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9 **IN THE UNITED STATES DISTRICT COURT**
 10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN FRANCISCO DIVISION**

12
 13 NORTHWEST ENVIRONMENTAL)
 ADVOCATES, et al.,)

14 Plaintiffs,)

15 v.)

16 UNITED STATES ENVIRONMENTAL)
 17 PROTECTION AGENCY,)

18 Defendant,)

19 SHIPPING INDUSTRY BALLAST WATER)
 20 COALITION,)

21 Defendant-Intervenor.)

22 THE STATES OF NEW YORK, ILLINOIS,)
MICHIGAN, MINNESOTA, WISCONSIN AND)
 23 THE COMMONWEALTH OF)
PENNSYLVANIA,)

24 Plaintiff-Intervenors,)

25 v.)

26 UNITED STATES ENVIRONMENTAL)
 27 PROTECTION AGENCY,)

Defendant,)

28 SHIPPING INDUSTRY BALLAST WATER)
 COALITION,)

Defendant-Intervenor.)

Case No. CV 03-05760 SI

**BRIEF FOR THE STATES OF
 NEW YORK, ILLINOIS,
 MICHIGAN, MINNESOTA,
 WISCONSIN AND THE
 COMMONWEALTH OF
 PENNSYLVANIA ON SELECTION
 OF REMEDY AND FINAL ORDER
 OF JUDGMENT**

Hearing on Selection of Remedy and
 Final Order of Judgment:

Date: November 30, 2005

Time: 2:00 p.m.

Courtroom: 10, 19th Floor

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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
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4 NORTHWEST ENVIRONMENTAL)
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7 v.)
8 UNITED STATES ENVIRONMENTAL)
9 PROTECTION AGENCY,)
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11 SHIPPING INDUSTRY BALLAST WATER)
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13 Defendant-Intervenor.)

Case No. CV 03-05760 SI

14 THE STATES OF NEW YORK, ILLINOIS,)
15 MICHIGAN, MINNESOTA, WISCONSIN AND)
16 THE COMMONWEALTH OF)
17 PENNSYLVANIA,)
18 Plaintiff-Intervenors,)
19 v.)
20 UNITED STATES ENVIRONMENTAL)
21 PROTECTION AGENCY,)
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24 COALITION,)
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26 **BRIEF FOR THE STATES OF NEW YORK,
27 ILLINOIS, MICHIGAN, MINNESOTA, WISCONSIN AND THE
28 COMMONWEALTH OF PENNSYLVANIA ON SELECTION
OF REMEDY AND FINAL ORDER OF JUDGMENT**

PRELIMINARY STATEMENT

For over thirty years the United States Environmental Protection Agency (“EPA”) had categorically exempted from control under the Clean Water Act (“CWA” or the “Act”), 33

1 U.S.C. §1251 et seq., vessels' ballast water discharges, including those that introduce harmful
2 alien aquatic nuisance species ("ANS") (also known as "exotic nuisance species" or "invasive
3 species") into the waters of the United States. 40 C.F.R. §122.3(a). The Court in its March 30,
4 2005 Order found this exemption to be beyond EPA's authority and ordered it to be repealed.

5 This Court is authorized under the CWA to order relief necessary to secure prompt
6 compliance with the Act. The necessities of this case require that the Court set a schedule for
7 EPA to establish prompt interim and timely final regulatory controls. Years ago EPA
8 acknowledged the increasing risk to native habitats from ANS in ballast water, yet steadfastly has
9 refused to repeal the exemption. Years ago Congress mandated that CWA permits be guided by
10 uniform effluent limitations and that protective pollution controls be achieved quickly, yet EPA
11 has failed to act. The time has come to order EPA to address the serious ongoing threat to the
12 nation's waters of ANS point source pollution.

13
14 The States respectfully submit that the Court order a remedial schedule requiring EPA to
15 establish interim regulatory controls by April 1, 2006, and final regulatory controls by October 1,
16 2007. Under the circumstances of this case this remedial schedule is reasonable, consistent with
17 the purposes of the CWA, and urgently needed.

18 **SUMMARY OF STATES' POSITION**

19 The problem of ANS in vessel ballast water discharges is serious and time-sensitive
20 because once introduced these pollutants are largely here to stay. ANS are biological pollutants
21 that can reproduce once released into aquatic ecosystems. As they multiply they spread across
22 political boundaries, and the magnitude of their impact grows. Through direct predation and
23 competition for nutrients, these resilient invaders have fundamentally degraded ecosystems by
24 reducing native populations and altering food web structure. Their harmful synergistic and
25 disease-introducing impacts are only beginning to be understood, but the high economic cost
26 associated with each new ANS infestation is undisputed. Vessel ballast water discharges are the
27 main source of ongoing, increasing ANS introductions to the nation's waters. Any further delay
28

1 by EPA in controlling these pollutant discharges as required by law should not be countenanced.

2 The problem of ANS in vessel ballast water is national in scope, requires coordinated
3 point source regulation across jurisdictions to control it effectively, and Congress gave EPA the
4 mandate and tools to do the job. EPA is charged with identifying technological pollution
5 controls necessary for each category of point source discharges. Those control standards provide
6 uniformity in permit conditions imposed on similar dischargers within the same category.
7 Congress employed a strategy of successive statutory deadlines in order to control water
8 pollution quickly. EPA's illegal categorical exclusion has thwarted the timely operation of the
9 CWA that Congress intended, and must promptly be remedied.

