

US EPA ARCHIVE DOCUMENT

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 NORTHWEST ENVIRONMENTAL  
9 ADVOCATES; THE OCEAN  
CONSERVANCY; and WATERKEEPERS  
10 NORTHERN CALIFORNIA and its projects  
CENTER FOR MARINE CONSERVATION, and  
11 SAN FRANCISCO BAYKEEPER and  
DELTAKER,  
12

No. C 03-05760 SI

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT;  
DENYING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

12 Plaintiffs,  
13 v.  
14 UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
15 Defendant.  
16 \_\_\_\_\_ /  
17

18 Currently pending before this Court are the parties' cross-motions for summary judgment. Having  
19 carefully considered the argument of the parties and the papers submitted, the Court hereby GRANTS  
20 plaintiffs' motion and DENIES defendant's motion.  
21

**BACKGROUND**

22 In 1972, Congress enacted significant amendments to the Clean Water Act ("CWA" or "Act") in order  
23 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §  
24 1251(a). The CWA prohibits the discharge of any pollutant from a "point source" into navigable waters of the  
25 United States without a National Pollutant Discharge Elimination Systems ("NPDES") permit. Northern Plains  
26 Resource Council v. Fidelity Exploration & Development Company, 325 F.3d 1155, 1160 (9th Cir. 2003).  
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1        The term “point source” includes a “vessel or other floating craft.” 33 U.S.C. § 1362(14). “Discharge  
2 of any pollutant” is defined as: “(A) any addition of any pollutant to navigable waters from any point source,  
3 [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source  
4 other than a vessel or other floating craft.” 33 U.S.C. § 1362(12). The term “pollutant” includes “biological  
5 materials.” 33 U.S.C. § 1362(6). The CWA excludes from the definition of “pollutant” any “sewage from  
6 vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces.” 33 U.S.C. §  
7 1362(6).

8        The Environmental Protection Agency (“EPA”) has primary authority to implement and enforce the  
9 CWA. 33 U.S.C. § 1251(d). Pursuant to this authority, the EPA implemented 40 C.F.R. § 122.3(a), which  
10 states:

11        The following discharges do not require NPDES permits:

12        (a) Any discharge of sewage from vessels, effluent from properly  
13 functioning marine engines, laundry, shower, and galley sink wastes, or  
14 any other discharge incidental to the normal operation of a vessel. This  
15 exclusion does not apply to rubbish, trash, garbage, or other such  
16 materials discharged overboard; nor to other discharges when the vessel  
17 is operating in a capacity other than as a means of transportation such as  
18 when used as an energy or mining facility, a storage facility or a seafood  
19 processing facility, or when secured to the bed of the ocean, contiguous  
20 zone or waters of the United States for the purpose of mineral or oil  
21 exploration or development.

22        40 C.F.R. § 122.3(a).

23        The portion of 40 C.F.R. § 122.3(a) that is particularly relevant in this matter is its exclusion from the  
24 NPDES permitting requirements for “any other discharge incidental to the normal operation of a vessel.” In  
25 particular, the EPA has relied on this regulation to exempt a variety of pollutant discharges, including ballast  
26 water, from NPDES permitting requirements. Ballast water is taken on or discharged by ships in order to  
27 accommodate changes in its weight when cargo is loaded and unloaded. Ships collect ballast water in  
28 dedicated ballast water tanks, empty cargo tanks, or empty 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. The amount of ballast water  
discharged in this country’s waters exceeds 21 billion gallons each year. See Sivas Decl., Ex. C, EPA, Aquatic  
Nuisance Species in Ballast Water Discharges: Issues and Options (“EPA Report”) at 4 (Draft Report,

1 September 10, 2001).

2 The impact of this immense amount of ballast water discharged in this country's waters each year is that  
3 "more than 10,000 marine species each day hitch rides around the globe in the ballast water of cargo ships."  
4 Id. In fact, "the primary vector for ANS [Aquatic Nuisance Species] transport at this time is probably ballast  
5 water." Id. Invasive species transported by ballast water have "taken over wetland habitats, and deprived  
6 waterfowl and other species of food sources." United States General Accounting Office, Invasive Species:  
7 Obstacles Hinder Federal Rapid Response to Growing Threat, GAO-01-724, July 2001) at 3 (hereinafter  
8 "GAO Report").

9 The GAO Report stated that: "Zebra mussels are a widely known aquatic invasive. Transported into  
10 the Great Lakes in ships' ballast water, zebra mussels have clogged the water pipes of electric companies and  
11 other industries; infestations in the Midwest and Northeast have cost power plants and industrial facilities almost  
12 \$70 million between 1989 and 1995." Id. Other governmental agencies have recognized that "[t]he ecological  
13 damage caused by invasive species can be enormous." EPA Report at 9.

14 In January 1999, plaintiffs, among others, filed a petition requesting the EPA to repeal 40 C.F.R. §  
15 122.3(a) because it conflicts with the Clean Water Act, which does not exempt "discharges incidental to the  
16 normal operation of a vessel" from the requirement to obtain an NPDES permit. Sivas Decl., Ex. J ("Petition  
17 to Repeal 40 C.F.R. § 122.3(a)") at 1-2. In response to the petition, the EPA prepared the EPA Report for  
18 public comment. After considering public comments, the EPA denied the petition to repeal the exemption. 68  
19 Fed. Reg. 53,165 (September 9, 2003).

