate in a highly invaded estuary, Science, 279 555-558 (1998).

[19] Phillips, Stephen et al., "Ballast Water Issue Paper." Pacific States Marine Fisheries Commission. Aug. 2005.

[20] Lambie, Chris, "Bacteria Hiding in Ship Ballast," 29 May 2008. The Chronicle Herald: Nova Scotia.

[21] Tibbetts, John, "The State of the Oceans, Part 1: Eating Away at a Global Food Source," Environmental Health Perspectives Volume 112, Number 5, Apr. 2004.

major spills from large tanker or bulker accidents."[22]

C. Blackwater: Sewage Discharges

Blackwater is sewage – wastewater from toilets, urinals and infirmaries. Sewage from vessels of all sizes, from cruise ships to recreational boats, is far more concentrated than sewage collected in towns and cities. A cruise ship generates an estimated 8,000 to 21,000 gallons of blackwater per day. Likewise, a small recreational vessel also generates a significant amount of concentrated human waste. According to EPA, "the amount of bacterial pollution (fecal coliforms) from one weekend boater's discharge of untreated sewage is equal to the amount from the treated sewage of 10,000 people during the same time period[.]"[23] EPA exhorts recreational boaters to follow the requirements of the CWA by informing them that untreated sewage discharge from vessels can "suffocate animals and plants living in the aquatic environment" and that "[v]essel sewage discharges increase bioerosion of coral reefs, making them more susceptible to collapse."[24]

The introduction of disease-carrying microorganisms from fecal matter into the coastal aquatic environment puts humans at risk from eating contaminated shellfish and by swimming in contaminated waters resulting in acute gastroenteritis from bacteria and viruses, including hepatitis A and E, typhoid, cholera, *Salmonella, shigella*, and other gastro-intestinal viruses.[25] Pathogen contamination in swimming areas and shellfish beds poses potential risks to human health and the environment by increasing the rate of waterborne illnesses. Shellfish feed by filtering particles from the water, concentrate bacteria and viruses from the water column, and pose the risk of disease in consumers when eaten raw.[26] Studies conducted in Puget Sound, Long Island Sound, Narragansett Bay, and Chesapeake Bay have demonstrated that boats can be a significant source of fecal coliform bacteria in coastal waters, particularly in areas with high boat densities and low hydrologic flushing.[27]

Section 312 of the CWA establishes the treatment and transfer requirements for vessel sewage discharges. However, the Coast Guard regulations and inspection and enforcement mechanisms are completely inadequate to ensure compliance with Section 312. For example, a GAO report on cruise ship pollution incidents found that Coast Guard inspectors "rarely have time during

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[22] Phillips, Stephen et al., "Ballast Water Issue Paper," Pacific States Marine Fisheries Commission. Aug. 2005.

[23] "Have you ever considered the impact of one boater's untreated sewage?" http://www.epa.gov/owow/oceans/regulatory/vessel_sewage/vsdflyer.html.

[24] *Id.*

[25] National Research Council, 1993.

[26] Draft Cruise Ship Assessment Report, EPA, December 20, 2007 at 3-21, http://www.epa.gov/owow/oceans/cruise_ships/pdf_disch_assess/section3_graywater.pdf.

[27] *Id.* citing (Milliken and Lee, 1990; JRB Associates, 1980).

scheduled ship examinations to inspect sewage treatment equipment or filter systems to see if they are working properly and filtering out potentially harmful contaminants."[28] Likewise, there is little if any oversight over the millions of smaller vessels' compliance with CWA Section 312 requirements. As a result, there is a wide discrepancy between sewage treatment policies for municipal dischargers and for vessels and vessel discharges of sewage post a significant and largely unmitigated threat to public health and the environment.

A growing number of cruise ships are employing Advanced Wastewater Treatment (AWT) systems for the treatment of sewage prior to discharge.[29] EPA cites a recent cruise industry estimate that roughly 40 percent of the International Council of Cruise Lines members' 130 ships, two-thirds of the world's cruise fleet, have installed AWTs, with the number growing every year. AWTs are considered a step up from the requirements of the CWA Section 312's Marine Sanitation Devices. EPA describes their function as follows: "AWTs generally provide improved screening, biological treatment, solids separation (using filtration or flotation), disinfection (using ultraviolet light), and sludge processing as compared to traditional Type II MSDs."[30] Sewage sludge from cruise ships is discharged without treatment beyond 12 miles from shore.[31]

Using AWTs is not a solution, however. The use of AWTs gives ships and regulators the confidence to continually discharge treated wastewater while transiting State waters and while docked but the filters employed by AWTs after secondary treatment may not eliminate viruses such as the norovirus that cause illnesses, according to the Washington State Department of Health.[32] While fecal coliform bacteria are the indicators of contamination used to gauge levels of human pathogens, they do not reflect the levels of viruses that are the major cause of food borne illness from consumption of shellfish such as oysters, clams, and mussels.

Human health is not the only concern of untreated or inadequately treated blackwater. The U.S. Fish & Wildlife Service has observed that sewage discharges from boats may degrade water quality by locally increasing biological oxygen demand particularly as the number of boats using

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[28] Marine Pollution – Progress made to reduce marine pollution by cruise ships, but important issues remain,"GAO Report to Congressional Requesters (GAO/RCED-00-48) February 2000, http://www.gao.gov/new.items/rc00048.pdf (January 2003).

[29] Draft Cruise Ship Assessment Report, EPA, December 20, 2007 at 2-6, http://www.epa.gov/owow/oceans/cruise_ships/pdf_disch_assess/ section2_sewage.pdf.

[30] *Id.*

[31] Draft Cruise Ship Assessment Report, EPA, December 20, 2007 at 2-20, http://www.epa.gov/owow/oceans/cruise_ships/pdf_disch_assess/ section2_sewage.pdf.