10 On an interim basis, in order to secure compliance with the Act's absolute prohibition of
11 unpermitted point source discharges, EPA must repeal the exemption and develop interim
12 NPDES permit requirements for vessel ballast water discharges. EPA will not be required to
13 write on a blank slate here; many regulatory options have already been analyzed or even adopted
14 in part by other agencies such as the Coast Guard. History also demonstrates that it is feasible
15 for EPA to take these necessary first steps quickly. Under a court-ordered schedule EPA
16 previously remedied illegal categorical exclusions by publishing, within a year, both proposed
17 and final regulations for not one but several categories of point source discharges. In addition,
18 the CWA provides EPA with the means to proscribe, in the short term, vessel practices that
19 aggravate pollution, while final regulatory controls are developed. General or area-wide permits
20 can be used to ease regulatory burdens while requiring practices designed to reduce pollutant
21 discharges. EPA has employed such regulatory devices numerous times, and has acknowledged
22 their usefulness in controlling vessel ballast water discharges. Moreover, as anticipated by the
23 Act and acknowledged by EPA, the agency can utilize existing Coast Guard regulations to aid in
24 accomplishing NPDES permit conditions.
25

26 EPA must establish also timely final regulatory controls in order to meet the CWA's long
27 overdue requirement of progressively more protective, uniform effluent limitations. Again,
28

1 history demonstrates that after court order, EPA published within one to two years time final
2 effluent limitation guidelines for point source discharge categories. And again, EPA will be
3 working off the basis of the substantial scientific work already done to develop technologically
4 and economically feasible means for addressing ANS in ballast water.

5 This Court should exercise its broad equitable authority to fashion a remedy that
6 effectuates the objectives of the CWA. EPA, left to its own devices, has shown no sign of
7 accomplishing needed pollution controls anytime soon. The necessities of this case require that
8 EPA be ordered to establish interim regulatory controls by April 1, 2006, and final regulatory
9 controls by October 1, 2007. The States respectfully submit that their proposed remedial
10 schedule is both reasonable and consistent with the purposes of the Act.

11 **BACKGROUND**

12 **A. Statutory Background**

13 The CWA establishes a comprehensive program for the regulation and elimination of
14 water pollution. Milwaukee v. Illinois, 451 U.S. 304, 318 (1981). Its purposes include
15 restoration and maintenance of the physical and biological integrity of the nation's waters.
16 33 U.S.C. §1251(a); Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1123 (9th Cir. 2005).
17 Under the CWA the discharge of any pollutant from a point source is illegal unless specifically
18 authorized by a permit. 33 U.S.C. §1311(a) (CWA Section 301(a)); Envtl. Def. Ctr., Inc. v. EPA,
19 344 F.3d 832, 853 (9th Cir. 2003). Primary responsibility for implementation and enforcement
20 of the CWA resides with EPA. 33 U.S.C. §§1251(d), 1361(a); Envtl. Def. Ctr., 344 F.3d at 853.

21 The CWA established the National Pollutant Discharge Elimination System ("NPDES")
22 as the means of enforcing the Act's permit requirement. Id. at 841 (citing 33 U.S.C. §1342
23 (CWA Section 402)). The NPDES permit program is central to enforcement of the Act; it
24 translates general "effluent limitations" into the specific obligations of the discharger. EPA v.
25 California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205 (1976); NRDC v. Costle, 568
26 F.2d 1369, 1374 (D.C. Cir. 1977). Effluent limitations are technology-based pollution control
27
28

1 requirements that dischargers must meet pursuant to 33 U.S.C. §1311(b) (CWA Section 301(b)).
2 See NRDC v. Costle, 568 F.2d at 1373-74. EPA is required to issue effluent limitation
3 guidelines under 33 U.S.C. §1314(b) (CWA Section 304(b)) for categories of point source
4 dischargers to “provide uniformity in the permit conditions imposed on similar sources within
5 the same category . . .” NRDC v. Train, 510 F.2d 692, 707 (D.C. Cir. 1975).

6 The CWA’s structure and legislative history demonstrate that Congress intended Sections
7 301(b), 304(b) and 402 to work interdependently in order to achieve uniform nationwide
8 pollution prevention. Through this interrelationship the Section 304(b) guidelines identify what
9 constitutes the increasingly more protective technological controls required by Section 301(b), so
10 those controls can be promptly imposed as permit conditions under Section 402. Washington v.
11 U.S. EPA, 573 F.2d 583, 591-92 (9th Cir. 1978); NRDC v. Train, 510 F.2d at 708; see Defenders
12 of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999) (33 U.S.C. §1311(a) prohibits point
13 source pollutant discharges absent NPDES permit, and 33 U.S.C. §1311(b)’s effluent limitations
14 supply permit’s technological controls).

15 Congress also intended that pollutant discharges be brought under control quickly.
16 Indeed, in recognition of “Congressional insistence upon prompt action by the Administrator in
17 implementing the statutory purposes,” the court in American Frozen Food Institute v. Train, 539
18 F.2d 107, 130 (D.C. Cir. 1976), held permissible EPA’s simultaneous issuance of Section 304(b)
19 guidelines and Section 301(b) limitations. “The authors of the Act were much concerned about
20 timely implementation, and specified implementation dates of 1977, 1983 and 1985 for different
21 phases of achievement of the principal purpose of elimination of all pollutants.” Id. at 124. The
22 court in NRDC v. Train further underscored Congress’s intention that uniform controls for
23 categories of point sources occur quickly. The court ordered EPA to adhere to a prompt schedule
24 for publishing the bulk of effluent limitation guidelines, finding that EPA’s discretion to defer
25 their promulgation was significantly circumscribed by the language and history of the CWA.
26 NRDC v. Train, 510 F.2d at 706-07 (duty to publish Section 304(b) guidelines by December
27
28

1 1974).

2 Yet another court found an indication of Congress's concern that point sources be
3 controlled quickly in the provision that EPA may issue permits upon "such conditions as the
4 Administrator determines are necessary to carry out the provisions of the Act," 33 U.S.C.
5 §1342(a), even "prior to the taking of necessary implementing actions" relating to enumerated
6 statutory requirements, including the requirement of effluent limitations under Section 301.
7 Congress recognized that the development of numerical effluent limits may take some time, but
8 did not want the issuance of permits to wait. "This provision gives EPA considerable flexibility
9 in framing the permit to achieve a desired reduction in pollutant discharges. The permit may
10 proscribe industry practices that aggravate the problem of point source pollution." NRDC v.
11 Costle, 568 F.2d at 1380 (footnote omitted).

