ORAL ARGUMENT SCHEDULED FOR MAY 9, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1001, with Nos. 09-1010, 1076 & 1115, *Consolidated*

LAKE CARRIERS' ASSOCIATION, *et al.*, *Petitioners,*

v.

LISA JACKSON, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondents.*

ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JOINT BRIEF OF INTERVENORS NORTHWEST ENVIRONMENTAL ADVOCATES, PEOPLE FOR PUGET SOUND, CENTER FOR BIOLOGICAL DIVERSITY AND NATURAL RESOURCES DEFENSE COUNCIL, INC. IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amicus Curiae*

Except for the States of New York and Michigan, all parties, intervenors and *amici* appearing in this Court are listed in the Brief of Petitioners.

B. Rulings Under Review

Petitioners accurately identified the agency action under review.

C. Related Cases

Intervenors agree with Respondent's description of the related cases.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Each of Respondent-Intervenors Northwest Environmental Advocates, Center for Biological Diversity, People for Puget Sound, and Natural Resources Defense Council, Inc. are not-for-profit conservation organizations that have issued no shares to the public and have no parent corporations.

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GLOSSARY OF ABBREVIATIONS

EAB	Environmental Appeals Board
EPA	Environmental Protection Agency
JA	Joint Appendix
NPDES	National Pollutant Discharge Elimination System
NRDC	Natural Resources Defense Council

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Addendum filed by Petitioners and the Addendum filed by Respondent.

I. INTRODUCTION

By congressional design, the Clean Water Act is a model of "cooperative federalism." The Federal Government must establish minimum national pollution discharge requirements, while states develop and enforce local water quality standards. The statute also encourages states to take primary responsibility for issuing permits that set limits on discharges of pollutants based on both the federal requirements and state and local water quality standards. Section 401 of the Clean Water Act, 33 U.S.C. § 1341, is an important component of this statutory scheme, giving states the authority to protect state water quality by vetoing, or setting additional conditions on, federal projects and permits that may result in discharges of pollutants in state waters.

In this case, Petitioners Lake Carriers' Association, et al. ("Lake Carriers") ask this Court to rewrite the careful federal-state balance struck by Congress, arguing that the U.S. Environmental Protection Agency ("EPA") can and should override state water quality conditions incorporated through section 401 into the nationwide General Permit for Discharges Incidental to the Normal Operation of a Vessel ("Vessel General Permit"). Because Congress deliberately chose not to provide federal veto authority over state section 401 certification conditions, this Court should decline to read such authority into the statute.

II. STATEMENT OF FACTS

A. The Clean Water Act.

Faced with an alarming deterioration in water quality across the nation, Congress enacted the Federal Water Pollution Control Act of 1972, commonly known as the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the Act adopts a "national goal that the discharge of pollutants into navigable waters be eliminated." Id. The statute establishes distinct and complementary roles for the federal and state governments. PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology, 511 U.S. 700, 704 (1994). While conveying significant authority on EPA to oversee a nationwide water quality program, the Act also embodies "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

Under this cooperative federalism scheme, EPA and the States share responsibility for developing pollution control standards. EPA sets minimum nationwide technology-based standards for specific categories and classes of point source discharges through the development of "effluent limitation guidelines" and new source performance standards. 33 U.S.C. §§ 1311(b), 1314, 1316. These national standards establish a federal floor for environmental protection in order to

avoid a "race to the bottom" by state regulators. See Natural Resources Defense Council, Inc. ("NRDC") v. Train, 510 F.2d 692, 709-10 (D.C. Cir. 1974) (explaining that Congress intended these uniform federal requirements to "safeguard against industrial pressures by establishing a uniform 'minimal level of control imposed on all sources within a category or class'"); 117 Cong. Rec. 10,650 (1972) (explaining that "[e]ach branch of government . . . help[s] the other resist untoward pressure and act[s] as a check on the other to produce the strongest pollution control possible"). States are free, however, to impose more stringent standards or requirements to protect local water quality. 33 U.S.C. § 1370; Keating v. F.E.R.C., 927 F.2d 616, 622 (D.C. Cir. 1991) ("The states remain, under the Clean Water Act, the 'prime bulwark in the effort to abate water pollution,' and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law.").

Congress, moreover, charged states with responsibility for establishing local water quality standards "to protect the public health and welfare, enhance the quality of water, and serve the purposes of" the Clean Water Act; such standards must take into consideration the designated uses and value of the water for public water supplies, for propagation of fish and wildlife, and for recreational, agricultural, industrial, navigational, and other purposes. 33 U.S.C. § 1313(c). As this Court has explained, determining the uses and characteristics of local receiving

waters is "a complex matter Congress left to the setting of water quality standards under section 303." Hercules, Inc. v. EPA, 598 F.2d 91, 116 (D.C. Cir. 1978). State water quality standards supplement technology-based controls, "so that numerous point sources, despite individual compliance with [technology-based] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" PUD No. 1, 511 U.S. at 704 (quoting EPA v. California ex rel. State Water Resources Control Bd, 426 U.S. 200, 205, n.12 (1976)).

EPA and the states also share responsibility for enforcing required technology- and water quality-based controls. Section 301(a) of the Act, 33 U.S.C. § 1311(a), provides that "the discharge of any pollutant . . . shall be unlawful" unless, in pertinent part, the discharge is authorized by a National Pollution Discharge Elimination System ("NPDES") permit, as provided by section 402 of the Act. Id. § 1342. NPDES permits, in turn, incorporate technology- and water-quality based controls in the form of effluent limitations. While Congress required EPA to develop the NPDES permit program in the first instance, the Act allows – indeed, encourages – each state to obtain approval to administer the program for waters within its jurisdiction. 33 U.S.C. § 1342(b); EPA v. California ex rel., 426 U.S. at 206-08. In total, 46 states have obtained federal approval, thereby assuming the primary role for permitting point source discharges, as Congress envisioned. 33 U.S.C. § 1342(c).

Consistent with this general statutory structure, section 401 of the Act, 33 U.S.C. § 1341, requires that any applicant for a "[f]ederal license or permit to conduct any activity . . . which may result in a discharge to navigable waters" must first obtain a certification from each state "in which the discharge[s] . . . will originate." 33 U.S.C. § 1341(a). The certifying state may establish, as a condition on the Federal permit or license, "any effluent limitations and other limitations, and monitoring requirements necessary to assure" compliance with both federal and state water quality requirements. 33 U.S.C. § 1341(d). The state may alternatively deny certification, in which case the federal agency may not issue the permit, or waive its right to certify the permit, in which case the federal agency may issue the permit without any changes. Id. § 1341(a)(1).

Any additional condition to a federal license or permit established by states under section 401 "shall become" an enforceable term of the federal license or permit without any direct review by the federal agency issuing the permit. Id. § 1341(d) (emphasis added); American Rivers, Inc. v. Fed. Energy Reg. Comm'n, 129 F.3d 99, 108-12 (2d Cir. 1997) (holding that federal agencies "do[] not possess a roving mandate to decide [whether the] substantive aspects of state-imposed conditions are inconsistent with the terms of § 401" and are bound to incorporate those conditions into their permits); accord Keating, 927 F.2d at 622.

In issuing section 401 certifications for federal permits, states exercise the authority conferred by Congress "to give the states veto power over the grant of federal permit authority for activities potentially affecting a state's water quality," United States v. Marathon Dev. Corp., 867 F.2d 96, 99-100 (1st Cir. 1989). Congress deliberately provided that section 401 "'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'" S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 380 (2006) (quoting S. Rep. No. 414, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3735); see also id. at 386 (quoting 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie)). Thus, "Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval," Keating, 927 F.2d at 622, or to condition section 401 certifications on compliance with more stringent effluent limitations and "any other appropriate requirement of State law," including state water quality standards adopted pursuant to section 303 of the Clean Water Act. PUD No. 1, 511 U.S. at 712-13.

In this way, section 401 allows states to retain a primary role for implementing water quality requirements in their own waters even in circumstances when a federal agency such as EPA is the one issuing a license or permit. See Keating, 927 F.2d at 622 ("One of the primary mechanisms through

which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act."); see also Islander East Pipeline Co. v. McCarthy, 525 F.3d 141, 164 (2d Cir. 2008) (describing states as "deputized regulators of the Clean Water Act" when they issue section 401 certifications for federal permits); Marathon Dev. Corp., 867 F.2d at 102 ("Far from being irrational, [Section 401's] provisions enable a state to assess its need for stronger environmental policies in the context of its own unique environmental problems."). The U.S. Supreme Court has recognized that "[s]tate certifications under § 401 are essential in the [Clean Water Act's] scheme to preserve state authority to address the broad range of pollution." S.D. Warren, 547 U.S. at 386.