[32] Assessment of Potential Health Impacts of Virus Discharge from Cruise Ships to Shellfish Growing Areas in Puget Sound, Washington Department of Health, November 2007 http://www.doh.wa.gov/ehp/sf/Pubs/cruise-ship-report.pdf at 1.

coastal waters continues to increase substantially.[33] The organic-rich sewage wastes can depress oxygen levels as they decay in the marine environment. The U.S. Fish & Wildlife Service notes that "[a]lthough the volume of wastewater discharged from boats is relatively small, the organics in the wastewater are concentrated," concluding that the likelihood of localized oxygen suppression is great.[34] Where vessels discharge their sewage from holding tanks contrary to regulatory requirements, particularly in poorly flushed waterbodies, the dissolved oxygen concentrations of the water may decrease. Finally, chemical additives such as chlorine and formaldehyde used to disinfect or control odors of on-board sewage may cause environmental problems. The U.S. Fish & Wildlife has expressed concern about the use of chlorine which is toxic in the aquatic environment and, on vessels, used by untrained operators.

D. Graywater Discharges

Graywater is wastewater from the sinks, showers, galleys, and cleaning activities aboard a ship. It can contain a variety of substances including detergents, oil and grease, and food waste. With few exceptions, the discharge of graywater is not regulated.[35] Under the EPA regulatory exemption, graywater discharges from vessels generally are not regulated under the Clean Water Act, except for graywater from commercial vessels operating on the Great Lakes, where the definition of sewage includes graywater.[36] Discharges of graywater are partially regulated in Alaska.[37] Cruise ships are the largest sources of graywater and graywater is the largest source of liquid waste on cruise ships. While some sources have estimated the generation of more than 1 million gallons of graywater on a typical 7-10 day cruise[38] EPA estimates 36,000 to 249,000 gallons/day/vessel, a range of .4 to 2.5 million gallons for a 10 day cruise.[39] Graywater can

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[33] http://kleanmarine.com/pdf/cvapog.pdf, February 11, 1994.

[34] *Id.* citing (JRB Associates, 1981). The report cites the extremely high biological oxygen demand (BOD) levels for vessel discharges of 1700-3500 mg/l as compared to that of raw municipal sewage (110-400 mg/l) or treated municipal sewage (5-100 mg/l).

[35] Draft Cruise Ship Assessment Report, EPA, December 20, 2007 at 3-3, http://www.epa.gov/owow/oceans/cruise_ships/pdf_disch_assess/section3_graywater.pdf.

[36] 33 U.S.C. § 1322(a)(6).

[37] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, enacting into law Title XIV of Division B of H.R. 5666, 114 Stat. 2763A-315, and codified at 33 U.S.C. § 1901 Note.

[38] A Shifting Tide: Environmental Challenges and Cruise Ship Responses, Center for Environmental Leadership in Business at 10, http://www.celb.org/ImageCache/CELB/content/travel_2dleisure/cruise_5finterim_5fsummary_2epdf/v1/cruise_5finterim_5fsummary.pdf.

[39] Draft Cruise Ship Assessment Report, EPA, December 20, 2007 at 3-2, http://www.epa.gov/owow/oceans/cruise_ships/pdf_disch_assess/section3 _graywater.pdf.

legally be pumped overboard almost anywhere the ship sails.[40] According to information gathered by EPA, graywater systems on some cruise ships may include any of the following, regardless of the fact that some of the waste streams do not meet the statutory definition of graywater: wastewater from bar and pantry sinks, salon and day spa sinks and floor drains, interior deck drains, shop sinks and deck drains in non-engine rooms (e.g., print shops, photo processing shops, dry cleaning areas, and chemical storage areas); refrigerator and air conditioner condensate; wastewater from laundry floor drains in passenger and crew laundries; dry cleaning condensate; wastewater from dishwashers, food preparation, galley sinks, floor drains, and the food pulper; wastewater from garbage room floor drains and from sinks in restaurants and cafes; wastewater from whirlpools; and wastewater from medical facility sinks and medical floor drains.[41]

EPA conducted limited sampling of cruise ships operating in Alaska in 2004 and 2005. The agency found that the fecal coliform concentrations in some cruise ship graywater waste streams are one to three orders of magnitude greater than typical fecal coliform concentrations in untreated domestic wastewater.[42] EPA concluded that the fecal indicators from untreated cruise ship graywater consistently exceed the water quality criteria for marine water bathing and shellfish harvesting waters. EPA also found copper, nickel, and zinc at levels approximately 2 to 63 times above national criteria for aquatic life protection. Likewise, arsenic, thallium, Bis(2-ethylhexyl) phthalate, and tetrachloroethylene were found at levels that exceeded national criteria for human health protection and ammonia exceeded aquatic life criteria.[43]

E. Hull Cleaning and Maintenance

Antifoulant paints are used on vessels of all sizes to kill marine life and keep the vessel clean to maintain vessel speed, fuel efficiency, and hull integrity. The chemical tributyl tin, commonly used for this purpose, is extremely toxic to lobster and mollusks such as mussels, clams and oysters. The International Maritime Organization (IMO) has initiated a phased ban of tributyl tin. Studies have found that hull paint toxicants accumulate in the sediment of some harbors, such as San Diego Bay.[44] Other less toxic paints, primarily based on the use of copper, are now available but they too contaminate waters and sediments and require careful treatment to prevent contamination of waterways.[45] The use of copper in antifouling paints is being reevaluated by numerous agencies yet striking the right balance between reducing invasive species transport on

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[40] *Id.*

[41] *Id.* at 3-2.

[42] *Id.*

[43] *Id.*

[44] http://seagrant.ucdavis.edu/bpecon.htm.