12 [W]hen numerical effluent limitations are infeasible, EPA may issue
13 permits with conditions designed to reduce the level of effluent
14 discharges to acceptable levels. This may well mean opting for a
15 gross reduction in pollutant discharge rather than the fine-tuning
16 suggested by numerical limitations. But this ambitious statute is not
hospitable to the concept that the appropriate response to a difficult
pollution problem is not to try at all.

17 Id.

18 In addition, where there is some urgency due to threatened environmental harm or
19 impending deadlines, EPA may achieve prompt regulatory controls by "interim final
20 rulemaking." Grounded in the "good cause" exception contained in Administrative Procedure
21 Act ("APA") rulemaking provisions, see 5 U.S.C. §553(b)(3)(B), (d)(3), an agency using interim
22 final rulemaking adopts a rule without prior public input, makes it immediately effective, and
23 then invites post-promulgation comments directed towards whether the rule should be changed in
24 the future. See Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 750-52 (10th Cir. 1987)
25 (hunting limits where risk of wildlife extinction or endangerment); Center for Marine
26 Conservation v. Brown, 917 F.Supp. 1128, 1152-53 (S.D. Tex. 1996) (shrimping restrictions to
27 protect threatened and endangered sea turtles); Washington State Farm Bureau v. Marshall, 625
28

1 F.2d 296, 306-07 (9th Cir. 1980) (pesticide spraying limits to protect strawberry harvesters).

2 **B. Background of This Proceeding**

3 In 1973, EPA promulgated regulations implementing the NPDES permitting system
4 pursuant to the 1972 CWA. Despite the plain language of the Act, EPA elected to exclude from
5 the permit program any “discharge incidental to the normal operation of a vessel,” 40 C.F.R.
6 §122.3(a), claiming that “this type of discharge generally causes little pollution and exclusion of
7 vessel wastes from the permit requirements will reduce administrative costs drastically.” 38 Fed.
8 Reg. 13,528 (May 22, 1973). On January 13, 1999, Plaintiffs petitioned EPA to repeal 40 C.F.R.
9 §122.3(a) as inconsistent with the CWA (Dock. #20, Ex. J).¹ Pursuant to a court order, NWEA
10 v. EPA, 340 F.3d 853 (9th Cir. 2003), EPA responded to the petition on September 2, 2003,
11 denying it. See 68 Fed. Reg. 53,165 (Sept. 9, 2003); (Dock. #20, Ex. K).

12 Plaintiffs commenced this case on December 22, 2003, asserting that EPA’s vessel
13 discharge exemption was in clear violation of the CWA, and seeking declaratory and injunctive
14 relief. The States submitted an amici curiae brief in support of Plaintiffs’ motion for summary
15 judgment. The States established that ANS introduced into the Great Lakes from oceangoing
16 vessels’ ballast water discharges have compromised the viability of the region’s native plants,
17 fish and wildlife, harmed commercial and recreational fishing industries, and damaged public
18 water and energy generating infrastructure. The States showed that vessel ballast water
19 discharges are the predominant pathway for ANS entry into the Great Lakes, and that EPA’s
20 categorical regulatory exclusion allows these harmful invasive species introductions to continue.
21 (Dock #s 24, 25).

22 On March 30, 2005, the Court granted Plaintiffs’ motion for summary judgment. The
23 Court stated that “the language of the Clean Water Act directly states that EPA must form
24 NPDES permit requirements for discharges incidental to the normal operation of a vessel,
25 including ballast water.” (Dock. #48 at 12). Further, “given the clear language of the CWA, the
26
27

28 ¹References to “Dock. #” are to Court Docket document number.

1 statute requires that discharges of pollutants from non-military vessels into the nation's lakes,
2 rivers, and harbors occur only under the regulation of an NPDES permit. The Court finds that
3 the language of the CWA demonstrates the 'clear intent' of Congress to require NPDES permits
4 before discharging pollutants into the nation's navigable waters." (Dock. #48 at 13). The Court
5 declared that "EPA's exclusion from NPDES permit requirements for discharges incidental to the
6 normal operation of a vessel at 40 C.F.R. §122.3(a) is in excess of the agency's authority under
7 the Clean Water Act," and "order(ed) the EPA to repeal the regulation." (Dock. #48 at 18).

8
9 On May 6, 2005, the States moved to intervene as plaintiffs to participate in the remedial
10 phase of the case. The States asserted their compelling interests in clean water, and in EPA's
11 timely implementation of an effective remedial program. (Dock.#s 52, 59). The Court granted
12 the States' motion, acknowledging the States' strong interest in protecting the Great Lakes
13 ecosystem, and noted "the fact that pollutants flow freely from state to state, which causes ballast
14 water discharges throughout the country to impact each of the Great Lakes States' interests."
15 (Dock. #60 at 4). The Court further observed that "the remedy adopted by this Court will impact
16 the timing and manner in which EPA adopts ballast water discharge regulations." (Dock. #60 at
17 4).

18 ARGUMENT

19 **THE COURT SHOULD ORDER EPA TO REMEDY THE** 20 **ILLEGAL CATEGORICAL EXCLUSION BY REQUIRING** 21 **IT TO ESTABLISH EFFECTIVE REGULATORY CONTROLS** 22 **ON PROMPT, FIXED SCHEDULES.**

23 **A. This Court Has the Authority to Issue a Prompt Remedial Compliance Schedule.**

24 Under both the inherent equitable jurisdiction of the district courts and the CWA, this
25 Court has broad latitude to fashion equitable relief necessary to further the public interest,
26 remedy established wrongs and achieve statutory objectives. Here the significant public interest
27 in preventing ANS introductions to the nation's waters is implicated; the EPA exclusion has been
28 found illegal; and action is necessary to achieve the Act's goal of restoring the biological
integrity of those waters. Under these circumstances, this Court is well within its authority to

1 order EPA to establish effective regulatory controls on prompt, fixed schedules.

2 The Supreme Court determined that in enacting the CWA Congress did not foreclose
3 courts' exercise of equitable discretion, but rather envisioned it. In ruling that the district court
4 was not required to issue an immediate prohibitory injunction of the U.S. Navy's illegal pollutant
5 discharges,² the Court found that the Act did not limit courts' full exercise of their
6 comprehensive equitable jurisdiction, described as "the power . . . to do equity and mold each
7 decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished
8 it." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (internal citations omitted).
9 Moreover, the Court stated that the CWA "permits the district court to order the relief it
10 considers necessary to secure prompt compliance with the Act." Id. at 320 (emphasis supplied.)