B. The Ballast Water Invasive Species Problem.

At issue here is the Vessel General Permit, issued by EPA in 2008 to address previously unregulated discharges of pollutants from certain vessels, including most significantly the discharge of ballast water containing invasive species.[1] Shortly after passage of the Clean Water Act in 1972, EPA adopted a regulation exempting from permitting requirements "[a]ny 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,"

[1] The Clean Water Act defines "pollutant" to include, among other things, "biological materials," 33 U.S.C. § 1362(6).

on the ground that "this type of discharge generally causes little pollution." 38 Fed. Reg. 13,528 (May 22, 1973) (later codified at 40 C.F.R. § 122.3(a)). According to EPA, the agency's early Clean Water Act regulations dealt with other priorities and excluded vessel discharges because, in the agency's view, they "were not important to the overall scheme of things at that time." Northwest Envtl. Advocates v. U.S. EPA, 537 F.3d 1006, 1011-12 (9th Cir. 2008) (citing Craig Vogt, EPA, EPA Pub. Meeting # 12227, Ocean Discharge Criteria (Sept. 12, 2000, 1 p.m.)).

Over the years, however, EPA came to realize that vessel discharges, particularly ballast water, pose a tremendous threat to the ecosystem and the economy. In a 2001 report, EPA concluded that "[t]he ecological damage caused by invasive species can be enormous," threatening not only the Great Lakes and San Francisco Bay, but also "[c]oral reef ecosystems in the Florida Keys, Gulf of Mexico and wider Caribbean" and "bird and wildlife populations" connected to these aquatic environments. EPA, Aquatic Nuisance Species in Ballast Water Discharges 9 (Sept. 10, 2001), http://www.epa.gov/npdes/pubs/ ballast_report _attch5.pdf. EPA's current website explains:

> Invasive species are one of the largest threats to our terrestrial, coastal and freshwater ecosystems, as well as being a major global concern. Invasive species can affect aquatic ecosystems directly or by affecting the land in ways that harm aquatic ecosystems. Invasive species represent the second leading cause

> of species extinction and loss of biodiversity in aquatic environments worldwide. They also result in considerable economic effects through direct economic losses and management/control costs, while dramatically altering ecosystems supporting commercial and recreational activities. Effects on aquatic ecosystems result in decreased native populations, modified water tables, changes in run-off dynamics and fire frequency, among other alterations. These ecological changes in turn impact many recreational and commercial activities dependent on aquatic ecosystems. Common sources of aquatic invasive species introduction include ballast water . . .

EPA, Invasive Species, http://water.epa.gov/type/oceb/habitat/invasive_ species _ index.cfm.

Ecologically, "invasive species can multiply rapidly and quickly take over an ecosystem, threatening native species. Indeed, invasive species 'are a major or contributing cause of declines for almost half the endangered species in the United States.' Once established, invasive species become almost impossible to remove, leading '[s]cientists, industry officials, and land managers [to] recogniz[e] that invasive species are one of the most serious, yet least appreciated, environmental threats of the 21st century.'" Northwest Envtl. Advocates, 537 F.3d at 1013 (citations omitted). Noting that invasive species "often displace a whole suite of native species," EPA describes their impacts as "insidious," and in January 2003, the Director of the U.S. Fish and Wildlife Service called them "the biggest environmental threat to this county . . . it's something everyone needs to take very,

very seriously." EPA, Watershed Academy Web, Invasive Non-Native Species, http://www.epa.gov/owow/ watershed/wacademy/acad2000/invasive.html.

These pollutants also pose a serious threat to public health. As EPA concluded in 2001, "[a]n introduced strain of cholera bacteria, possibly released in the bilge water of a Chinese freighter, caused the deaths of 10,000 people in Latin America in 1991. This cholera strain was then imported into the United States from Latin America in the ballast tanks of ships that anchored in the port of Mobile, Alabama." Northwest Envtl. Advocates, 537 F.3d at 1013. One Great Lakes shipping survey found cholera in 15 percent of ships, enterovirus in 18 percent, *Giardia* in 18 percent, hepatitis A in 9 percent, *Cryptosporidium* in 9 percent, and fecal coliform in a full 88 percent. Knight, I. 1999. Pathogen Survey for Ships in the Great Lakes Trade. Paper presented at the Ninth International Zebra Mussel and Aquatic Nuisance Species Conference, Duluth, MN, April 26-29, 1999.

Finally, invasive species pollution from vessels has taken, and continues to take, an enormous economic toll. For example, zebra and quagga mussels transported from Asia and Europe to the Great Lakes in ballast water tanks "have clogged the water pipes of electric companies and other industries" in the Midwest and Northeast, Northwest Envtl. Advocates, 537 F.3d at 1013, and are rapidly spreading to western states, where they also may cause hundreds of millions of

dollars in impacts. Aquatic Nuisance Species Task Force, Mussel Action Plan for Western U.S. Waters 3-4 (Feb. 2010), available at http://anstaskforce.gov/QZAP/ QZAP_ FINAL_Feb2010.pdf; see also JA_(EPA-HQ-OW-2008-0055-0439) (estimating $6.1 billion per year in industry costs from zebra mussels). Research suggests that the annual cost to the Great Lakes region from invasive species introduced by shipping may be over $200 million annually. Lodge, D. & Finnof, D., Annual Losses to Great Lakes Region by Ship-borne Invasive Species at least $200 Million: Preliminary Results (2008), http://www.glu.org/en/system/files/ lodge_factsheet.pdf. The Great Lakes' $ 7 billion fishing industry is "at extreme risk" from invasive species. Great Lakes Comm'n, Establishing Strong Protections Against Aquatic Invasive Species (2010), http://www.glc.org/restore/ 2010/AIS GLRI priority fact sheet-2010-FINAL.pdf (suggesting that "[m]ore than 180 non-native aquatic species have become established in the Great Lakes, causing economic losses estimated at $5.7 billion annually").

Ballast water tanks are the principal source these destructive aquatic invasive species pollutants:

> All mainland coasts of the United States - East, West, Gulf, and Great Lakes, as well as the coastal waters of Alaska, Hawaii, and the Pacific Islands - have felt the effects of successful aquatic species invasions. Over two-thirds of recent non-native species introductions in marine and coastal areas are likely due to ship-borne vectors, and ballast water transport and discharge is the most universal and ubiquitous of these.

EPA, Invasive Species, http://water.epa.gov/type/oceb/habitat/invasive_species_ index.cfm. "More than 10,000 marine species each day hitch rides around the globe in the ballast water of cargo ships," and more than 21 billion gallons of ballast water are released into the United States each year. Northwest Envtl. Advocates, 537 F.3d at 1013.

C. The Vessel General Permit.

In January 1999, Intervenor Northwest Environmental Advocates and other organizations petitioned EPA to repeal the regulation exempting vessel discharges from the NPDES program, on the grounds that the exemption was ultra vires. Following initial litigation over EPA's delay in responding to that petition, the agency ultimately took final action in 2003, denying the petition in its entirety and declining to regulate vessel discharges. Northwest Envtl. Advocates, 537 F.3d at 1014; EPA, Decision on Petition for Rulemaking to Repeal 40 C.F.R. 122.3(a), http://www.epa.gov/npdes/pubs/ballast_report_ petition_response.pdf. Three months later, a subset of the original petitioners filed suit in district court challenging that denial. Id.

In 2005, the district court issued summary judgment in plaintiffs' favor, finding that under the "clear language" of the Clean Water Act, Congress required non-military vessels to obtain a permit "before discharging pollutants into the

nation's navigable waters" – just like other "point sources" of pollution. Northwest Envtl. Advocates v. U.S. EPA, No. 03-05760, 2005 WL 756614, at *9 (N.D. Cal. Mar. 30, 2005). After further proceedings on remedy, the court remanded the matter to EPA for further consideration and ordered the illegal vessel exemption vacated within two years, thereby allowing EPA time to address its replacement. Northwest Envtl. Advocates v. U.S. EPA, No. 03-05760, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006). In July 2008, the Ninth Circuit upheld the district court's orders in their entirety. Northwest Envtl. Advocates, 537 F.3d at 1027.

