

Case Nos. 03-74795, 06-17187, 06-17188

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NORTHWEST ENVIRONMENTAL ADVOCATES, et. al.  
Plaintiffs-Appellees; Petitioners,

and

THE STATES OF NEW YORK, et. al.  
Plaintiff-Intervenors Appellees

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Defendant-Appellant; Respondent,

and

THE SHIPPING INDUSTRY BALLAST WATER COALITION  
Defendant-Intervenor Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
Case No. 03-05760 SI

**BRIEF OF AMICUS CURIAE**  
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**Corporate Disclosure Statement**

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae National Marine Manufacturers Association certifies that it has no parent corporation, and that no publicly held company owns 10% or more of its stock.

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## **STATEMENT OF IDENTITY**

The National Marine Manufacturers Association (NMMA) submits this *amicus* brief in support of Appellant-Respondents United States Environmental Protection Agency (EPA or Agency) and the Shipping Industry Ballast Water Coalition (SIBWC). NMMA respectfully requests that this Court reverse the district court, and dismiss the Petition for Review filed by Plaintiff-Appellee-Petitioners (Plaintiffs). A Motion for Leave to File is being submitted with this brief.

NMMA is the nation's leading recreational marine industry association, representing over 1,600 boat builders, engine manufacturers, marine accessory manufacturers, and industry service providers. NMMA members produce over 80 percent of all recreational marine products sold in the U.S. Recreational boating is a popular U.S. activity, with approximately 71.3 million boaters and 18 million boats in use. The recreational boating industry employs approximately 373,000 people in the U.S.

NMMA's mission is to protect and defend recreational boating, the industry, and the environment. Among other member services, NMMA provides technical expertise, safety improvements, and statistical analysis. NMMA operates a mandatory certification program where independent inspectors verify that member product lines satisfy the Federal Boat Safety Act, 46 U.S.C. §§ 4301-11, and

consensus standards including those of the American Boat and Yacht Council (ABYC) and the Society of Automotive Engineers (SAE).

The district court's ruling would invalidate the decades-old incidental discharge exemption of 40 C.F.R. § 122.3(a), and require virtually every boat in the U.S. obtain a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act (CWA) by September 2008. However, the proceedings below focused almost exclusively on ballast water, and the administrative record includes virtually no consideration of other incidental discharges from boats. NMMA has strong interests in preserving the economic viability of boating, and maintaining consistent and well-considered legal requirements -- both of which are implicated by this case.

## ARGUMENT

### **I. EPA Reasonably Concluded That Congress Did Not Intend to Mandate NPDES Permits for Incidental Discharges From Boats Used for Transportation**

In addition to being 30 years untimely (*see* Section III, below), Plaintiffs' claims fail on the merits. The statutory scheme, at a minimum, does not unambiguously evince Congressional intent to mandate NPDES permits for incidental discharges, and EPA reasonably interpreted the CWA to allow 40 C.F.R. § 122.3(a). EPA at 26-46; SIBWC at 13-36.

Indeed, the only legislative history on the subject directly supports EPA's interpretation, and refutes Plaintiffs'. *See* Congressional Record for Oct. 10, 1972, P. E8454, Extension of Remarks of Robert E. Jones, Committee Chairman (“[The Conference Committee] would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines.”); *quoted in* 38 Fed. Reg. 1362, 1364 (Jan. 11, 1973).

As discussed below, further support for EPA's conclusion is provided by: (A) the nature of recreational boating and incidental discharges; (B) the NPDES statutory scheme as a whole, which was designed to regulate stationary sources, and includes provisions inconsistent with an intent to regulate mobile source incidental discharges; and (C) Congress' repeated reinforcement of this conclusion

by adopting non-NPDES approaches in every instance where it determined that a particular type of incidental discharge warranted regulation.