11 EPA previously has been enjoined to promulgate regulations on a schedule to remedy
12 illegal categorical exclusions from the NPDES permit program. NRDC v. Train, 396 F.Supp.
13 1393 (D.D.C. 1975), aff'd sub nom., NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977). There
14 the district court ruled illegal EPA's exemption from the permitting program of classes of point
15 source dischargers including silviculture, storm runoff and concentrated animal feeding
16 operations. On June 10, 1975, the court ordered EPA to complete, within a year's time, the
17 publishing of proposed and final regulations "extending the NPDES permit system to include all
18 point sources" in the previously excluded categories. 41 Fed. Reg. 6281 (Feb.12, 1976)
19 (proposed silvicultural regulations). EPA was required to comply with the scheduling order
20 while it appealed the district court's decision. Id.; see 40 Fed. Reg. 54,182 (Nov. 20, 1975)
21 (proposed concentrated animal feeding operations regulation); 41 Fed. Reg. 24,709 (June 18,
22 1976) (final silviculture regulation); see also Environmental Protection Information Center
23 ("EPIC") v. Pacific Lumber, 266 F.Supp. 2d 1101, 1107 (N.D. Cal. 2003) (discussing EPA's
24
25

26
27 ²See Weinberger v. Romero-Barcelo, 456 U.S. at 309 ("[T]he release of ordnance from
28 aircraft or from ships into navigable waters is a discharge of pollutants, even though the EPA,
which administers the Act, had not promulgated any regulations setting effluent levels or
providing for the issuance of an NPDES permit for this category of pollutants.")

1 promulgation of silvicultural regulations as remedy for illegal exemption).

2 In NRDC v. Train, 510 F.2d at 704-05 (1975), described as “the leading case on the
3 subject of agency failure to meet statutory deadlines,” Sierra Club v. Thomas, 658 F.Supp. 165,
4 170 (N.D. Cal. 1987), the D.C. Circuit affirmed the district court order that EPA promulgate
5 according to the court’s schedule “Group I” effluent limitation guidelines, the agency having
6 failed to meet its statutory duty to issue them within a year of CWA enactment. As to all
7 remaining Section 304(b)(1)(A) effluent limitation guidelines, the appellate court imposed its
8 own schedule, ordering EPA to publish them by the deadline of December 31, 1974. Id. at 714.
9 The court ordered EPA to identify all of the point source categories, determine the nature of the
10 pollutants discharged, ascertain the best practicable technology available to control those
11 discharges, and calculate the effluent reduction achievable through application of that
12 technology. The court stated:

13
14 Although these steps may be cumbersome, even awesome, they may
15 well be within the agency’s grasp, at least generally. The court’s
16 injunction should serve like adrenalin, to heighten the response
17 and to stimulate the fullest use of resources. This may run the
18 risk of overstimulating the organism, but palliative measures may
19 be taken with regard to specific categories if indicated at a later date.

20 Id. at 712.

21 The court’s order further provided that it was EPA’s burden to show that promotion of
22 Congress’s goal of uniform permit conditions within categories would not be served by effluent
23 limitation guidelines. Id. at 710. Similarly, it was EPA’s burden to demonstrate that manpower
24 or methodological constraints threatened to delay guideline promulgation beyond the deadline, in
25 which case EPA could petition for modification of the court’s mandate. Id. at 712-14.

26 Significantly, in imposing a rulemaking schedule on EPA, the court in NRDC. v. Train
27 stated that it “need not determine” whether EPA’s duty to complete publication of all effluent
28 guidelines by December 31, 1974 was a non-discretionary duty within the Act’s citizen suit
provisions, or unlawful agency action under the APA. Id. at 714. The authority for the court’s
order imposing a schedule rested upon its equitable jurisdiction to effectuate the CWA’s

1 objectives. “A federal equity court may exercise its discretion to give or withhold its mandate in
2 furtherance of the public interest, including specifically the interest in effectuating the
3 congressional objective incorporated in regulatory legislation.” *Id.* at 713.

4 Whether viewed as unlawful agency action or failure to comply with statutory deadlines,³
5 here there can be no dispute that for over thirty years EPA’s illegal vessel discharge exemption
6 has frustrated the CWA’s requirements that every pollutant discharge requires a permit, and that
7 permit conditions be guided by uniform effluent limitations. Indeed, as to devastating ANS
8 pollution from vessel ballast water discharges, the illegal exclusion effectively has foreclosed any
9 of the core regulatory functions that EPA is responsible for under the Act. See EPIC v. Pacific
10 Lumber, 301 F.Supp. 2d 1102, 1113 (N.D. Cal. 2004). Thus, this Court is authorized to order
11 EPA to remedy this failure by requiring that it establish both prompt interim and timely final
12 regulatory controls on a schedule.

13
14 Prompt short term controls are urgently needed to “stop the bleeding” and secure
15 compliance with the Act’s absolute prohibition of unpermitted discharges. Timely final
16 regulatory controls are needed to meet the Act’s long overdue requirement of progressively more
17 protective, uniform effluent limitations. Both are “necessary to secure prompt compliance with
18 the Act.” Weinberger v. Romero-Barcelo, 456 U.S. at 320. Accordingly, the States respectfully
19