[45] Underwater Hull Cleaner's Best Management Practices (BMPs), http://seagrant.ucdavis.edu/underwater.htm.

vessels and preventing toxic contamination has been, to date, elusive.[46] Substantial outreach and education is required to convince boat owners to take fairly complicated precautions to prevent toxic contamination.[47] Toxic pollution is generated during the routine maintenance and cleaning of commercial and recreational vessels, during hull surface cleaning and treatment as well as paint removal and application. Heavy metal debris, paint effluent, anti-foulants, solvents, oil and grease, fuels, cleaning agents and "flush down water and sand-blasting substances" are all discharged into the surrounding water.[48]

F. Solid Waste

Solid waste generated on ship can include glass, paper, cardboard, aluminum and steel cans, incinerator ash, plastics and kitchen grease. Cruise ships generate large amounts of solid wastes; on average, each cruise ship passenger generates at least two pounds per day, plus two bottles and two cans multiplied by up to 3,000 passengers.[49] While there is an international ban on ocean dumping of plastics,[50] plastic wastes such as utensils may be mixed with other wastes such as food. Food waste that has passed through a grinder can be discharged three miles from shore.[51] Other types of garbage, such as paper products, rags, glass, metal, bottles, crockery, lining and packing materials can be legally discharged 25 miles from shore with the exception of certain "Special Areas," such as the Caribbean, deemed to require additional protections.[52] However, even in the Caribbean, an exception is made for food waste, which can be discharged 12 or more nautical miles from shore.

Solid waste becomes marine debris, which harms marine aquatic life including mammals, birds, fish, and invertebrates. In particular fishing nets, ropes, and lines from commercial fishing

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[46] Environmental Policy Conflicts on the Horizon: Vessel Antifouling Paints, Coastal Water Quality, and Invasive Species, Leigh Taylor Johnson and Jamie Anne Gonzalez California Policy Research Center, University of California, August 2006, http://seagrant.ucdavis.edu/CPRCPolicyReport2006.pdf.

[47] *See, e.g.*, http://seagrant.ucdavis.edu/publications.htm.

[48] Hayman, Brian et al. "Technologies for reduced environmental impact from ships - Ship building, maintenance and dismantling aspects," 2000.

[49] http://www.celb.org/ImageCache/CELB/content/travel_2dleisure/cruise_5finterim_5fsummary_2epdf/v1/cruise_5finterim_5fsummary.pdf at 14.

[50] Annex V of the International Convention for the Prevention of Pollution from Ships (MARPOL); Act to Prevent Pollution from Ships (APPS; 33 U.S.C. § 1901 et seq.).

[51] 33 C.F.R. § 151.69.

[52] 60 Fed. Reg. 43374, IMO Special Areas, August 21, 1995, http://www.epa.gov/docs/fedrgstr/EPA-GENERAL/1995/August/Day-21/pr-551.html (February 2003).

vessels entangle whales, turtles and other wildlife.[53] Fishing gear is a significant concern:

> The impacts of derelict fishing gear on marine wildlife are dramatic. In Hawaii, derelict fishing gear is the most serious human-related threat to the fragile coral reefs of the Northwestern Hawaiian Islands where it abrades, enshrouds, encrusts and breaks corals. It also injures and kills wildlife, including the endangered Hawaiian monk seal and protected sea turtles and cetaceans: between 1982 and 2000, over 200 Hawaiian monk seals were entangled in derelict nets (Boland and Donohue, 2003). In Washington State's Puget Sound and Northwest Straits region, hundreds of derelict crab pots and gill nets have been documented on the seafloor. Divers observed 1 to 3 foot deep accumulations of bird bones under just one derelict net off the San Juan Islands, where presumably bones had drifted down from decomposing carcasses, likely for years (NRC 2004).[54]

In 1993, the National Park Service released a study linking the shrimping industry to an accumulation of debris near the Padre Island National Seashore.[55] The study reported that the local shrimping vessels were responsible for polluting the local waters with items such as wood disks (used on shrimp nets), rubber gloves, salt bags and more. Between March 1994 and February 1995 alone more than 40,000 debris items were collected in a 16-mile area off the island, 65 percent of which was used by the shrimping industry. The study found that during peak shrimping time, there was a correlation of nearly five times more debris in the area than during times of little shrimping activity.

While there are many types of solid waste discharged both directly and indirectly to the ocean and rivers, by far the one of most concern is plastics. For example, the Algalita Marine Research Foundation's investigation of plastic in the North Pacific Central Gyre of the Pacific Ocean showed that the mass of plastic pieces was six times greater than zooplankton floating on the water's surface.[56] Most of the marine debris in the world is comprised of plastic materials with an average proportion between 60 to 80% of total marine debris. The majority of this debris is believed to come from land-based sources from urban runoff through storm drains but substantial amounts also come from ocean-going vessels. Plastics are carried by currents and can circulate continually in the open sea. The impacts of plastics are significant and of growing concern.

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[53] Sheavly, Seba B. San Mateo Countywide Water Pollution Prevention Program. The Ocean Conservancy. 2004.

[54] Reducing Marine Debris: Derelict Fishing Gear Removal Programs in Hawaii, Washington, and California, Kirsten Gilardi, et al., http://conference.plasticdebris.org/ whitepapers/ Kirsten_Gilardi.doc.

[55] Heinrich, Katherine M. New Study Traces Padre Island Trash to Shrimpers. National Parks: Washington. Sept. 1995. Vol. 69. Iss. 9-10; pg. 21.

[56] http://www.plasticdebris.org/, citing C.J. Moore, S.L. Moore, M.K. Leecaster, and S.B. Weisberg, A Comparison of Plastic and Plankton in the North Pacific Central Gyre, Marine Pollution Bulletin, 13 February 2004.