20 After the denial of its petition, plaintiffs filed a complaint in this Court against the EPA, requesting a  
21 declaration that the EPA's failure to rescind 40 C.F.R. § 122.3(a) in response to plaintiffs' petition was in clear  
22 violation of the CWA, and an injunction directing the EPA to repeal and rescind 40 C.F.R. § 122.3(a).<sup>1</sup>  
23 Plaintiffs assert two claims: 1) that the EPA's promulgation of 40 C.F.R. § 122.3(a) is inconsistent with the  
24 EPA's statutory authority in the CWA and thus unlawful and subject to review under the Administrative  
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26  
27 <sup>1</sup> Apparently in recognition of the subject matter jurisdiction issues discussed below, plaintiffs filed an  
28 alternative petition for review with the Ninth Circuit in December 2003. The Ninth Circuit granted plaintiffs' motion for voluntary dismissal without prejudice to reinstatement on May 4, 2004, in order to allow this Court to reach a final judgment in this case.

1 Procedure Act (“APA”), 5 U.S.C. § 706(2); and 2) that the EPA’s denial of plaintiffs’ petition was arbitrary,  
2 capricious, and an abuse of discretion given the CWA and subject to judicial review under § 706(2) of the  
3 APA.

4 The parties have since filed cross-motions for summary judgment. The Court has granted the Great  
5 Lakes States’ request to file an amicus curiae brief in support of plaintiffs’ motion for summary judgment.  
6 These motions are now before the Court.

7

## 8 **LEGAL STANDARD**

9 **1. Summary judgment**

10 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions  
11 on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that  
12 the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears  
13 the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett,  
14 477 U.S. 317, 323 (1986). The moving party, however, has no burden to negate or disprove matters on which  
15 the non-moving party will have the burden of proof at trial. The moving party need only point out to the Court  
16 that there is an absence of evidence to support the non-moving party’s case. See id. at 325.

17 The burden then shifts to the non-moving party to “designate ‘specific facts showing that there is a  
18 genuine issue for trial.’” Id. at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party  
19 must “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita  
20 Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). “The mere existence of a  
21 scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for  
22 the [non-moving party].” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

23 In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the  
24 non-moving party, and all justifiable inferences are to be drawn in its favor. Id. at 255. “Credibility  
25 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury  
26 functions, not those of a judge [when she] is ruling on a motion for summary judgment.” Id.

1       **2.     Review of administrative action**

2                   Judicial review of the EPA's promulgation of 40 C.F.R. § 122.3(a) and the subsequent denial of  
3                   plaintiffs' petition to repeal the regulation is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2).  
4                   The court "shall" set aside any agency decision that the Court finds is "arbitrary, capricious, an abuse of  
5                   discretion or otherwise not in accordance with law" or a decision that is "in excess of statutory jurisdiction,  
6                   authority, or limitations." 5 U.S.C. § 706(2)(A) and (C).

7                   Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984) ("Chevron"),  
8                   provides the standard for a court's review of an agency's construction of a statute:

9                   When a court reviews an agency's construction of the statute which it  
10                  administers, it is confronted with two questions. First, always, is the  
11                  question whether Congress has directly spoken to the precise question at  
12                  issue. If the intent of Congress is clear, that is the end of the matter; for  
13                  the court, as well as the agency, must give effect to the unambiguously  
14                  expressed intent of Congress. If, however, the court determines Congress  
15                  has not directly addressed the precise question at issue, the court does not  
16                  simply impose its own construction of the statute, as would be necessary  
17                  in the absence of an administrative interpretation. Rather, if the statute is  
18                  silent or ambiguous with respect to the specific issue, the question for the  
19                  court is whether the agency's answer is based on a permissible  
20                  construction of the statute.

21                   Chevron, 467 U.S. at 842-42.

22                   **DISCUSSION**

23        **1.     Subject matter jurisdiction**

24                   Plaintiffs assert that this Court has subject matter jurisdiction over their claims under 28 U.S.C. §  
25                  1331,<sup>2</sup> since the complaint challenges the EPA's actions under the CWA and the APA, both federal statutes.  
26                   Section 1331 effectively provides the default for federal jurisdiction in these matters: "[U]nless Congress  
27                  specifically maps a judicial review path for an agency, review may be had in federal district court under its  
28                  general federal question jurisdiction, 28 U.S.C. § 1331." Owner-Operators Independent Drivers Ass'n of  
29                  America, Inc. v. Skinner, 931 F.2d 582, 585 (9th Cir. 1991). Plaintiffs argue that no alternate "judicial review  
30                  path" has been mapped by Congress for this case, so that this Court has jurisdiction under § 1331 to review  
31                  "a final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

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2                   <sup>2</sup> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution,  
3                   laws, or treaties of the United States." 28 U.S.C. § 1331.