20
21 ³Courts for many years have exercised their equitable authority to set binding schedules
22 for federal agencies to comply with statutory deadlines. See e.g., Alaska Center for the
23 Environment (“ACE”) v. Reilly, 796 F.Supp. 1374 (W.D. Wash. 1992), aff’d sub nom., ACE v.
24 Browner, 20 F.3d 981 (9th Cir. 1994) (ordering EPA to develop total maximum daily loads for
25 designated water bodies on a schedule and retaining jurisdiction); Environmental Defense Fund
26 v. Reilly, No. 89-0598 (D.D.C. February 21, 1990) (ordering organic toxicity characteristic rule
27 issued on fixed schedule and finding EPA arguments for more time unpersuasive); New York v.
28 Ruckelshaus, 21 Env’t Rep. Cas. (BNA) 1721 (D.D.C. 1984) (requiring EPA to issue ruling on
interstate pollution petitions within sixty days); Natural Resources Defense Council, Inc. v.
Ruckelshaus, 21 Env’t Rep. Cas. (BNA) 1953 (D.D.C. 1984) (ordering issuance of automotive
pollution standards pursuant to court-determined schedule); Sierra Club v. Ruckelshaus, 602
F.Supp. 892 (N.D. Cal. 1984) (ordering EPA to issue final emissions standards within 90 days);
New York State v. Gorsuch, 554 F.Supp. 1060 (S.D.N.Y. 1983) (ordering EPA to issue proposed
regulations establishing emissions standards within 180 days).

1 submit that the Court set the following schedule for the long overdue vessel ballast water
2 discharge regulatory controls:

3 PROPOSED SCHEDULE

4 Interim Regulatory Controls: April 1, 2006

5 Final Regulatory Controls: October 1, 2007

6 The States respectfully request that the Court retain jurisdiction and require EPA to make
7 periodic reports on their progress in meeting the schedule.
8

9 **B. The States' Proposed Remedial Compliance Schedule Is Reasonable and**
10 **Consistent With the Requirements of the CWA.**

11 **1. The CWA's Absolute Prohibition of Unpermitted Pollutant Discharges**
12 **Necessitates That EPA Promptly Establish Interim Regulatory Controls.**

13 Congress clearly intended that the CWA provide comprehensive regulatory controls
14 prohibiting every point source discharge to the nation's waters unless covered by a permit.
15 Milwaukee v. Illinois, 451 U.S. at 318; Envtl. Def. Ctr., 344 F.3d at 853; NWEA v. EPA, 2005
16 U.S. Dist. LEXIS 5373 (N.D. Cal. March 30, 2005) (Dock. #48 at 13). In order for EPA to
17 secure compliance with this cornerstone principle of the Act, EPA must promptly repeal the
18 illegal categorical exclusion and "form NPDES permit requirements for discharges incidental to
19 the normal operation of a vessel, including ballast water." Id. (Dock. #48 at 12). These
20 necessary first steps can be taken quickly, as demonstrated by case histories (see above, pp. 9-
21 10), the statute itself and EPA's own pronouncements. Indeed, the pollution at issue here, being
22 almost impossible to eliminate once introduced, is arguably more serious and deserving of
23 prompt action than pollution from silviculture or feedlots.

24 CWA Section 402(a) "gives EPA considerable flexibility in framing the permit to achieve
25 a desired reduction in pollutant discharges. The permit may proscribe industry practices that
26 aggravate the problem of point source pollution." NRDC v. Costle, 568 F.2d at 1380. It would
27 be an understatement to say that vessel ballast water discharges of invasive species represent
28 "industry practices that aggravate the problem of point source pollution." Fortunately, Congress

1 has provided the means necessary to achieve needed ANS pollution controls in the short term,
2 EPA need not begin from scratch to achieve them, and the agency has acknowledged as much.

3 General or area-wide permits are mechanisms available to EPA under the CWA to cope
4 with administrative exigencies and ease regulatory burdens. General permits enable EPA to
5 regulate large numbers of similar dischargers. General permits identify permit requirements for a
6 class of dischargers, who then file their notices of intent to abide by the general permit
7 conditions. EPA has used general permits to cover many thousands of pollutant discharges from
8 such varied activities as urbanized storm water runoff, see 40 C.F.R. §§122.30-37; discharges
9 from construction sites more than one acre in size, see 40 C.F.R. §§122.26(a)(9)(i),
10 122.26(b)(14)(x), 122.26(b)(15)(i) and 122.34(b)(4)(i); and concentrated land animal and aquatic
11 animal feeding operations, see 40 C.F.R. §§122.23 and 122.24. General permitting has long been
12 recognized as a lawful, practical way of adhering to the Act's strict prohibition of unpermitted
13 pollutant discharges. Envtl. Def. Ctr., 344 F.3d at 853 (citing NRDC v. Costle).

14
15 Four years ago, EPA acknowledged its ability to revise the NPDES program to regulate
16 vessel ballast water discharges and develop a general permit at the same time. EPA stated it
17 could couple rulemaking with development of a model general permit for use by NPDES-
18 authorized states, and that “[a] general permit would provide the benefits of increased uniformity
19 and predictability over individual permits, and would reduce the administrative burden associated
20 with this approach.” See EPA, Division of Water, Aquatic Nuisance Species in Ballast Water
21 Discharges: Issues and Options, (Washington, D.C. September 10, 2001) (hereinafter “EPA
22 Ballast Report”) (Dock. #20, Ex. C. at 35). In the EPA Ballast Report the agency recognized the
23 desirability of uniform point source permit standards for vessels moving between states. “Given
24 the nature of vessel commerce, a coordinated national approach is preferred to a patchwork of
25 regulations.” Id. at 33. EPA further stated that “[a] regulation could probably be drafted in a
26 manner to allow States and permittees flexibility in meeting federal requirements.” Id. at 35. It
27 is the States’ position that EPA can and should provide the federal leadership necessary to
28

1 achieve effective, uniform permit standards for ballast water discharges from vessels that
2 routinely cross political boundaries.