While EPA defended its vessel discharge exemption in court, a number of states stepped up to fill the regulatory void, consistent with their Clean Water Act obligations and their own state statutory authority. For instance, in 2005, Michigan enacted legislation requiring that, effective January 1, 2007, all oceangoing vessels obtain a ballast water control permit from the Michigan Department of Environmental Quality to engage in port operations within the state. MCL 324.3112(6). Under the statute, the Department may issue a permit only if the applicant can demonstrate that its vessel (1) "will not discharge aquatic nuisance species" or (2) "will utilize environmentally sound technology and methods, as determined by the Department, that can be used to prevent the discharge of aquatic nuisance species" in connection with any discharge of "ballast water or other waste

or waste effluent." Id. To implement this statute, the Department issued a general permit that pre-approves use of four different kinds of ballast water treatment technology and allows vessel operators to apply for an individual permit if they want to use different technology. MDEQ Ballast Water Control General Permit, No. MIG140000 at 14, http://www.michigan.gov/documents/deq/wb-npdes-generalpermit-MIG140000_247256_7.pdf.[2]

In 2006, California adopted legislation requiring its State Lands Commission to set ballast water performance standards by January 1, 2008. The resulting regulations establish interim and final numerical standards for allowable concentrations of invasive species in ballast water and sampling protocols for ballast water discharges. See California State Lands Commission, Marine Invasive Species Program, Laws and Regulations, Article 4.7 Performance Standards, http://www.slc.ca.gov/spec_pub/mfd/ballast_water/Laws_Regulations.html. The Lands Commission has, moreover, concluded that "[m]ultiple systems have demonstrated that they have the potential to meet California's performance standards," and the technology continues to develop rapidly. Cal. State Lands Comm'n, 2011 Biennial Report on the California Marine Invasive Species

[2] The constitutionality of Michigan's statute was unsuccessfully challenged by shipping interests. Fednav v. Chester, 547 F.3d 607, 624 (6th Cir. 2008).

Program iv (Jan. 2011), http://www.slc.ca.gov/Spec_Pub/MFD/Ballast_Water/Documents/2011_BiennialRpt_Final.pdf.

Responding to the court's invalidation of the vessel discharge exemption in Northwest Environmental Advocates, EPA published a draft General Permit for Discharges Incidental to the Normal Operation of a Vessel in the Federal Register for public comment, 73 Fed. Reg. 34,296 (June 17, 2008), and issued the final Vessel General Permit six months later. 73 Fed. Reg. 79,473 (Dec. 29, 2008).[3]

The Vessel General Permit does not adopt nationwide numerical effluent limitations or narrative performance standards for ballast water discharges, the vessel pollution of greatest concern. Instead, it merely incorporates requirements from existing Coast Guard and St. Lawrence Seaway Development Authority regulations that oceangoing vessels conduct a mid-ocean ballast water exchange or, if they declare No Ballast On Board status, saltwater flushing of their ballast tanks. JA_(EPA-HQ-OW-2008-005-0436) (VGP § 2.2.3); see also 33 C.F.R. §§ 151.2025(b)(1) & (2), 151.2035 (ballast water exchange requirements); id. pt. 401 (saltwater flushing requirements). These requirements, which represent the regulatory status quo from before EPA issued the permit, contain significant

[3] EPA issued the Vessel General Permit pursuant to its authority under section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), as well as its regulation governing issuance of general permits for discharges not regulated by a delegated state program. 40 C.F.R. § 122.28.

loopholes for safety and other considerations, see, e.g., 33 C.F.R.. § 151.1514, do not apply to discharges of ballast water from vessels that operate solely within the Great Lakes (including many of Lake Carriers' members), and have proven largely ineffective in stopping the spread of invasive species. An EPA study of ballast water exchange found that "a 95 percent exchange of the original water resulted in flushing of only 25 to 90 percent of the organisms studied." EPA, Aquatic Nuisance Species in Ballast Water Discharges 9 (Sept. 10, 2001), http://www.epa.gov/npdes/pubs/ballast_report_attch5.pdf. Further, EPA found that "[w]here ballast water is taken up and discharged in saltwater ports, it can be expected that mid-ocean ballast water exchange will be even less successful." Id.[4]

[4] The EPA study identified a number of "[d]rawbacks to the mid-ocean exchange method of ballast water management," including:

- Many ships are not structurally designed to safely allow ballast water exchange at sea;
- Exchange is sometimes impossible in rough weather due to safety concerns;
- Some organisms can survive under a very wide range of salinity conditions;
- Some ports have salinities very similar to mid-ocean salinities;
- Despite flushing of the ballast tanks with open ocean water, "pockets" of unexchanged water (and entrained organisms) may still remain in nooks and crannies of the ballast tanks;
- Ballast water tanks often contain a layer of sediment, in which organisms can escape being flushed out in a ballast water exchange, to reinocculate the exchanged ballast water;
- The method is unusable by the many ships that travel coastal or inland waterways and never reach the high seas; and

Nor is saltwater flushing any more effective for No Ballast On Board vessels. A 2007 study by the National Oceanic and Atmospheric Association found that saltwater flushing also has highly variable effectiveness, depending on the age and salinity tolerance of the organisms in the ballast tank. Gregory M. Ruiz & David F. Reid, Current State of Understanding about the Effectiveness of Ballast Water Exchange (BWE) in Reducing Aquatic Nonindigenous Species (ANS) Introductions to the Great Lakes Basin and Chesapeake Bay, USA (2007), http://permanent.access.gpo.gov/lps93114/tm-142.pdf.

Most important, the 2008 Vessel General Permit does not attempt to define, let alone quantify, what effluent limitations might be necessary to ensure compliance with state and local water quality standards, as the Clean Water Act requires. See 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1), and discussion supra. Rather, the permit includes only a general statement that "discharge[s] must be controlled as necessary to meet applicable water quality standards in the receiving waterbody or another waterbody impacted by . . . discharges." JA_(EPA-HQ-OW-2008-0055-0436) (VGP § 2.3.1). To protect local water quality and enforce their existing state vessel discharge standards, several states included more specific

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- If mid-ocean exchange does not lead to significant shifts in salinity of ballast water, verification that exchange occurred can be problematic.

Id.

discharge conditions in their section 401 certifications. The state section 401 conditions are the only numeric limitations on invasive species dischargescontained in the Vessel General Permit – and the only controls of any kind that are imposed on vessels operating solely in the Great Lakes (such as many of Lake Carriers' members).

In two separate petitions for review, previously consolidated with Lake Carriers' petition here, Intervenors challenged the Vessel General Permit for failure to incorporate adequate technology-based or water quality-based effluent limitations on vessels' discharges of ballast water containing invasive species. EPA has since convened two scientific panels to evaluate these issues further, and Intervenors' petitions are being held in abeyance by court order pending finalization of a likely settlement with EPA.

III. SUMMARY OF ARGUMENT

Lake Carriers' arguments are premised on a fundamental misunderstanding of section 401 and the federal-state partnership embedded in the Clean Water Act. In essence, Lake Carriers seek to compel EPA to review and override the state section 401 conditions incorporated by operation of law into the Vessel General Permit. Because EPA lacks the statutory authority to ignore or change section 401 conditions imposed by states, it makes no sense to require that the federal agency undertake

additional administrative review of those conditions. Lake Carriers' concerns about individual state certification conditions are properly addressed to the state agencies that adopted those conditions through state notice and comment processes, as required by section 401. To the extent that Lake Carriers were unhappy with the outcome of any state's section 401 certification process, administrative and judicial remedies are available under that state's law. Indeed, the Lake Carriers and other shipping interests have already pursued those remedies, sometimes successfully, in multiple states. Because EPA has no statutory authority to alter or ignore the section 401 conditions adopted by individual states, Lake Carriers' petition should be denied.