1 Defendant, however, contends that there is an alternative court to review the EPA's action. Defendant  
2 claims that the Courts of Appeals have exclusive jurisdiction over this matter under 33 U.S.C. § 1369(b)(1):  
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5 Review of the Administrator's action . . . (E) in approving or promulgating  
6 any effluent limitation or other limitation under section 1311, 1312, 1316,  
7 or 1345 of [the Act], [and] (F) in issuing or denying any permit under  
8 section 1342 of [the Act] . . . may be had by any interested person in the  
9 Circuit Court of Appeals of the United States for the Federal judicial  
10 district in which such person resides or transacts business which is directly  
11 affected by such action upon application by such person.

12  
13 Defendant claims that §§ 1369(b)(1)(E) and (F) both provide that plaintiffs' claims are within the Ninth  
14 Circuit's exclusive jurisdiction. Plaintiffs respond that the review channeling provisions of § 1369(b)(1) should  
15 be narrowly construed, and that they do not apply under the circumstances surrounding this case.

16 **A. 33 U.S.C. § 1369(b)(1)(E)**

17 Defendant argues that subsection (E) places jurisdiction with the Court of Appeals because 40 C.F.R.  
18 § 122.3(a) involves "effluent limitations and other limitations" contained in NPDES permits. Defendant relies  
19 on Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 673 F.2d 400  
20 (D.C. Cir. 1982) ("NRDC v. EPA") in support of its argument that "effluent limitations" include regulations that  
21 implement NPDES permit programs. In NRDC v. EPA, the D.C. Circuit found that it had original jurisdiction  
22 under § 1369(b)(1)(E) to review NPDES regulations that established "a complex set of procedures for issuing  
23 or denying NPDES permits." Id. at 402. The court held that original jurisdiction in the Courts of Appeals was  
24 proper because a contrary finding would "produce the truly perverse situation in which the court of appeals  
25 would review numerous individual actions issuing or denying permits . . . but would have no power of direct  
26 review of the basic regulations governing those individual actions." Id. at 405-06. See also Environmental  
27 Defense Center, Inc. v. United States Environmental Protection Agency, 344 F.3d 832, 843 (9th Cir. 2003)  
28 ("EDC v. EPA") (Ninth Circuit had jurisdiction under § 1369(b)(1) to hear challenge to EPA regulation  
regarding NPDES permits for storm sewers, which excluded certain facilities from regulation).

29 Plaintiffs argue that § 1369(b)(1)(E) does not apply in this case because the provision in 40 C.F.R. §

1 122.33(a) that “any discharge incidental to the normal operation of a vessel” is exempted from NPDES permit  
2 requirements cannot be construed as an “effluent limitation or other limitation” under § 1369(b)(1)(E). Plaintiffs  
3 assert that an outright exemption for an entire class of discharges is not a limitation, because “limitation” is  
4 defined as “[t]he act of limiting; the state of being limited” or a “restriction.” Black’s Law Dictionary (7th Ed.  
5 1999).

6 The Court recognizes that the Ninth Circuit has “counseled against the expansive application of §  
7 1369(b).” League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 n. 8 (9th Cir. 2002).  
8 Defendant has not cited any cases that deal with an exemption from NPDES permit requirements for an entire  
9 class of discharges. In NRDC v. EPA, the court found that the regulations issued by the EPA “restrict who  
10 may take advantage of certain provisions or otherwise guide the setting of numerical limitations in permits . . .  
11 . [T]he [regulations] are a limitation on point sources and permit issuers and a restriction on the untrammeled  
12 discretion of the industry.” 673 F.2d at 404-05. In the current case, the exemption in question cannot be  
13 classified as presenting any restriction or any limitation; instead, it is a categorical exemption for all discharges  
14 incidental to the normal operation of a vessel, including ballast water discharges.

15 In EDC v. EPA, the EPA issued regulations regarding storm sewer systems. The regulations required  
16 permits for a variety of storm sewer systems, including small municipal systems and construction sites. 344  
17 F.3d at 842. As a result, municipal governments brought a challenge against the permit requirements, and an  
18 environmental advocacy group argued that the permit process did not provide for adequate public oversight.  
19 Id. at 843, 852. The environmental advocate plaintiffs also challenged the EPA’s decision to delegate to local  
20 authorities supervision of a small group of commercial and governmental facilities. Id. at 858-59. Defendant  
21 argues that this last claim by the plaintiffs in EDC v. EPA is similar to the plaintiffs’ claim in this case, and,  
22 therefore, § 1369(b)(1)(E) applies.

23 The Court finds EDC v. EPA distinguishable, because that case involved a complicated regulatory  
24 structure for storm sewer systems. Although the EPA exempted a narrow group of facilities from NPDES  
25 permit requirements, it clearly limited the amount of storm sewer pollutants, unlike the case before this Court.  
26 EDC v. EPA also contained permit requirements for storm sewer pollutants, unlike the blanket exemption for  
27 ballast water discharges in this case. Therefore, the Court finds that 40 C.F.R. § 122.3(a) is not an “effluent  
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1 limitation . . . [e]ven under the expansive definition of NRDC v. EPA.” Environmental Protection Information  
2 Center v. Pacific Lumber Company, 266 F.Supp.2d 1101, 1119 (N.D. Cal. 2003) (“EPIC”) (EPA regulation  
3 that exempted a number of silvicultural activities from the definition of “silvicultural point source” did not  
4 constitute an “effluent limitation” under § 1369(b)(1)(E)).

