

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 16
Issue 2 *Spring 2009*

Article 7

2009

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Recommended Citation

Robert A. Noce, *If a Regulation Falls in the Courts, and Nobody's There to Hear It... The Limited Impact of Northwest Environmental Advocates v. EPA on Federal Ballast Water Policy. Northwest Environmental Advocates v. U.S. Environmental Protection Agency.*, 16 Mo. Env'tl. L. & Pol'y Rev. 594 (2009)
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**IF A REGULATION FALLS IN THE COURTS, AND NOBODY'S THERE TO
HEAR IT ... THE LIMITED IMPACT OF *NORTHWEST ENVIRONMENTAL
ADVOCATES V. EPA* ON FEDERAL BALLAST WATER POLICY**

*Northwest Environmental Advocates v. U.S. Environmental
Protection Agency*¹

I. INTRODUCTION

In 1972, Congress, acting under pressure to address the increasingly destructive pollution of America's waterways, passed the first incarnation of the Clean Water Act ("CWA") in part to protect the "biological integrity of the Nation's waters."² Among the CWA's requirements is that no person be allowed to discharge pollutants into the water except by an Environmental Protection Agency ("EPA") permit.³ One issue involved with this obligation has caused particular tension between environmentalists and the regulators charged with issuing permits: the status of ballast water. Ballast water is water taken on or released by cargo ships to balance gains and losses in weight as fuel and cargo is added or released. Because ballast water is essential to the safety of cargo ships, and because it was once thought to have little environmental impact, it has been excluded from the permit process by EPA regulation since 1973.⁴ But ballast water has since been found to have a calamitous effect on the native ecosystems into which it is discharged and is estimated to cause billions of dollars in damages through

¹ 537 F.3d 1006 (9th Cir. 2008).

² 33 U.S.C. § 1251(a) (2000).

³ 33 U.S.C. § 1311(a) (1972). The EPA, through the National Pollutant Discharge Elimination System (NPDES) oversees the approval or denial of permits. *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, 537 F.3d 1006, 1010 (9th Cir. 2008) (citing 33 U.S.C. § 1342). Permits can be categorized as either individual or general. *Nw. Env'tl. Advocates*, 537 F.3d at 1010 (citing *Natural Res. Def. Council v. U.S. Env'tl. Prot. Agency*, 279 F.3d 1180, 1183 (9th Cir. 2002)). Individual permits allow particular individuals or organizations to release pollutants in a specified location. *Id.* General permits "are issued for an entire class of hypothetical dischargers in a given geographical region." *Id.* at 1011.

⁴ 40 C.F.R. § 122.3(a) (1973).

the release of nonindigenous aquatic species accidentally transported to new ecosystems by ballast tanks from other areas of the world.⁵

Unsatisfied with Coast Guard and state regulations already in place,⁶ environmentalists sued to force the EPA to oversee ballast water transfers through the permit process for the discharge of other pollutants.⁷ The 9th Circuit sided with the environmentalists, finding that the CWA mandated EPA regulation of ballast water and that agency action to the contrary violated the spirit of the statutory permit requirement.⁸ But for those who advocate increased regulation of ballast water, the decision may have a limited impact as Congress moves to pass a law that would put ballast water regulation under the exclusive control of the Coast Guard and possibly blunt the impact of state restrictions.⁹ The court in this case probably did not break a great deal of new legal ground, but its decision, especially its reaffirmation of an extremely high standard for finding congressional acquiescence to regulatory bodies, may well have an impact on future congressional decision-making.

II. FACTS AND HOLDING

Among the CWA's requirements is that no person be allowed to discharge pollutants except by an EPA permit.¹⁰ Nonetheless, ballast

⁵ Brent C. Foster, *Pollutants without Half-Lives: The Role of Federal Environmental Laws in Controlling Ballast Water Discharges of Exotic Species*, 30 ENVTL. L. 99, 99 (2000).

⁶ "The Coast Guard regulations . . . require that any ship with ballast water tanks that enters United States waters from beyond 200 miles of the coastline engage in certain practices designed to minimize [aquatic nuisance species] introduction." Loren Remsberg, *Too Many Cooks in the Galley: Overlapping Agency Jurisdiction of Ballast Water Regulation*, 76 GEO. WASH. L. REV. 1412, 1419 (2008) (citing 33 C.F.R. § 151.2035(b) (2004)).

⁷ *Nw. Env'tl. Advocates*, 537 F.3d at 1013.

