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Decision on Petition for Rulemaking to Repeal 40 C.F.R. 122.3(a)

The Petition dated January 13, 1999, to the United States Environmental Protection Agency ("EPA") for repeal of the regulation at 40 C.F.R. 122.3(a), submitted by the Pacific Environmental Advocacy Center, Center for Marine Conservation, San Francisco Bay Keeper, and a number of other concerned groups, is HEREBY DENIED for the reasons set forth below.

Petition for Rulemaking

On January 13, 1999, the Pacific Environmental Advocacy Center submitted the Petition on behalf of a number of environmental organizations seeking the repeal of a regulation promulgated under the Clean Water Act (CWA) and published at 40 C.F.R. 122.3(a). That regulation provides:

> The following discharges do not require National Pollutant Discharge Elimination System (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 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)(emphasis added)("normal operation exclusion" or "regulatory exclusion"). The Petition expresses particular concern regarding the italicized language to the extent it shields ballast water discharges containing non-indigenous aquatic nuisance species[1] from NPDES permit requirements. The Petition opens with the concern that the "introduction of non-indigenous species (NIS) through ballast water is significantly degrading aquatic resources throughout the United States." Petition at 1. The Petition cites to congressional findings in the Non-indigenous Aquatic Nuisance Prevention and Control Act ("NANPCA"), 16 U.S.C.A. § 4701(a), and to the legislative history of the statute and its 1996 amendment, the National Invasive Species Act ("NISA"), Pub. L. No. 104-332, 110 Stat. 4073 (1996), to support the Petition's claim regarding the significant adverse environmental and economic impacts caused by the release of exotic species in ballast water. Petition at 2-6.

The balance of the Petition seeks repeal of the NPDES normal operation exclusion based on legal arguments about the scope of permitting requirements under the Clean Water Act. The

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[1] Throughout this document and its attachments, EPA uses the terms "aquatic nuisance species," "exotic species," "non-indigenous species", "invasive species", and the acronyms "ANS" and "NIS" interchangeably.

1977, EPA re-opened the NPDES normal operation exclusion regulation and invited additional public comment. 43 Fed. Reg. 37078 (Aug. 21, 1978). In 1979, EPA promulgated the final revision that established the NPDES normal operation exclusion regulation in its current wording. 44 Fed. Reg. 32854 (June 7, 1979).

B. Act to Prevent Pollution from Ships

The Act to Prevent Pollution from Ships ("APPS") implements the provisions of the 1973 "International Convention for the Prevention of Pollution from Ships" ("MARPOL") as supplemented by a 1978 Protocol and the Annexes to which the United States is party. 33 U.S.C. § 1901 *et seq.* The U.S. Coast Guard has primary responsibility to prescribe and enforce regulations necessary to implement APPS.. MARPOL addresses certain discharges from ships and vessels, including a "discharge" and "garbage" and a "harmful substance" as those terms are defined in the relevant and applicable provisions of MARPOL. When it enacted APPS in 1980, Congress established a regulatory mechanism that is separate and distinct from the CWA to implement the MARPOL.

C. Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended by the National Invasive Species Act of 1996

In 1990, Congress enacted legislation specifically to focus federal efforts on non-indigenous, invasive, aquatic nuisance species, specifically when such species occur in ballast water discharges. 16 U.S.C. § 4701 *et seq.* In doing so, Congress not only focused specific attention on the introduction of non-indigenous species in ballast water, but also attempted to coordinate activities of the federal government to develop and establish a federal research and technology development program for the control of the problem. The congressional purposes under the Non-indigenous Aquatic Nuisance Prevention and Control Act ("NANPCA") were:

> (1) to prevent unintentional introduction and dispersal of nonindigenous species into waters of the United States through ballast water management and other requirements;
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> (2) to coordinate federally conducted, funded or authorized research, prevention control, information dissemination and other activities regarding the zebra mussel and other aquatic nuisance species;
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> (3) to develop and carry out environmentally sound control methods to prevent, monitor and control unintentional introductions of nonindigenous species from pathways other than ballast water exchange;
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> (4) to understand and minimize economic and ecological impacts of nonindigenous aquatic nuisance species that become established, including the zebra mussel; and

were now to include record-keeping and sampling provisions, and provide for variation in: vessel types; the characteristics of point of origin and receiving water bodies; the ecological conditions of waters and coastal areas of the United States; and different operating conditions. Id. Third, NISA required the Secretary to review the voluntary guidelines on a triennial basis, among other things, to assess the compliance rate with and the effectiveness of the voluntary guidelines. 16 U.S.C. § 4711(e). Fourth, if after the review the Secretary determines that the rate of effective compliance with the voluntary guidelines is inadequate, the Secretary would be required to promulgate regulations that make the voluntary guidelines for ballast water exchange into mandatory and enforceable requirements. 16 U.S.C. § 4711(f).

In compliance with NISA, the Coast Guard has established both voluntary guidelines and regulations to control the invasion of aquatic nuisance species. 33 C.F.R. Part 151 Subparts C & D. The voluntary guidelines urge the masters, owners, and operators of vessels to:

> (1) Avoid the discharge or uptake of ballast water in areas within or that may directly affect marine sanctuaries, marine preserves, marine parks, or coral reefs;
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> (2) Minimize or avoid uptake of ballast water in the following areas and situations:
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> > (i) Areas known to have infestations or populations of harmful organisms and pathogens (e.g., toxic algal blooms);
> > (ii) Areas near sewage outfalls;
> > (iii) Areas near dredging operations;
> > (iv) Areas where tidal flushing is known to be poor or times when a tidal stream is known to be more turbid;
> > (v) In darkness when bottom-dwelling organisms may rise up in the water column; and
> > (vi) Where propellers may stir up the sediment.
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> (3) Clean the ballast tanks regularly to remove sediments. Clean the tanks in mid-ocean or under controlled arrangements in port, or at dry dock. Dispose of your sediments in accordance with local, State, and Federal regulations.
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> (4) Discharge only the minimal amount of ballast water essential for vessel operations while in the waters of the United States.
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> (5) Rinse anchors and anchor chains when [masters/owners/operators] retrieve the anchor to remove organisms and sediments at their place of origin.
>
> (6) Remove fouling organisms from hull, piping, and tanks on a regular basis and dispose of any removed substances in accordance with local, State and Federal regulations.

Bases for EPA's Response to the Petition

In deciding to deny the Petition and not to reopen the NPDES normal operation exclusion for additional rulemaking, EPA based its decision on several factors.

First, there are significant practical and policy considerations that support EPA's decision not to re-open the regulation. There are many ongoing activities within the federal government related to control of invasive species in ballast water, many of which are likely to be more effective and efficient than reliance on NPDES permits under the CWA. In addition, use of NPDES permits would add a resource burden.

Second, the regulation is consistent with Congressional action since EPA promulgated the normal operation exclusion. Though the CWA does not explicitly exclude such discharges from permitting requirements, Congress has expressly considered EPA's long-standing and consistent interpretation of how to implement the "vessel or other floating craft" provisions of the CWA twice, first in 1979 and then again in 1996. In 1990, when Congress specifically focused on the problem of aquatic nuisance species in ballast water through enactment of other statutes, including the NANPCA as amended by NISA, it delegated authority to the Coast Guard to establish a phased-in regulatory program for ballast water. Congressional action and inaction regarding the NPDES normal operation exclusion and ballast water confirms legislative acquiescence to EPA's interpretation of the CWA.