5 Given that the EPA regulation in question did not constitute an “effluent limitation or other limitation,”  
6 the Court finds that the Court of Appeals does not have exclusive jurisdiction over the matter under §  
7 1369(b)(1)(E).

8

9 **B. 33 U.S.C. § 1369(b)(1)(F)**

10 Although it acknowledges that the provision is “not without ambiguity,” defendant argues that  
11 § 1369(b)(1)(F) locates plaintiffs’ claims within the Ninth Circuit’s exclusive jurisdiction because the regulation  
12 in question deals with the issuance or denial of a permit under § 1342. Def.’s Mot. at 14. Defendant claims  
13 that the review of the regulation requires a court to define the scope of the applicability of the NPDES  
14 permitting program, which has been recognized by the Ninth Circuit as subject to review under subsection (F).

15 Defendant relies primarily on two Ninth Circuit cases, NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992)  
16 and American Mining Congress v. EPA, 965 F.2d 759 (9th Cir. 1992) (“AMC v. EPA”). In both cases, the  
17 court relied on subsection (F) to review EPA regulations. In NRDC v. EPA, plaintiffs challenged EPA  
18 regulations which related to storm water discharges by industrial activities and municipalities and which  
19 exempted some activities from immediate NPDES permitting requirements. 966 F.2d at 1301-1308. In AMC  
20 v. EPA, the challenged regulations imposed permit requirements for discharges from inactive mines, but  
21 contained exceptions for two types of inactive coal mines pending expiration of a storm water permit  
22 moratorium in October 1992. 965 F.2d at 762-3.

23 However, both NRDC v. EPA and AMC v. EPA involved temporary exclusions from the NPDES  
24 permit requirements, not the permanent exclusions found in this case. Therefore, these cases do not support  
25 defendant’s assertion that the regulation in question, which eliminates an entire type of discharge from the  
26 NPDES permit requirements, is a provision governing the issuance of permits or regulates the underlying permit  
27 procedures. There is no discharge subject to the permit requirements in this case, so it is not possible for the  
28

1 EPA to have procedures or permits for the court to evaluate under subsection (F).

2 This Court has already addressed this issue in factual circumstances very similar to the current case.  
3 In EPIC, an environmental group brought an action challenging 40 C.F.R. § 122.27(b)(1), which exempted  
4 from NPDES permitting requirements a number of silvicultural activities, such as nursery operations,  
5 reforestation, surface drainage, and road construction and maintenance from which there is natural runoff. 266  
6 F.Supp.2d at 1107-08. Defendants brought a motion to dismiss, claiming that the district court lacked subject  
7 matter jurisdiction because the challenge was a review of an EPA action under subsection (F). Id. at 1113.  
8 Judge Patel, in a carefully reasoned opinion, found that subsection (F) did not apply because “the EPA action  
9 at issue is properly characterized as a regulation identifying a class of silvicultural sources that do not require  
10 NPDES permits.” Id.

11 As is true in the current case, the plaintiffs’ challenge in EPIC dealt with a wholesale exclusion from the  
12 NPDES permit requirements: in EPIC, surface drainage from silvicultural activities; in this case, ballast water  
13 discharges. In EPIC, Judge Patel found that NRDC v. EPA and AMC v. EPA were distinguishable, because  
14 in those cases “the regulations directly governed permit procedures by determining when permitting would  
15 occur. In the action at bar, there can be no underlying permit procedures for silvicultural sources, because they  
16 are not subject to an NPDES program.” Id. at 1115. For the same reason, the court rejected defendants’  
17 argument that there would be an illogical tension between district court and circuit court review:

18 Given the specific language of the jurisdictional provision and the rationale  
19 behind circuit court review of underlying procedures, however, such an  
20 outcome is reasonable. Because [plaintiff] challenges a decision that in  
21 effect excludes sources from the NPDES program, the circuit courts will  
22 never have to confront the issuance or denial of a permit for these sources  
. . . . 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 the D.C. Circuit case of NRDC v. EPA [673  
F.2d 400 (D.C. Cir. 1982)].

23 Id. at 1115-16.

24 The Court agrees with Judge Patel’s analysis, and finds that subsection (F) does not apply in the current  
25 case because of the EPA’s wholesale exclusion of ballast water from the NPDES permit requirements.  
26 Although § 1369(b)(1) is not a “model of clarity,” it is not so cloudy as to require this Court to find that  
27 plaintiffs’ challenge to 40 C.F.R. § 122.3(a) is a review of an EPA action “in issuing or denying any permit

1 under § 1342”; the EPA could never issue or deny a permit for ballast water discharges given that they are  
2 exempt from the NPDES permit requirements and absolutely no procedures exist to provide such permits.

3 Therefore, the Court finds no basis in § 1369(b)(1)(F) to require that initial review of plaintiffs’  
4 challenge to 40 C.F.R. § 122.3(a) be had in the Court of Appeals.