⁸ *Id.* at 1021.

⁹ Dan Egan, *Conservation Groups Warn of Hole in Ballast Water Bill*, MILWAUKEE JOURNAL-SENTINEL, July 25, 2008, <http://www.jsonline.com/story/index.aspx?id=776605>.

¹⁰ 33 U.S.C. § 1311(a) (1972). The EPA, through the National Pollutant Discharge Elimination System (NPDES) oversees the approval or denial of permits. *Nw. Env'tl. Advocates*, 537 F.3d at 1010 (citing 33 U.S.C. § 1342). Permits can be categorized as

water and other ship discharges were not of primary concern to the EPA when it went about promulgating regulations to compliment the CWA in the early 1970s.¹¹ Following its passage, the EPA promulgated regulations addressing the enforcement of the CWA's provisions.¹² One such regulation freed from the permit requirement the 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."¹³ These regulations effectively exempted unburned fuel, oil, certain bacteria, ammonia, arsenic, copper, lead, nickel, zinc, and other pollutants.¹⁴ The exemptions also applied to ballast water.¹⁵ Because ballast water can contain organisms from various ecosystems, it can be particularly harmful to native populations of wildlife into which it is released.¹⁶ These invasive species also cost an estimated \$137 billion each year in economic losses.¹⁷

either individual or general. *Nw. Envtl. Advocates*, 537 F.3d at 1010 (citing *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 279 F.3d 1180, 1183 (9th Cir. 2002)).

Individual permits allow particular individuals or organizations to release pollutants in a specified location. *Id.* General permits "are issued for an entire class of hypothetical dischargers in a given geographical region." *Id.* at 1011.

¹¹ "[The EPA was] faced with many, many other much higher priority situations such as raw sewage being discharged, municipal plants having to be built, very large paper mills or steel mills and the like discharging. At the time we thought that was not an important area to deal with." *Nw. Envtl. Advocates*, 537 F.3d at 1011 (quoting Craig Voght, EPA, EPA Pub. Meeting #12227, Ocean Discharge Criteria (Sept. 12, 2000, 1p.m.)).

¹² *Id.*

¹³ EPA Administered Permit Programs: the National Pollutant Discharge System, 40 C.F.R. § 122.3(a) (1973). Sewage discharges were already exempt from the permitting process under the CWA, but the other three exceptions were crafted by the EPA through this regulation. *Nw. Envtl. Advocates*, 537 F.3d at 1011. The EPA exempted these discharges largely to reduce administrative costs. *Id.* (citing 38 Fed. Reg. 13,528(b)(13)(ii) (Jan. 11, 1973)).

¹⁴ *Nw. Envtl. Advocates*, 537 F.3d at 1012.

¹⁵ *Id.* (citing *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, 2006 WL 2669042 (N.D. Cal. 2006)).

¹⁶ *Id.* One example of the invasive species phenomenon is the zebra mussel, which had been native to Asia, but after being transported to America in ballast water is now common in the Great Lakes and their tributaries. *Id.* Zebra mussel have been known to starve native populations of fish and other animals where they exist in North America by

In 1999, Northwest Environmental Advocates, San Francisco Baykeeper, and the Ocean Conservancy, environmental groups concerned primarily with the regulation of ballast water, petitioned the EPA to rescind 40 C.F.R. § 122.3(a) on the grounds that it contradicted the statute.¹⁸ The EPA initially ignored the petition, and the environmental groups sued, alleging unreasonable delay.¹⁹ Facing an order from the district court to make a decision on the petition, the EPA consented to do so by September 2, 2003.²⁰ After prolonged silence on the issue, the EPA denied the petition and the environmental groups brought suit in the Northern District of California.²¹

The plaintiffs contended that the CWA did not allow the regulation excepting certain discharges from the permit requirement because the statute clearly prohibited any discharge of almost any pollution except by permit.²² The EPA countered on several fronts, arguing that the district court had no jurisdiction, that the statute of limitations had run, and that Congress had impliedly acquiesced to the regulation by its inaction over the three decades it had been in force.²³ In granting summary judgment for the environmental groups, the district court agreed with their contention that the regulation ran counter to the clear intent of the statute and was thus *ultra vires*.²⁴ It rejected the argument that Congress had acquiesced to the regulation, noting that “overwhelming evidence” is required to hold

eating through algae and other food sources. Zebra Mussels,
<http://www.gma.org/surfing/human/zebra.html>.

