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January 13, 1999

Carol Browner, Administrator
U.S. Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

Re: Petition for repeal of 40 C.F.R. § 122.3(a)

Dear Ms. Browner:

The introduction of non-indigenous species (NIS) through ballast water is significantly degrading aquatic resources throughout the United States. The introduction and spread of these pest species threatens aquatic ecosystems and the economic livelihood of many communities dependent on these aquatic resources. Today, ballast water discharges are the primary source of these introductions.

Under existing EPA regulations implementing the Clean Water Act (CWA), those who discharge ballast water from vessels are not required to have National Pollution Discharge Elimination System (NPDES) permits. 40 C.F.R. § 122.3 (a). The undersigned groups (Petitioners) are writing to formally petition for the repeal of this rule, which is contrary to the express requirements of the CWA. We are filing this petition pursuant to both 5 U.S.C. § 553(e) and 5 U.S.C. § 555(e).

As you know, Section 301 of the CWA prohibits all point source discharges of pollutants into the waters of the United States unless a permit has been issued pursuant to either § 402 (establishing the NPDES program) or § 404 (covering dredge and fill activities). 33 U.S.C. § 1311(a). Nowhere does the statute exempt "discharges incidental to the normal operation of a vessel" from the requirement to obtain a permit. To the contrary, the Act specifies that vessels are point sources under the CWA. 33 U.S.C. § 1362(14). It is also clear that ballast water contains large numbers of NIS, which qualify as biological pollutants under the definitions of the Act, as well as other non-biological pollutants. 33 U.S.C. § 1362(6).[1]

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[1] The CWA does exempt incidental discharges from Armed Services vessels from NPDES permitting requirements. As set forth below, the existence of this narrow exemption adds further support to the conclusion that non-exempt incidental discharges are subject to § 301.

Thus, under the clear terms of the statute, discharges of ballast water require NPDES permits.

40 C.F.R. § 122.3(a), however, states that:

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

(Emphasis added). The CWA defines the phrase "discharge incidental to the normal operation of a vessel" to include ballast water. 33 U.S.C. § 1322(a)(12)(A)(i). Thus, 40 C.F.R. § 122.3(a) excludes ballast discharges from NPDES permit requirements.

This exclusion is illegal. It conflicts with the statute and runs counter to case law that is directly on point.

In *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (*NRDC v. Costle*), the D.C. Circuit directly addressed the question whether EPA can exempt classes of discharges from the requirement to obtain an NPDES permit. The court plainly stated that "[t]he wording of the statute, 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." *Id.* at 1377.

Because 40 C.F.R. § 122.3(a) runs counter to both the statute and binding judicial authority, we hereby petition EPA to repeal it.

I. The Impact of Exotic Invasive Aquatic Species

Non-indigenous species pose a significant threat to the health, productivity and diversity of U.S. waters and caused billions of dollars in economic damage.[2] As David G. Davis, EPA's Deputy Director of the Office of Wetlands, Oceans and Watersheds, testified before Congress:

> [T]he unintentional introduction of exotic species affects almost all of our Nation's economically vital and fragile coastal, estuarine, and inland waters. These non-

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[2] National Invasive Species Act of 1996, 16 U.S.C.A. § 4701(4).

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indigenous species have had severe economic impacts locally, and seriously threaten ecosystems nationwide.[3]

More than 21 billion gallons of ballast water containing living organisms are discharged into U.S waters every year.[4] As noted by Mr. Davis, this is an average of more than 2.4 million gallons per hour.[5] We recognize that some efforts have been made on the federal level to address ballast water discharge through the Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA), 16 U.S.C.A. § 4701 (as amended by the National Invasive Species Act of 1996). While we recognize that these efforts are good first steps, they do not do enough to prevent the often irreversible impacts that unregulated ballast discharges are having and will continue to have on aquatic ecosystems throughout the U.S. Moreover, they do not substitute for compliance with the CWA.

The introduction of NIS through ballast water is currently the major cause of exotic aquatic species introductions to the Great Lakes and other aquatic ecosystems throughout the country, including the Columbia River Basin.[6] At least 367 taxonomic groups of plants and animals have

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[3] Reauthorization of the 1990 Non-indigenous Aquatic Nuisance Prevention and Control Act: Hearings on H.R. 3217 Before the House of Representatives Subcommittee on Water Resources and Environment and the Subcommittee on Coast Guard and Maritime Transportation of the Committee on Transportation and Infrastructure, 104th Cong., 2nd Sess., (1996) (Testimony of David G. Davis, then-Deputy Director, Office of Wetlands, Oceans and Watersheds, Office of Water, U.S. EPA).