5  
6 **2. Statute of limitations**

7 Plaintiffs have brought two causes of action against defendant pursuant to 5 U.S.C. § 706(2). The first  
8 cause of action asserts that the EPA’s promulgation of 40 C.F.R. § 122.3(a) was “inconsistent with, and in  
9 excess of EPA’s statutory authority under, the Clean Water Act.” Compl. at ¶ 29. The second cause of action  
10 alleges that the EPA’s denial of plaintiffs’ January 13, 1999 petition requesting repeal of 40 C.F.R. § 122.3(a)  
11 was “arbitrary, capricious, an abuse of discretion and not in accordance with the Clean Water Act.” Id. at ¶  
12 32.

13 Defendant does not challenge the timeliness of the second cause of action. Defendant does, however,  
14 argue that the first cause of action, challenging EPA’s initial promulgation of the regulation, is untimely under  
15 the six year statute of limitations provided in 28 U.S.C. § 2401(a) (“Except as provided by the Contract  
16 Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the  
17 complaint is filed within six years after the right of action first accrues. . .”). Section 2401(a) does generally  
18 apply to actions brought under the APA. Wind River Mining Corp. v. United States, 946 F.2d 710, 713 (9th  
19 Cir. 1991). Given that 40 C.F.R. § 122.3(a) was first promulgated in 1973, defendant argues that the cause  
20 of action is clearly time-barred. See 38 Fed. Reg. 13, 528 (May 22, 1973).

21 In Wind River, the Ninth Circuit held that challenges to procedural violations in the adoption of  
22 regulations and policy-based challenges must be brought within six years of a regulation’s promulgation. Wind  
23 River, 946 F.2d at 715-16. It also held, however, that a substantive challenge to an agency decision alleging  
24 that the agency lacked constitutional or statutory authority to make the decision may be brought within six years  
25 of the application of that agency decision to the challenger, as an “as applied” challenge. Id. In so deciding,  
26 the Ninth Circuit specifically approved the reasoning of the D.C. Circuit in Oppenheim v. Coleman, 571 F.2d  
27 660 (D.C. Cir. 1978).

28

1       Cases following Wind River, including cases from other circuit courts, have specifically allowed *ultra*  
2 *vires* challenges to regulations when filed within six years after the agency takes action based on the regulation.  
3 See Natural Resources Defense Council, Inc. v. Evans, 279 F.Supp.2d 1129, 1148 (N.D. Cal. 2003); Gifford  
4 Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059, 1075-76 (9th Cir. 2004); Legal  
5 Environmental Assistance Foundation, Inc. v. U.S. Environmental Protection Agency, 118 F.3d 1467, 1473  
6 (11th Cir. 1997) (“LEAF v. EPA”); Public Citizen v. Nuclear Regulatory Commission, 901 F.2d 147, 152  
7 (D.C. Cir. 1990).

8       The parties dispute whether this case can fairly be classified as an “as applied” challenge. Defendant  
9 argues that it cannot, because the EPA did not “apply” 40 C.F.R. § 122.3(a) to plaintiffs. Plaintiffs argue that  
10 the case should be classified as an “as applied” challenge, since the EPA could not deny plaintiffs’ petition  
11 without applying the regulation in the process.

12       This Court agrees with plaintiffs, and with the numerous courts which have held that “a claim that  
13 agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition  
14 for amendment or rescission of the agency’s regulations.” Public Citizen, 901 F.2d at 152; LEAF v. EPA, 118  
15 F.3d at 1473; Advance Transp. Co. v. United States, 884 F.2d 303, 305 (7th Cir. 1989); EPIC, 266  
16 F.Supp.2d at 1121.

17       Here, plaintiffs clearly brought a petition to the EPA requesting rescission of the regulation in question,  
18 based on the EPA having acted in excess of its statutory authority by issuing it. The Court finds that plaintiffs’  
19 challenge is an “as applied” challenge, which accrued when the EPA rejected its petition on September 9,  
20 2003. Therefore, this Court finds, as did the Eleventh Circuit in LEAF v. EPA, that it can “entertain [plaintiffs’]  
21 contention that the regulations upon which EPA relies are contrary to the statute and therefore invalid,  
22 regardless of the fact that [plaintiffs’] challenge is brought outside the statutory period for a direct challenge to  
23 the regulations.” 118 F.3d at 1473.

24       Plaintiffs’ claim under the first cause of action is not time-barred under 28 U.S.C. § 2401(a).

25  
26       **3. Review of 40 C.F.R. § 122.3(a)**

27       Under Chevron, plaintiffs argue that Congress “has directly spoken to” the issue of whether the EPA  
28

1 must implement NPDES permit requirements for discharges incidental to the operation of a vessel, including  
2 ballast water. Plaintiffs refer to the language of the Clean Water Act in support of their claim. The Court  
3 agrees that the language of the Clean Water Act directly states that the EPA must form NPDES permit  
4 requirements for discharges incidental to the normal operation of a vessel, including ballast water.