¹⁷ *Nw. Envntl. Advocates*, 537 F.3d at 1012. (citing *Nw. Envntl. Advocates*, 2006 WL 2669042).

¹⁸ *Id.* at 1013.

¹⁹ *Id.*

²⁰ *Id.* (citing *Nw. Envntl. Advocates v. U.S. Envntl. Prot. Agency*, F.3d 853, 857 (9th Cir. 2003).

²¹ *Id.* at 1013-14. The plaintiffs also filed directly with the 9th Circuit in the event that the court should have decided it had original jurisdiction pursuant to jurisdictional provisions. *Id.* at 1014.

²² *Id.* The plaintiffs also sought a declaration that the EPA’s decision on their petition was “not in accordance with law.” *Id.*

²³ *Id.* at 1015.

²⁴ ²⁴ *Nw. Envntl. Advocates v. U.S. Envntl. Prot. Agency*, 2005 WL 756614, 9 (N.D. Cal. 2005).

that Congress has accepted a regulation that appears to contradict a statute.²⁵

During the remedy stage, several Great Lakes states²⁶ intervened as plaintiffs and the Shipping Industry Ballast Water Coalition, a private interest group, intervened as a defendant.²⁷ The district court vacated the regulation effective September 30, 2008,²⁸ at which time the defendants appealed the ruling to the 9th Circuit Court of Appeals. The appellate court held in a unanimous decision that the plaintiffs filed their complaint in a timely manner, that 40 C.F.R. § 122.3(a) was promulgated in excess of authority granted to the EPA by the CWA, and that, despite acknowledging its existence, Congress had not acquiesced to the regulation's clear divergence from the spirit and letter of the law.²⁹

III. LEGAL BACKGROUND

The CWA mandates that “[t]he discharge of any pollutant by any person shall be unlawful” except where allowed by EPA permit.³⁰ By regulation, the EPA excluded certain discharges, including ballast water, from the permit process despite being allowed no such power by statute.³¹ Environmental advocates have often clashed with the EPA on similar regulations in the past, with courts generally siding in favor of the environmental advocates on issues such as the interpretation of statutes of limitation, *Chevron* analysis of potentially *ultra vires* regulation and alleged Congressional acquiescence to administrative authority.

²⁵ *Id.* at 12.

²⁶ Illinois, Michigan, Minnesota, New York, Pennsylvania and Wisconsin intervened. *Id.* at 9.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Nw. Envtl. Advocates*, 537 F.3d at 1022.

³⁰ 33 U.S.C. § 1311(a) (1972).

³¹ 40 C.F.R. § 122.3(a).

A. *Statute of Limitations*

By law, civil actions against the United States government must be filed within six years of the accrual of the action.³² The rule is deceptively unambiguous, because while the date of accrual is often clear in tort cases, for example, it is not always as obvious when dealing with environmental regulation and administrative action.³³ Does the action accrue when a regulation is promulgated, when it is challenged administratively, or when administrative proceedings are completed?³⁴

Contrary to other circuits, the 9th Circuit had historically expressed worry that endorsing a broad interpretation of the statute would essentially negate its purpose.³⁵ In *Shiny Rock Mining Corporation v. U.S.*, for example, the 9th Circuit held that an action accrues for the plaintiff as soon as an injury to *any* person or group becomes apparent.³⁶ In its analysis, the court reasoned that a broader interpretation would allow an action to be filed every time an agency rejected a petition for abolition of a regulation, regardless of whether such challenges had been rebuffed by the court in the past.³⁷ The court adopted the position that implementation “of [the plaintiff’s] rationale would virtually nullify the statute of limitations for challenges to agency orders.”³⁸ An absence of direction from the Supreme Court eventually led to a circuit split on this issue, with other circuits mostly taking the opposing position.³⁹

³² 28 U.S.C. § 2401(a) (1978). The purpose of statutes of limitation is to “suppress fraudulent and stale claims from springing up at great distances of time.” 54 C.J.S. *Limitations of Actions* § 2 (2008).

³³ See *Wind River Min. Corp. v. U.S.*, 946 F.2d 710, 713-14 (9th Cir. 1991).

³⁴ *Id.*

³⁵ See *Shiny Rock Min. Corp. v. U.S.*, 906 F.2d 1362, 1365 (9th Cir. 1990).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* See also *Sierra Club v. Penfold* 857 F.2d 1307, 1315 (9th Cir. 1988) (holding that where procedural issues are challenged, the statute of limitations begins to run as soon as injury becomes apparent).