[4] Reauthorization of the 1990 Non-indigenous Aquatic Nuisance Prevention and Control Act: Hearings on S. 1660 Before the Subcommitte on Drinking Water, Fisheries and Wildlife, Senate Environment and Public Works Committee Regarding Non-indigenous Species and S. 1660, (Testimony of Dr. James Carlton, Director of the Maritime Studies Program of Williams College and Mystic Seaport.); Edward Mills et. al, Exotic Species in the Great Lakes: A History of Biotic Crises and Anthropogenic Introductions, 19 J. Great Lakes Res. 1,2 (1993).

[5] Davis testimony, *supra*, n.3.

[6] Carlton and Geller, Ecological Roulette: The Global Transport and Invasion of Nonindigenous Marine Organisms, Science (1993); Carlton, Reid and Van Leeuwen, The Role of Shipping in the Introduction of Nonindigenous Aquatic Organisms to the Coastal Waters of the United States (other than the Great Lakes) and an Analysis of Control Options, a Report to U.S. Coast Guard, Marine Environment Protection Division, Washington, D.C.; Marine Board of the National Research Council, Stemming the Tide, National Academy Press, Washington D.C. (1996).

been identified in the ballast water of ships arriving in Oregon from Japan.[7] Because of ballast water caused introductions of NIS, a new exotic species is established in San Francisco Bay on average once every 14 weeks.[8] Currently, more than 234 NIS are established in San Francisco Bay and the number continues to rise.[9] The introduction of exotic species has fundamentally altered many aquatic ecosystems, such as the Great Lakes, and is becoming what some scientists have described as "a significant component of global environmental change."[10]

As noted by Rowan Gould, the Deputy Assistant Director of Fisheries for the U.S. Fish and Wildlife Service:

> Introductions of non-indigenous species, both aquatic and terrestrial, continue to occur at an accelerating rate. Many of these introductions are likely to become nuisances and will have substantial impacts on the Nation's fish and wildlife resources as well as other human interests and activities.[11]

EPA's David Davis also testified before Congress that:

> through predation and competition, introduced species have contributed to the regional eradication of some native species and dramatic reductions in others. These

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[7] Office of Technology Assessment, Harmful non-indigenous species in the United States, p. 82 (1993).

[8] Cohen and Carlton, Accelerating Invasion Rate in a Highly Invaded Estuary, *Science* 279, pp. 555-558 (1996).

[9] Cohen and Carlton, Nonindigenous Aquatic Species in a United States Estuary: a Case Study of the Biological Invasions of San Francisco Bay and Delta, a Report to U.S. Fish and Wildlife Service, Washington, DC and National Sea Grant College Program, Connecticut Sea Grant (1996).

[10] Vitousek, D'Antonio, Loope and Westbrooks, Biological Invasions as Global Environmental Change, *American Scientist* Vol. 84, No. 5, (1996).

[11] Reauthorization of the 1990 Non-indigenous Aquatic Nuisance Prevention and Control Act: Hearings on S. 1660 Before the Subcommittee on Drinking Water, Fisheries and Wildlife, Senate Environment and Public Works Committee Regarding Non-indigenous Species and S. 1660, (Testimony of Rowan W. Gould, Deputy Assistant Director-Fisheries, U.S. Fish and Wildlife Service, Department of the Interior).

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factors compound the effects of direct habitat loss and alteration, over-fishing, and other human activities, causing extensive resource and environmental loses.[12]

EPA aquatic ecologist David Yont has further noted that:

> The spread of [the zebra mussel] would mean severe and dramatic consequences for the ecological integrity of surface water as it causes major shifts in food-web interactions and in the movement of nutrients and toxic materials, and reduces the diversity of species.[13]

Of course, these environmental impacts have accompanying economic impacts, due to both the impairment of economically significant native species and the cost of NIS control efforts.[14]

When adopting NISA in 1996, Congress recognized the significant ecological and economic impacts that can result from the unregulated release of exotic species in ballast water. Specifically, Congress found that:

> (1) [T]he discharge of untreated water in the ballast tanks of vessels and through other means results in unintentional introductions of non-indigenous species to fresh, brackish, and saltwater environments;
>
> (2) [W]hen environmental conditions are favorable, non-indigenous species become established, may compete with or prey upon native species of plants, fish, and wildlife, may carry diseases or parasites that affect native species, and may disrupt the aquatic environment and economy of affected near-shore areas.

