DECLARATION OF JAMES A. HANLON

I, James A. Hanlon, declare that the following statements are true and correct to the best of my knowledge, information, and belief, and are based on my personal knowledge and information supplied to me by employees of the United States Environmental Protection Agency (EPA or Agency) under my supervision.

INTRODUCTION

1. I am James A. Hanlon, Director of the Office of Wastewater Management in EPA's Office of Water. I have served as the Office Director since April 2002. As the Director of the Office of Wastewater Management (OWM), I direct the EPA Office responsible for national program direction for the National Pollutant Discharge Elimination System (NPDES) permit program, including oversight of authorized State and Territorial NPDES programs. OWM has oversight responsibilities and provides technical assistance supporting EPA regional water programs. OWM also administers federal financial and technical assistance for publicly owned treatment works (e.g., municipal sewage collection systems and treatment plants). I currently supervise a staff of approximately 110 permanent full-time and part-time federal employees. OWM's annual program (operating) budget for fiscal year 2006 was approximately 29 million dollars ($29,000,000), while for fiscal year 2007, the current budget is approximately 28 million dollars ($28,000,000).

2. Prior to my current position, I served as the Deputy Office Director of the Office of Science and Technology (OST) in EPA's Office of Water beginning in 1991. OST is responsible for the scientific and technical basis for federal water quality and

safe drinking water programs, including establishment of national effluent limitations guidelines and analytical test methods. OST also provides scientific and technical support to other Offices with program implementation responsibilities within the Office of Water, including OWM, the Office of Wetlands, Oceans, and Watersheds, and the Office of Ground Water and Drinking Water. I have worked for EPA for more than 34 years. I received a Bachelor of Science degree in Civil Engineering from the University of Illinois and a Masters of Business Administration degree from the University of Chicago. I am a registered Professional Engineer in the State of Illinois.

3. I have read the district court's order of September 18, 2006 in Northwest Environmental Advocates, et al. v. EPA, No. C 03-05760 SI (N.D. Cal.) and have discussed it with EPA counsel. I understand that, under the district court's order, the regulation excluding discharges incidental to the normal operation of a vessel from Clean Water Act (CWA) NPDES permitting requirements, currently at 40 C.F.R. §122.3(a), will be vacated on September 30, 2008. I further understand that the vacatur will cover not only ballast water discharges, but all discharges incidental to the normal operation of a vessel currently exempt from NPDES permitting requirements pursuant to the 40 C.F.R. §122.3(a) exclusion. In addition, I understand that EPA appealed the district court's order, and that Northwest Environmental Advocates' Petition for Review has been reinstated and that Petitioners have now requested that this Court impose the same remedy in the Petition for Review case (vacatur of the

regulatory exemption effective September 30, 2008). I submit this declaration in support of EPA's response to the Petition for Review.[1]

NUMBER OF VESSELS AND DISCHARGES POTENTIALLY SUBJECT TO A SEPTEMBER 2008 VACATUR

4. Regarding the scope of the remedy requested in the Petition for Review, the Petitioners' request that this Court vacate the regulation as it applies to all discharges incidental to the normal operation of a vessel, as opposed to only ballast water discharges as urged by EPA, significantly expands the universe of vessels EPA understood to be at issue either in the petition for rulemaking or in the district court litigation, because most vessels operating in United States waters do not carry ballast water. Updated information provided to EPA by the United States Coast Guard since the 2005 Hanlon Declaration indicates, at a minimum, that approximately 8,400 vessels equipped with ballast water tanks reported over 86,000 port calls in the U.S. during 2005.[2] These numbers, however, are dwarfed by the non-ballast carrying vessel universe potentially subject to the September 2008 vacatur that Petitioners request. For example, the Coast Guard estimates that in 2005 there were approximately 81,000 commercial fishing vessels operating in U.S. waters and that, in addition, there were

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[1]I also submitted a declaration to the district court on issues associated with bringing ballast water into the NPDES permitting program (2005 Hanlon Declaration). I understand that the same panel of this Court will review the appeal of the district court decision and the Petition for Review; thus, the panel will have access to the declaration I filed in the district court. According, I have largely limited this declaration to information pertaining to non-ballast water discharges and other information that has become available since the district court's decision.