³⁹ See *Illinois Cent. Gulf R.R. Co. v. ICC*, 720 F.2d 958, 961 (7th Cir. 1983) (holding that the statute of limitations does not begin to run upon the promulgation of a regulation if “no one had any reason to challenge the decision at the time it was made”). See also, e.g., *Public Citizen v. Nuclear Regulatory Comm’n.*, 901 F.2d 147, 152 (D.C. Cir. 1990)

But the 9th Circuit reversed course only a year after its *Shiny Rock* decision in *Wind River Mining Corporation v. U.S.*, finding that for the purposes of 28 U.S.C. § 2401(a), a civil action accrues when a final ruling is made on a challenge to administrative rules or regulations.⁴⁰ When the challenge deals with an agency overreaching its authority, the 9th Circuit held that a party is allowed to file a complaint with the agency, and, if denied, is allowed to sue at any time up to six years after the final disposition.⁴¹

In some circumstances, it is difficult to tell when an agency decision is final in terms of the statute. An action is final when it marks the end of the decision-making process on the part of the agency.⁴² It must also be an action by which "rights or obligations have been determined," or from which "legal consequences will flow."⁴³ A mere recommendation cannot be a final decision in terms of 28 U.S.C. § 2401(a).⁴⁴

B. Ultra Vires Challenges and Chevron⁴⁵

Congress has charged the courts with the responsibility of deciding when an agency action is outside the bounds of statutory authority.⁴⁶ The court must invalidate any statute that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."⁴⁷ When an agency does exceed its legislative mandate, the judiciary must step in and put it

(holding that, on issues of substance rather than procedure, the statute of limitations does not run until a final agency action).

⁴⁰ 946 F.2d 710, 716 (citing *Crown Coat Front Co. v. U.S.*, 386 U.S. 503, 511 (1967)).

⁴¹ *Wind River Min. Corp.*, 946 F.2d at 714; see also *Oppenheim v. Coleman*, 571 F.2d 660, 663 (D.C. Cir. 1978) (holding that when the plaintiff "seeks to set aside recent arbitrary agency action" based on an *ultra vires* regulation, the statute of limitations begins to expire only after the plaintiff challenges that action).

⁴² *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). The decision "must not be merely tentative or interlocutory in nature." *Id.* at 178.

⁴³ *Id.* (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

⁴⁴ *Id.*

⁴⁵ *Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984).

⁴⁶ 5 U.S.C. § 706(2)(C) (1966).

⁴⁷ *Id.*

back on course.⁴⁸ In the landmark case *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court had to decide the validity of the EPA's interpretation of a clause in the Clean Air Act requiring an agency permit for individuals or corporations to operate new sources of air pollution.⁴⁹ The court laid out a simple two-part test for determining a regulation's legitimacy. First, the court must decide whether Congress statutorily expressed its intention on the exact issue in question.⁵⁰ If Congress has done so, the inquiry ends and the unambiguous statutory intent controls.⁵¹ If Congress has not done so, then the court must decide whether the agency's interpretation is acceptable.⁵² If the statute has implicitly given an agency the authority to disseminate ambiguities, then reasonable agency interpretation must be allowed to stand, but if the interpretation is not reasonable, the court may strike down the regulation in question.⁵³ Naturally, it is in the best interest of any agency to adhere closely to Congressional intent, lest it risk judicial interference.⁵⁴

But in recent years, the court has found ambiguity even in the simplicity of *Chevron*-style deference to agency interpretation.⁵⁵ In *Christensen*, for example, the court held that agency decisions lacking force of law "do not warrant *Chevron*-style deference," and instead should be entitled to respect only so long as they are persuasive interpretations of statutory ambiguities.⁵⁶ But in his concurrence, Justice Scalia wrote that agencies should continue to enjoy the wide deference laid out in *Chevron* regardless of the format of their interpretations because "[t]he power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to

⁴⁸ James T. O'Reilly, *Losing Deference in the F.D.A.'s Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 979 (2008).

⁴⁹ *Chevron*, 467 U.S. at 839-40.

⁵⁰ *Id.* at 842. If Congress has granted authority to an agency to "elucidate a specific provision of the statute by regulation ... [s]uch regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Id.* at 843-44.

⁵¹ *Id.* at 843.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ O'Reilly, *supra* note 28, at 941-42.

⁵⁵ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207 (2006).