**A. The Nature of Recreational Boating and Incidental Discharges Belies Any Congressional Intent to Mandate NPDES Permitting**

1. Existing Recreational Boats Vastly Outnumber all Other Permitted Sources Combined

EPA estimates there are 17,500 ballast vessels in U.S. waters (10,000 U.S. flagged and 7,500 foreign). *See* Excerpts of Record for Federal Defendant-Appellant (“ER”) at 146. These vessels are typically large cargo ships, which may carry 100,000 to 28,000,000 gallons of ballast. As cargo is loaded and unloaded, the ship adjusts by taking on or discharging ballast water. Most ballast is discharged in port as cargo is loaded. ER 141.

By contrast, there are approximately *18 million* recreational boats in use in the United States -- or *1,000 times* the number of ballast sources.<sup>1</sup> There are also millions of other commercial boats. For comparison, today there are about 600,000 total facilities that require NPDES permits (100,000 non-stormwater, and 500,000 stormwater).<sup>2</sup> Adding recreational boats to the NPDES program would increase the number of permitted sources by over 30 times (3,000%). Adding just

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<sup>1</sup> *E.g.*, NMMA 2005 Recreational Boating Statistical Abstract at 2 (“NMMA 2005 Abstract”) (17.95 million recreational boats in 2005). The 16 million figure cited by EPA was for 1997. EPA at 47; ER 145.

<sup>2</sup> ER 278-79.

ballast boats (virtually the exclusive focus below) would expand the number of permittees by only about 3% (from 600,000 to 617,500).

Among other things, given that Congress specially amended the CWA in 1987 to require EPA to exercise its authority to permit stormwater discharges (about 500,000 permittees), it would be quite odd to conclude that Congress in 1972 intended to require EPA to permit *36 times* that number of boats, but never noticed or sought to correct EPA's failure to do so.

2. There are a Staggering Variety of Recreational Boats and Incidental Discharges Which Would Evidently Require NPDES Permits Under the District Court's Ruling

Of the 18 million recreational boats, there are about 8.55 million outboard motor boats, 1.76 million inboard boats, 1.86 million sterndrive boats, 1.55 million personal watercraft (e.g., jet skis), 1.57 million sailboats, and 2.65 million canoes, kayaks, and other types.<sup>3</sup> Within each category, boats vary dramatically by size, hull type, capacity limits, power, and other design elements that affect the ability to add discharge-related features without impacting seaworthiness and safety.

Virtually all transportation by boat entails some measure of incidental discharges. Neither the Agency in denying the petition nor the district court considered the nature of non-ballast incidental discharges. Nor did they perform any meaningful analysis of such discharges under the CWA -- including which, if

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<sup>3</sup> NMMA 2005 Abstract at 2.

any, constitute “pollutants,” and whether such ongoing incidental discharges from underway vessels (as opposed to large premeditated releases, such as ballast, or releases from a floating industrial facility) must be considered the “discharge of a pollutant” from a “point source,” within the meaning of CWA § 502(6), (12), (14), (16), (19).

The District Court barely mentioned non-ballast discharges until after summary judgment. At the remedy stage, the district court provided only a brief description of “graywater” (water from sinks and galleys), “bilge water” (water that collects in the bilge) and “black water” (treated or untreated sewage),<sup>4</sup> citing no support from the administrative record. ER 354.

In fact, boats routinely experience a number of incidental discharges. For example, boats inevitably take on water from spray, waves, and weather, and must promptly drain it, resulting in discharges of deck run-off and bilge water. Some boats collect water in the bilge, which must then be pumped out, and others drain continuously. Even a canoe or kayak that takes on significant water will either drain immediately through boat design (if outside the cockpit), or must be bailed. Boating design standards require that boats drain quickly to maintain weight

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<sup>4</sup> Sewage is not at issue here. It is exempt from NPDES permitting by statute and regulated separately under the Clean Vessel Act and CWA § 312. *See* Section I.C, below.

limits.<sup>5</sup> These standards are critical because exceeding a boat's certified capacity can endanger the lives of all onboard.