Finally, the nearly 30 year old exclusion is narrowly tailored and has been consistently interpreted since enactment of the CWA; in responding to the Petition, EPA is not interpreting the statute for the first time. Essentially contemporaneous with enactment of the CWA, EPA interpreted the CWA to provide for regulation under NPDES of discharges from industrial operations on vessels (e.g., seafood processing facilities, or mineral or oil exploration)) and overboard discharges like rubbish, trash, or garbage, but not discharges "incidental to the normal operation of a vessel." EPA's interpretation is supported by long-standing administrative law principles.

A. Significant Practical and Policy Considerations Support EPA's Decision Not to Re-open the Regulation

Analysis of the policy and practical implications of a repeal of the existing regulation demonstrates the reasonableness of EPA's interpretation. First, EPA believes its regulatory exclusion is reasonable in light of the many ongoing activities of EPA, the Coast Guard and other federal agencies to prevent the introduction of invasive species to aquatic ecosystems through ballast water discharges. EPA is working with other agencies (including the Coast Guard, the National Oceanic and Atmospheric Administration, and the Department of Defense) to increase awareness and capabilities of ballast water control programs; host national workshops designed to bring together scientists to discuss regional and national scientific issues related to nonindigenous species; foster research on invasive species and research and development of new

BWM. 68 Fed. Reg. 44691 (Jul. 30, 2003). Fourth, the Coast Guard will continue to develop a quantitative BWT performance standard. See Attachment 4, Report to Congress on the Voluntary National Guidelines for Ballast Water Management, USCG-2002-13147-2.

Third, EPA believes that regulation of all discharges incidental to the normal operation of a vessel, including discharges of ballast water, would be a massive undertaking, especially if an NPDES permit were required for all discharges from each such vessel. More than 31,000 voyages occur annually from beyond the exclusive economic zone ("EEZ") into waters of the United States. Commercial cargo vessels of all flags made some 78,000 port calls in 1997, and there are more than 110,000 commercial fishing vessels and 16 million recreational boats in the United States. If Congress intended for EPA to issue NPDES permits for the incidental discharges from all these vessels, it could have questioned the normal operation exclusion in the almost 30 years since EPA promulgated it. Instead, Congress has established other regimes to address some of the excluded discharges and has supported the regulatory exclusion.

Finally, it is also important to note that States are not pre-empted by the CWA from acting to regulate discharges incidental to the normal operation of a vessel (other than an Armed Forces vessel pursuant to the Uniform National Discharge Standards at 40 C.F.R. 122.3(a) which is not a required element for State NPDES programs) See 40 C.F.R. 123.1(i)(2)("Nothing in this part precludes a State from ... operating a program with a greater scope of coverage than that required under [the NPDES State program regulations]."). Further, under CWA Section 510 , States are not precluded from adopting more stringent requirements than Federal requirements. Thus, the NPDES regulations do not prohibit States from using NPDES permits to regulate ballast water or other discharges incidental to the normal operation of a vessel (other than an Armed Forces vessel). An NPDES-authorized State that identifies the discharge of invasive species in ballast water as a significant concern in its waters may act to address those discharges through its NPDES program.

B. EPA's Regulation is Consistent with Congressional Action Addressing Discharges Incidental to the Normal Operation of Vessels Through Statutes other than the CWA

Petitioners also argue that when Congress excludes discharges from the NPDES program (sewage from vessels and incidental discharges from Armed Forces vessels), Congress specifically provides alternative programs for control of such discharges under the CWA, but Congress has not done so for all incidental discharges. Petition at 8. Petitioners overlook the fact that Congress has enacted programs to address some of the excluded discharges under other statutes, such as the NANPCA, as amended by the NISA, and the Act to Prevent Pollution from Ships. The NISA authorized and directed the Coast Guard to establish regulations for the control of invasive species in ballast water. Coast Guard rules provide for mandatory ballast water exchange for ships entering the Great Lakes from beyond U.S. waters, mandatory ballast water reporting and sampling for most vessels, and voluntary ballast water management guidelines for most vessels. The NISA required the Coast Guard to review the voluntary guidelines on a

graywater in certain waters off of Alaska. Alaska Cruise Ship Legislation, §1404. By definition, the term "graywater" means galley, dishwasher, bath, and laundry waste water. Alaska Cruise Ship Legislation, §1414(4). EPA's regulatory exclusion under the CWA extends to such graywater. Thus, when faced with a situation where unregulated graywater rose to the level of legislative concern, Congress did not repeal the Agency's regulatory exclusion, nor did it amend the CWA. Instead, Congress established a separate statutory regime to address these specific discharges. Alaska Cruise Ship Legislation, § 1411(a).