[2]In addition, this information indicates there are many more vessels that discharge ballast water in U.S. coastal and inland waters which either do not trigger the Coast Guard's reporting requirements because they do not traverse reporting boundaries, or for which the federal government does not yet have verifiable estimates. For example, Coast Guard information for 2005 indicates there are approximately 53,000 freight and tank barges of all sizes operating in U.S. waters, an unknown number of which may take up and discharge ballast water either for stability purposes or to clear low-lying bridges in inland waterways.

another nearly *13 million* state-registered recreational vessels in the United States. The National Marine Manufacturers Association (NMMA) estimates that in 2005 there were approximately 5 million additional unregistered recreational vessels, thus bringing the total (i.e., both registered and unregistered recreational vessels) to approximately 18 million. See http://www.nmma.org/facts/boatingstats/2005/files/populationstats3.asp; see also NMMA amicus brief at p. 4.

5. In fact, the number of vessels potentially subject to NPDES permitting requirements under the remedy Petitioners request here far exceeds the number of facilities, entities, and point sources currently subject to the NPDES permitting program. As of June 30, 2006, the scope and coverage of the NPDES program consisted of approximately 549,900 facilities, entities, and point sources.[3] This number is obviously far less than the millions of vessels described in paragraph 4 that would potentially be brought into the NPDES permitting program under the Petitioners' requested remedy.

6. It should also be noted that, because most vessels can be expected to have discharges incidental to their normal operations other than ballast water, the requested remedy would also significantly expand the universe of discharges potentially subject to permitting. Although EPA only possesses limited data specific to the nature and extent of such additional discharges, the federal government's experience with regulation of discharges incidental to the normal operation of vessels of the Armed Forces under CWA §312 is instructive. As part of a final rulemaking under that authority, the federal

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[3]This number has decreased somewhat since I submitted the 2005 Hanlon Declaration to the district court due primarily to fluctuations in the stormwater permitted universe. See 2005 Hanlon Declaration ¶ 7 (describing the 607,000 facilities, entities and point sources then authorized to discharge by the NPDES permit program).

government identified 39 discharges incidental to the normal operation of a vessel of the Armed Forces. A preliminary analysis conducted by my staff suggests that eliminating ballast water and those other discharges that might be found only on military vessels would leave 25 potential discharges incidental to the normal operation of a vessel to be considered. Because commercial and recreational vessels (e.g., cruise ships, cargo vessels, fishing boats) are different in nature than military vessels, EPA expects there could be an additional number of operational discharges from non-military vessels.

EFFECT OF DISTRICT COURT'S SEPTEMBER 30, 2008 DATE OF VACATUR ON EPA'S ABILITY TO COLLECT DATA TO SUPPORT PERMITTING OF VESSEL DISCHARGES

7. Given the uncertainty over whether the district court's order will be reversed or altered on appeal, the Agency has decided that it would be prudent to begin the process of attempting to develop a practicable framework for authorizing the millions of potentially affected discharges from vessels (or otherwise addressing the vacatur) by September 2008. While we are continuing to analyze the many complex issues associated with this endeavor, one key aspect has become clear – a September 2008 vacatur date, which Petitioners now also request from this Court in their Petition for Review, will not allow EPA to collect the types of information EPA normally relies upon in drafting the first permits covering a category of discharges not previously subject to the NPDES permit requirement. Instead, EPA would be forced to proceed without the full extent of information the Agency typically takes into account when creating a new permitting program.

8. The Agency has reached this conclusion because, as explained below, two years is not enough time for the Agency to collect original data specifically tailored to NPDES permitting needs and then use that data in proposing and finalizing permit requirements. Given that the process for developing such original data can be quite lengthy, and the timeframe associated with processing a draft and final general permit (based on information already collected) for a new category of discharges can itself be expected to exceed two years, the Agency has concluded that pursuing such original data is not feasible. Instead, the Agency has begun the process of trying to find data collected by non-EPA entities (e.g., Coast Guard, MARAD, states) for purposes other than NPDES permitting and plans to make use of it to the best of our ability. The increased reliance on assumptions and possibility of data gaps inherent in such an approach obviously increases the chance that any permit program that results may not ultimately ensure effective permitting of discharges incidental to the normal operation of a vessel.