⁵⁶ *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

fill any gap left, implicitly or explicitly, by Congress.”⁵⁷ Justice Breyer, meanwhile, advocated a return to *Skidmore*⁵⁸-type analysis in cases in which Congress did not impliedly or expressly grant authority,⁵⁹ arguing that courts “may pay particular attention to the views of an expert agency where they represent ‘specialized experience.’”⁶⁰ It appears that the question of whether *Chevron* will remain the major controlling case on issues of statutory interpretation by agencies has not been conclusively answered,⁶¹ but Justice Breyer’s position that *Chevron* is an outgrowth of *Skidmore* is becoming more popular with the court.⁶²

C. Congressional Acquiescence

When considerable evidence exists that Congress has acquiesced to an agency interpretation, that interpretation must stand.⁶³ The 9th Circuit has long held that Congressional acquiescence is difficult to show. Acquiescence can only be shown if the administrative interpretation is “of long standing, and ... well-established in administrative practice.”⁶⁴ In *Bob Jones University v. U.S.*,⁶⁵ the Supreme Court held that Congressional acquiescence can come in the form of hearings and votes on the issue that tend to uphold the agency’s view.⁶⁶ However, “[a]bsent such overwhelming evidence of acquiescence, [the court is] loath to replace the plain text and original understanding of a statute with an

⁵⁷ *Id.* at 591.

⁵⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁵⁹ *Skidmore.*, 323 U.S. at 139 (holding that courts should defer to agency interpretations even when “they do not constitute an exercise of delegated lawmaking authority.” *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting) (citing *Skidmore*, 323 U.S. at 139)).

⁶⁰ *Christensen* 529 U.S. at 596 (quoting *Skidmore* 323 U.S. at 139).

⁶¹ See Sunstein, *supra* note 37.

⁶² See *U.S. v. Mead*, 533 U.S. 218, 228 (2001) (holding that the court should look to “the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position,” regardless of whether Congress intended for the agency to have interpretative authority, as is an important factor in *Chevron* analysis).

⁶³ *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, 537 F.3d 1006, 1022 (9th Cir. 2008).

⁶⁴ *Maun v. U.S.*, 347 F.2d 970, 978 (9th Cir. 1965).

⁶⁵ 461 U.S. 574 (9th Cir. 1983).

⁶⁶ *Id.* at 168-69.

amended agency interpretation.”⁶⁷ Mere Congressional inaction in the face of a regulation, therefore, is not enough,⁶⁸ but it is not always clear how much evidence is necessary to find Congressional consent.⁶⁹

In *Rapanos v. U.S.*, the Supreme Court held that an Army Corps of Engineers’ interpretation of a CWA provision protecting “navigable waters” was too broad.⁷⁰ In response to the argument that Congress acquiesced to the interpretation, Scalia wrote for the majority, “[w]hat the dissent refers to as ‘Congress’ deliberate acquiescence’ should more appropriately be called Congress’s failure to express any opinion.”⁷¹ In seeming contradiction with the *Bob Jones* case, the majority here held that only legislative action reinforcing administrative interpretation is enough to find Congressional acquiescence.⁷²

The major issue decided in the instant case was whether Congress had acquiesced to the regulation in question.⁷³ The court addressed the issues of *Rapanos* in greater detail, examining every law passed by Congress since the promulgation of the regulation in question that might be a sign of acquiescence. If there is a novel legal aspect to this decision, it is in its reaffirmation and perhaps even strengthening of Scalia’s basic conclusion in *Rapanos* that “the standard for a judicial review of congressional acquiescence is extremely high.”⁷⁴

IV. INSTANT DECISION

The defendant brought several issues to the 9th Circuit’s attention on appeal. The court held that (1) it did not have original jurisdiction, and

⁶⁷ *Nw. Envntl. Advocates*, 537 F.3d at 1022 (quoting *Bob Jones Univ.*, 461 U.S. at 595).

⁶⁸ *Rapanos v. U.S.*, 547 U.S. 715, 749 (2006); see also Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 796 (2007).

⁶⁹ See Bressman, *supra* note 48. Bressman argues that the quantity of evidence necessary to find acquiescence is fact-dependant. *Id.*

⁷⁰ 547 U.S. 715, 737 (2006).

⁷¹ *Id.* at 750.

⁷² *Id.* While acknowledging that the court sometimes found acquiescence without legislative action, the court argued that the overwhelming evidence necessary to do so was not present here. *Id.*

⁷³ *Nw. Envntl. Advocates v. U.S. Envntl. Prot. Agency*, 537 F.3d 1006, 1022 (9th Cir. 2008).