IV. STANDING

Intervenors are each non-profit membership organizations that have members who live or recreate in areas that have been and continue to be harmed ecologically and economically by invasive species spread through vessels' ballast water discharges. See Addendum (attaching declarations by members and representatives of each Intervenor organization). These organizations have an abiding interest in protection of state waters in these areas from further degradation by invasive species and other vessel pollutants, and they have advocated for enforcement of state water quality

standards, including those standards incorporated into the section 401 certifications for the Vessel General Permit. Id. Intervenors' interest in this case is to ensure that these state-created restrictions, which include the only numeric limitations on invasive species in the Vessel General Permit, and the only limitations of any kind on invasive species discharged by vessels that operate solely in the Great Lakes, remain in place as the Clean Water Act requires. That interest establishes Intervenors' standing under Article III of the Constitution, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), and falls squarely within the "zone of interests" protected by the Clean Water Act. See Fed. Election Comm'n v. Akins, 524 U.S. 11, 20 (1998).

V. ARGUMENT

A. Because EPA Has Neither the Duty Nor the Ability to Alter the State's Section 401 Conditions, It Need Not Provide Separate Federal Notice and Opportunity to Comment on those Conditions.

Lake Carriers' argument that EPA unlawfully failed to provide its own notice and an opportunity for comment on state section 401 certification conditions incorporated into the Vessel General Permit is fundamentally flawed. The language, structure, and legislative history of the Clean Water Act make clear that the development of section 401 certifications is a state action, not a federal action.

The notice and comment requirements of the Administrative Procedure Act do not, therefore, apply to the certifications.

As discussed above, the section 401 certification process is a state law process. It requires that states "establish procedures for public notice in the case of all applications for certification by it." 33 U.S.C. § 1341(a)(1). EPA regulations further specify that "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State" and shall not occur through EPA's own administrative process. 40 C.F.R. § 124.55(e).

As this Court has noted, "the decision whether to issue a section 401 certification generally turns on questions of state law. [The federal agency's] role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless." City of Tacoma v. F.E.R.C., 460 F.3d 53, 67 (D.C. Cir. 2006). This statutory structure ensures that that "[f]ederal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414, at 69 (1971). Consistent with this interpretation, EPA has long held that it has a "duty . . . to defer to considerations of State law" and thus has no authority to "relax[] any requirements, limitations, or conditions imposed by the State law" as expressed through state section 401 certifications. In re Dominion Energy Brayton Point, L.L.C., NPDES

Appeal 03-12, 2006 WL 3361084, at *174-204 (E.A.B. Feb. 1, 2006);[5] U.S. EPA, Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes: Interim Handbook 10, 22 (2010), http://www.epa.gov/owow/wetlands/pdf/CWA_401_Handbook_2010_Interim.pdf.

Courts have never required federal permitting agencies to provide a second round of notice and comment, beyond their normal administrative process, before enforcing state section 401 certification conditions. To the contrary, in Ackels v. EPA, 7 F.3d 862, 867 (9th Cir. 1993), the Ninth Circuit rejected the argument that Lake Carriers advance here. In that case, Alaskan gold miners challenged NPDES permits issued by EPA[6] on the ground, among others, that EPA failed to provide another opportunity for comment after the State of Alaska added a new limitation that had not been included in the draft permit. Id. at 867. In rejecting the miners' argument, the Ninth Circuit explained that "in this case the new conditions were added by the state, not EPA. EPA was required to forward the entire permit to the state, not merely the modified conditions, and once the state added the additional

[5] The United States Environmental Appeals Board ("EAB") is EPA's supreme adjudicative body. See 57 Fed. Reg. 5320 (Feb. 13, 1992). EAB decisions represent the position of the EPA Administrator with respect to the matters brought before it. See Tennessee Valley Auth. v. U.S. E.P.A., 278 F.3d 1184, 1198–99 (11th Cir. 2002) (finding EAB decision to be "final agency action").

[6] At the time, Alaska did not have authority to issue NPDES permits in lieu of EPA, but could still include section 401 conditions on federal permits to protect local water quality.

conditions, EPA was required to incorporate those conditions into the final permit and lacked authority to reject them. Petitioners' only recourse is to challenge the state certification in state judicial proceedings." Id. (citations omitted).

More recently, the Ninth Circuit, in a case on which Lake Carriers heavily rely, reiterated that "EPA does not act as a reviewing agency for state certification, and the proper forum for review of state certification is through applicable state procedures." NRDC v. EPA, 279 F.3d 1180, 1188 (9th Cir. 2002) (citing 40 C.F.R. § 124.55(e)). This Court's own precedent accords with Ninth Circuit case law. See, e.g., Keating, 927 F.2d at 622 (recognizing authority that disputes over "the validity of a state's decision to grant or deny a request for certification . . . are properly left to the states themselves") (citing cases from First and Third Circuits and district courts).

Lake Carriers' reliance on NRDC v. EPA is thus misguided. As that court explained, "it is not the state certification that is at issue here; rather, it is the EPA's independent statutory obligation under the [Clean Water Act] to ensure compliance with water quality standards, see 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(1), and its power to impose additional permit conditions necessary to meet that end." 279 F.3d at 1188 (emphasis added). In particular, NRDC challenged an EPA permit on the ground that EPA made changes between the draft and final permit that violated EPA's own obligations under federal law, irrespective of any

state section 401 certification, to ensure that permits it issues comply with state water quality standards. Id. at 1188 (citations omitted). The court agreed, holding that where EPA itself made a substantive change that arguably violated state water quality standards, it was required to provide an opportunity for additional public comment on that change. Id. Importantly, NRDC v. EPA affirms the reasoning in Ackels that a state certification, by contrast, is subject only to state administrative processes, not to federal notice and comment. 279 F.3d at 1188.

Here, EPA fully satisfied its public notice and comment obligations in developing the federal NPDES permit. EPA published a draft Vessel General Permit for review and comment in June 2008. JA_(EPA-HQ-OW-2008-0055-0437) (73 Fed. Reg. 34,296 (June 17, 2008)). Lake Carriers took advantage of that opportunity for comment. JA_(EPA-HQ-OW-2008-0055-0362.1). No additional federal process was required by the Administrative Procedure Act.

During the same timeframe, EPA provided the states with an opportunity to certify the permit under section 401. See, e.g., JA_(EPA-HQ-OW-2008-0055-0707 (Region 4), -0696 (Region 3), -0677 (Region 6)). Each State that did so provided notice and opportunity through state administrative mechanisms to comment on its certification. Lake Carriers and other shipping interests not only submitted comments on a number of those certifications, they also sought judicial review of several States' certifications. See EPA Br. at 23 n.19 (noting that

shipping interests pursued unsuccessful litigation in New York and successful litigation in Pennsylvania, and also persuaded several other States to delete conditions from their section 401 certifications); see also Port of Oswego Auth. v. Grannis, 897 N.Y.S.2d 736, 738-39 (App. Div. 2010) (rejecting claims by shipping and port interests, including Lake Carriers, that New York's 401 certification for the Vessel General Permit was ultra vires and arbitrary and capricious).

Under the statutory structure created by Congress, no amount of public comment could empower EPA to change the section 401 conditions that resulted from these state processes. Because EPA has no ability to ignore, reconcile, or adopt less stringent state section 401 certification conditions for the Vessel General Permit, "a new round of notice and comment would not provide commentators with . . . . criticisms which the agency might find convincing." Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991). Thus, the Court need not consider Petitioners' "logical outgrowth" argument, which does not apply to the facts of this case.

In short, state section 401 certification conditions are the outcome of state administrative processes and not part of the federal rulemaking process under the Administrative Procedure Act. EPA thus has no obligation to provide additional notice and comment on these conditions and this Court is without jurisdiction to

review the substance of those state processes or to require that EPA interfere with them.

B. Section 401 Plainly Provides States with Authority to Certify the Vessel General Permit, and the EPA Administrator May Not Usurp This Authority.