3 Here, EPA's responsibility to implement prompt CWA regulatory controls is made easier
4 by existing U.S. Coast Guard regulations that, but for the current lack of effective enforcement,
5 constitute standards that EPA can employ as permit conditions in the short term. Under the
6 Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 ("NANPCA"),
7 reauthorized and amended by the National Invasive Species Act of 1996 ("NISA"), 16 U.S.C.
8 §4701 et seq.,⁴ the Coast Guard has promulgated ballast water management regulations for both
9 the Great Lakes and the nation at 33 C.F.R. Part 151, Subparts C and D, respectively. Those
10 regulations, at least nominally, require vessels that have operated beyond the Exclusive
11 Economic Zone ("EEZ") either to perform ballast water exchange beyond the EEZ, retain ballast
12 water on board the vessel, or use an approved alternative environmentally sound method of
13 ballast water management. See 33 C.F.R. §§151.1510 and 151.2035(b) (ballast water
14 management requirements for Great Lakes and U.S. waters, respectively).⁵ The U.S. National
15 Oceanic and Atmospheric Administration ("NOAA") has concluded that vessel ocean flushing
16 and ballast water exchange, though imperfect, if conducted are beneficial in reducing the risk of
17 ANS introductions to the Great Lakes from ballast water discharges. See Johengen, Reid, et al.,
18 Assessment of Transoceanic NOBOB Vessels and Low-Salinity Ballast Water as Vectors for
19 Non-Indigenous Species Introductions to the Great Lakes, pp. 6-3, 6-10 (NOAA, Univ. of
20 Michigan April 2005) (hereinafter "NOAA NOBOB Report").⁶

23
24 ⁴As the Court has found, pursuant to 16 U.S.C. §§4711(b)(2)(C) and 4711(c)(2)(J),
25 Congress clearly did not intend NANPCA/NISA to limit the CWA with respect to ballast water
26 discharges. (Dock. #48 at 16).

27 ⁵The regulations also contain certain reporting, recordkeeping and monitoring provisions.
28 See, e.g., 33 C.F.R. §§151.1516; 151.2041; 151.2045; 151.2050.

⁶The NOAA NOBOB Report (quoted previously by the States, Dock. #59 at 5) is
available at www.glerl.noaa.gov/res/projects/nobob/products/NOBOBFinalReport20050415.pdf

1 The States in their amici curiae brief pointed out the well-documented, massive
2 regulatory hole in the Coast Guard program known as the “no ballast on board”(NOBOB)
3 exception, that has allowed over 90% of transoceanic ships entering the Great Lakes to evade
4 performing any ballast water management (Dock. #24 at 13). The NOAA NOBOB Report,
5 recently issued by NOAA and the University of Michigan, and sponsored by EPA, the Coast
6 Guard and others, confirms that vessels claiming NOBOB in reality carry tons of ballast water
7 often containing ANS, that these vessels comprise over 90% of the ocean ships entering the
8 Great Lakes, and that these ships’ ballast water discharges present the greatest threat of
9 continuing ANS introductions to the Great Lakes. Id., pp. vii, 2-7, 6-2, 6-10. The States have
10 maintained that this loophole is due to an improper interpretation and application of both NISA
11 and Coast Guard rules that, on their face, do not exclude NOBOB vessels.⁷

12
13 There is no good reason why EPA cannot utilize the substance of Coast Guard regulations
14 -- correctly interpreted to cover purported NOBOB ships -- as NPDES permit conditions in
15 order to promptly establish interim CWA regulatory controls.⁸ Indeed, both the CWA and EPA’s

16
17 ⁷Over a year ago the States administratively petitioned the Coast Guard to conform its
18 regulatory program to the requirement of NISA, 16 U.S.C. §4711(b)(2)(A), that its regulations
19 “apply to all vessels equipped with ballast water tanks,” or, as explained by Congress, “regardless
20 of whether they are currently carrying ballast or the amount of ballast in their tanks.” H. Rep.
21 No. 104-815, 104th Cong. 2d Sess. 15 (1996) (see Dock. #24 at 13, n. 56). The States’ Petition
22 is available at <http://dms.dot.gov> under Docket 19842. The Coast Guard has since acknowledged
23 that purported NOBOB vessels do indeed carry ballast water containing ANS. See 70 Fed. Reg.
24 1448-49 (Jan. 7, 2005). Thus NOBOBs should be regulated even under the Coast Guard’s
25 questionable rule limiting their Great Lakes regulations’ applicability to “each vessel that carries
26 ballast water . . .” 33 C.F.R §151.1502. Recently the agency issued a “Notice of policy”
27 recommending but not requiring ballast water management practices for NOBOBs. 70 Fed. Reg.
28 51,831, 51,835 (Aug. 31, 2005). As stated by the Coast Guard, “we cannot enforce vessel
compliance with a voluntary program.” Id. (emphasis supplied). The Coast Guard has yet to
require any ballast water management for NOBOBs in the Great Lakes.

⁸The States do not suggest that EPA necessarily utilize the “interim final rulemaking”
described above to meet the States’ proposed schedule for establishing interim regulatory
controls. Nor do the States suggest that EPA must use Coast Guard standards. Rather, the point
is that EPA can move very quickly here given work already done.

1 own regulations already contain provisions allowing for harmonization of the NPDES permit
2 program with NISA regulations. See EPA Ballast Report (Dock. #20, Ex. C at 37), citing 33
3 U.S.C. §1342(g) (CWA Section 402(g)) and 40 C.F.R. §122.44(p). This could satisfy, at least in
4 the interim, the Act's requirement that NPDES permit controls provide comprehensive coverage
5 for all dischargers, thereby immediately improving upon the Coast Guard's currently ineffective
6 vessel program. As noted, prior to development of numeric effluent limitations, interim NPDES
7 permit conditions can include enforceable best management practices ("BMPs"). BMPs can
8 include a variety of required operating procedures, practices and/or prohibitions of practices. See
9 40 C.F.R. §122.2; EPA, Division of Water, U.S. EPA NPDES Permit Writers' Manual, 141
10 (Washington, D.C. December 1996).⁹ Here, EPA could, and should, require as a vessel BMP
11 ballast water exchange or retention of ballast water.¹⁰

12
13 EPA can meet the States' proposed interim remedial schedule by utilizing the regulatory
14 tools available under the CWA and the work already done by the Coast Guard. Given the
15 CWA's absolute prohibition of unpermitted pollutant discharges, EPA's refusal to repeal the
16 illegal categorical exclusion that continues to frustrate timely achievement of the Act's purposes,
17 and the devastating, ongoing negative impacts of uncontrolled ANS-containing vessel discharges