9. In the following paragraphs, I outline the basis for the conclusion that a September 30, 2008 vacatur does not provide the time necessary to collect original data on which to base any permits issued. I describe, first, the permitting approach under most serious consideration by the Agency – general permitting; second, the Agency's critical need for vessel data to use in creating any general permit; third, the process the Agency typically follows to collect original data and the time that process typically takes; fourth, the process the Agency typically follows in proposing and finalizing a general permit (based on information already collected) and the time that process can reasonably be expected to take; and, fifth, the reasons why, in preparing

for a September 2008 vacatur, the Agency has concluded that developing original data is not feasible, and instead will need to rely on existing data it can obtain to support any general permits issued. Finally, I describe the types of information the Agency is in the process of collecting to support the effort of permitting discharges incidental to the normal operation of a vessel.

10. Likely Use of General Permit. Because issuance of individual permits to the massive number of vessels and variety of waste streams that would be potentially subject to permitting under the order would be administratively infeasible, the Agency's current plan is to strive to provide for NPDES authorization to discharge for vessels by general permit.[4] Unlike individual permits, which are unique to the individual permittee and are tailored for an individual facility, a general permit is developed and issued by a permitting authority to cover multiple facilities within a specific category. The general permit vehicle, however, does not relieve the Agency of complying with CWA permit requirements. As explained in the 2005 Hanlon Declaration, under the NPDES program, absent an effluent limitations guideline for discharges from a particular point source, EPA would need to develop technology-based permit limits on a "best professional judgment" (BPJ) basis, considering the same statutory factors applicable to development of an effluent limitations guideline. 2005 Hanlon Declaration ¶ 56. The permit writer bases this BPJ analysis on specific information regarding the content of the discharge and the availability of technologies that are economically achievable to reduce pollutants in the discharge. In addition, NPDES permits, including general

[4]Although more than one general permit for vessel discharges may ultimately be necessary or appropriate, I will refer to "general permit" in the singular in this declaration.

permits, must contain more stringent limits when necessary to meet state water quality standards.

11. EPA's Critical Need for Vessel Data to Support Permitting. EPA does not currently possess the types of information the Agency has used in the past to develop new NPDES technology-based permit limitations for general permits. As explained in the 2005 Hanlon Declaration, with respect to ballast water, I anticipate that EPA will consider imposing ballast water management practices currently required by the Coast Guard (or other regulatory authorities) in order to develop technology-based effluent limits in ballast water permits. 2005 Hanlon Declaration ¶ 62.[5] However, the wide range of operational discharges other than ballast water potentially subject to permitting under the district court's order, and now as requested by Petitioners in their Petition for Review in this Court, also will need to be addressed. The Agency simply does not, at this time, possess the data or information necessary to specify appropriate technology-based effluent limitations; in particular, EPA does not have all of the needed information on how to categorize classes of vessels, what types of discharges exist and what they are composed of, and the cost and availability of technologies to address such discharges. The fact that EPA's information on the types and characteristics of discharges incidental to the normal operation of a vessel is exceedingly limited requires that the Agency undertake efforts to obtain such information.

12. Process for Developing Original Data. The process for development of a

[5]As I understand, the predominant method for addressing threats from ballast water is mid-ocean ballast water exchange. Declaration of Dr. Richard A. Everett ¶ 5. While mid-ocean ballast exchange may generally be practicable for ocean-going vessels, one issue EPA will need to confront during the permitting process is whether vessels traversing only near coastal waters or operating in inland waters could undertake such a practice.

permit program for a previously unregulated category of point source discharges typically consists of two broad phases – the collection of information necessary to understand the industry to be regulated and the development and processing of a permit based on such information. With respect to data collection, the Agency's preferred approach where, as here, the Agency's knowledge of the universe of point sources to be permitted is relatively poor, is to develop original data specific to the facilities actually being regulated and tailored to the reasons for that regulation (e.g., to determine appropriate technology-based effluent limitations).

