**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:
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> (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.

Petition states that "vessels" are "point sources" requiring NPDES permits for discharges to waters of the United States (other than in the ocean and contiguous zone), Petition at 7, and that EPA has no authority to exclude point source discharges from vessels from the NPDES program. Petition at 2 & 8 (citing Natural Resources Defense Council v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977)). The Petition also contends that ballast water must be regulated under the NPDES program because it contains biological materials (e.g., invasive plant and animal species) and other pollutants (oil, chipped paint, sediment, and toxins in ballast water sediment). Petition at 6-7. Finally, the Petition argues that the recent enactment of the "Uniform National Discharge Standards for Armed Forces Vessels" in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 325(b) to (c)(2), 110 Stat. 254 (1996) demonstrates Congress' recognition that EPA lacks a statutory basis for, and Congress' tacit rejection of, the NPDES normal operation exclusion. Petition at 10.

**Statutory and Regulatory Background**

A. Clean Water Act

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq., is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. Section 101(a), 33 U.S.C. § 1251(a). As the primary means of achieving this goal, Congress established the National Pollutant Discharge Elimination System (NPDES) permitting program in Section 402 of the Act. 33 U.S.C. § 1342. Section 501(a) authorized the EPA Administrator to establish regulations to administer the program. 33 U.S.C. § 1361(a).

CWA Section 301(a) provides that "the discharge of any pollutant [from a point source] by any person shall be unlawful" without an NPDES permit. 33 U.S.C. § 1311(a). The term "point source" includes a "vessel or other floating craft." 33 U.S.C. 1362(14). The definition of "discharge of a pollutant" means "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). Finally, the term "pollutant" excludes "sewage from vessels" and "a discharge incidental to the normal operation of a vessel of the Armed Forces." 33 U.S.C. § 1362(6)(A)(including cross-reference to 33 U.S.C. § 1322))

EPA first promulgated the challenged regulation, including the normal operation exclusion, pursuant to notice and comment rulemaking procedures in 1973, shortly after enactment of the CWA. 38 Fed. Reg. 1362 (Jan. 11, 1973)(proposal); 38 Fed. Reg. 13528 (May 22, 1973)(final). The normal operation exclusion in the regulation was based on the legislative history of the CWA, which stated that "[The Conference Committee] would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines." 38 Fed. Reg. at 1364 n.1 (quoting Congressional Record for Oct. 10, 1972 page E8454, Extension of Remarks). After Congress re-authorized and amended the CWA in

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

(5) to establish a program of research and technology development and assistance to States in the management and removal of zebra mussels.

16 U.S.C. § 4701(b). Recognizing a deficit in research and technology to control such species, Congress established a program to "phase in" regulatory requirements for ballast water as necessary to control invasive species. The federal agency directed to lead this phased-in program was the U.S. Coast Guard.

The first phase of the regulatory program required the Secretary[2] of Transportation to issue voluntary guidelines to prevent the introduction and spread of aquatic nuisance species into the Great Lakes through the exchange of ballast water of vessels prior to entering those waters. 16 U.S.C. § 4711(a). Within two years, the Secretary was to impose controls on such introduction and spread via enforceable regulations. 16 U.S.C. § 4711(b). NANPCA also established the federal Aquatic Nuisance Species Task Force ("Task Force"), co-chaired by the Director of the U.S. Fish and Wildlife Service and the Under Secretary of Commerce for Oceans and Atmosphere, and including the Administrator of EPA, the Commandant of the U.S. Coast Guard, and the Assistant Secretary of the Army (Civil Works). 16 U.S.C. § 4721. This multi-agency Task Force was directed to develop and implement a program for aquatic nuisance species prevention, monitoring, control, education and research to be conducted or funded by the federal government. 16 U.S.C. § 4722. The Task Force was to include recommendations for funding to implement elements of the program, and to develop a demonstration program of prevention, monitoring, control, education and research for one specific aquatic nuisance, the zebra mussel. Id. In addition, the program focused on prevention and monitoring, with a heavy focus on research and education. Id. NANPCA authorized the expenditure of significant amounts for implementation, including over $21 million for research under the Task Force programs. 16 U.S.C. § 4741. Congress directed the Task Force to report on its progress annually. 16 U.S.C. § 4722(k).