18
19 ⁹The U.S. EPA NPDES Permit Writers' Manual is available at
20 www.epa.gov/npdes/pubs/owm0243.pdf

21 ¹⁰Vessels that have heretofore claimed NOBOB status can conduct a form of ballast water
22 exchange. By carrying only slightly less cargo these ships can flush their ballast tanks with a
23 small amount of sea water, thereby mitigating the ANS threat posed by NOBOBs. See NOAA
24 NOBOB Report, p. 2-20 (describing ecosystem protection achieved by this form of exchange); E.
25 Reeves, Exotic Politics: An Analysis of the Law and Politics of Exotic Invasions of the Great
26 Lakes, Toledo J. of Great Lakes' Law, Science & Policy Vol. 2, 125, 145 (Spring 2000)
27 (describing this form of exchange, colloquially known as "swish and spit," as achievable if
28 vessels forego a relatively small amount of cargo); States' Petition to Coast Guard, available at
<http://dms.dot.gov>, Docket 19842, Document Number USCG-2004-19842-9 at 3-4 (NOBOB
ships' market decision to carry full load of inbound cargo frustrates effective ballast water
discharge controls and externalizes significant costs of dealing with ANS); 70 Fed. Reg. 51,831,
51,835 (Aug. 31, 2005) (Coast Guard describing, but not requiring, saltwater flushing of ballast
tanks as a BMP for NOBOBs).

1 upon the States and the nation, this proposed schedule for interim remedial controls is necessary,
2 consistent with the CWA, reasonable and feasible, and long overdue.

3
4 **2. The CWA's Long Overdue Requirement of Protective, Uniform Effluent**
5 **Limitations For Categories of Point Sources Necessitates That EPA Timely**
6 **Establish Final Regulatory Controls.**

7 EPA's illegal categorical exemption of ANS-containing vessel discharges has thwarted
8 achievement of the progressively stricter effluent limitations called for by the CWA. All of the
9 deadlines specified by Congress for point source dischargers to meet, and then improve upon,
10 pollution technology controls have passed without EPA performing its statutory responsibilities.
11 The observation of the court in the seminal case decades ago is prescient: the "exemption tends
12 to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled
13 in the absence of crisis . . ." NRDC v. Costle, 568 F.2d at 1382.

14 The Act was intended to be comprehensive, employing an implementation strategy with
15 successive deadlines to further its goals of abating pollution and restoring the nation's waters.
16 Milwaukee v. Illinois, 451 U.S. at 318-19; Washington v. U.S. EPA, 573 F.2d at 591-92;
17 American Frozen Food Institute v. Train, 539 F.2d at 124. Dischargers were required to employ
18 "best practicable control technology currently available" by July 1, 1977, and, no later than
19 March 31, 1989, BAT, the "best available technology economically achievable." 33 U.S.C.
20 §1311(b); Env'tl Def. Ctr., 344 F.3d at 841. EPA has referred to these as "final statutory
21 deadlines" for required levels of treatment technology. U.S. EPA NPDES Permit Writers'
22 Manual at 52-53, Exhibit 5-1. The illegal vessel discharge exclusion has had the insidious,
23 domino effect of forestalling all of the interrelated requirements of the Act. This Court should
24 order EPA to establish timely final regulatory controls for vessel discharges in order to achieve
25 the Act's long overdue requirement of progressively more protective, uniform effluent
26 limitations.

27 EPA previously has promulgated final effluent limitation guidelines for numerous
28

1 categories of point source dischargers within a relatively short space of time. After the district
2 court decision in NRDC v. Train, 6 ERC 1033 (D.D.C. 1973), rev'd in part, 510 F.2d 692 (D.C.
3 Cir. 1975), EPA expeditiously published final effluent guidelines and standards for many "Group
4 I" point source categories and subcategories, with effective dates soon thereafter, having
5 proposed the guidelines only a few months previously.¹¹ As to several "Group II" point source
6 categories identified by the district court in NRDC v. Train, supra, EPA promulgated final
7 effluent guidelines within one and one-half to two years of the court's order, and in at least one
8 instance made the rule effective immediately by utilizing interim final rule making.¹² The task
9 here - - covering one category of discharges - - is no less achievable, and can be done within the
10 timeframe proposed by the States.

11
12 Four years ago EPA acknowledged the value of a Section 304(b) national effluent
13 guideline for vessel discharges to promote uniform levels of treatment, but complained that it
14 would be a time consuming, complex undertaking. EPA Ballast Water Report at 36 (Dock. #20,
15 Ex. C at 36). Had EPA begun developing the regulation at that time it could have been in place
16 by now, even under EPA's protracted schedule. Id. Fortunately, as with needed interim
17 regulatory controls, EPA is not writing on a blank slate in developing effluent limitation

18
19
20 ¹¹See, e.g., final effluent guidelines and standards for the following point source
21 categories: Glass Manufacturing-Insulation Fiberglass Subcategory, 39 Fed. Reg. 2564 (Jan. 22,
22 1974); Sugar Processing-Beet Sugar Processing Subcategory, 39 Fed. Reg. 4034 (Jan. 31, 1974);
23 Cement Manufacturing-Nonleaching, Leaching, and Materials Storage Piles Runoff
24 Subcategories, 39 Fed. Reg. 6590 (Feb. 20, 1974); Rubber Processing-Tire and Inner Tube
25 Plants, Emulsion Crumb Rubber, Solution Crumb Rubber, and Latex Rubber Subcategories, 39
26 Fed. Reg. 6660 (Feb. 21, 1974); Ferroalloy Manufacturing-Open Electric Furnaces With Wet Air
27 Pollution Control Devices, Covered Electric Furnaces and Other Smelting Operations With Wet
28 Air Pollution Control Devices, and Slag Processing Subcategories, 39 Fed. Reg. 6806 (Feb. 22,
1974); and Asbestos Manufacturing-(seven subcategories), 39 Fed. Reg. 7526 (Feb. 26, 1974).