16 U.S.C.A. § 4701(a).

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[12] Reauthorization of the 1990 Non-indigenous Aquatic Nuisance Prevention and Control Act: Hearings on S. 1660 Before the Subcommittee on Drinking Water, Fisheries and Wildlife, Senate Environment and Public Works Committee Regarding Non-indigenous Species and S. 1660, (Testimony of David G. Davis, then-Deputy Director Office of Wetlands, Oceans and Watersheds, Office of Water, U.S. EPA).

[13] Yont, The Eco Invaders, EPA J., Nov. (1990).

[14] Harmful Non-Indigenous Species in the United States, Office of Technology Assessment, U.S. Congress, at 67 (1993).

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Focusing specifically on the ruffe, Congress noted that:

> [S]ince their introduction in the early 1980's in ballast water discharges, ruffe [] have caused severe declines in populations of other species of fish in Duluth Harbor . . . and are likely to spread quickly to most other waters in North America if action is not taken promptly to control their spread. . . .

16 U.S.C.A. § 4701(a)(10).

And finally, Congress recognized that:

> the potential economic disruption to communities affected by the zebra mussel due to its colonization of water pipes, boat hulls and other hard surfaces has been estimated at $5,000,000,000 by the year 2000, and the potential disruption to the diversity and abundance of native fish and other species by the zebra mussel and ruffe, round goby, and other non-indigenous species could be severe. . . .

16 U.S.C.A. § 4701(a)(4).

II. The Plain Language of the Clean Water Act Requires NPDES Permits for Ballast Water Discharges

The CWA prohibits "the discharge of any pollutant by any person" except as in compliance with specified sections of the Act, including the permitting provisions of § 402. 33 U.S.C. § 1311(a). The phrase "discharge of a pollutant" is defined to include "any addition of any pollutant to the navigable waters from any point source." 33 U.S.C. § 1362(12). Vessels are specifically defined as point sources in the CWA. 33 U.S.C. § 1362(14). Moreover, the CWA specifically includes "biological materials" in its definition of pollutants. 33 U.S.C. § 1362(6).

The discharge of ballast water from vessels is a discharge of pollutants because ballast water is known to contain invasive plant and animal species, as well as bacteria and viruses associated with human sewage.[15] All of these pollutants qualify as "biological materials" within

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[15] Carlton, Reid and Van Leeuwen, *supra*, n.6; Carlton, Transoceanic and Interoceanic Dispersal of Coastal Marine Organisms: the Biology of Ballast Water, Oceanography and Marine Biology, An Annual Review 23, pp. 313-371 (1985); Ruiz and Hines, The Risk of Nonindigenous Species Invasion in Prince William Sound Associated with Oil Tanker Traffic and Ballast Water Management: Pilot Study. Smithsonian Environmental Research Center (1997); and McCarthy and Khambaty, International Dissemination of Epidemic *Vibrio*

the meaning of the CWA. Additionally, ballast water is likely to contain other pollutants, such as oil, chipped paint, sediment, and toxins contained in ballast sediment.[16]

Under the CWA, vessels qualify as point sources. Accordingly, when they discharge pollutants, they are required to have NPDES permits. Although EPA has purported to exempt "discharge[s] incidental to the normal operation of a vessel" from the requirement to obtain a permit, 40 C.F.R. § 122.3(a), the D.C. Circuit has confirmed that nothing in the CWA gives EPA the power to create categorical exemptions. *NRDC v. Costle*, 568 F.2d at 1377. While the EPA is given substantial deference in interpreting the CWA, the EPA cannot rely upon regulations that are clearly contrary to express statutory requirements. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588 (1994).