⁷⁴ *Id.*

thus the district court's jurisdiction was proper,⁷⁵ (2) that the statute of limitations had not expired because it did not start running until the plaintiffs' petition to the EPA was denied,⁷⁶ (3) that the plaintiffs challenged all exemptions in the regulation that ran counter to the statute,⁷⁷ (4) that the regulation clearly ran counter to the intent of the legislature⁷⁸ and that (5) Congress did not acquiesce to the regulation simply through inaction.⁷⁹

A. Subject Matter Jurisdiction

The court first addressed the issue of whether any statute removed the district court's subject matter jurisdiction in this case⁸⁰. At the urging of the defendants, the court concentrated on section 509(b)(1) of the CWA, which specified two categories of agency action that would result in original jurisdiction for the 9th Circuit if they applied in this instance, and addressed them in turn.⁸¹ The court found that the first category, 1369(b)(1)(E), did not apply because, while it did provide original jurisdiction for any EPA act backing numerical limitations on the CWA, the regulation in question did not fall into that category.⁸² The regulation does not involve limitations, rather it fashions exemptions from the CWA's limitations on discharging pollutants.⁸³

The second section the court examined was 509(b)(1)(F). This provision allowed the 9th Circuit original jurisdiction in cases involving the issuance or denial of permits for discharging pollutants. In its analysis, the court points out that prior decisions had narrowly tailored this

⁷⁵ *Id.* at 1015.

⁷⁶ *Id.* at 1019.

⁷⁷ *Id.* at 1020.

⁷⁸ *Id.* at 1023.

⁷⁹ *Id.* at 1024.

⁸⁰ It should be noted that this question was largely academic. The plaintiffs had filed a complaint directly to the 9th Circuit in addition to the complaint filed to the district court in case the 9th Circuit found that it had original jurisdiction. *Id.* at 1014.

⁸¹ *Id.* at 1015.

⁸² *Id.* at 1017.

⁸³ *Id.*

provision.⁸⁴ Unless the case involves a specific instance of the EPA granting or denying a permit, this statute cannot be used to obtain original jurisdiction in the court of appeals.⁸⁵ The court pointed out that whenever it had used these statutes in the past to obtain original jurisdiction, it had done so on the basis of explicit provisions giving it that right.⁸⁶ In the instant case, because the regulation specifically exempted the pollutants in question from regulation, there would never be a case involving the issuance or denial of a permit.⁸⁷ The court concluded that the statute in question did not allow for original jurisdiction.

B. Statute of Limitations

The court next addressed the issue of whether the statute of limitations had run on the current action. Its analysis hinged on whether the cause of action was first available when the regulation was promulgated or in 2003 when the EPA ruled on the petition.⁸⁸ This question had already been duly ruled upon.⁸⁹ In previous decisions, the court had held that the statute of limitations begins to run after a ruling is made on a petition or request.⁹⁰ Because this case was indistinguishable from previous cases, the court concluded that the suit had been filed in a timely manner.⁹¹

C. Ultra Vires Challenge

The court then began its analysis of the merits of the plaintiffs' case. The court proposed that if the plaintiffs were correct that the regulation in question exceeded the statutory jurisdiction of the EPA, then

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 1017-18.

⁸⁷ *Id.* at 1018. (citing *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp.2d 1101, 1115-16 (N.D. Cal. 2003).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (citing *Wind River Mining Corp. v. U.S.*, 946 F.2d 710, 716 (9th Cir. 1991).

⁹¹ *Id.* at 1019.

it would be invalid.⁹² The court applied the *Chevron* test to decide whether the regulation was *ultra vires* in nature.⁹³ The court first disposed of the defendants' arguments in turn. The EPA asserted first that the plaintiffs had only challenged the portion of the regulation dealing with ballast water in their petition, and should have been limited to challenging that portion at trial.⁹⁴ The court held that while the plaintiffs had always concentrated on the ballast water discharges, they had challenged all three exemptions that they claimed violated the CWA in their petition.⁹⁵

The court next turned to the *Chevron* analysis. The defendants disputed the plaintiffs' claim that the regulation contradicted the plain meaning of the statute. The court quickly disposed of this argument, asserting that the text of the CWA was clear on the issue of permits. It clearly required permits for all discharged pollutants, the court concluded.⁹⁶ The court looked to the definition of pollutant, which included "biological materials."⁹⁷ The court read "biological materials" to include the invasive species often released with ballast water.⁹⁸ The court finally referenced a D.C. Circuit case that had held that the EPA could decide whether to issue permits, but could not decide to exempt pollutants entirely from requiring permits to discharge.⁹⁹ The court agreed that the D.C. case was "dispositive of our case."¹⁰⁰ It concluded that because the plain intent of the statute was to require permits for all discharges of pollution, the regulation was outside the authority of the EPA to promulgate.