¹²See, e.g., final effluent guidelines and standards for the following point source
categories: Paving and Roofing Materials (Tars and Asphalt), 40 Fed. Reg. 31,190 (July 24,
1975); Mineral Mining and Processing-(numerous subcategories) 40 Fed. Reg. 48,652 (Oct. 16,
1975) (using interim final rulemaking).

1 standards for vessel ballast water discharges.

2 Studies of technical options for controlling ballast water were produced by Australia in
3 1993,¹³ and by Canada in 1996.¹⁴ Acting under the mandate of NANPCA, United States agencies
4 produced two major studies in 1995 and 1996. These were the “Shipping Study” conducted for
5 the Coast Guard and published in 1995,¹⁵ and the “Marine Board” study of ballast water, entitled
6 Stemming the Tide, published in 1996.¹⁶ Since then, after the issue became a focus of the
7 International Maritime Organization (“IMO”), research on options for controlling ballast water
8 has become a minor international industry. IMO held “Research & Development” symposiums
9 with reports on original technical research in 2001 and 2003.¹⁷ The current IMO “Ballast Water
10 Treatment R&D Directory” of 2004, produced by these symposiums and other submissions, now
11 lists more than a hundred separate research projects from fifteen countries.¹⁸
12

13
14 ¹³AQIS (Australian Quarantine and Inspection Service), Ballast Water Treatment for the
15 Removal of Marine Organisms (AQIS Ballast Water Research Series Report No. 1, Canberra,
Australia: Australia Government Publishing Service, June 1993).

16 ¹⁴Aquatic Sciences, Examination of Aquatic Nuisance Species Introductions to the Great
17 Lakes through Commercial Shipping Ballast Water and Assessment of Control Options, Phase I
18 & Phase II (ASI Project E9225/E9285, Aquatic Sciences, Inc., St. Catharines, Ontario, March
and June 1996).

19 ¹⁵James T. Carlton, Donald M. Reid, and Henry van Leeuwen, The Role of Shipping in
20 the Introduction of Nonindigenous Aquatic Organisms to the Coastal Waters of the United States
21 (other than the Great Lakes) and an Analysis of Control Options, Shipping Study I, USCG Report
No. CG-D-11-95 (Springfield, VA: National Technical Information Service, April 1995).

22 ¹⁶National Research Council Marine Board Committee on Ships’ Ballast Operations,
23 Stemming the Tide: Controlling Introductions of Nonindigenous Species by Ships’ Ballast Water
24 (National Academy Press: Washington, DC, 1996).

25 ¹⁷IMO 1st International Ballast Water Treatment R&D Symposium, London, 26-27 March
26 2001, and IMO 2nd International Ballast Water Treatment R&D Symposium, London, 21-23 July,
2003.

27 ¹⁸IMO Global Ballast Water Management Programme “Ballast Water Treatment R&D
28 Directory” (2nd ed., November 2004), available at
<http://globallast.imo.org/RandD%20Directory%20November%202004.pdf>

1 A comprehensive 1999 report prepared for the binational International Joint Commission
2 (“IJC”) on ANS invasions of the Great Lakes summarized numerous technologically and
3 economically feasible options for addressing ANS in ballast water.¹⁹ As described above, much
4 work has been done in the intervening six years,²⁰ and discussion is ongoing about which
5 technological options make sense for particular ships. But it makes no sense to delay needed
6 pollution controls until technology is someday perfected.²¹ Such a recipe for inaction clearly is
7 contrary to the purposes of the CWA. Here, history demonstrates that there will not be
8 commercial application of pollution control technology on vessels until there are regulatory
9 standards requiring it. Moreover, until regulatory standards exist to guide new vessel
10 construction, the opportunity will be lost to make needed design changes in new vessels that
11 could be in service for decades, and that will require greater expense to correct later with
12 retrofitting.²²

13
14 In developing final effluent limitation regulatory standards for vessels, EPA has the
15 flexibility to prescribe different requirements for different classes of ships within the vessel
16 category. For example, the more stringent technological measures necessary for ballast water

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18
19 ¹⁹Eric Reeves, Exotic Policy: An IJC White Paper on Policies for the Prevention of The
20 Invasion of the Great Lakes by Exotic Organisms, §3.7 (July 15, 1999), available at
www.ijc.org/rel/milwaukee/wrkshps/exoticpolicy.html

21 ²⁰EPA itself states that in 2001 it established with the Coast Guard an “engineering test
22 program,” purportedly to accelerate development and commercialization of ballast water
23 treatment technologies (Dock. #37, Brief at 40). EPA also states that for the last two years it has
24 worked with the Coast Guard to establish a “quantitative ballast water discharge performance
standard.” (Dock. #37, Brief at 39).

25 ²¹See Reeves, Exotic Policy: An IJC White Paper on Policies for the Prevention of The
26 Invasion of the Great Lakes by Exotic Organisms at §3.7: “The fact that there is still some work
27 to be done to perfect various options, or that there are other interesting but unproven technologies
to consider, should not be allowed to obscure the fact that technologically and economically
feasible means to deal with ballast do in fact exist at the present time.”

28 ²²Id. at §§1, 3.7.

1 from transoceanic vessels may not be needed for local and regional shipping whose discharges do
2 not introduce ANS from other ecosystems. And EPA may take into account a variety of
3 discharge factors, and provide a series of deadlines, to accommodate various members of the
4 vessel regulated community, as it did in promulgating a regime of stormwater discharge
5 requirements. See 40 C.F.R. §122.26(e).

6 The States submit that it is EPA's responsibility under the CWA to establish vessel
7 discharge regulatory controls in the form of effluent limitations. The Act's deadlines for
8 achieving any of the required levels of treatment technology have passed, and EPA has shown no
9 sign it will carry out its statutory responsibilities unless ordered to do so. Under these
10 circumstances the States submit that their proposed schedule, requiring EPA to establish final
11 regulatory controls by October 1, 2007, is reasonable, necessary and should be ordered by the
12 Court.

13 CONCLUSION

14 For the foregoing reasons, the States respectfully request that the Court adopt their
15 proposed schedule of interim and final regulatory controls as the remedy selected in the Court's
16 final order of judgment.

17 Dated: September 6, 2005

18 Respectfully submitted,

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