The Battle Against Invasive Species: The Clean Water Act and Environmental Protection Agency Regulation of Recreational Boats

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THE BATTLE AGAINST INVASIVE SPECIES:
THE CLEAN WATER ACT AND
ENVIRONMENTAL PROTECTION AGENCY
REGULATION OF RECREATIONAL BOATS

I. INTRODUCTION

Boats pollute. The most dangerous pollutants coming from boats are invasive species—pollutants with the ability to reproduce. Invasive species are not limited to the Great Lakes and coastal regions; invasive species are a global problem.1 Recently, the United States District Court for the Northern District of California recognized this problem. It held that the Environmental Protection Agency’s (“EPA”) exemption of incidental and other discharges from vessels from the National Pollution Discharge Elimination System (“NPDES”)2 violated the Clean Water Act (“CWA”)3 and vacated the exemption.4 The exemption stated: “The following discharges do not require NPDES permits: . . . Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel.”5 The EPA must now create a scheme to regulate boat discharges. To do so properly, the EPA must recognize and address the fact that recreational boats pollute by spreading invasive species to waterways.

The plaintiffs’ primary concern in Northwest Environmental Advocates v. United States Environmental Protection Agency was the

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5. 40 C.F.R. § 122.3.
spread of invasive species as a result of ballast water discharges. The court recognized that discharging ballast water was "incidental [to] the normal operation of a vessel" but found that the biological pollution caused by the discharging of ballast water violated the CWA. The court gave the EPA until September 30, 2008, when the current exemption will be vacated, to develop a new regulatory scheme for vessels that complies with the CWA, the NPDES, and the holding of Northwest Environmental Advocates.

This Comment supports the holding of Northwest Environmental Advocates but suggests a broader approach, beyond proscription of ballast water discharges, to prevent the spread of invasive species to inland waterways. This Comment suggests that, due to the invasive species threat posed by recreational boats and large commercial ships, the EPA will need to recognize and regulate both types of vessels when drafting the new regulatory scheme that complies with the CWA, the NPDES, and the court's holding.

This Comment will show that the spread of invasive species by recreational boats requires that the EPA, under the CWA, recognize and address the problem. To do otherwise would violate the CWA, the NPDES, and Northwest Environmental Advocates. Part II discusses the history and purposes of the CWA and the NPDES. Part III describes the interest of the federal government and selected state governments in preventing the spread of invasive species in their water resources. Part IV addresses the court's holding and analysis in Northwest Environmental Advocates v. United States Environmental Protection Agency. Finally, Part V discusses the threat of recreational boats spreading invasive species and argues that the CWA's scope, the EPA's responsibilities, and the holding in Northwest Environmental Advocates go beyond the discussion of large, commercial ships' ballast waters. It concludes that the CWA's scope and the EPA's responsibilities must extend to recreational boats as point source polluters in order to prevent the spread of invasive species to inland water systems.

6. Nw. Envtl. Advocates, 2006 WL 2669042, at *3. Ballast water is water taken on by large shipping vessels to help maintain stability and balance, which are often disturbed by loading and unloading of cargo. Id.
7. Id. (quoting 40 C.F.R. § 122.3(a)).
8. Id. at *10. The court noted that one goal of the CWA was to maintain the "biological integrity of the Nation's waters." Id. at *1 (quoting 33 U.S.C. § 1251(a)).
9. Id. at *14–15.
10. See infra Part IV.B.
II. THE CLEAN WATER ACT AND NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM

Congress enacted the modern Clean Water Act in 1972 with the objective of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." The CWA evolved from the Rivers and Harbors Appropriations Act of 1899 and the Federal Water Pollution Act of 1948. These two predecessor laws vested most power to control water pollution in the states and were used only to help enable states to reach their goals. These statutory schemes allowed states to determine how much pollution a water body could receive and allowed pollution discharges into state waters as long as the water quality standards stayed within the limits established by the individual states.

Congress, by creating the CWA, changed the legislative scheme from a water quality standard approach operated by the states to an effluent limits approach with more EPA control. The statute defines "effluent limitation" as: "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." Congress gave the EPA authority to enforce the CWA.

To further help control point source pollution discharges, Congress created the NPDES. A "point source" is:

11. 33 U.S.C. § 1251(a) (2000). The CWA has undergone several amendments since 1972, but the legislative scheme has remained intact. See id.
14. Id. at 52.
[A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.  

The NPDES allows the EPA to issue permits for discharging pollutants to point source polluters, as long as in so doing it is consistent with the CWA. An NPDES permit allows the “discharge [of] a specified amount of a pollutant” into the United States' waters. “Pollutant” is defined as:

[D]redged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean . . . “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the meaning of section 1322 of this title . . . .

Courts have interpreted pollutants to include dead fish and fish parts as biological materials. Congress intended for a broad definition of pollutant but specifically excepted “sewage from vessels” due to another statute covering marine sanitation devices.

The CWA considers pollution discharges “any addition of any pollutant . . . from any point source” into United States' waters. Thus,

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five elements must be present for the NPDES permit to be required: “(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.” Without a permit, “the discharge of any pollutant by any person [is] unlawful.”

The statute does not define “added,” but courts have interpreted it to mean that the pollutant must come from the “outside world.” In *National Wildlife Federation v. Gorsuch*, the court stated that a dam did not add pollution to a river when it turned live fish (biological matter) into dead fish because the fish existed in the water prior to their death. Thus, “added” has a straightforward meaning—the addition of something new to the water.

The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” Although this is a vague definition, courts have determined that Congress intended to give the word the broadest interpretation and go beyond just waters that are navigable in fact. Some courts have even stated that the CWA applies to all waters within the borders of the United States. Congress’s authority over intrastate waters, derived from the Commerce Clause, allows Congress to regulate the recreational use of inland lakes because these lakes have an impact on interstate commerce.