D. Acquiescence by Congress

⁹² *Id.*

⁹³ *Id.* at 1020.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1021. (citing *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993)).

⁹⁷ 33 U.S.C. § 1362(7), (8).

⁹⁸ *Nw. Envtl. Advocates*, 537 F.3d at 1021.

⁹⁹ *Id.* (citing *Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977)).

¹⁰⁰ *Id.*

The court next took up the issue of whether Congress had acquiesced to the EPA's interpretation of § 122.3(a) of the CWA. The judges first noted that the standard of review, as set out in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), is difficult to overcome.¹⁰¹ The court noted that only when the interpretation of the statute is obviously correct, and when there is extensive legislative history evidencing Congress' intent, can their acquiescence be implied.¹⁰² It relied heavily on the Supreme Court's previous decisions in *Bob Jones* and *Rapanos* that congressional acquiescence is extremely difficult to prove.¹⁰³ The court acknowledged the EPA's contention that several post-1973 statutes pointed to Congress' knowledge of the regulation and perhaps even its unwillingness to overturn it, but asserted that the statutes, while evidence that Congress knew of the regulation at issue, did not evidence its acquiescence.¹⁰⁴ First, the court ruled that the fact that Congress had made legislation exempting certain military vessels from compliance with the CWA did not evidence its acquiescence with the regulation.¹⁰⁵ The court pointed to legislative history showing Congress' concern with state, not federal, regulations that led them to pass this law.¹⁰⁶ Although Congress acknowledged the presence of § 122.3(a), it never cited it approvingly. Another statute referenced by the defendants extended the CWA to vessels engaged in certain mining and drilling operations even when beyond its traditional scope.¹⁰⁷ The court noted that because Congress never explicitly approved of the EPA's decision to exempt certain vessels from the permit requirement, this law did not evidence acquiescence.¹⁰⁸

The court also acknowledged the EPA's argument that several statutes Congress passed regulating the discharge of pollutants exempted

¹⁰¹ *Id.* at 1022.

¹⁰² *Id.* (citing *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 595 (1983)).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1023.

¹⁰⁵ *Id.* The National Defense Authorization Act of 1996 exempted "discharges incidental to the normal operation of United States military vessels from CWA permitting requirements..." *Id.* (citing 33 U.S.C. §§ 1322(a) (1996)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1024.

¹⁰⁸ *Id.*

by the regulation evidenced its intent to leave the regulation in place.¹⁰⁹ The court noted that Congress had passed several laws limiting the discharging of certain pollutants, but that all of the statutes cited by the defense explicitly stated that they would only supplement, not “amend [or] repeal any other provision of law.”¹¹⁰ The court held that because the overwhelming evidence of Congressional acquiescence required by the *Northern Cook County* case was not present here, it had to rule in favor of the plaintiffs.¹¹¹

V. COMMENT

It is unclear at this time whether this decision will have a wide-ranging impact on ballast water pollution. Future Congressional action will most likely have a much more prominent effect on whether ballast water will be regulated more stringently in the future. Most of this court’s impact on the ballast water debate will most likely be felt in the near future, before Congress has had the opportunity to act. It may also influence Congress to take action on an issue that it has long ignored.

A. Legal Analysis

That said, the court’s conclusion that the regulation was *ultra vires* is certainly correct. There is no exception in the CWA permit requirements for ballast water, and for the EPA to create one through the promulgation of *ultra vires* regulation is inappropriate. In coming to its decision, the court did not stray from existing precedent – if anything, it strengthened it – and, on the crucial question of whether the regulation went beyond the statutory jurisdiction of the EPA, correctly applied the *Chevron* test. The dispositive issue was whether the term “biological materials” included invasive species released in ballast water. Because the definition accompanying the statute does specifically include “biological materials” as pollutants, the court’s decision was not a difficult one.¹¹²

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing 33 U.S.C. § 1907(f)).

¹¹¹ *Id.*

¹¹² *Northwest Envtl. Advocates* at 1021.