5

6 **A. The Clean Water Act**

7 The CWA prohibits the “discharge of any pollutant” except as authorized by an NPDES permit. 33  
8 U.S.C. §§ 1311(a), 1342(a). An activity is subject to NPDES permit requirements when it 1) discharges, i.e.  
9 adds, 2) a pollutant 3) to navigable waters 4) from 5) a point source. Committee to Save Mokelumne River  
10 v. East Bay Municipal Utility District, 13 F.3d 305, 308 (9th Cir. 1993). The term “discharge of any pollutant”  
11 is defined by the CWA as “any addition of any pollutant to navigable waters from any point source.” 33  
12 U.S.C. § 1362(12)(A). The term “pollutant” includes solid waste, sewage, garbage, and biological materials.  
13 33 U.S.C. § 1362(6). The “navigable waters” include “the waters of the United States, including the territorial  
14 seas.” 33 U.S.C. § 1362(7). A “point source” under the CWA includes “any . . . vessel or other floating craft,  
15 from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

16 First, ballast water discharges constitute a “discharge” or “addition” under the CWA. If a pollutant has  
17 been introduced into navigable waters “from the outside world,” it meets the definition of “addition” under the  
18 CWA. Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481, 491 (2d Cir.  
19 2001). Ballast water discharges clearly introduce biological materials from outside sources, as demonstrated  
20 in the introduction of the zebra mussel in the Great Lakes Region. GAO Report at 3.

21 Second, the discharged ballast water and other discharges incidental to the operation of a vessel  
22 constitute “pollutants” under the CWA. See National Wildlife Federation v. Consumers Power Co., 862 F.2d  
23 580, 583, 586 (6th Cir. 1988) (finding that fish and fish remains are “pollutants” because they constitute  
24 “biological materials” under the CWA). It is not contested that ballast water can contain “biological materials,”  
25 such as fish and other forms of aquatic life. EPA Report at 4.

26 Third, defendant does not dispute that the rivers, lakes and harbors where ballast discharges occur are  
27 “navigable waters” under the CWA. Plaintiffs specifically reference the San Francisco Bay and the Great  
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1 Lakes, which clearly constitute “the waters of the United States” under 33 U.S.C. § 1362(7).

2 Finally, ballast water discharges clearly arise “from” a “point source,” as vessels are specifically  
3 referenced in 33 U.S.C. § 1362(14).

4 The two exemptions for vessel discharges from the CWA do not apply in this case. The CWA  
5 excludes from the definition of “discharge of a pollutant” the addition of a pollutant to the “contiguous zone” or  
6 “ocean.” 33 U.S.C. § 1362(12)(b). The “contiguous zone” refers to the zone three miles from shore and  
7 extending for twelve miles. 33 U.S.C. § 1362(9). The “ocean” extends beyond the “contiguous zone.” 33  
8 U.S.C. § 1362(10). The CWA also excludes from the definition of “pollutant” any “sewage from vessels or  
9 a discharge incidental to the normal operation of a vessel of the Armed Forces” 33 U.S.C. § 1362(6)(a).  
10 These discharges are regulated by 33 U.S.C. § 1322.

11 The challenged regulation does not pertain to these exemptions. Instead, given the clear language of  
12 the CWA, the statute requires that discharges of pollutants from non-military vessels into the nation’s lakes,  
13 rivers, and harbors occur only under the regulation of an NPDES permit. The Court finds that the language  
14 of the CWA demonstrates the “clear intent” of Congress to require NPDES permits before discharging  
15 pollutants into the nation’s navigable waters.

17 **B. Congressional acquiescence**

18 Defendant does not contest this interpretation of the language of the CWA with respect to its passage  
19 in 1972. Instead, defendant argues that its denial of the plaintiffs’ petition in 2003 was reasonable because  
20 Congress has assented to the EPA’s interpretation of the CWA in 40 C.F.R. § 122.3(a) in the thirty years since  
21 its promulgation.

22 Defendant argues that the length of time the regulation has been in effect, and Congress’ failure to revise  
23 or repeal the regulation exempting “any other discharge incidental to the normal operation of a vessel” from  
24 NPDES permit requirements, constitute persuasive evidence that Congress intended the interpretation taken  
25 by the EPA. This argument fails for a number of reasons.

26 First, defendant asks the Court to consider the length of time that the regulation has been in effect to  
27 determine Congressional intent, relying on National Muffler Dealers Association, Inc. v. United States, 440  
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1 U.S. 472 (1979). However, National Muffler is a pre-Chevron case. Moreover, in that case the Court found  
2 that the statute in dispute “ha[d] no well-defined meaning . . . It is a term so general as to render an interpretive  
3 regulation appropriate.” Id. at 477. By contrast, in this case the discharges that fall within the NPDES permit  
4 requirements under the CWA are clearly articulated and there is a “well-defined meaning.” Therefore, under  
5 Chevron, the Court is not required to determine whether the EPA’s decision on plaintiffs’ petition was a  
6 “reasonable” interpretation; rather, the Court is required to determine if the regulation reflects the  
7 “unambiguously expressed intent of Congress.”

8 Defendant then asserts that Congress has repeatedly addressed the CWA and discharges incidental  
9 to a vessel, which gave rise to 40 C.F.R. § 122.3(a); therefore, Congress’ refusal to override the EPA’s  
10 construction of the regulation demonstrates that it “acquiesced” to the EPA’s interpretation. This argument is  
11 factually and legally flawed.