Most plastic floats near the sea surface where some is mistaken for food by birds, fish, and marine invertebrates. This suggests that plastic particles may be considered a mimic of natural food, such as zooplankton, in marine habitats. In addition, small plastic particulates on the marine ecosystem have been found to accumulate polycyclic aromatic hydrocarbons, chlorinated and legacy pesticides and other persistent organic pollutants, and to contain hormonally active additives.[57]

IV. Congressional Mandates and Authorization to Regulate Vessel Discharges Has Been Implemented by Federal Agencies Poorly if At All.

Since passage of the Clean Water Act in 1972, Congress has authorized, and in some cases mandated, a number of programs to regulate certain types of discharges from certain types of vessels. In each case, the federal agencies charged by Congress to implement these regulatory programs have taken an extraordinary amount of time to carry them out or have ignored the mandates altogether. EPA and the Department of Defense have made only slow progress carrying out the UNDS program for Armed Forces vessels. EPA has slowly moved towards establishing regulations on cruise ship sewage discharges, has exempted by regulation a variety of vessel discharges from the CWA, and has failed to update the requirements on sewage treatment and pump out from vessels. EPA has also refused or only very slowly responded to two administrative petitions concerning vessel discharges. Likewise, the Coast Guard has failed to carry out Congressional mandates to protect the Great Lakes from invasive species carried in ballast water tanks and similarly refused to response to an administrative petition to do so. In other words, the experience over the last decades strongly suggests that nothing short of Congressional fiat or court order will result in timely action, whether the regulatory agency is the EPA or the Coast Guard. It would be a mistake to not learn from this history.

A. The Uniform National Discharge Standards (UNDS) for Armed Forces Vessels is Proceeding Very Slowly if At All

In 1996, Congress passed the Uniform National Discharge Standards for Armed Forces Vessels Act (UNDSAF) which amended the CWA to exempt incidental discharges from Armed Forces vessels from the normal requirements of the CWA.[58] Congress passed this act out of concern that some coastal states could attempt to enforce CWA requirements against Armed Forces vessels discharging ballast water. The Senate Report explained:

> The Navy wishes to clarify the regulatory status of certain non-sewage discharges from Navy vessels. Vessels are point sources of pollution under the Clean Water Act. Any discharge from a point source, including a vessel, into the waters of the

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[57] Density of Plastic Particles found in zooplankton trawls from Coastal Waters of California to the North Pacific Central Gyre, C.J. Moore, et al. Algalita Marine Research Foundation, http://conference.plasticdebris.org/whitepapers/CJ_Moore_Comparision _of_Debris.doc.

[58] 33 U.S.C. § 1362(6)(A).

> United States is prohibited unless specifically permitted under section 402 or 404 of the Act. Notwithstanding this prohibition, discharges from vessels have generally not been subject to the permit requirements.[59]

The primary effect of the UNDSAF was to amend the definitions section of the CWA so as to exclude discharges incidental to the normal operation of a Armed Forces vessels from the definition of a pollutant.

As a result of the UNDSAF, EPA began a three-phase approach to regulating Armed Forces vessels. On May 10, 1999, EPA and the Department of Defense (DOD) published the Phase I final rule.[60] The Phase I rule identified all discharges incidental to the normal operation of armed forces vessels, and characterized each discharge to determine if it required control, based on its potential to have an environmental impact. The rule determined the types of vessel discharges that require control by a marine pollution control device (MPCD) and those that do not require such controls. EPA and DOD identified a total of 39 types of discharges, 25 of which would require control by an MPCD and 14 requiring no controls.[61] In the intervening nine years, EPA and DOD have focused on developing Phase II discharge controls for 7 of the 25 types of discharges requiring controls. Following Phase II, DOD, in consultation with EPA and the U.S. Coast Guard, will have one year to establish regulations governing the design, construction, installation, and use of MPCDs onboard Armed Forces vessels necessary to meet the performance standards promulgated in Phase II. The Phase II performance standards do not become effective, nor does the preemption of state regulation of armed forces vessel discharges become effective, until Phase III requirements are in place.[62]

The UNDS program began with a promising start. Nine years, however, have lapsed since the agencies identified which discharges require controls and no Phase II performance standards have been issued. It is unclear from EPA's website if the agencies have a time frame for completion of even the first batch of 7 Phase II regulations, let alone the remaining 18 discharge types. The UNDS program, a good idea, has to all appearances completely stalled out.

B. Coast Guard Fails to Regulate Great Lakes Transoceanic Vessels Declaring No Ballast On Board Despite the Passage of NISA and a Petition by States for Regulations Consistent with the Statute

The Coast Guard's failure to implement the Non-indigenous Aquatic Nuisance Prevention and Control Act (NANPCA),[63] as re-authorized and amended by the National Invasive Species Act of

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59 S. Rep. No. 104-113, at 1 (1995).

60 64 Fed. Reg. 25126; 40 CFR Part 1700.

61 http://www.epa.gov/owow/oceans/regulatory/unds/batchruleprocess.html#3.

62 *Id.*

63 16 U.S.C. § 4701.

1996 (NISA), is another example of how Congressional mandates to establish regulatory controls over vessel discharges have been ignored by the implementing agency. NANPCA/NISA was adopted by Congress to spur regulation of ballast water discharges, although the legislation clearly was not intended to preempt or limit the CWA with respect to ballast water discharges.