The CWA does contain certain limited exemptions relating to the need to obtain NPDES permits for ballast water and other discharges incidental to the normal operation of vessels. None of these exemptions can reasonably be construed as permitting the blanket exemption contained in 40 C.F.R. § 122.3(a). First, the CWA excludes incidental discharges from vessels made in the "contiguous zone" and the "ocean" from having to obtain an NPDES permit. 33 U.S.C. § 1362(12)(B). These terms have clear statutory definitions: the "contiguous zone" begins three miles from shore and extends seaward to twelve miles from shore, and the "ocean," is any portion of the high seas beyond the contiguous zone. 33 U.S.C. § 1362(9) and (10). Thus, the effect of this exemption is that incidental discharges (such as ballast water) that occur more than three miles from shore are not required to have NPDES permits. However, this exemption can in no way be construed as applying inside the three mile contiguous zone boundary.

Second, the CWA specifically excludes two types of discharges from its definition of "pollutants." 33 U.S.C. § 1362(6)(A). The Act states that "sewage from vessels or a discharge incidental to the normal operation of a vessel of the *Armed Forces*," are not to be considered pollutants. *Id.* (emphasis added). As a result of the second aspect of this exclusion, discharges incidental to the normal operation of Armed Services vessels are not required to have an NPDES

Choloerae by Cargo Ship Ballast and Other Nonpotable Waters. *Appl. Envir. Microbiol.* 60: pp. 2597-2601 (1994).

[16] Munson, Darby, and Coats, Transport of Potentially Pathogenic *Acanthamoeba* in Ship Ballast Sediment, American Zoo Soc. Mtg, Washington D.C. (1996); Carlton, Navarret, and Mann. Biology of Ships Ballast Water: the Role of Ballast Water in the Transoceanic Dispersal of Marine Organisms, Final Project Report, National Science Foundation (Woods Hole Oceanographic Institute. Woods Hole MA), pp 78-82 (1982).

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permit. However, this exemption is specifically limited to Armed Services vessels; EPA cannot reasonably expand it to apply to all vessels, as it has done in 33 C.F.R. § 122.3(a).

It is important to note that in exempting both sewage discharges and incidental discharges from Armed Services vessels, Congress specifically provided alternative programs for control of such discharges under other sections of the CWA. *See* 33 U.S.C. § 1322(b) (addressing sewage discharges) and § 1322 (n) (addressing incidental discharges from Armed Forces vessels). The fact that there is no similar statutory or regulatory provision addressing incidental discharges from non-Armed Services vessels under the CWA further supports the conclusion that Congress intended for ballast water discharges be regulated under § 402.

The Act is clear that ballast water releases that contain biological materials qualify as point source discharges of a pollutant and that such discharges require NPDES permits under § 402. 40 C.F.R. 122.3(a) runs directly counter to this plain statutory requirement and should therefore be repealed.

III. <u>The Case Law Unequivocally Indicates that EPA Does Not Have the Discretion to Exempt Incidental Discharges from the Requirements of the CWA.</u>

In *NRDC v. Costle,* the D.C. Circuit addressed the question of whether EPA could exempt agricultural return flows from the requirements of the CWA. The court unambiguously stated that the EPA did not have the authority to exempt categories of discharges from the requirements of § 402. Finding that § 402 permits were central to achieving the stated goals of the CWA, the court found that "[t]he wording of the statute, 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 at* 1377; *see also NRDC v. U.S. E.P.A.*, 966 F.2d 1292, 1305 (9th Cir. 1992); *Carr v. Alta Verde Industries Inc.*, 931 F.2d 1055,1060 (5th Cir. 1991); *Sierra Club v. Abston*, 620 F.2d 41, 44 (5th Cir. 1980); and *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 372 (10th Cir. 1979).

In reaching this result, the *NRDC v. Costle* court relied on both the language of the statute itself and its underlying legislative history. As noted by the court, when the Clean Water Act being adopted the House Report addressed the effect of § 301 in the following terms:

> *Any discharge of a pollutant without a permit* issued by the Administrator under section 318, or by the Administrator or State under 402 or by the Secretary of the Army under 404 *is unlawful.*

568 F.2d at 1374, quoting from H.Rep.No.92-911, 92d Cong., 2d Sess. 100 (1972), reprinted in Legislative History at 787 (emphasis added).

The court further noted that there were:

> [I]nnumerable [other] references in the legislative history to the effect that the Act is founded on the basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful.