12 Defendant relies primarily on two cases, United States v. Riverside Bayview Homes, Inc., 474 U.S.  
13 121 (1985) and Bob Jones University v. United States, 461 U.S. 574, 601 (1983). In Riverside Bayview,  
14 plaintiffs challenged an Army Corps of Engineers regulation, promulgated under the CWA, which included  
15 definitions of “wetlands” and “waters of the United States” in the course of regulating discharges of fill material  
16 into wetlands adjacent to navigable waters. The Court found through the legislative history that Congress  
17 acquiesced to the agency’s definition and upheld the regulation. Id. at 138. In Bob Jones University, the Court  
18 found that Congress, by failing to pass bills overturning the regulatory provision, had “affirmatively manifested  
19 its acquiescence” in an IRS policy revoking tax-exempt status for a university that engaged in racial  
20 discrimination.

21 More recently, however, the Supreme Court has cautioned that courts should recognize congressional  
22 acquiescence only “with extreme care.” Solid Waste Agency of Northern Cook County v. United States Army  
23 Corps of Engineers, 531 U.S. 159, 169 (2001) (“SWANCC”). The Court noted that there is a tenuous  
24 relationship between the actions of the session of Congress that enacted the statute and later actions or inactions  
25 by other sessions of Congress. Id. at 170. Because “subsequent history is less illuminating than the  
26 contemporaneous evidence. . . [the agency] face[s] a difficult task in overcoming the plain text and import of  
27 [the statute].” Id.

28

1        As in Riverside Bayview, SWANCC addressed regulations relating to the definition of “navigable  
2        waters” under the CWA as applied to wetlands. In light of the high standard which applies, the Court found  
3        that the agency’s expansion of the definition of “navigable waters” to include nonnavigable, isolated waters  
4        under the CWA was in excess of its jurisdiction. The Court distinguished Riverside Bayview because in that  
5        case Congress had demonstrated its “unequivocal acquiescence to, and approval of, the Corps’ regulations  
6        interpreting the CWA to cover wetlands adjacent to navigable waters . . . We found that Congress’ concern  
7        for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands ‘inseparably  
8        bound up’ with the ‘waters’ of the United States.” Id. at 167.

9        In order to demonstrate the difficulty in proving congressional acquiescence, the Court in SWANCC  
10      distinguished Bob Jones University:

11      In Bob Jones University v. United States, 461 U.S. 574 (1983), for  
12      example, we upheld an Internal Revenue Service Revenue Ruling that  
13      revoked the tax-exempt status of private schools practicing racial  
14      discrimination because the IRS’ interpretation of the relevant statutes was  
15      “correct”; because Congress had held “hearings on this precise issue,”  
16      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.

17      Id. at 170.

18      In this case, nothing defendant presents in support of its congressional acquiescence theory comes close  
19      to the “overwhelming evidence of acquiescence” required by the Supreme Court in SWANCC. For example,  
20      defendant presents no evidence of Congress’ consideration of and refusal to pass a statute overturning the  
21      EPA’s exemption for discharges incidental to the normal operation of a vessel found in 40 C.F.R. § 122.3(a).

22      Instead, defendant points to congressional enactment of two other statutes – (1) the Non-indigenous  
23      Aquatic Nuisance Prevention and Control Act (“NANPCA”), 16 U.S.C. § 4701, as re-authorized and  
24      amended by the National Invasive Species Act of 1996 (“NISA”); and (2) the Act to Prevent Pollution from  
25      Ships (“APPS”), 33 U.S.C. §§ 1901 et. seq., which was enacted in 1980 – to demonstrate that Congress has  
26      acquiesced to the regulation by dealing with invasive species. Neither performs the “difficult task [of]  
27      overcoming the plain text and import of” the CWA. Id. at 170.

28

1 NANPCA/NISA (hereinafter “NISA”) established a program to develop regulatory requirements for  
2 ballast water to control invasive species and directed the Coast Guard, instead of the EPA, to oversee the  
3 program. However, NISA clearly was not intended to limit the CWA with respect to ballast water discharges;  
4 Congress so stated in the text of NISA itself.<sup>3</sup> Additionally, NISA only addresses aquatic nuisance species  
5 from ballast water. It does not address the many other types of pollutants found in ballast water, such as  
6 sediment, debris, rust, and interior coatings that have flaked off the inside walls of ballast tanks. See Andrew  
7 N. Cohen and Brent Foster, The Regulation of Biological Pollution: Preventing Exotic Invasions From Ballast  
8 Water Discharged into California Coastal Waters, 30 Golden Gate U. L. Rev. 787, 790-92, 799-801 (2000).  
9 Therefore, the Court finds that NISA does not demonstrate Congress’ intent to recognize the EPA’s regulation  
10 under 40 C.F.R. 122.3(a), as it specifically prevents preemption of the CWA.