> The regulations issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act.[64]
>
> The voluntary guidelines issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the Untied States under the Federal Water Pollution Control Act . . . .[65]

NANPCA/NISA required that no later than 2 years after November 29, 1990, the Secretary of the Department in which the Coast Guard was then operating "issue regulations to prevent the introduction and spread of aquatic nuisance species into the Great Lakes through the ballast water of vessels."[66] NANPCA, as amended by NISA in 1996, specified in pertinent part that such regulations must:

> (A) apply to all vessels equipped with ballast water tanks that enter a United States port on the Great Lakes after operating on the waters beyond the exclusive economic zone; NISA, passed 12 years ago, required the Coast Guard to address the problem of invasive species carried in ballast water to the Great Lakes.

and

> (B) require a vessel to:
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> (i) carry out exchange of ballast water on the waters beyond the exclusive economic zone prior to entry into any port within the Great Lakes;
>
> (ii) carry out an exchange of ballast water in other waters where the exchange does not pose a threat of infestation or spread of aquatic nuisance species in the Great Lakes and other waters of the United States, as recommended by the Task Force [established under 16 U.S.C. § 4712]; or
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> (iii) use environmentally sound alternative ballast water management methods if the Secretary determines that such alternative methods are as effective as ballast water exchange in preventing and

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[64] 16 U.S.C. § 4711(b)(2)(C).

[65] 16 U.S.C. § 4711 (c)(2)(J).

[66] 16 U.S.C. § 4711(b)(1).

controlling infestations of aquatic nuisance species.[67]

The statute is clear that the Coast Guard's regulations under NANPCA/NISA must prevent the introduction and spread of aquatic nuisance species and require all vessels equipped with ballast water tanks that enter a United States port on the Great Lakes after operating beyond the exclusive economic zone (the "EEZ"), with no exemption for those claiming to have no ballast on board, to carry out ballast water exchange or some other alternative. Contrary to the statute, however, the current Coast Guard program neither prevents the introduction of invasive species nor applies to all vessels with ballast tanks.

Instead, the Coast Guard's regulations[68] contain an applicability provision providing that "[t]his subpart applies to each vessel that carries ballast water," contrary to the statutory requirement that the regulations shall apply to vessels with ballast water tanks, regardless of the amount of ballast water in those tanks. As a direct consequence of these regulations, vessels claiming to have "no ballast on board" – so-called NOBOBs – are not generally required to take any measures to prevent the harmful release from their ballast tanks of invasive species into the Great Lakes. The Coast Guard acknowledged this gap over five years before the States' petition was filed – that is to say over nine years ago – and stated that it was working to identify management methods to reduce the threat from NOBOBs, but that "it would be premature to issue regulations specifically for these (NOBOB) vessels at this time."[69] This failure has been exacerbated by rules promulgated regarding penalties for non-submission of ballast water management (BWM) reports, in which rulemaking the Coast Guard stated that "NOBOBs will still be exempt from conducting BWM practices."

The vessels at issue include up to 90 percent of all transoceanic vessels entering the Great Lakes. These NOBOBs do not need to have ballast on board at the time they enter the Great Lakes because they arrive fully laden with cargo. However, their ballast tanks typically contain up to 100 tons of residue, consisting of a layer of water and accumulated sediments lying below the ships' ballast pump intakes. This residue can contain invasive species. Once a NOBOB vessel has entered the Great Lakes, it typically takes on lake water as ballast when it unloads its cargo at a Great Lakes port. In the process, the residue in the ballast tanks, including any nonindigenous species that may be present, is mixed with lake water. Subsequently, the vessel typically discharges its ballast when it reloads at another Great Lakes port, before leaving the Great Lakes fully loaded with cargo. The discharge of such NOBOB ballast is believed to represent an important pathway for the introduction of invasive aquatic nuisance species into the Great Lakes.

Following years of inaction by the Coast Guard, seven Great Lakes States filed a petition with the

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[67] 16 U.S.C. § 4711(b)(2)(A)&(B).

[68] 33 C.F.R. § 151.1502.

[69] 64 Fed. Reg. 26675 (May 19, 1999).

Coast Guard[70] in July 2004 – four years ago – on which the Coast Guard has yet to take any action, either by responding to the petition or with regard to regulating the so-called NOBOBs. Against the backdrop of the Coast Guard's inaction and its failure to protect the Great Lakes from invasive species, the St. Lawrence Seaway Development Corporation, in conjunction with its Canadian counterpart, began this year to require ballast water exchange for ships before they enter the Great Lakes.

C. EPA Making Only Slow Progress on Cruise Ship Regulations Authorized by Statute and Requested by an Administrative Petition

EPA is well aware of the significant waste streams generated by cruise vessels. The agency comments on its website that there are more than 230 cruise ships operating world wide functioning as "literally floating cities" for more than 3,000 passengers and crew, and often operating in pristine coastal waters. Waste streams include the same list of discharges incidental to the operation of a vessel cited above, such as bilge water, sewage, graywater, and ballast water. In addition, however, cruise ships also generate a significant amount of solid waste (food waste and garbage) and waste streams with hazardous materials such as from dry cleaning, photography labs, beauty parlors, and swimming pools.[71]

In December 2000, Congress passed HR 4577, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001 which contained Title XIV, called "Certain Alaskan Cruise Ship Operations."[72] Title XIV established discharge standards for sewage and graywater from large cruise ships (those authorized to carry 500 or more passengers for hire) while operating in certain Alaska waters. It also authorized EPA to develop additional standards for these discharges in Alaska. Over three years passed before EPA sampled wastewater from four cruise ships in Alaska. That same year, 2004, EPA also distributed an extensive survey of cruise ships operating in Alaska. To date, four years later and eight years after the Act was passed, EPA has not promulgated any additional regulations based on either its sampling or its surveys.[73]

Eight months before the passage of Title XIV, in March 2000, the Bluewater Network on behalf of 53 organizations petitioned EPA to assess, and where necessary control, cruise ship

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[70] Petition of the States of New York, Wisconsin, Minnesota, Ohio, Illinois, the Commonwealth of Pennsylvania, the Michigan Department of Environmental Quality, and Great Lakes United to Require the Amendment of Regulations and Regulatory Practices Governing Ballast Water Management for Control of Nonindigenous Aquatic Nuisance Species in the Great Lakes to Admiral Thomas H. Collins, Commandant, United States Coast Guard and Tom Ridge, Secretary, United States Department of Homeland Security, July 14, 2004.