The issue of congressional acquiescence, however, was closer. While the court correctly applied a high standard on this matter, it is unclear whether Congress actually did not acquiesce. The court relied heavily on the Supreme Court's decision in *Bob Jones University v. United States* that "[a]bsent ... overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation."¹¹³ In that case, the court referenced repeated congressional refusal to overturn an IRS regulation as evidence of acquiescence.¹¹⁴

In the present case similar evidence should have been apparent. Even as the appeals court handed down its decision, Congress was (and is) in the process of passing new legislation that would cement the Coast Guard's authority over ballast water regulation, and explicitly uphold the EPA's continued refusal to regulate it.¹¹⁵ Perhaps the court was unaware of congressional action because it has occurred relatively recently and was not referenced in any presented briefs, but if it was aware, the court at least should have acknowledged its presence. Even if it had, however, it's very possible the court still would have held that congressional action on a bill that has not yet been voted on in the Senate did not meet the standard for congressional acquiescence. It certainly was weaker than the evidence in *Bob Jones*. Given that, though its decision to find a lack of congressional acquiescence should have been more deeply analyzed, the court made the right decision.

B. The Future of Ballast Water Regulation: The Coast Guard?

In the wake of the decision, the EPA has put forward proposals for new regulations on ballast water discharge in U.S. waters. Future EPA permits would probably only require ships to flush their ballast tanks with saltwater before entering U.S. waters, a practice already required by Coast

¹¹³ 461 U.S. 574, 595 (1983).

¹¹⁴ *Id.*

¹¹⁵ H.R. 2830, 110th Cong. (2008). The resolution, which passed the House by an overwhelming margin and is also likely to pass the Senate, upholds the regulation in its current form.

Guard regulations.¹¹⁶ According to some environmental advocates, “the EPA has put forward a weak permit that will not fully protect the Great Lakes or other U.S. waters from the threat of aquatic invasive species.”¹¹⁷

Regardless, future ballast water regulation may be out of the EPA’s hands. Congress is currently in the process of passing the Ballast Water Treatment Act of 2008.¹¹⁸ That bill would require ocean vessels coming into any U.S. port to install treatment technology to clean ballast water before its discharge.¹¹⁹ The bill has been met with mixed reviews from environmental advocates. For one thing, the bill in its current form would only require the shipping industry to install cleaning technology several years down the road, not immediately as the situation likely demands.¹²⁰ The bill in its current form would also limit the ability of state and local governments to apply more stringent regulations to ballast water discharge.¹²¹ This would have the most prominent effect on the Great Lakes states, many of which already have their own ballast water laws.¹²²

Despite these concerns, many environmental advocates and Congressional leaders have stated their support for the legislation, which would eventually require technological improvements to stem the environmental impact of ballast water discharges. Should the bill pass the Senate and be signed into law, one thing is clear: The impact of the 9th Circuit’s decision in *Northwest Environmental Advocates* on ballast water regulation will be nullified. Its future effect will probably be limited to its reaffirmation and perhaps even strengthening of the high standard of evidence required to find congressional acquiescence.

VI. CONCLUSION

¹¹⁶ *Id.*

¹¹⁷ Healing Our Waters–Great Lakes Coalition, July 23, 2008, available at <http://www.glin.net/lists/glin-announce/2008-07/msg00053.html>.

¹¹⁸ H.R. 2830, 110th Cong. (2008).

¹¹⁹ *Northwest Environmental Advocates v. U.S. EPA*, ENVIRONMENTAL APPEALS COURT BLGG, July 24 2008, <http://environmentalappealscourt.blogspot.com/2008/07/northwest-environmental-advocates-v-us.html>.

¹²⁰ Egan, *supra* note 7.

¹²¹ *Id.*

¹²² Karen Shapiro, Keep State Control, Milwaukee Journal-Sentinel, May 3 2008, available at <http://www.jsonline.com/story/index.aspx?id=746426>.

FEDERAL BALLAST WATER POLICY

The court's decision to apply the CWA permit requirement to ballast water discharges is the correct one. It upholds the will of the legislature as codified in the law and beats back regulatory attempts to blunt the impact of environmental regulation. The decision now lies with Congress, as it should, as to whether it wishes to keep the CWA as it currently stands and require EPA permits for ballast water regulation. Any Congressional attempt to dull the impact of the court's decision will surely be met with an outcry from the environmentalist community and with applause from the shipping coalition. Congress should ignore reactions from both sides to come up with a sensible new policy that protects American waters by requiring swift action from the shipping industry while nullifying the certain economic impact of such actions. Easier said than done.

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