Id. at 1375 (internal quotations and citations omitted).

In promulgating 40 C.F.R. § 122.3(a), EPA acted in direct violation of the straightforward rule established in *NRDC v. Costle*. EPA has created a categorical exclusion in a statutory scheme that permits none.

IV. Subsequent Legislative Developments Underscore the Conclusion that Ballast Water Discharges and Other Discharges Incidental to the Normal Operation of a Vessel Require NPDES Permits.

In 1996, Congress passed the Uniform National Discharge Standards for Armed Forces Vessels Act (UNDSAF) which amended the CWA to exempt incidental discharges from Armed Forces vessels from the normal requirements of the CWA. PL 104-106, § 325(c)(3); 33 U.S.C. § 1362(6)(A). Congress passed this act out of concern that some coastal states could attempt to enforce CWA requirements against Armed Forces vessels discharging ballast water. The Senate Report explained:

> The Navy wishes to clarify the regulatory status of certain non-sewage discharges from Navy vessels. Vessels are point sources of pollution under the Clean Water Act. Any discharge from a point source, including a vessel, into the waters of the United States is prohibited unless specifically permitted under section 402 or 404 of the Act. Notwithstanding this prohibition, discharges from vessels have generally not been subject to the permit requirements.

S. Rep. No. 104-113, at 1 (1995). The Report further noted that such discharges were "currently exempt from control under the Federal Water Pollution Control Act based on regulations issued by EPA." *Id.* at 2.

The primary effect of the UNDSAF was to amend the definitions section of the CWA so as to exclude discharges incidental to the normal operation of a Armed Forces vessels from the definition of a pollutant. 33 U.S.C. § 1362(6)(A). S. Rep. No. 104-113, at 1 (1995). Prior to that time, the definition of a pollutant excluded only "sewage from vessels" and did not mention incidental discharges of any kind. Paragraph 6(A) Pub.L. 104-106, § 325(c)(3).

Congress took this action in 1996 to specifically remove a narrow subset of incidental discharges—those from Armed Services vessels—from the NPDES permitting program. While Congress acknowledged the presence of the more broad regulatory exemption contained in 40 C.F.R. § 122.3(a), Congress viewed this exemption as being problematic in the face of the clear

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and unqualified statutory language imposing the permit requirement. Thus, the Senate Report stated that:

> The amendment to section 312 made by this bill is intended to address discharges that are currently subject to the Federal Water Pollution Control Act as vessels are point sources of discharge, but have been exempt from permit requirements under section 402 of the Act because of provisions of the regulation published at part 122.3 of title 40, Code of Federal Regulations.

Rep. No. 104-113, at 7 (1995). Referring specifically to incidental discharges from Armed Services vessels, the Senate Report further stated that "[t]he effect of this amendment is to remove the statutory requirement for a permit for these point source discharges to the waters of the United States." S. Rep. No. 104-113, at 1.

These statutory developments highlight the lack of a statutory basis for EPA's general regulatory exclusion for incidental discharges from vessels in 40 C.F.R. § 122.3(a). They further demonstrate Congress's recognition that such a basis is lacking. Even though Congress was aware of EPA's exclusion, Congress believed that these discharges were subject to NPDES permitting requirements. Although Congress removed the permit requirement for incidental discharges from Armed Services vessels, it took no action to remove the statutory permit requirement for discharges from non-Armed Services vessels. If Congress had agreed with EPA's more broadly drawn exemption, it would have been simple for it to incorporate it into the statutory scheme. Congress's failure to have done this can only be read as a tacit rejection of EPA's approach.

V. Conclusion

Non-indigenous species introduced through ballast water have caused widespread environmental degradation and billions of dollars in resulting economic damage. Petitioners believe that in light of the clear statutory language, congressional intent and case law, EPA should repeal 40 C.F.R. § 122.3(a), thus paving the way for the regulation of ballast water discharges under the CWA. The exclusion provided in 40 C.F.R. § 122.3(a) is plainly inconsistent with the CWA and should be eliminated as quickly as possible to help prevent the further degradation of aquatic resources from NIS.

Thank you for your attention to this petition, we look forward to your prompt response. Please feel free to contact me at (503) 768-6713 with any questions or concerns.

Sincerely,

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