Section 401 grants states "in which the discharge[s] . . . will originate" the right to certify any "Federal license or permit to conduct activity . . . which may result in a discharge." 33 U.S.C. § 1341(a). The text of this provision plainly authorizes states to certify the Vessel General Permit. Lake Carriers argues, however, that because vessels are "mobile point sources" that may discharge in multiple states, "there is no single state in which the discharge originates" and therefore, no statutory authority for any State or entity other than the EPA itself to certify the Vessel General Permit under section 401. Pet. Br. At 37-41. In effect, they ask the Court to read out of the Clean Water Act the very state veto authority that Congress expressly sought to preserve in section 401. This novel argument finds no support in the statute.[7]

[7] Moreover, it makes no sense as a practical matter. If EPA had elected not to issue a nationwide general permit for vessel discharges, as it was entitled to do, each and every one of the 46 states with federally approved NPDES permitting programs could have required a separate state discharge permit, complete with its own distinct performance standards and effluent limitations. The fact that EPA has accommodated the shipping industry by issuing a single nationwide permit and states have cooperated with this approach by exercising their section 401 certification authority should be celebrated as a cost-effective means of addressing

Under the statute, a state has authority to issue section 401 certifications where the "Governor of a State, by statute, or by other governmental act, [designates the person or agency] to certify compliance with applicable water quality standards." 40 C.F.R. § 121.1. Once a state has this authority, it may certify "any activity . . . which may result in a discharge to navigable waters," and an applicant "shall provide the licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1); PUD No. 1, 511 U.S. at 712; see also S.D. Warren, 547 U.S. at 380 (asserting that section 401 "requir[es] state approval any time a federally licensed activity 'may' result in a discharge" affecting the state's water quality). Thus, any federal permit to conduct an activity that may result in a discharge to a state's waters triggers that state's right to subject the activity to a specific set of state water quality standards. There is nothing in the statute to support Lake Carriers' argument that states lose their authority to certify activities that may result in a discharge into their waters simply because the same point source may also discharge into another state's waters. Instead, if a federal permit authorizes an activity that may result in discharges in multiple states, each state in which a discharge may occur can issue 401 certifications conditioning the permitted activity. Indeed, the fact that Congress

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mobile sources, not bemoaned because some states' certifications require additional measures to protect water quality standards.

used the common articles "a" and "the" in referring to certifying states in no way suggests that Congress intended to limit certification to one state.

Lake Carriers similarly presents no authority to support its claim that the EPA may usurp the States' authority by doing the 401 certification itself. Once the state government has created an adequate certifying body, the federal government may not preclude the state from adopting pollution controls. Only if states forego their right to regulate their own waters does the Clean Water Act direct EPA to act in their place. Specifically, if a state's laws provide no mechanism for issuing a section 401 certification, and thus the state "has no authority" to provide the certification, EPA must do so instead. 40 C.F.R. § 121.21. Contrary to the Lake Carriers' tortured reading of the statute, this language has nothing to do with discharges in multiple states and does not apply to the case at bar.

Finally, the Clean Water Act's plain language does not support the Lake Carriers' argument that EPA should have bypassed the state certification process and invoked section 401(a)(2). Section 401(a)(2) is reserved for situations in which a discharge in an upstream state may negatively affect waters in a downstream state, where no discharge – and thus no section 401 certification – occurs. Congress recognized that such interstate pollution could cause tension between states, and so provided this procedure to allow downstream states to comment on the discharge's potential effects. In contrast to this upstream-

downstream situation, the Vessel General Permit state certification requirements apply to discharges actually occurring in the certifying state. EPA has no statutory authority under those circumstances to supersede state certification rights.

C. EPA Satisfied Its Procedural Obligations under the Administrative Procedure Act by Fully Explaining Its Obligation to Incorporate State Section 401 Conditions in Response to Public Comments.

Lake Carriers' argument that EPA did not adequately consider and respond to industry concerns about multiple state requirements also fails, and for much the same reason. As EPA explained in its responses to comments on the draft general permit, a federal agency has no ability, under the structure of the Clean Water Act, to disregard discharge requirements imposed by individual States through the section 401 certification process; as discussed at length above, those state requirements are incorporated by law into the federal permit. EPA thus satisfied its procedural obligations in issuing the Vessel General Permit.

Judicial review under the arbitrary and capricious standard "is deferential," Recording Indus. Ass'n of America, Inc. v. Librarian of Congress, 608 F.3d 861, 865 (D.C. Cir. 2010), as a "reviewing court may not set aside an agency rule that is rational," Motor Vehicles Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 42 (1983). The courts will not vacate an agency decision as irrational unless it "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem,

offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Nat'l Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotations and citation omitted). In evaluating the challenged agency action, courts must not "substitute [their] judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009) (internal quotations and citation omitted).

EPA's response to comments on the Vessel General Permit was entirely reasonable. As discussed above, a federal agency "has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of state law." Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1065 (1st Cir. 1982) (internal quotations and citation omitted); see also supra, sections II.A, V.A. In light of section 401's mandatory language, EPA's decision to incorporate state certifications into the Vessel General Permit was not arbitrary and capricious; on the contrary, it was legally required, which surely meets the rational basis test.

Moreover, EPA's response to comments demonstrates that it adequately considered all aspects of the "problems" articulated by Lake Carriers, including the

Lake Carriers' concerns about complying with multiple state requirements and the bearing of maritime law on the Vessel General Permit. Adequate consideration of these concerns does not require the agency to choose a certain outcome. Rather, agencies' duties "are essentially procedural . . . the only role for a court is to insure that the agency has considered the [factor]." Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980). In evaluating whether an agency considered a given issue, courts do not require lengthy and detailed explanations; they ask only that an "agency's response to public comments . . . 'enable [them] to see what major issues of policy were ventilated . . . and why the agency reacted to [the comments] as it did.'" City of Portland v. EPA, 507 F.3d 706, 714 (D.C. Cir. 2007) (quoting Auto Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968)). Moreover, agencies need only consider and respond to "significant" comments – that is, comments that, "if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." Id. (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)) (internal quotations omitted).

EPA thoroughly responded to each and every comment that raised section 401 certification issues. Petitioners themselves concede that EPA explained in numerous responses to comments that the Clean Water Act does not permit a federal agency to review state certification conditions and, as a result, EPA could

not override state certification conditions under any circumstances. Pet. Br. at 48 (citing JA_(EPA-HQ-OW-2008-0055-0438) (EPA Response to Comments §§ 14-1 to 14-3, 14-8 to 14-13, 14-15 to 14-18, 14-25 to 14-26, 14-30 to 14-32, 14-33, 15-2)). For example, EPA responded:

> "Pursuant to Section 401 of the CWA, EPA may not issue a permit until a certification is granted or waived by a state." Id. § 14-2;
>
> "it is well-established that a Federal agency does not have the ability to reject conditions in a CWA 401 certification that it finds to be ultra vires." Id. § 14-3;
>
> "CWA § 510 expressly preserves State authority to issue more stringent requirements than the Federal government and, under CWA § 401, federally issued-NPDES permits are subject to certification by the states as to compliance with state water quality standards and other requirements of state law." Id. § 14-5;
>
> "EPA does not have 'the discretion to . . . modify the Section 401 certification program.'" Id. § 14-13.

These explanations meet the "adequately considered" standard, as they demonstrate to the public and this Court that EPA acted pursuant to a statutory mandate and that it respected the states' role under the Clean Water Act.

EPA also adequately considered whether maritime law preemption applied in this permitting context. Id. § 14-8 to 14-11. In response to a comment raising maritime law concerns, the agency correctly clarified that maritime law preemption did not apply because the Clean Water Act "expressly grants States, Tribes, and Territories the right to add conditions to federally issued NPDES permits as

necessary to assure compliance with state water quality standards . . . ." Id. § 14-2 (emphasis added). Because the Vessel General Permit is a federal permit which incorporates certain state conditions, not a state permit, there is no plausible preemption issue. Indeed, maritime preemption only applies where "state laws 'interfere with, or are contrary to the laws of Congress . . . .'" Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (quoting Gibbons v. Ogden, 9 Wheat 1, 211 (1824)) (emphasis added). The doctrine does not apply to federal permits promulgated pursuant to federal law.

D. The Vessel General Permit Is Not Unconstitutional.

1. The Permit Does Not Violate the Dormant Commerce Clause Because It Is a Federal Permit, Not a State Action.

Like the notice and comment argument, Lake Carriers' Dormant Commerce Clause claim fails on federalism grounds. There is no dispute here that the Vessel General Permit is a federal permit, notwithstanding its incorporation of certain state section 401 conditions. The Dormant Commerce Clause, however, applies exclusively to state actions that hinder interstate commerce. See, e.g., Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38 (2008) ("The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (internal quotations

and citation omitted); Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005) (explaining that the Dormant Commerce Clause "creates an area of trade free from interference by the States") (internal quotations and citation omitted).