11 The other statute defendants rely on, APPS, implements the provisions of the 1973 “International  
12 Convention for the Prevention of Pollution from Ships” (“MARPOL”). With APPS, Congress established a  
13 regulatory mechanism to implement domestic responsibilities under MARPOL, which was delegated to the  
14 Coast Guard. However, the law contained a savings clause which is inconsistent with the argument that APPS  
15 demonstrates Congress’ intent to limit the CWA: “Remedies and requirements of this chapter supplement and  
16 neither amend nor repeal any other provisions of law, except as expressly provided in this chapter.” 33 U.S.C.  
17 § 1907(f). Defendant argues that the savings clause tips in its favor, because 40 C.F.R. § 122.3(a) was in  
18 effect at the time of APPS’s passage and so the savings clause must endorse the regulation as written.  
19 However, a general savings clause regarding the CWA cannot be read to endorse an action taken by an agency  
20 that directly contradicts the CWA. At the very least, the general savings clause does not present  
21 “overwhelming evidence of acquiescence.”

22 Defendant also argues that Congress must have recognized 40 C.F.R. § 122.3(a) because Congress  
23 has “comprehensively revisited” the CWA in 1997, 1981, and 1987, and has not overridden the regulation.  
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25 <sup>3</sup>See 16 U.S.C. § 4711(b)(2)(C)(“The regulations issued under this subsection shall . . . not affect or  
26 supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United  
27 States under the Federal Water Pollution Control Act”) and 16 U.S.C. § 4711 (c)(2)(J)(“The voluntary  
28 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 . . . ”).

1 However, this is not the Overwhelming evidence required by SWANCC; indeed, Congress did not directly  
2 discuss regulation of ballast water discharges and other discharges incidental to the operation of a vessel, nor  
3 did Congress reject a bill overturning 40 C.F.R. § 122.3(a). Nor does excluding vessels of the Armed Forces  
4 from NPDES permit requirements (see 33 U.S.C. § 1322(a)(12)) suggest approval of or application to non-  
5 military vessels.

6 The Deep Seabed Hard Mineral Resources Act ratified the EPA's regulation that asserted CWA  
7 jurisdiction over discharges from vessels associated with commercial recovery or exploration. 30 U.S.C. §  
8 1419(e). Under the statute, these vessels will not be considered a "vessel or other floating craft" under 33  
9 U.S.C. § 1362(12)(B), a provision that exempts the discharge of pollutants by "vessels" in the contiguous zone  
10 or the ocean from the definition of "discharge of a pollutant" under the Act. Therefore, by implementing 30  
11 U.S.C. § 1419(e), Congress expanded NPDES permit requirements to include discharges by vessels  
12 associated with commercial recovery or exploration beyond three miles from the shoreline. Defendant argues  
13 that this expansion of the NPDES permit requirements simultaneously endorses the EPA's drastic exclusion  
14 from the NPDES system by 40 C.F.R. § 122.3(a). Defendant does not provide any legislative history  
15 suggesting that Congress was faced with a bill proposing the rejection of 40 C.F.R. § 122.3(a), nor does  
16 defendant explain how the expansion of the scope of the CWA in this instance implicitly ratified the regulation  
17 in question.

18 Therefore, the Court finds, after evaluating defendant's claim with "extreme care," that defendant has  
19 not demonstrated "overwhelming evidence of acquiescence" by Congress with respect to the NPDES permit  
20 exemption in 40 C.F.R. § 122.3(a), as required by SWANCC.

21

22 **C. Summary**

23 The Court finds that the Congress has "directly spoken" in the CWA and specifically requires NPDES  
24 permits for vessels discharging pollutants in the nation's waters. The Court also rejects defendant's argument  
25 that Congress acquiesced to the EPA regulation exempting "discharges incidental to the operation of a vessel"  
26 in 40 C.F.R. § 122.3(a). Given the Court's finding that Congress has "directly spoken" on the question before  
27 the Court today, it is "the end of the matter" and the Court, as well as the EPA, must give effect to the  
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1 unambiguously expressed intent of Congress. Chevron, 467 U.S. at 842-43.

2 Therefore, the Court finds that EPA acted in excess of its statutory authority under 5 U.S.C. §  
3 706(2)(C) in exempting an entire category of discharges from the NPDES permit program and denying  
4 plaintiffs' petition to rescind 40 C.F.R. § 122.3(a). See NRDC v. Costle, 568 F.2d 1369, 1377 (D.C. Cir.  
5 1977) (EPA did not have authority to exclude categories of point sources from NPDES permit program).  
6 Based on this finding, the Court GRANTS plaintiffs' motion for summary judgment; DECLARES that the  
7 EPA's exclusion from NPDES permit requirements for discharges incidental to the normal operation of a vessel  
8 at 40 C.F.R. § 122.3(a) is in excess of the agency's authority under the Clean Water Act; and ORDERS the  
9 EPA to repeal the regulation.

10

11 **CONCLUSION**

12 For the foregoing reasons, the Court DENIES defendant's motion for summary judgment [Docket #  
13 37]; GRANTS plaintiffs' motion for summary judgment [Docket # 12]; and ORDERS the defendant to repeal  
14 40 C.F.R. § 122.3(a).

15 The parties are ordered to appear for a further case management conference on **Friday, April 15,**  
16 **2005 at 2:30 p.m. to discuss further proceedings in this action.**

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19 **IT IS SO ORDERED.**

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21 Dated: March 30, 2005

22 S/Susan Illston  
23 SUSAN ILLSTON  
24 United States District Judge

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**United States District Court**

For the Northern District of California

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