Congress re-authorized and amended NANPCA six years later with the National Invasive Species Act of 1996 ("NISA"). Pub. L. No. 104-332, 110 Stat. 4073 (1996). With NISA, Congress recognized that resolving the problems associated with aquatic nuisance species will require investment in the development of prevention technologies. 16 U.S.C. § 4701(15). NISA also added additional "phases" to the phased-in control program. First, NISA extended the ballast water exchange requirements applicable in the Great Lakes to waters of the Hudson River north of the George Washington bridge. 16 U.S.C. § 4711(a)(3). Second, NISA directed the Secretary to issue voluntary guidelines to prevent the introduction and spread of non-indigenous species in all waters of the United States (by ballast water operations and other operations of vessels equipped with ballast water tanks). 16 U.S.C. § 4711(c). The voluntary guidelines also

[2] NANCPA defines "Secretary" to mean the Secretary of the department in which the U.S. Coast Guard is operating. 16 U.S.C. § 4702(10). Currently, the U.S. Coast Guard operates within the Department of Homeland Security. 6 U.S.C. § 113(c).

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.
>
> (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.
>
> (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.
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> (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.

(7) Maintain a ballast water management plan that was developed specifically for the vessel.

(8) Train the master, operator, person-in-charge, and crew, on the application of ballast water and sediment management and treatment procedures.

33 C.F.R. 151.2035(a). In addition, for vessels that carry ballast water – that was taken on in areas less than 200 nautical miles from any shore or in waters less than 2000 meters deep -- into the waters of the United States after operating beyond the Exclusive Economic Zone (EEZ), the guidelines urge vessel masters, owners, and operators to:

(1) Exchange ballast water on the waters beyond the EEZ, from an area more than 200 nautical miles from any shore, and in waters more than 2,000 meters (6,560 feet, 1,093 fathoms) deep, before entering waters of the United States;

(2) Retain the ballast water on board the vessel;

(3) Use an alternative environmentally sound method of ballast water management that has been approved by the Coast Guard before the vessel begins the voyage; or

(4) Discharge ballast water to an approved reception facility.

33 C.F.R. 151.2035(b). The regulations also require non-exempted vessel masters, owners, or operators to submit ballast water management reports to the Coast Guard. 33 C.F.R. 151.2040 & Appendix to Subpart D.

As noted above, NISA requires ballast water treatment via mandatory mid-ocean ballast water exchange, or by a Coast Guard-approved alternative treatment method, for vessels entering the Great Lakes and the Hudson River north to the George Washington Bridge. 16 U.S.C. § 4711(a)(3). In March of 2002, the Coast Guard published an advance notice of proposed rulemaking and requested comments on standards for alternative treatment methods, specifically, standards for living organisms in ballast water discharges. 67 Fed. Reg. 9632 (Mar. 4, 2002).

In June of 2002, the Secretary of Transportation submitted a Report to Congress that determined that the rate of effective compliance with the voluntary guidelines was inadequate. The determination thus triggered NISA requirement, 16 U.S.C. § 4711(f), to promulgate regulations that make the voluntary guidelines for ballast water exchange into mandatory and enforceable requirements. The Coast Guard has proposed a rule that would establish these requirements. 68 Fed. Reg. 44691 (Jul. 30, 2003).

**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

ballast water treatment technologies; and participate in international efforts to control invasive species as part of the U.S. delegation to the Marine Environmental Protection Committee of the International Maritime Organization. See Attachment 1, Current EPA Activities and Involvement in Ballast Water Issues.