The inclusion of state certification conditions does not diminish the Vessel General Permit's federal status. By including section 401 in the bill that became the Clean Water Act, sponsor Senator Edmund Muskie noted that "[a]ll we ask is that activities that threaten to pollute the environment be subject to the examination of the State . . . before the Federal license or permit be granted." 117 Cong. Rec. 17,424 (1971). The States' power is simply a federally-granted veto power over federal action that would pollute a State's waters. See Marathon Development Corp., 867 F.2d at 99-100. Once the States exercise their veto power, potentially inserting conditions into the federal permit, those state conditions are in essence "federalized" and, as a result, are no longer state laws subject to a Commerce Clause or preemption challenge. See Islander East Pipeline, 525 F.3d at 164.

This Court has previously rejected an attempt to insert the Commerce Clause as a bar to States acting on their congressionally sanctioned environmental authority. In American Trucking Ass'n, Inc. v. EPA, 600 F.3d 624, 626-28 (D.C. Cir. 2010), the trucking industry challenged California's in-use non-road engine regulations, which, much like the state certification requirements that apply

only to ships operating in a given State's waters, applied to all trucks operating in California. The challenge was based in part on a claim that California's regulation violated the Dormant Commerce Clause because it applied to vehicles that originated in other States but traveled in or through California. The Court rejected this argument, reasoning that the applicable federal law permitted California to pass such regulations and severely limited EPA's power to review them. Id. at 628 ("ATA is seeking 'improperly to engraft a type of constitutional Commerce Clause analysis onto EPA's Section 7543(e) waiver decisions that is neither present in nor authorized by the statute.") (citation omitted). As the Court explained, if industry wants to challenge the federal statute that guided EPA's and California's actions, its "argument is best directed to Congress because the problem it identifies is inherent in the congressional decision to give California the primary role in regulating certain mobile pollution sources." Id.

The same logic applies here. Although state section 401 conditions may impact interstate commerce in some way, it is Congress's prerogative to allow such an encumbrance. Where Congress "has struck the [federal-state] balance it deems appropriate, the courts are no longer needed to prevent states from burdening commerce . . . ." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154-55 (1982) (declining judicial review of a Native American Tribe's tax challenged under the

Dormant Commerce Clause because the challenged tribal tax "was enacted in accordance with this congressional scheme").

2. The Permit Does Not Violate Substantive Due Process.

Finally, Lake Carriers allege a violation of "due process" without serious analysis. Pet. Br. at 49-50. That argument also fails.

The Due Process Clause of the Federal Constitution protects individuals from governmental deprivations of "life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. When government action does not implicate a fundamental right, it will be found to violate substantive due process only when it is an "exercise of power without any reasonable justification in the service of a legitimate governmental objective." County of Sacramento v. Lewis, 523 U.S. 833, 845-47 (1998). Only "an act of 'grave unfairness,' such as 'a deliberate flouting of the law that trammels significant personal or property rights,' may violate" substantive due process. Am. Fed'n of Gov't Employees, AFL-CIO, Local 446 v. Nicholson, 475 F.3d 341, 353 (D.C. Cir. 2007) (quoting Tri County Indus. Inc. v. District of Columbia, 104 F.3d 455, 459 (D.C. Cir. 1997). Courts have not found substantive due process violations even where an agency violated applicable law. Id.

The Vessel General Permit easily satisfies this highly deferential standard of review. As discussed at length above, EPA followed section 401 and its own

regulations in incorporating state certifications into the permit. Moreover, the permit itself does not, as Lake Carriers suggest, force states to comply with incompatible requirements. Lake Carriers speculate that the Michigan and New York certification requirements could prove impossible to comply with simultaneously, because Michigan's certification limits the amount of chlorite that ships can discharge into its waters while New York sets relatively strict limits on the concentration of living organisms that vessel operating in its waters may discharge. Lake Carriers assert, without any supporting evidence, that in order to meet New York's low organism concentration requirements, a ship might need to exceed Michigan's chlorite discharge limitations.

This argument ignores the fact that there are many ways to reduce live organism concentrations in ballast water; chlorine-based treatment is just one possible avenue. Many companies have developed and continue to improve on ballast water treatment technologies.[8] Moreover, Lake Carriers themselves acknowledge that both New York and Michigan law allow ship owners to choose among multiple technology options for controlling invasive species in ballast water. Pet. Br. at 21-22. Although Michigan (unlike New York) requires the specific technology that a vessel owner chooses be approved for use in its waters,

[8] New York and Michigan's Amicus Brief cites to Lloyd's Register, *available at* www.lr.org/Images/ BWT0210_tcm155-175072.pdf, for a description of the many ballast water treatment systems that are available.

Michigan (contrary to Lake Carriers' assertions) does not limit vessel owners' choices. Chlorine-based treatment is only one of four treatment methods that the Michigan Department of Environmental Quality has pre-approved for use to comply with Michigan law, and (although Lake Carriers fail to mention this) vessels owners may also apply for an individual permit to use a different treatment method, so long as that treatment method will meet the State's water quality criteria. JA_(EPA-HQ-OW-2008-0055-0436) (VGP § 6.15) (incorporating MDEQ Ballast Water Control General Permit, No. MIG140000 at 14, http://www.michigan.gov/documents/deq/wb-npdes-generalpermit-IG140000_247256_7.pdf)).

To the extent that a vessel owner who wishes to discharge ballast water in Michigan is concerned about meeting Michigan's chlorite discharge limitations, he or she can avoid this potential problem (and still meet New York's concentration-based invasive species standards when operating in New York waters) by using a different method of treatment. Even if a vessel owner chooses to install a chlorine-based treatment system to comply with New York standards, Lake Carriers present no evidence (and Intervenors are aware of none) that such a system would necessarily violate Michigan law if also used in Michigan.

VI. CONCLUSION

For the foregoing reasons, Lake Carriers' Petition for Review should be denied.

Dated: March 1, 2011 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 8,749 words, exclusive of tables, certificates, and cover page, as determined by the word processor program on which this document was produced.

Dated: March 1, 2011

/s/ Deborah Sivas
Deborah A. Sivas

ADDENDUM

DECLARATION OF NINA BELL

I, Nina Bell, hereby declare:

1. I am the Executive Director of Northwest Environmental Advocates (NWEA), an organization founded in 1969 and incorporated in 1981. I have worked with NWEA since 1977. I make this declaration to demonstrate that NWEA has standing to intervene and to show that NWEA's members, including myself, have a legally cognizable interest in the regulation of vessel discharges pursuant to the EPA's Vessel General Permit.

2. NWEA's general purpose or mission is to advocate on behalf of, educate, protect, and restore the natural environment, with the particular focus on issues involving the Clean Water Act (CWA). Although NWEA's focus is mainly on issues in Oregon and Washington, we also do a lot of national policy work because we believe it crucial to success at the regional and local level.

3. Since 1988, NWEA has had a particular focus on protecting and restoring the Columbia River, its estuary and its tributaries. For example, NWEA has worked to improve the water quality of the Columbia and Willamette Rivers, advocated for habitat restoration in the Columbia River estuary, and worked to ensure that various dredging projects in the Columbia and Willamette Rivers will not harm the river ecosystems and the species, including threatened and endangered salmon, that they support. In the past, NWEA has had educational programs that focused specifically on the Lower Columbia and Willamette Rivers that included the publication of educational maps (Columbia River: Troubled Waters, Portland/Vancouver: Toxic Waters), boat tours, and riverside clean-up activities.

4. NWEA attempts to achieve its goals primarily through litigation, advocacy, and education. As such, its activities include working with government agencies by participating in

notice and comment proceedings, advisory committees, mediation, and other public participation processes. In addition, NWEA works to involve the public in government decisions that affect the quality of the Columbia River ecosystem. The organization also spent years advocating for National Estuary Program designation and co-chairing the Bi-State Lower Columbia River Water Quality Study, as well as working to prevent new pollution sources to the river. Many of the water quality issues I work on involve salmonids, specifically including temperature and toxic pollutants.

5. I am aware of the problems caused by unregulated ballast water discharges and am very concerned about the effects these discharges have and will have on environmental health. I believe that the EPA's Vessel General Permit is a crucial step towards remedying the harms associated with ballast water discharge.

6. I live in Portland, Oregon, near the Columbia and Willamette Rivers and regularly recreate on or near both of them. I personally recreate by hiking along the Columbia River and near the Columbia River estuary, where I observe wildlife and vegetation. I also occasionally boat on the Columbia River. My interest in the recovery and health of Pacific Northwest salmon connects me with the river frequently. I derive a significant amount of scientific, aesthetic, and spiritual benefit from the health of the Columbia.