These various statutory schemes and amendments demonstrate that Congress was aware of the Agency's regulatory exclusion. Congress has chosen to regulate such discharges, in the first instance, elsewhere. Such Congressional acquiescence supports EPA's conclusion that its longstanding interpretation of the CWA is reasonable and that the existing regulatory exclusion is consistent with the CWA. In determining whether Congress has specifically addressed the question of aquatic nuisance species in ballast water discharges incidental to the normal operation of a vessel, EPA does not confine itself to examination of the CWA in isolation, but instead reads the words of the CWA in their context and with a view to their place in the overall statutory scheme. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). The meaning of a statute may be affected by others, particularly where Congress has spoken subsequently and more specifically to the topic at hand. Id. at 133 (citing United States v. Estate of Romani, 523 U.S. 517, 530-31 (1998) & United States v. Fausto, 484 U.S. 439, 453 (1988)).

C. EPA's Longstanding Regulation is Reasonable and Authorized by the CWA

The regulatory exclusion is a narrow one, designed to address only discharges which are incidental to the "normal operation" of a vessel. All other discharges from vessels to the navigable waters (with the exception of sewage, which is regulated under CWA Section 312) remain subject to NPDES jurisdiction. By its terms, the exclusion does not apply to discharges of pollutants that are not "incidental to the normal operation of a vessel," such as "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. . . ." 40 CFR 122.3(a). EPA believes that this type of narrow exclusion comports with Congressional intent. While the Petition essentially argues that the language of the CWA does not permit EPA any flexibility to define "discharges incidental to the normal operation of a vessel" as not requiring permits, the legislative history, in fact, indicates otherwise. "[The Conference Committee] would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines." Congressional Record for Oct. 10, 1972 page E8454 (Extension of Remarks; Congressman Robert E. Jones of Alabama).

Moreover, in light of the structure of the NPDES program established by Congress, EPA believes the existing regulatory exclusion reasonably implements Congress' intent with respect to regulation of discharges from vessels under the CWA. The NPDES program is largely implemented by States, Territories, or Tribes authorized by EPA to operate their own NPDES

cites to NRDC v. Costle, in which the D.C. Circuit found that "[t]he wording of the statute, the legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402." 568 F.2d 1369, 1377 (D.C. Cir. 1977). Contrary to the Petition's implied suggestions, the normal operation exclusion does not exempt a category of point sources from NPDES permitting requirements. Rather, the regulation narrowly excludes only some types of discharges from vessels from NPDES requirements. Vessels, as a category, remain point sources otherwise subject to Section 402 of the Act.

Under established administrative law principles, to uphold an agency's interpretation of a statute it administers, a court need only conclude that the agency's construction is a reasonable interpretation of the relevant provisions; it does not need to find that an agency's statutory construction is the only reasonable one, or even that it is the result the court would have reached had the question arisen in the first instance in judicial proceedings. Aluminum Company of America v. Central Lincoln Peoples' Utility District, 467 U.S. 380, 389 (1984)(citations omitted); Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 125 (1985) (EPA's view of the Clean Water Act is "entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA."). The courts have identified five factors which generally support giving great deference to an agency interpretation: the interpretation is by the regulatory agency charged with administering the statute; the interpretation is issued contemporaneously with passage of the statute; the agency interpretation has been consistent; the statute requires, and the interpretation reflects, the agency's particular expertise; there is a thorough record of the interpretation; and there has been congressional acquiescence to the interpretation. In this case, all five factors support granting substantial deference to EPA's interpretation of the CWA to support the regulatory "normal operation" exclusion at 40 C.F.R. 122.3(a).