[71] Cruise Ship White Paper, EPA, August 22, 2000 at 15, http://www.epa.gov /owow/oceans/cruise_ships/white_paper.pdf.

[72] 33 U.S.C. § 1901.

[73] http://www.epa.gov/owow/oceans/cruise_ships/sewage_gray.html.

discharges.[74] Eight years later, EPA issued a Cruise Ship Discharge Assessment Report[75] in which EPA quantified waste stream volumes; made a scientific assessment of the impacts on water quality, the marine environment, and human health of sewage, graywater, hazardous waste, solid waste, and oily bilge water. EPA declined, however, to assess the adequacy of existing regulations to control these waste streams, to formulate any recommendations on whether, and if so how, any existing EPA regulations should be revised. EPA stated its intention to identify a range of options and alternatives to address certain waste streams, namely sewage and graywater, in the completed Assessment Report, which it hopes to finalize by the end of 2008, nearly nine years after the petition was filed.[76]

In the context of evaluating cruise ship sewage discharges, EPA noted that its regulations governing sewage discharges from vessels in general, pursuant to Section 312 of the CWA, might not be adequate. EPA stated that it might want to consider

> whether the standards for MSDs should be revised. Those standards were developed in 1976 and may no longer be sufficiently stringent in light of available new technologies. There is information to indicate that the performance of many MSDs decreases over time. New or revised standards could account for the operational life of MSDs.[77]

EPA also noted that it could interpret section 312 as applying to any waters where the discharge of sewage from vessels might affect waters within the three mile limit. "Under this approach, section 312 would be brought to bear on cruise ship discharges to waters that are beyond the three mile limit but within bays, fords, sounds, or other water bodies and likely to adversely affect water quality inside the three mile limit."[78]

As part of its cruise ship regulatory assessment, EPA specifically declined to evaluate "a number of other waste streams that may be generated onboard cruise ships, some of which may be considered incidental to the normal operation of a vessel (e.g., ballast water, deck runoff, hull coat leachate)" because, "as part of a separate effort, EPA has begun an administrative process to prepare for regulation of discharges incidental to the normal operation of a vessel that, as of

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[74] Letter from Russell Long, Bluewater Network, to Carol Browner, EPA, March 17, 2000, http://www.epa.gov/owow/oceans/cruise_ships/petition.pdf.

[75] Cruise Ship White Paper, EPA, August 22, 2000, http://www.epa.gov/owow/oceans/cruise_ships/white_paper.pdf.

[76] Letter from Benjamin Grumbles, EPA, to Russell Long, Bluewater Network, January 31, 2008, at 2, http://www.epa.gov/owow/oceans/cruise_ships/Bluewater_Network_Petition_Response_20_31_08.pdf.

[77] Cruise Ship White Paper, EPA, August 22, 2000, at 13, http://www.epa.gov/owow/oceans/cruise_ships/white_paper.pdf.

[78] *Id.*

September 30, 2008, will no longer be excluded from Clean Water Act permitting requirements . . . ."[79]

D. Some Oil Discharges Have Been Deregulated by EPA

Despite the serious hazards posed by oil from vessel engines, EPA has deregulated this discharge. Section 311 of the CWA establishes that "it is the policy of United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."[80] The Act also defines "discharges" in the context of oil pollution to include "spilling, leaking, pumping, pouring, emitting, emptying or dumping." Section 311 only covers discharges not regulated by NPDES permits by excluding from the definition of oil discharges covered by this section, those discharges of oil that are (1) in compliance with an NPDES permit, (2) identified, reviewed, and subject to conditions in an NPDES permit, and (3) anticipated to be intermittent or continuous that are identified in an NPDES permit or an application and are within the scope of relevant operating and treatment systems.[81] In other words, Congress intended that oil discharges covered by an NPDES permit would not subject to the limitations in Section 311 but rather be subject to the conditions of the NPDES permit itself.

EPA has interpreted the statute in what is referred to as the "No-Sheen" Rule:

> For purposes of section 311(b) of the Act, discharges of oil into or upon the navigable waters of the United States or adjoining shorelines in such quantities that it has been determined may be harmful to the public health or welfare of the United States except as provided in § 110.7 of this part [deeming oil discharges from properly functioning engines, but not bilges, not harmful] include discharges of oil that:
> a) Violate applicable water quality standards; or
> b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.[82]

As a result of EPA's regulations implementing Section 311 and its regulatory exemption for discharges incidental to the operation of a vessel, vessel discharges of oil have not been authorized to obtain NPDES permits and are, therefore, only subject to the requirements of Section 311. Additionally, since EPA has created regulatory exemptions for oil discharges from

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[79] *Id.*

[80] CWA § 311(b)(1).

[81] CWA § 311(a)(2).

[82] 40 C.F.R. § 110.3 (as to navigable waters); 40 C.F.R. § 110.4 (as to contiguous zone): 40 C.F.R. § 110.5 (as to areas beyond contiguous zone); 61 Fed. Reg. 7421, (Feb. 28, 1996).

properly functioning engines both from NPDES permits and from the requirements of Section 311,[83] oil discharges from properly functioning marine engines have been exempted from the Clean Water Act entirely. There is no indication that Congress intended such an outcome. Rather, it intended that either the NPDES permit program or Section 311 would apply to oil discharges from a vessel. The outcome of EPA's regulations is directly contrary to the policy interests of the United States.