Of greatest relevance to this decision, the Coast Guard is engaged in ongoing efforts to establish a quantitative ballast water treatment ("BWT") performance standard, protocols for verifying and reporting on BWT technologies, and a program that will provide incentives for the experimental shipboard installation and operation of promising BWT technologies. The Coast Guard also has taken a series of four administrative steps with respect to BWT technologies. In May of 2001, the Coast Guard published a notice and request for comments in the Federal Register that discussed four possible approaches to setting standards for BWT. 66 Fed. Reg. 21807 (May 1, 2001). Later that month, the Coast Guard published a notice and request for comments on how a program of experimental BWT installation and testing might be structured so as to encourage participation by ship owners and operators. 66 Fed. Reg. 28213 (May 22, 2001). On June 12, 2001, EPA and the Coast Guard signed a Memorandum of Agreement establishing a formal engineering test program to accelerate the development and commercialization of ballast water treatment technologies. (See Attachment 2, Memorandum of Agreement Between the U.S. EPA Office of Research and Development and the U.S. Coast Guard on Collaborative Environmental Technology Verification, signed on June 12, 2001**).** In November of 2001, the Coast Guard published regulations requiring submission of ballast water management reports from all vessels equipped with ballast tanks that enter U.S. waters after operating beyond EEZ. 66 Fed. Reg. 58381 (Nov. 21, 2001). In addition, EPA is assisting the Coast Guard in the development of a BWT performance standard. On August 21, 2003, the two agencies entered into a Memorandum of Understanding (MOU) outlining their collaborative efforts in drafting the Environmental Impact Statement (EIS) for this standard. EPA will be a cooperating agency drafting portions of the EIS on affected environment and environmental consequences, and reviewing all other portions of the EIS consistent with the regulations at 40 CFR 1501.6, 1501.8 and the January 30, 2002 CEQ memorandum for the Heads of Federal Agencies (Subject: Cooperating Agencies in Implementing the Procedural requirements of the National Environmental Policy Act). Attachment 3: Memorandum of Understanding Between the US Coast Guard, Office of Marine Safety, Security and Environmental Protection and the US EPA, Office of Water for EIS activities under NEPA for NANPCA rulemaking, June, 2003.

Second, the Coast Guard is taking steps to maximize the use of existing ballast water management ("BWM") techniques by all vessels, while fostering the development of new BWT technologies. First, the Coast Guard has proposed regulations to require all vessels equipped with ballast tanks that enter U.S. waters to submit a BWM report or face penalties established in NISA. 68 Fed. Reg. 523 (Jan. 6, 2003). Second, the Coast Guard will develop and administer a program to facilitate the development of effective BWT systems by providing conditional approval of experimental systems installed and tested onboard operating vessels. Third, the Coast Guard has proposed regulations requiring all vessels equipped with ballast water tanks that enter the waters of the U.S. after operating beyond the EEZ to perform some form of active

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

triennial basis to assess the compliance rate with and the effectiveness of the voluntary guidelines. Upon a determination that the rate of effective compliance with the voluntary guidelines is inadequate, the Coast Guard would be required to promulgate regulations that make the voluntary guidelines for ballast water exchange into mandatory and enforceable requirements. In fact, the Coast Guard has made such a determination of inadequate compliance and has embarked on rulemaking for mandatory standards.

EPA believes it is appropriate to defer to the NANPCA/NISA's "phased-in" regulatory approach in the NANPCA (and the NISA), based on the apparent congressional desire for additional information gathering, as well as Congress' recognition of the current deficit in technological development of environmentally sound alternatives for ballast water management to prevent and control infestations of aquatic nuisance species. The NISA amendments directed the Secretaries of Interior and Commerce to "conduct a ballast water management demonstration program to demonstrate technologies and practices to prevent aquatic non-indigenous species from being introduced into and spread through ballast water in the Great Lakes and other waters of the United States." 16 U.S.C. § 4714(b)(1). In addition, Congress also directed location-specific regional research grants on aquatic nuisance species prevention and control. 16 U.S.C. § 4712(e). Given Congress' recognition of the technological challenges associated with control of aquatic nuisance species in ballast water, combined with the establishment of a regulatory program administered by the Coast Guard, EPA does not believe that Congress intended that EPA would repeal the normal operation exemption and begin implementation of a regulatory program like NPDES.

Similarly, and as noted above, the Act to Prevent Pollution from Ships, which implements MARPOL, designates the Coast Guard as the agency to prescribe and enforce regulations necessary to implement the APPS. MARPOL addresses certain discharges from ships. In the APPS, Congress established a regulatory mechanism that is separate and distinct from the CWA in order to implement domestic obligations under the MARPOL Convention and its Annexes. While the APPS contains a savings clause making clear that the APPS does not amend or repeal the Clean Water Act, EPA believes that Congress indicated its preference for regulatory control of routine, operational discharges from vessels by assigning that task to the Coast Guard.[3] EPA's normal operation exclusion for incidental discharges existed for seven years prior to enactment of the APPS.