13. This process can be lengthy for two key reasons. First, determining how to effectively collect original information for a relatively unknown universe of point sources is a complicated task. It typically involves sending a survey questionnaire to the industry to be covered by the permit. The survey questionnaire needs to be carefully designed to elicit detailed technical, economic, and environmental information for EPA's use in determining, among other things, the "best technologies available" to reduce discharges for specific waste streams and the costs associated with those technologies. Second, there are a series of time-consuming mandatory steps in the process of developing such original data. In particular, before the Agency sends the questionnaire it has developed to facilities, EPA must submit it to OMB for approval under the Paperwork Reduction Act, together with an "Information Collection Request" (ICR).[6] An ICR is a detailed document that EPA must submit to OMB explaining why a "collection of information" is necessary. The administrative process for OMB to clear the survey

[6]The Paperwork Reduction Act generally prohibits federal agencies from conducting a "collection of information" without OMB approval. A "collection of information" includes identical questions posed to 10 or more persons in a 12-month period.

questionnaire typically cannot be done in less than 180 days[7] and often takes longer. Once OMB approves the survey, EPA sends the survey to facilities (EPA may need to give facilities 60 days or more to complete it, depending on the size of the survey). Once EPA receives completed surveys, the Agency must then review the information contained in the responses. This is often a time consuming task. For example, it is typical to have to contact about five percent of the facilities that respond, to clarify their answers to certain technical and economic questions. Depending on the actual number of facilities surveyed, this can potentially be a very large number.

14. In my experience, for the reasons described above, the time it takes to develop original data can be quite lengthy and averages between 12 and 30 months, depending on the complexity of the universe to be permitted, but has taken as long as 6 years. See, e.g., 2005 Hanlon Declaration ¶ 60 (describing instances where data collection took from over 3 to 6 years).

15. Process for Developing a General Permit Based on Information Collected. The process of creating a general permit for discharges previously not subject to the NPDES requirement typically begins with the analysis of data collected for the purpose of developing the permit effluent limitations required by the CWA. NPDES permits must incorporate effluent limitations for toxic and non-conventional pollutants that represent application of the "best available technology economically achievable" (BAT). Since EPA has not established effluent limitation guidelines (ELGs) reflecting the degree of

[7]This includes 60 days required by OMB regulations for public notice of the ICR before it can be submitted to OMB (5 C.F.R. §1320.8(d)) and an estimated 60 days for EPA to respond to public comments on the ICR. After the ICR is submitted to OMB, 5 C.F.R. §1320.10(b) allows OMB up to 60 days for review and approval of the ICR, but requires that OMB provide at least 30 days for public comment on the ICR.

effluent reduction attainable by vessel operators through various technologies, the permitting authority must (in accordance with 40 C.F.R. §125.3(c)(2)) establish technology-based effluent limits in an NPDES permit on a case-by-case basis. In deriving these BAT limits, also referred to as "best professional judgment" (BPJ) limits, the permitting authority needs to consider: (1) the appropriate technology for the category or class of point sources based on all available information for a particular applicant; and (2) any unique factors relating to the applicant. When setting these BPJ limitations, the permit writer (in accordance with 40 C.F.R. §125.3(d)(3)) must also take into account: age of equipment and facilities involved; process employed; engineering aspects of the application of various types of control techniques; process changes; cost of achieving effluent reduction; and non-water quality environmental impact. Once technology-based effluent limits are established, EPA must also determine whether any more stringent limitations are necessary to meet water quality standards.

16. Once the process of determining BAT limits for a particular category is complete, EPA develops a proposed permit. Proposing a general permit typically involves the following steps: drafting the permit text with effluent limits for each waste stream that addresses the universe of similar dischargers that discharge into water bodies of similar environmental characteristics (this may often require more than one general permit); drafting the accompanying fact sheet for each permit that explains the rationale for the requirements established in the permit, and drafting the Federal Register preamble that adequately notifies interested stakeholders of the opportunity for

public comment.[8] In addition to the drafting of these documents, there are also a number of additional procedural steps; prior to publishing the permit in the Federal Register for public comment, the permit goes through management review and Agency staff must prepare the administrative record.[9]

17. The actions required prior to the issuance of a general permit entail analyzing public comments and identifying critical issues to raise to Agency management, resolution of those issues, finalizing the permit and final fact sheet language, finalization of the administrative record and Federal Register publication. In addition, there are a number of time-consuming statutory requirements that EPA must complete prior to publishing the final general permit in the Federal Register.[10] For example, EPA is required to: 1) ensure, in consultation with the United States Fish and Wildlife Services and the National Marine Fisheries Service under the Endangered Species Act, that issuance of an NPDES permit is not likely to jeopardize the continued existence of endangered species[11]; 2) obtain CWA section 401 certification (or waiver of certification) from each state where discharges authorized under the permit originate,

[8]Although EPA is exploring the viability of forgoing public notice and comment, as suggested by the district court in its order, I am not aware of EPA ever having issued a general permit without first providing for public comment. Even if legally permissible, I would be very concerned about the implications of doing so here, where the public is understandably extremely interested in the content of EPA's action and EPA's information on the point source discharges at issue is relatively limited.