E. Sewage Discharges: Regulated by Statute But Implementation is Outdated and Wholly Inadequate

The discharge of untreated or inadequately treated sewage from vessels has long been recognized as a serious threat to public health and the environment. Section 312 of the CWA establishes effluent standards for marine sanitation devices (MSDs) for all commercial and recreational vessels equipped with installed toilets; on-board equipment designed to treat or store vessel sewage before discharging it; and procedures for the designation of "no-discharge zones" (NDZs) for vessel sewage. Section 312 does not apply to vessels beyond the three-mile limit of U.S. territorial waters. EPA is responsible for developing effluent performance standards for MSDs and the Coast Guard is responsible for MSD design, construction, installation, and operation regulations, and certifying MSD compliance with EPA regulations.[84] There are three types of MSDs, any one of which may be used by vessels under 65 feet in length. Two types discharge after treatment and one is a holding tank where sewage is kept until it can be disposed onshore. Vessels over 65 feet in length are restricted to one of two types. Most cruise ships employ holding tanks. Whether a cruise ship discharges sewage in the open ocean or to onshore facilities depends on the circumstances of its voyage.

The regulations implementing Section 312 date back to 1976 and, as EPA has noted, are very likely outdated. Moreover, the MSD regulations are not working. Anecdotal evidence suggests that particularly in crowded marinas, particularly on weekends, vessels equipped with holding tanks are simply discharging untreated sewage as it is convenient rather than to onshore facilities. This is common knowledge amongst people who work at marinas but has not been translated by EPA and the Coast Guard into any improved requirements for sewage holding and treatment, or the implementation of programs more likely to be used (e.g., sewage pump outs like garbage pick-ups). The entire system relies upon educational efforts which are not sufficient to overcome the practical realities of a failed system.

F. Ballast Water Discharges: EPA Fails to Act in Absence of Court Order

In the face of inaction by EPA and the Coast Guard, citizens groups and States have sought their own ways to restrict the discharge of untreated ballast water to the nation's waters. Even so, the result has been excessive delays. The petitioners in the lawsuit to overturn EPA's regulatory exemption for discharges incidental to vessel operation filed their administrative petition with

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[83] 40 C.F.R.§ 110.7.

[84] CWA § 312(b)(1).

the agency at the outset of 1999, nine and a half years ago. At the time the District Court issued its order on remedy, the court observed that EPA had had over six years since the petition was filed to consider the problem of regulating vessel discharges – particularly ballast water discharges – under the NPDES program. The court also found that EPA had demonstrated its intimate familiarity with the subject matter in materials submitted in the lawsuit, thereby concluding that two years was an adequate amount of time for EPA to begin regulating vessel discharges.

The Michigan legislature, weary of waiting for federal actions, passed a bill requiring discharge permits for ballast water to ships starting in January 1, 2007. The State has issued a general permit that covers oceangoing vessels that do not discharge ballast water into the waters of the state or choose to discharge ballast water treated by one of four ballast water treatment methods determined by the Michigan Department of Environmental Quality to be environmentally sound and effective in preventing the discharge of aquatic nuisance species.[85] This program has been challenged by shippers.[86]

This April, in response to a citizens lawsuit, a Minnesota court ordered the Minnesota Pollution Control Agency to begin issuing NPDES discharge permits to ships discharging ballast water into Minnesota waters starting on October 1, 2008. The court found that the State was remiss in taking no action to prevent the spread of the viral hemorrhagic septicemia (VHS), described by the U.S. Department of Agriculture as "an extremely serious pathogen of fresh and saltwater fish."[87]

Other States have taken various approaches to ballast water controls and treatment in an attempt to fill the void left by EPA and the Coast Guard, including the States of California, Oregon, and Washington.

Conclusion

Vessels of all sizes, from ocean-going tankers and cruise ships to the millions of motorized recreations vessels plying the nation's rivers and lakes, discharge a myriad of pollutants that pose a hazard to human health, the fish and shellfish many commercial and recreational boat

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[85] Permit No. MIG140000, Ballast Water Control General Permit, Port Operations and Ballast Water Discharge, Michigan Department of Environmental Quality, http://www.deq.state.mi.us/documents/deq-water-npdes-generalpermit-MIG140000.pdf.

[86] *See Fednav, Ltd. v. Chester*, 505 F.Supp 2d 381 (E.D. Mich., 2007), *appeal pending*, No. 07-2083 (6th Cir.) (rejecting shipping industry challenges to Michigan's ballast water law).

[87] *State of Minnesota ex rel., Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, File No. 62-CV-07-2224 (Ramsey Co. Dis. Ct., State of Minnesota, April 21, 2008) (court ordered Minnesota Pollution Control Agency to begin issuing Clean Water Act discharge permits to ships by October 1, 2008 to stop or mitigate the spread of Viral Hemorrhagic Septicemia) at 2.

users are seeking to catch, birds and mammals, and the integrity of the ecosystems that support a wide range of aquatic life. Our understanding of these threats is more than adequate to know they are substantial and less than fully adequate to know how to perfectly control, treat, and regulate them. However, after over 35 years of working to implement and refine the Clean Water Act, we know this: the nation's preeminent water pollution control law offers the best approach to protecting the nation's waters under evolving circumstances. The Act was established to adapt to changing information about pollution impacts as well as to the development of new pollution treatment technologies. It has lofty goals but offers substantial flexibility on how and when to meet those goals. The Clean Water Act balances the need to provide a high level of protection to public waters with providing certainty and "permit shields" to those dischargers covered under its NPDES permits. It encourages the gathering of information on both discharges and the nations' water quality to ensure that science is the basis for future regulatory actions.