Finally, in 2000, Congress enacted a stand alone title within the omnibus appropriations bill to prevent the unregulated discharge of treated sewage and graywater in certain areas of Alaska. See Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 2001, Pub. L. No. 106-554, § 1401 ("Alaska Cruise Ship Legislation"). The Alaska Cruise Ship Legislation establishes specific limitations on the discharge of treated sewage and

[3] The APPS also regulates certain discharges that are not routine, operational discharges, and that are also regulated under the CWA.

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

programs under State, Territorial, or Tribal law. At present, EPA has approved 45 States and the U.S. Virgin Islands to administer the NPDES permitting programs. In the remaining States, Territories, and Indian country, EPA administers the NPDES program. States are not required to administer NPDES programs that are identical to those of the Federal government, but rather only programs that meet minimum Federal requirements. State regulations, therefore, frequently differ from those of the Federal government and from other States. Once a State receives authorization to administer the NPDES program, EPA must stop issuing NPDES permits in that jurisdiction. Section 402(c), 33 U.S.C. § 1342(c). NPDES agencies can provide permit authorization under either an individual permit (which covers a single discharger) or under a general permit (which covers a number of similar dischargers, usually within a specified geographic area). NPDES permits must contain technology-based limits, and any more stringent limits as necessary to meet State water quality standards. Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Because most States administer the NPDES program, EPA does not have authority to issue permits in these States to provide nationally uniform or standardized permit requirements for discharges incidental to the normal operation of a vessel in these States' waters.[4]

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

The Petition argues that under existing case law, EPA did not have the authority to promulgate the normal operation exclusion at 40 C.F.R. 122.3(a). Petition at 7-8. The Petition

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[4]After EPA authorizes a State to administer the NPDES program, EPA must suspend its issuance of permits in such a State. 33 U.S.C. § 1342(c)(1). EPA's authority to issue permits in authorized States is limited to situations where EPA objects to the permit issued by an authorized State, and the State declines to modify the permit to meet the objection. 33 U.S.C. § 1342(d)(4). While EPA *could* object to all permits for normal operation vessel discharges issued by authorized States (assuming EPA had a reasoned basis to do so), any resulting EPA-issued NPDES permits would not be uniform or standardized because each of the various States have established differing water quality standards, with which such permits would need to assure compliance.

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.

The CWA was enacted in October 1972. EPA proposed the normal operation exclusion in January 1973 and promulgated the regulation in May 1973. Such contemporaneous construction is entitled to increased deference. NWF v. Gorsuch, 693 F.2d at 167; Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 844 (1986)("as the CFTC's contemporaneous interpretation of the statute it is entrusted to administer, considerable weight must be accorded the CFTC's position"); Aluminum Company of America, 467 U.S. at 390; Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 90 (1959).

The normal operation exclusion at 40 C.F.R. 122.3(a) has been the Agency's implementing regulation for nearly 30 years, essentially since enactment of the CWA. Even though the Agency re-opened and revisited the regulation, EPA has consistently maintained the underlying interpretation. For instance, in 1979, the Agency promulgated an amendment to the regulation clarifying that the exclusion does not extend to vessels operating as energy, mining or seafood processing facilities or to secured vessels used for mineral or oil exploration or development. 44 Fed. Reg. at 32859 (June 7, 1979). Longstanding interpretations of statutes are entitled to particular deference. Barnhart v. Walton, 535 U.S. 212, 220 (2002)(citing North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522, n.12 (1982)); NWF v. Gorsuch, 693 F.2d at 167 (citing Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).

Courts have acknowledged the need for deference to EPA's interpretation of the CWA in light of "the complexity and technical nature of the statutes and the subjects they regulate . . . and EPA's unique experience and expertise." E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135, n.25 (1977) (internal quotes omitted). Such expertise is due substantial deference even when the question is one of statutory interpretation and jurisdiction. Schor, 478 U.S. at 845 ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference." (internal quotes omitted)). In response to the Petition, EPA prepared (and invited public comment on) a report entitled "Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options," which explores the complex technical and policy issues surrounding the question of how best to address the discharges which are at the center of the Petition. 66 Fed. Reg. 49381 (Sept. 27, 2001) & Attachment 5.