7. I have a particularly strong attachment to the estuary, which I have been working to improve and restore since 1988. I have long believed that the estuary is one of the most important habitats of the Columbia River basin and that a thriving estuary is one important key to salmon recovery and critical to the overall improvement in the health of the Columbia River.

8. Living in Portland, I have a daily connection to the Willamette River, which flows through the heart of our city. I regularly drive over bridges that span the Willamette River when

I travel from my house to the west side of Portland. I occasionally ride my bike along the Willamette River to observe fish and wildlife in and along the Willamette River.

9. I also occasionally consume fish that inhabit the Columbia River. I eat wild Columbia River salmon occasionally, as well as Dungeness crabs that are caught off the coast of Oregon near the Columbia River estuary. Although I enjoy these fish, I limit my consumption of them due in part to my concern for the species' viability and in part to my concerns that the fish contain unacceptable levels of heavy metals and other pollutants.

10. I am very concerned about the effects of unregulated ballast water on the Columbia. The health of the river, and especially the recovery and future of the Pacific Northwest salmon, has been in large part my life's passion. I am concerned that ballast water discharges could irrevocably damage the integrity of the Columbia River ecosystem, and pose risks to the very survival of the salmon that inhabit this ecosystem.

11. I am concerned about several non-native invasive species that have been introduced from ships' ballast water discharges and that are either already in the Columbia River or threaten to enter the ecosystem. For example, mitten crabs have been sighted in the Columbia. Mitten crabs are considered voracious predators and are known to feed on native salmon and sturgeon eggs. They were likely introduced through ballast water discharges and could have dramatic negative effects on the salmon of the Columbia if they increase in number. Mitten crabs also can plug up hydrological distribution systems, as they have in California, and could clog irrigation canals and fish screens, which, in turn, could further stress the already precarious migration of the Columbia Basin's salmon to and from the ocean.

12. I am even more concerned about the Asian copepods that have recently invaded the Columbia-Snake River system. Scientists believe that ballast water is a major source of these

copepods, having traveled from the San Francisco estuary to Puget Sound and then to the Columbia River as well as in ballast water directly from Asian ports. I am extremely concerned about these species because they have the ability to completely change foodweb dynamics upon which threatened and endangered salmon depend.

13. I am also concerned about how the national problem of invasive species will affect my local environment. For example, I fear the introduction of Zebra mussels, another invasive species already introduced through ballast water in the Great Lakes, which have clogged municipal water supplies and dams across the Midwest. I am also concerned that the mussels could directly harm the salmon by scraping off their scales. Similarly, I am concerned about the introduction of invasive species from San Francisco Bay, both through ballast water discharges and by coastal migration of species that were introduced into California's waters via ballast water. I know, for example, that the European green crab, which was introduced into California through ballast water, has now made its way up the Oregon coast. This crab is, like the mitten crab, is a voracious predator that preys on lower food chain species and can outcompete salmon and Dungeness crab for food.

14. I think that Columbia River fisheries are highly vulnerable to further alteration of the already degraded ecosystem upon which they rely. Scientists say that all introduced species invasions represent permanent alterations of the biological integrity of the Lower Columbia River (LCR) and that introduced species could have a variety of effects on salmon including: enhancing the food base of salmon predators, changing the distributions or abundances of salmon food species, and harbor salmon diseases or parasites. Invasive species are the second greatest threat to endangered and threatened species nationwide. Ballast water has been found to have been a significant pathway for nonnative species introductions into Pacific coast waterways. At

least 54 species have been identified as introduced in the LCR. While there has been inadequate monitoring, there appears to be an increasing rate of accumulation of introduced invertebrate species in the lower Columbia River, mirroring the trends elsewhere. Some of these are more easily controlled than others because while some are carried in ballast water, others are likely introduced by barges and other vectors. Scientists believe that many of the nonindigenous zooplankton, such as the cumacean Nippoleucon hinumensis, and the amphipod Grandidierella japonica, were likely ballast water introductions. They conclude that the number of species identified as introduced to date have already caused significant biological alteration of the Columbia River.

15. My concerns about non-native invasive species discharged via ballast water are borne out by the serious problems that other invasive species, which may or may not have been introduced from ballast water, have presented to the Columbia River and other areas. As an example, the invasive plant purple loosestrife has caused significant habitat degradation in the Lower Columbia estuary. The plant has outcompeted native wetland plants that provide habitat for salmon. Purple loosestrife does not provide salmon habitat, and thus, in effect, has resulted in less habitat for salmon rearing and feeding. Purple loosestrife has created enough problems that the Army Corps of Engineers intervened, attempting to eradicate the invasive plant in an effort to restore salmon habitat. The San Francisco Bay and the Great Lakes present examples of how much damage the unchecked spread of invasive species can have on an ecosystem and, oftentimes, the economy. My concerns about ballast water discharges into the Columbia River basin are therefore well founded. Once invaded, there may be little if anything that can be done to restore balance to an ecosystem.

16. In addition to the risks presented from non-native invasive species, I am also concerned about pollutants discharged from ballast water, such as heavy metals, petroleum products and by-products, and various bacteria and human pathogens. I am aware of cholera outbreaks in Peru and the Gulf of Mexico which have been attributed to ballast water discharges. In fact, in Peru, a ballast water-caused cholera outbreak resulted in 4,000 deaths and 500,000 sicknesses in 2001. I am concerned that a similar outbreak, either of cholera or another human pathogen, could occur in the Columbia or Willamette River.

17. Due in part to my concerns about the impacts of invasive species introduced from ballast water, I have altered my behavior. As an example, although I enjoy eating salmon, I limit my consumption of Columbia River salmon, which are considered a threatened species under the Endangered Species Act and which are or could be greatly impacted by non-native invasive species. When I do eat salmon, my family and I eat only wild - as opposed to farmed - salmon from the Columbia River basin. I believe that wild salmon contain fewer pollutants and additives than farmed salmon (although I recognize that even wild salmon can contain detectable levels of heavy metals and other pollutants), and the process of farming salmon creates significant pollution and, in some instances, release of nonnative salmonid species. At this point, I am simply trying to limit my and my family's exposure to harmful substances. I incur additional expense in doing so, as wild salmon generally costs more than farmed salmon.

18. I have also altered my recreational activities due in part to my concerns about ballast water discharges. As an example, I no longer swim in the Willamette or the Columbia Rivers due to my concerns about the pollutants that ballast water discharges contain. I also do not allow my children to swim in these waterways in part due to my concerns about ballast water discharges. Although I recreate on and alongside these rivers, I enjoy my recreation less because

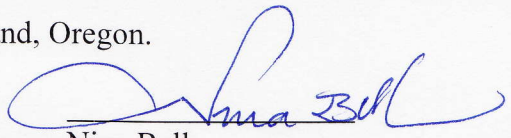
of my concerns about the impacts that ballast water discharges have had and continue to have on the river ecosystems and the species they support.

19. My organization was the lead organization in filing a petition to EPA to regulate ballast water in January, 1999. NWEA subsequently sued to compel EPA to regulate ballast water discharge, which resulted in a court order to regulate in *Northwest Environmental Advocates v. EPA*, No. C 03-05760 SI, 2006 WL 2669042 (Sept. 18, 2006), *aff'd* 537 F.3d 1006 (9th Cir. 2008). Pursuant to the court's order, EPA promulgated a permit that regulates ballast water discharges. I was actively involved in the permitting process, having submitted a number of comments on the draft permit during the public notice and comment period. Now, I am concerned that the Lake Carriers' Association's challenge will, if successful, derail over a decade of my work in advocating for regulations.

20. If the permit is invalidated, EPA and Northwest Environmental Advocates will suffer significant setbacks in our effort to combat invasive species. Lake Carriers suggest that Congress's NPDES permitting process is not the appropriate process for EPA to follow in permitting ballast water discharge. This is the very issue that NWEA litigated and won in *Northwest Environmental Advocates* and I have an active interest in continuing to advocate our position in this new challenge.

21. While I do not believe that EPA's permit is the perfect solution to the invasive species crisis, I do believe that it is a vital step in the right direction. Permit invalidation would have a significant impact on my own ability to enjoy the Portland's waters and would also be a significant setback to my organization's mission and hard-fought battle in the Northern District of California and Ninth Circuit.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of March, 2011 at Portland, Oregon.