The administrative record is silent concerning the contents of bilge and deck run-off from various boats under various circumstances. However, some such discharges may contain, for example, suspended solids, dirt, sea shells, mildew, sediment, wood particles, or other substances.<sup>6</sup>

In addition, because it is difficult to achieve air-cooling within the confined spaces of a boat, marine engines must be water cooled. 46 C.F.R. § 58.10-5. Boat engines also commonly use a wet exhaust system whereby water is continuously pumped through exhaust piping and discharged. This results in fewer air emissions

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<sup>5</sup> For example, ABYC Standard H-4 imposes drainage capacity requirements based on cockpit size or a drainage test. The test requires 75% of water volume to drain in 90 seconds. STANDARDS FOR COCKPITS AND SCUPPERS H-4.5.9.1 (ABYC 1999).

<sup>6</sup> After summary judgment, Plaintiffs alleged below that bilge water often contains oil. Riskedahl Decl. ¶ 6 (Nov. 10, 2005). However, existing law prohibits oil discharges sufficient to create a sheen or film, and impose measures to prevent oil from entering the bilge. 33 U.S.C. § 1321; 33 C.F.R. § 153.103(h). The same declarant asserts that he was "aware" or "read reports" that boats also discharge detergents, metals, pesticides, and bacteria, along with an anti-fouling agent called tributyltin (notwithstanding that Congress banned its use on boats under 25 feet in 1998). Riskedahl Decl. ¶¶ 6, 8. It is unclear whether these assertions were intended to refer only to discharges from large passenger vessels (like cruise ships that function as virtual "mini-cities"), or to include small recreational boats. The declarant identifies no support for these assertions, which were not presented to the Agency, and were not addressed by the district court.

(regulated under the Clean Air Act), and is cooler and quieter than a dry exhaust system.<sup>7</sup> The administrative record is silent as to the composition of such discharges.

3. Recreational Boating Involves Multiple Receiving Waters and Multiple States

The navigable waters of the United States include over 250,000 square miles of inland waters, and 88,000 linear miles of tidal shoreline. Recreational boaters regularly transport boats by trailer hundreds of miles to enter suitable bodies of water,<sup>8</sup> and travel by boat from reach to reach, and port to port, via connected waterways. One popular recreational boating route is the Atlantic Intracoastal Waterway -- a network of natural waterbodies and man-made canals that spans the Gulf Coast and Atlantic seaboard. Recreational boats regularly travel between states, from waters under federal jurisdiction to waters under primarily state jurisdiction, and (as discussed below) among waters with different CWA water quality designations.

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<sup>7</sup> Exhaust installations must conform to National Fire Protection Association Standard 302 and ABYC P-1. 46 C.F.R. § 58.10-5(d).

<sup>8</sup> California Boating Facilities Needs Assessment, at 2-15 (Oct. 15, 2002) (Table 2-10).

4. Boating Design and Construction Standards Have Developed for 30 Years in Reliance on 40 C.F.R. § 122.3(a)

The recreational boating industry has developed for over 30 years in reliance on 40 C.F.R. § 122.3(a). In addition to investments in new boat design and production capacity, the 18 million existing boats were designed, manufactured, and sold based on demanding federal and state laws and industry standards for safety and environmental protection that have evolved premised on 40 C.F.R. § 122.3(a). *See, e.g.*, 46 C.F.R. Part 58 (Coast Guard equipment requirements, incorporating industry standards); 33 C.F.R. Part 183 (weight capacity, floatation, safe powering, stability testing, and capacity labeling); 33 C.F.R. Part 155 (oil and hazardous materials); Part 159 (marine sanitation devices and sewage treatment); 33 C.F.R. Part 181, subpart B (compliance certification).

Boat safety depends on exacting specifications relating to weight, stability, floatation, drainage, and reliable and safe powering. NPDES permitting would expose boats and boaters to standards, management practices, and other requirements that are potentially far reaching and comprehensive, and inconsistent with existing standards. (*See, e.g.*, Section I.B., below). The reliance on 40 C.F.R. § 122.3(a) by private and government stakeholders was particularly justified given Congress' clear directive in favor of regulatory finality, expressed in the 120-day limit on judicial review in CWA § 509(b)(1). (*See* Section III, below).