The thoroughness of the Agency's position is demonstrated by the fact that the Agency went through notice and comment procedures at least twice to examine the nature of the regulatory exclusion. In both 1973 and 1978, the public had the opportunity to comment on the exclusion. 38 Fed. Reg. 1362, 1363-64 (Jan. 11,1973); 38 Fed. Reg. at 13528 (May 22, 1973); 43 Fed. Reg. at 37079 (Aug. 21, 1978).

Finally, Congress has been aware of and has supported the Agency's longstanding interpretation of the CWA. "Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the

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).

definition of "pollutant." 33 U.S.C. § 1362(6). It also provided for Uniform National Discharge Standards ("UNDS") for discharges incidental to the normal operation of vessels of the Armed Forces. CWA Section 312(n), 33 U.S.C. § 1322(n).

In addition, in the UNDS legislative history, Congress explicitly stated: "The *[CWA] and implementing regulations* currently exempt incidental vessel discharges from permitting requirements. Incidental discharges remain subject to varying state regulation." S. Rep. 104-112 at p. 211 (emphasis added). This legislative history indicates that not only was Congress aware of the regulatory exemption, but also that Congress believed that both the regulations *and* the CWA excluded incidental discharges and that Congress supported EPA's implementation of the CWA through the regulatory exclusion. Compare Schor, 478 U.S. at 846 (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-275 (1974))("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"). Congress comprehensively revisited the CWA three times in the 30 years since it was enacted (1977, 1981, and 1987) and has not repealed the Agency's longstanding interpretation. In fact, in amending the CWA to ensure that States cannot regulate incidental discharges from Armed Forces vessels, Congress has not merely been silent as to the Agency's construction of the statute, it has amended the statute assuming the validity of the Agency's interpretation.

Petitioners argue that the statutory exemption for discharges incidental to the normal operation of an Armed Forces vessel demonstrates that Congress tacitly rejected EPA's more broadly drawn exemption. Petition at 10. Petitioners argue that Congress would only have acted to exclude such Armed Forces discharges if it believed such discharges were covered by the NPDES program. To the contrary, the UNDS legislative history demonstrates Congress' knowledge, and approval, of the exclusion. Congress could have amended the statute and/or expressed disapproval with the regulation, but instead Congress acknowledged EPA's authority to address these discharges through the regulatory exclusion. In addition, Congress acted to exclude incidental discharges from Armed Forces vessels not because Congress questioned the regulatory exclusion, but because Congress wanted to prevent such discharges from being subject to inconsistent *State* regulation. Operation of the then-existing regulatory exclusion meant only that incidental discharges from Armed Forces vessels did not require federally-issued NPDES permits. As explained above, however, the NPDES program is largely implemented by States authorized by EPA to operate their own NPDES programs under State law and the normal operation exclusion was not a required[6] element for State NPDES programs. Thus, EPA believes Congress amended the CWA to expressly preclude State regulation and to ensure that incidental discharges from Armed Forces vessels were not subject to inconsistent

[6] As it relates to Armed Forces vessels, the "normal operation" exclusion now applies automatically to State NPDES programs via the pre-emptive effect of UNDS.

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.

/S/

Dated: September 2, 2003

Marianne Lamont Horinko
Acting Administrator

**Attachments:**

Attachment 1: Current EPA Activities and Involvement in Ballast Water Issues.

Attachment 2: Memorandum of Agreement between US EPA Office of Research and Development and the US Coast Guard on Collaborative Environmental Technology Verification, Signed June 21, 2001.

Attachment 3: Memorandum of Understanding Between the US Coast Guard, Office of Marine Safety, Security and Environmental Protection and the in US EPA, Office of Water for EIS activities under NEPA for NANPCA rulemaking, June 2003.

Attachment 4: Report to Congress on the Voluntary National Guidelines for Ballast Water Management.

Attachment 5: Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options.