Nina Bell

DECLARATION OF GINA TRUJILLO

I, Gina Trujillo, declare as follows under penalty of perjury:

1. I am the Director of Membership Development and Services at the Natural Resources Defense Council, Inc. ("NRDC"). I have worked in NRDC's Membership Department since 1991.

2. My duties include supervising the preparation of materials that NRDC distributes to members and prospective members. Those materials describe NRDC and its work, and identify its mission. My work requires that I be familiar with NRDC's purpose, organization, and activities, as well as with the environmental interests and concerns of NRDC's members. My work also requires me to be familiar with NRDC's membership records, the manner in which those records are maintained, and the manner in which information on members can be retrieved.

3. Founded in 1970, NRDC is a membership organization incorporated under the laws of the State of New York. It is recognized as a not-for-profit corporation under section 501(c)(3) of the United States Internal Revenue Code. NRDC has offices in New York, Washington, D.C., Chicago, Santa Monica, San Francisco, Montana, and Beijing.

4. NRDC's mission statement declares that the organization's purpose "is to safeguard the Earth: its people, its plants and animals, and the natural systems on which all life depends." The mission statement further declares that NRDC works "to restore the integrity of the elements that sustain life – air, land, and water – and to defend endangered natural places."

5. NRDC's certificate of incorporation states that among NRDC's purposes is "[t]o preserve, protect and defend natural resources, wildlife and the environment against encroachment, misuse and destruction" and "[t]o take whatever legal steps may be appropriate and proper to carry out the foregoing purposes."

6. NRDC's by-laws state that "a person or entity shall become a member . . . by submitting a membership application offered by the Corporation or by making a contribution to the Corporation accompanied by a statement requesting membership in the Corporation." The by-laws further provide for renewal of membership in NRDC based on payment of renewal membership dues.

7. NRDC currently has over a 400,000 members. There are NRDC members residing in each of the fifty United States, in the District of Columbia, and in Puerto Rico.

8. When an individual becomes a member of NRDC, his or her current residential address is recorded in NRDC's membership database. When a member renews his or her membership or otherwise makes a contribution to NRDC, the database entry reflecting the member's residential address is verified or updated.

9. When an individual becomes a member of NRDC, that person authorizes NRDC to take legal action on his or her behalf to protect the environment and public health.

10. Consistent with its mission, since its founding NRDC has frequently advocated for the protection of the Great Lakes and waters throughout the United States from threats including pollution runoff and discharges, the introduction of invasive species, sewer overflows, and water withdrawals. NRDC has been committed to protecting and restoring the quality of the waters of the United States and the natural biodiversity found therein. These efforts have included coordinated advocacy and petitioning at the state and federal levels, education campaigns regarding water quality, and litigation to enforce state and federal environmental laws. When NRDC opened its Chicago Office in January 2007, it identified challenging the spread of invasive species in the Great Lakes as one of the main priorities of that office.

11. NRDC's intervention as a defendant alongside the United States Environmental Protection Agency in litigation challenging the Agency's Clean Water Act Vessel General Permit is integral to and furthers NRDC's mission.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
February 23, 2011

Gina Trujillo

DECLARATION OF PENELOPE CRAWFORD

I, Penelope Crawford, hereby declare and state:

1. I reside at 1158 Baldwin, Ann Arbor, Michigan 48104.

2. Since 1972, I have spent every summer near Lake Huron in Black River, Michigan. In 1986 we built a beachfront home on Lake Huron, where we now stay in the summers.

3. I am a member of the Natural Resources Defense Council ("NRDC") and have been since 1987.

4. I am greatly concerned about preserving our planet's natural resources, especially protecting the water quality of the Great Lakes from threats such as invasive species.

5. For the past few years, I have been battling an invasive grass species that is spreading throughout the beach on my property in Black River. This thick, coarse, shoulder-height Phragmites grass has crowded out all the native plants that were growing there, and its presence interferes with my use and enjoyment of my beach and Lake Huron. This fall, with the help of Huron Pines AmeriCorps, we have attempted to eradicate the grass, but expect that, like most invasive species, Phragmites will survive our assault .

6. I have also been personally affected by aquatic invasive species in Lake Huron, including those that were spread to Lake Huron through vessels' ballast water discharges. The worst of these aquatic invasive species of which I am aware is the zebra mussel. I have encountered zebra mussels on the beach on my property. I am concerned about the impact that the zebra mussels and other aquatic invasive species have had and are continuing to have on the ecology and water quality of Lake Huron, where I swim and fish throughout the summer.

7. Each summer I see large and frequent build-ups of toxic, foul-smelling algae on the beach, which, from reading, I assume is either Microcystis or Cladophora or a combination of the two. I understand that zebra mussels and other aquatic invasive species have helped create conditions that contribute to the growth of these algae in Lake Huron.

8. The combined impacts of zebra mussels, Phragmites, and other invasive species – and the buildup of toxic, foul-smelling algae to which those invasive species contribute – interferes with my use and enjoyment of the beach on my property, as well as the use and enjoyment of my beach by my seven grandchildren, who come from all parts of the US to swim and play there.

9. I know that a major player in the introduction and spread of zebra mussels and other invasive species throughout the Great Lakes is ballast water discharged from vessels, including vessels that have entered the Great Lakes through the Saint Lawrence Seaway. Because these invasive species adversely impact my use and enjoyment of Lake Huron, I

support NRDC's efforts to defend federal and state restrictions on invasive species in vessels' ballast water discharges.

I declare under penalty of perjury that the foregoing is true and correct:

Executed in Ann Arbor, Michigan on 18 February 2011 by

Penelope Crawford

Penelope Crawford

DECLARATION OF JUDITH GORDON

I, Judith Gordon, hereby declare and state:

1. I reside at 44 Crestline Road, Rochester, New York, where I have resided since 1991.

2. My husband and I own a summer cottage on Eagle Island, which is located in Sodus Bay, off of Lake Ontario. I have spent summer months at that cottage every year since 1988, and I intend to continue doing so in the future.

3. I am a member of the Natural Resources Defense Council ("NRDC") and have been since 2001.

4. Since 2002 I have also been a member of Save Our Sodus, a non-profit organization concerned with deteriorating water quality in Sodus Bay and its watershed, and dedicated to cleaning up and protecting the Bay from aquatic invasive species and other pollution threats. Like many others who spend time in Sodus Bay, I am concerned that harms to Lake Ontario and Sodus Bay will hurt the tourism industry and economy of the area.

5. In over 20 years of summers at our summer cabin at Eagle Island, I have witnessed the health of Sodus Bay deteriorate significantly. Most noticeably, there has been extensive and prolific weed growth in the Bay that has clogged waterways, especially toward the end of each summer. In the summer of 2010, a major outbreak of toxic, foul-smelling blue-green algae further impacted water quality in Sodus Bay.

6. It is my understanding that the rapid spread of these weeds, and more recent outbreaks of blue-green algae, has been caused by zebra mussels and other aquatic invasive species that were first introduced into the Great Lakes in the late 1980's via ballast water discharges from ships. Zebra mussels filter large amounts of water, leading to increased clarity of the water which, in turn, allows for rapid weed growth.

7. The introduction of zebra mussels and resulting spread of weeds has seriously harmed my use and enjoyment of Sodus Bay and our summer cabin on Eagle Island. I used to look forward to swimming off our dock every morning, but this has become a thing of the past as now the Bay is clogged with weeds, especially near the shoreline. The weeds also interfere with my ability to go boating on the Bay, as weeds often get caught in the boat propeller and make maneuvering my boat more difficult.

8. By adversely impacting boating, swimming, and other recreational activities on the Bay, the introduction of zebra mussels and resulting spread of weeds and blue-green algae has also made our summer property on Eagle Island less attractive and negatively impacted the value of the property. The weeds have also increased my maintenance expenses for the property due to the cost of efforts to try to control or remove the weeds.

9. I believe that the discharge of ballast water from shipping vessels in the Great Lakes must be stringently regulated in order to reduce the impacts of zebra mussels and other aquatic

invasive species, prevent the introduction of new species, and avoid further adverse impacts to my use and enjoyment of Sodus Bay and Lake Ontario. As such, I strongly support NRDC's efforts to defend federal and state restrictions on invasive species in vessels' ballast water discharges.

I declare under penalty of perjury that the foregoing is true and correct:

Executed in Rochester, New York on February 25, 2011 by

Judith Gordon

Judith Gordon

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on March 1, 2011.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Deborah A. Sivas*