[9]In addition, because of the scope and magnitude of the effort to permit discharges incidental to the normal operation of a vessel, EPA anticipates that it will have to coordinate with other Federal agencies, which typically would require at least 90 days. Note that if EPA engages in such coordination at the proposal stage, it also usually does so at the final permit stage.

[10]It is important to note that these requirements apply only to EPA-issued permits, not those issued by authorized states.

[11]This assumes that EPA concludes that issuing the permit "may affect" listed species or designated critical habitat.

regarding whether an authorized discharge will comply with state water quality standards; and, 3) evaluate the general permit for consistency with the enforceable policies of approved state coastal zone management programs under the Coastal Zone Management Act.

18. In my experience, simply processing a proposed and final permit for a newly regulated category of point sources can reasonably be expected to exceed 2 years. As described in the 2005 Hanlon Declaration, in the situation of development of the first multi-sector general permit for industrial stormwater, it took EPA 13 months to simply prepare and publish the proposed general permit (based on data already collected and analyzed) and 22 additional months to finalize the permit. See 2005 Hanlon Declaration ¶ 60.

19. Modifications to the Process Outlined Above Necessary to Provide Permit Coverage by September 2008. Reviewing the steps outlined above in light of the circumstances associated with this litigation, it quickly became clear that the Agency would have to compress or modify them if permit coverage were to be provided by September 2008. The most dramatic adjustment to the preferred process, and the one I address in this declaration, necessarily has to be made with respect to collecting information regarding the discharges to be regulated, since the timeframe for proposing and finalizing a general permit alone (based on data previously collected and analyzed) would reasonably be expected to exceed the two years provided by the district court's order and now being requested of this Court. It is unlikely that the Agency could compress the time this process takes much below the two years provided by the district

court. In addition to the fact that the vessel discharges are more numerous and likely to be more complicated to regulate than stormwater discharges,[12] as described above, most of the steps involved in processing general permits for a category of discharges not currently permitted are critical or mandatory in nature.

20. Information Collection Currently Underway. The Agency has begun the collection of the existing information described above. Most notably, in addition to other efforts, the Agency has a contract in place to collect existing information from government (e.g., MARAD, USCG, state agencies) and private data sources to, among other things, identify: the number and various types of commercial and recreational vessels operating in waters of the U.S.; commercial and recreational vessel patterns (e.g., domestic versus international voyages, volume of vessel traffic by port, distribution of recreational vessels by state and/or harbors); the types of operations onboard commercial and recreational vessels giving rise to discharges incidental to the normal operation of a vessel and the characteristics of such discharges (e.g., volumes, discharge rates, constituents); existing international agreements and obligations applicable to discharges incidental to the normal operation of a vessel, as well as federal and state limitations or controls on discharges incidental to the normal operation of a vessel (e.g., types of vessels covered, geographic scope, specific nature of limitations); and the types of pollution control equipment or best management practices currently used or in development, and any practical limitations on their use (e.g., as to

[12] See 2005 Hanlon Declaration ¶ 60 (stating "I anticipate that permitting of vessel discharges would present additional complications that did not arise with NPDES permitting of discharges of stormwater associated with industrial activity"). In addition, the stormwater permits issued collectively covered 3000 facilities, which is obviously far fewer than the potentially millions of vessels at issue in this litigation.

vessel size, treatment volume or flow rates, power requirements, crew training needs, etc.).

21. As discussed above, the type of information that can be expected to be generated by the effort described in the prior paragraph differs from the original data EPA typically uses in NPDES permitting. EPA typically uses original data because it is collected directly from the facilities to be permitted with the specific goal of supplying the detailed technical, economic, and environmental information required by the NPDES permitting regulations. The data collection currently underway, however, will generate data collected by federal and state agencies with their own regulatory needs in mind and from private data sources. While such information will certainly be useful to the Agency, relying solely on this type of information collection to support a general permit is not the approach the Agency would typically take in the absence of a deadline (or other factor) making collection of original data infeasible.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of the United States Environmental Protection Agency under my supervision.

Executed on May 23, 2007

James A. Hanlon