As a general rule, courts must give "'great deference to the interpretation given the statute by the officers or agency charged with its administration.'" EPA v. National Crushed Stone Association, 449 U.S. 64, 83 (1980) (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)). EPA has responsibility for administering and interpreting the CWA. The D.C. Circuit has held that Congress expressly meant that EPA should have substantial discretion in administering the CWA, including the power to interpret the definitional provisions of the Act. NWF v. Gorsuch, 693 F.2d 156, 167 (D.D.C. 1982)("Congress expressly meant EPA to have not only substantial discretion in administering the Act generally, but also at least some power to define the specific terms "point source" and "pollutant."). Further, the Act specifically provides authority for the Administrator "to prescribe such regulations as are necessary to carry out his functions" under the CWA. CWA Section 501(a), 33 U.S.C. § 1361(a).

EPA interpreted the CWA to exclude from NPDES regulation those discharges incidental to the normal operation of a vessel essentially contemporaneously with enactment of the CWA.

legislative intent has been correctly discerned.'" North Haven Bd. of Education v. Bell, 456 U.S. at 535 (1982) (quoting United States v. Rutherford, 442 U.S. 544, 554, n.10 (1979) (internal quotes omitted)).

Since passing the CWA in 1972, Congress has enacted two statutes relevant to the regulation exempting discharges incidental to the normal operation of a vessel. In doing so, Congress specifically acknowledged the regulation, and did not act to ratify, repeal, or revise it. Therefore, Congress has acquiesced to the regulation.

Congress' first opportunity to consider the NPDES regulation at issue followed EPA's 1979 regulatory revision, when the Agency described some types of "vessels" that are not used for the primary purpose of transportation, and thus not exempt from NPDES permitting requirements. In the Deep Seabed Hard Mineral Resources Act, Congress explicitly ratified the portion of the regulation that asserts CWA jurisdiction over discharges from industrial operations on a "vessel or other floating craft."[5] 30 U.S.C. § 1419(e). In crafting this provision, the relevant Senate Committee Report considered the NPDES vessel regulation in its entirety. S. Rep. No. 96-300, at 2 (1979).

After EPA clarified the normal operation exclusion does not apply to discharges from industrial operations of vessels, Congress explicitly ratified that portion of the regulation. In doing so, the legislative history also demonstrates congressional acknowledgment of the entire regulation, which excludes discharges incidental to the normal operation of a vessel. S. Rep. No. 96-300, at 2 (1979). The legislative history also demonstrates that Congress did not believe that the current version of the CWA unambiguously addressed the issue stating that "the 1972 and 1977 Amendments to the Federal Water Pollution Control Act (FWPCA) did not speak specifically" to the scope of what discharges Congress intended would be regulated with reference to a "vessel and other floating craft." Id. at 3. Because Congress expressly acknowledged the NPDES normal operation exclusion regulation and chose not to ratify, repeal, or otherwise amend the remaining portions of it, Congress acquiesced to the regulation.

Congress similarly acknowledged and acquiesced to the NPDES normal operation exclusion when it established discharge standards for Armed Forces vessels. In 1996, Congress enacted the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 325(b) to (c)(2), 110 Stat. 254 (1996). This Act amended the CWA explicitly to exclude a "discharge incidental to the normal operation of a vessel of the Armed Forces" from the

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[5] The legislation provides that "For the 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 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).

State regulation, but to preserve the ability for States to regulate any other vessels under State law.

Conclusion

For the foregoing reasons, the Petition for repeal of 40 C.F.R. 122.3(a) is denied.

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Dated: September 2, 2003

Marianne Lamont Horinko
Acting Administrator