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## U.S. Environmental Protection Agency Oceans, Coasts, & Estuaries

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

January 13, 1999

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

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

Dear Ms. Browner:

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

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

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

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

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

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

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Introductions of non-indigenous species, both aquatic and terrestrial, continue to occur at an accelerating rate. Many of these introductions are likely to become nuisances and will have substantial impacts on the Nation's fish and wildlife resources as well as other human interests and activities.<sup>10</sup>

EPA's David Davis also testified before Congress that:

through predation and competition, introduced species have contributed to the regional eradication of some native species and dramatic reductions in others. These factors compound the effects of direct habitat loss and alteration, over-fishing, and other human activities, causing extensive resource and environmental losses.<sup>11</sup>

EPA aquatic ecologist David Yont has further noted that:

The spread of [the zebra mussel] would mean severe and dramatic consequences for the ecological integrity of surface water as it causes major shifts in food-web interactions and in the movement of nutrients and toxic materials, and reduces the diversity of species.<sup>12</sup>

Of course, these environmental impacts have accompanying economic impacts, due to both the impairment of economically significant native species and the cost of NIS control efforts.<sup>13</sup>

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

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

16 U.S.C.A. § 4701(a).

Focusing specifically on the ruffe, Congress noted that:

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

16 U.S.C.A. § 4701(a)(10).

And finally, Congress recognized that:



(such as ballast water) that occur more than three miles from shore are not required to have NPDES permits. However, this exemption can in no way be construed as applying inside the three mile contiguous zone boundary.

Second, the CWA specifically excludes two types of discharges from its definition of "pollutants." 33 U.S.C. § 1362(6)(A). The Act states that "sewage from vessels or a discharge incidental to the normal operation of a vessel of the *Armed Forces*," are not to be considered pollutants. *Id.* (emphasis added). As a result of the second aspect of this exclusion, discharges incidental to the normal operation of Armed Services vessels are not required to have an NPDES permit. However, this exemption is specifically limited to Armed Services vessels; EPA cannot reasonably expand it to apply to all vessels, as it has done in 33 C.F.R. § 122.3(a).

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

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

### **III. The Case Law Unequivocally Indicates that EPA Does Not Have the Discretion to Exempt Incidental Discharges from the Requirements of the CWA.**

In *NRDC v. Costle*, the D.C. Circuit addressed the question of whether EPA could exempt agricultural return flows from the requirements of the CWA. The court unambiguously stated that the EPA did not have the authority to exempt categories of discharges from the requirements of § 402. Finding that § 402 permits were central to achieving the stated goals of the CWA, the court found that "[t]he wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402." 568 F.2d at 1377; see also *NRDC v. U.S. E.P.A.*, 966 F.2d 1292, 1305 (9th Cir. 1992); *Carr v. Alta Verde Industries Inc.*, 931 F.2d 1055, 1060 (5th Cir. 1991); *Sierra Club v. Abston*, 620 F.2d 41, 44 (5th Cir. 1980); and *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 372 (10th Cir. 1979).

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



permitting program. While Congress acknowledged the presence of the more broad regulatory exemption contained in 40 C.F.R. § 122.3(a), Congress viewed this exemption as being problematic in the face of the clear and unqualified statutory language imposing the permit requirement. Thus, the Senate Report stated that:

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

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

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

## V. Conclusion

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

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

Sincerely,

Craig N. Johnston Attorney for Petitioners  
Pacific Environmental Advocacy Center  
Petitioners

Nina Bell, Executive Director  
Northwest Environmental Advocates

Steve Hall, Executive Director  
Association of California Water Agencies

Linda Sheehan, Pollution Program Manager

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Regarding Non-indigenous Species and S. 1660, (Testimony of Dr. James Carlton, Director of the Maritime Studies Program of Williams College and Mystic Seaport.); Edward Mills et. al, Exotic Species in the Great Lakes: A History of Biotic Crises and Anthropogenic Introductions, 19 J. Great Lakes Res. 1,2 (1993).

<sup>4</sup> Davis testimony, *supra*, n.3.

<sup>5</sup> Carlton and Geller, Ecological Roulette: The Global Transport and Invasion of Nonindigenous Marine Organisms, *Science* (1993); Carlton, Reid and Van Leeuwen, The Role of Shipping in the Introduction of Nonindigenous Aquatic Organisms to the Coastal Waters of the United States (other than the Great Lakes) and an Analysis of Control Options, a Report to U.S. Coast Guard, Marine Environment Protection Division, Washington, D.C.; Marine Board of the National Research Council, *Stemming the Tide*, National Academy Press, Washington D.C. (1996).

<sup>6</sup> Office of Technology Assessment, Harmful non-indigenous species in the United States, p. 82 (1993).

<sup>7</sup> Cohen and Carlton, Accelerating Invasion Rate in a Highly Invaded Estuary, *Science* 279, pp. 555-558 (1996).

<sup>8</sup> Cohen and Carlton, Nonindigenous Aquatic Species in a United States Estuary: a Case Study of the Biological Invasions of San Francisco Bay and Delta, a Report to U.S. Fish and Wildlife Service, Washington, DC and National Sea Grant College Program, Connecticut Sea Grant (1996).

<sup>9</sup> Vitousek, D'Antonio, Loope and Westbrooks, Biological Invasions as Global Environmental Change, *American Scientist* Vol. 84, No. 5, (1996).

<sup>10</sup> Reauthorization of the 1990 Non-indigenous Aquatic Nuisance Prevention and Control Act: Hearings on S. 1660 Before the Subcommittee on Drinking Water, Fisheries and Wildlife, Senate Environment and Public Works Committee Regarding Non-indigenous Species and S. 1660, (Testimony of Rowan W. Gould, Deputy Assistant Director-Fisheries, U.S. Fish and Wildlife Service, Department of the Interior).

<sup>11</sup> Reauthorization of the 1990 Non-indigenous Aquatic Nuisance Prevention and Control Act: Hearings on S. 1660 Before the Subcommittee on Drinking Water, Fisheries and Wildlife, Senate Environment and Public Works Committee Regarding Non-indigenous Species and S. 1660, (Testimony of David G. Davis, then-Deputy Director Office of Wetlands, Oceans and Watersheds, Office of Water, U.S. EPA).

<sup>12</sup> Yont, The Eco Invaders, EPA J., Nov. (1990).

<sup>13</sup> Harmful Non-Indigenous Species in the United States, Office of Technology Assessment, U.S. Congress, at 67 (1993).

<sup>14</sup> Carlton, Reid and Van Leeuwen, *supra*, n.6; Carlton, Transoceanic and Interoceanic Dispersal of Coastal Marine Organisms: the Biology of Ballast Water, *Oceanography and Marine Biology, An Annual Review* 23, pp. 313-371 (1985); Ruiz and Hines, The Risk of Nonindigenous Species Invasion in Prince William Sound Associated with Oil Tanker Traffic and Ballast Water Management: Pilot Study. Smithsonian Environmental Research Center (1997); and McCarthy and Khambaty, International Dissemination of Epidemic *Vibrio Cholerae* by Cargo Ship



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