EPA is now poised to regulate vessel discharges under the Act, to take timely action in place of its and the Coast Guard's refusal to implement clear Congressional mandates. As the agency has stated repeatedly in its response to a citizens' petition to regulate the massive discharges from cruise ships, it need not invent new regulations as it already has them at hand and is preparing to implement them with regard to vessel discharges.[88] Allowing the agency to move forward after so many years of delay – to assure the eventual treatment of ballast water, sewage, graywater, and bilge water – is the best course of action.

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[88] *See, e.g.*, Letter from Benjamin Grumbles, EPA, to Russell Long, Bluewater Network, January 31, 2008 at 2, http://www.epa.gov/owow/oceans/cruise_ships/ Bluewater_Network _Petition_Response_20_31_08.pdf; Draft Cruise Ship Assessment Report, EPA, December 20, 2007 at 3-30, http://www.epa.gov/owow/oceans/cruise_ships /pdf_disch_assess/section3_graywater.pdf.

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Passenger Vessel Association
Testimony Submitted for the Record

Hearing: Discharges Incidental to the Normal Operation of a Commercial Vessel

Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure
U.S. House of Representatives

June 12, 2008

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The Passenger Vessel Association (PVA) – the national trade association for owners and operators of U.S.-flagged passenger vessels of all types – urges Congress to ensure that permits are not required for discharges incidental to the normal operation of a vessel.

Despite the fact that the U.S. Environmental Protection Agency (EPA) does not believe that such permits for vessels are required or workable, and despite the lack of any demonstration of harm to the aquatic environment as a result of normal incidental vessel discharges, a permitting system may have to be devised and imposed as a result of a single federal district court ruling in 2006 (*Northwest Environmental Advocates et al v. Environmental Protection Agency*). PVA urges Congress to enact legislative relief for operators of vessels – both commercial and recreational.

For decades, the Environmental Protection Agency's regulations exempted incidental discharges associated with the normal operation of a vessel from Clean Water Act permitting requirements. Of course, there have always been special statutory requirements imposing certain treatment requirements for discharges of sewage from commercial vessels.

In recent years, the issue of invasive species carried in the ballast water of oceangoing cargo vessels has become severe. Dissatisfied with Congressional legislation on ballast water requirements, an environmental group sued in federal court in California challenging the EPA's regulatory exemption. The plaintiffs won their case, but to the surprise of all parties, the judge ruled that permits will be needed by vessels not only for ballast water discharges but for all discharges associated with the normal operation of a vessel. Her ruling went far beyond what the plaintiffs were seeking.

Vessel members of the Passenger Vessel Association do not customarily carry or discharge ballast water; even if they did, the discharges would not contain invasive species, because the vessels typically operate in the same location all the time (for instance, a particular lake, harbor, or stretch of river).

Also, please remember that the issue does not involve discharges of sewage. Other parts of the Clean Water Act address the treatment and proper disposal of vessel sewage and associated wastewater.

The members of the Passenger Vessel Association do have other types of "normal," incidental discharges. These include: cooling water from on-board heat exchange machinery, runoff of rain and spray from decks, and deck washings. It is these minor discharges that would have to be permitted should Congress allow the court ruling to stand.

These incidental discharges from the vessels of the Passenger Vessel Association in no way threaten or degrade the aquatic environment in which our members operate; therefore, a permitting requirement would be yet another regulatory burden on small

American businesses, one that even the EPA says is unnecessary! However, it will come into existence this coming September unless Congress acts or an appeal of the district court ruling is successful.

Some have proposed a legislative exemption from any permitting system for recreational craft. However, an exemption solely for recreational boaters will not solve the major problem facing commercial operators such as those who belong to the Passenger Vessel Association.

PVA members own and operate dinner cruise vessels, sightseeing and excursion vessels, passenger and vehicular ferries, private charter vessels, whalewatching and eco-tour operators, windjammers, gaming vessels, amphibious vessels, water taxis, and overnight cruise ships. PVA currently has nearly 600 vessel and associate members. Its vessel-operating members range from small family businesses with a single boat to companies with several large vessels in different locations to governmental agencies operating ferries.

PVA members operate vessels nationwide. Some companies and locations include:

Galveston-Bolivar Ferry – Galveston, Texas
Ship Island Excursions – Gulfport, Mississippi
Washington State Ferries – Seattle, WA
North Ferry; South Ferry – both of Shelter Island, New York
Entertainment Cruises – Washington, DC, and other cities
Hawaii Superferry – Honolulu, HI
San Diego Harbor Excursions -- San Diego, CA
Duluth-Superior Excursions – Duluth, MN
Cape May – Lewes Ferry – North Cape May, NJ
Fort Sumter Tours – Charleston, SC

PVA vessel operators face many challenges. The unbelievable increases in fuel costs constitute dramatic rises in their operating expenses while at the same time dampening revenues by holding down ridership. Congressional mandates on vessel security (including the Transportation Worker Identification Credential for many employees and the Automatic Identification System and electronic charting systems for vessels) have added substantial costs. Why should PVA vessels have to bear yet another federal regulatory mandate (this time imposed by a single federal judge), especially when there has been no showing of harm to the aquatic environment?

Vessels operated by PVA members fall within two statutory categories: "small passenger vessel" and "passenger vessel." Section 2101(35) of Title 46 U.S. Code defines "small passenger vessel" as "… a vessel of less than 100 gross tons … (A) carrying more than 6 passengers, including at least one passenger for hire; …." Section 2101(22) of title 46 United States Code defines "passenger vessel" as "… a vessel of at

least 100 gross tons … (A) carrying more than 12 passengers, including at least one passenger for hire; …."

PVA urges Congress to craft a legislative response to this issue that exempts "small passenger vessels" and "passenger vessels" (as defined in title 46 of the United States Code) from having to obtain permits under the Clean Water Act for discharges incidental to the normal operation of vessels.

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