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28. Id. at 165, 183; Brautigam, supra note 12, at 57.

29. See *Gorsuch*, 693 F.2d at 174–75, 183. Similarly, a factory that takes in water with existing pollutants would be responsible only for the pollutants added above the pre-existing pollutant levels upon discharge. See Brautigam, supra note 12, at 57.


33. *Byrd*, 609 F.2d at 1210. The court pointed out how water quality for swimming and for healthy fish and wildlife adds economic value to the lake and surrounding property. *Id.* However, some waters may still not be under the CWA jurisdiction, such as isolated ponds. See generally *Rapanos*, 126 S. Ct. at 2226; *SWANCC*, 531 U.S. at 171–72.
NPDES permits are valid, for a maximum of five years before renewal is required. The EPA is in charge of enforcing the CWA and NPDES. States may develop their own programs, but the EPA administrator must approve these programs. Permits issued through state programs are still subject to the EPA Administrator's approval and are subject to all conditions the Administrator feels are necessary to comply with the CWA and NPDES.

It should be noted that the EPA's authority to regulate ships and their discharges could conflict with Coast Guard regulations for the safe operation of ships. However, because the focus of this Comment is on the EPA exercising authority over recreational boats, these potential conflicts are not explored.

Violations of the CWA and the NPDES can carry criminal liability. Depending on the violator's mental state and the nature of the action, liability may range from $2,500 to over $1 million or fifteen years in prison or both. Civil penalties for violations can also be severe.

The EPA's exemption of "discharge[s] incidental to the normal operations of a vessel" from the NPDES program included ship ballast waters. Due to the spread of invasive species through ballast waters, the Northwest Environmental Advocates filed suit against the EPA, arguing that the exemption violated the CWA and the NPDES.

35. 33 U.S.C. § 1342(b); see also Fairhurst v. Hagener, 422 F.3d 1146, 1148 (9th Cir. 2005); Defenders of Wildlife v. EPA, 420 F.3d 946, 950 (9th Cir. 2005); Nw. Envtl. Advocates v. EPA, No. C 03-05760 SI, 2006 WL 2669042, at *2 (N.D. Cal. Sept. 18, 2006).
37. 33 U.S.C. § 1342(g). The EPA permit would be subject to the Coast Guard regulations concerning the safe operation of ships and stowage of pollutants. Id.
38. Unlike large commercial ships, recreational boats do not need to take in ballast water to operate safely. The focus of this Comment is on the potentially harmful spread of invasive species via small boats, which are often removed from one body of water and put into another. Therefore, for purposes of this Comment, no discussion on the potential conflicts between the two governing statutes is necessary. For a discussion of regulatory schemes pertaining to ballast water see Brautigam, supra note 12, at 44–51.
40. Id.
41. See id. § 1319(d). The penalty may be as high as $25,000 per day per violation. Id.
42. National Pollution Discharge Elimination System, 40 C.F.R. § 122.3(a) (2007).
III. INVASIVE SPECIES IN THE UNITED STATES' WATERS AND THE FEDERAL AND STATE GOVERNMENTS' STANCES

A. The Federal Government

Congress recognized the dangers of invasive species in United States waters when it passed the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 ("NANPCA"), which was amended and expanded by the National Invasive Species Act of 1996 ("NISA"). Congress found that "the discharge of untreated water in the ballast tanks of vessels and through other means" has led to invasive species in United States' waterways, creating a negative impact on native species and aquatic environments, as well as on the economies of the surrounding areas. Congress specifically called attention to invasive animal species like the zebra mussel, ruffe, and round goby, while also recognizing the effects of invasive plant species such as the Eurasian water milfoil.

Congress acknowledged that once invasive species have entered United States' waters they may unintentionally spread to other waters, such as inland lakes and rivers. Recreational boaters and commercial barge traffic are two ways by which invasive species may be inadvertently spread.

The purpose of NISA is to prevent the spread of invasive species and to manage, fund, and disseminate information that will help control the impacts of invasive species. The Aquatic Nuisance Species Task Force, of which the EPA administrator is a member, is in charge of seeing these...
purposes carried out.\textsuperscript{50} NISA also allows the Secretary of Homeland Security to create regulations and voluntary guidelines for ships with ballast water tanks but does not mention other types of vessels.\textsuperscript{51}

President Clinton took additional steps to help prevent and minimize the spread of invasive species by issuing an executive order requiring federal agencies to identify actions that may affect invasive species and to take steps to prevent their spread.\textsuperscript{52} This executive order created the Invasive Species Council to oversee its implementation, encourage state and local action, and develop recommendations for international cooperation.\textsuperscript{53}

B. State Governments

Many states have taken steps beyond the federal government's actions in an effort to prevent the spread of invasive species.\textsuperscript{54} For example, Wisconsin, which borders two Great Lakes and the Mississippi River and has numerous inland lakes, has passed specific legislation to address the spread of invasive species.\textsuperscript{55}

Wisconsin established a statewide management plan to help prevent the spread of invasive species.\textsuperscript{56} The Wisconsin legislature mandated the plan to provide invasive species education and research\textsuperscript{57} and to include an inspection program of recreational boats, trailers, and equipment.\textsuperscript{58}

\textsuperscript{50} Id. § 4721(b). Other members include the Director of the Fish and Wildlife Service, the Under Secretary of Commerce for Oceans and Atmosphere, the Commandant of the United States Coast Guard, the Assistant Secretary of the Army (Civil Works), the Secretary of Agriculture, and any other federal agency head that the Director of the Fish and Wildlife Service or the Under Secretary of Commerce for Oceans and Atmosphere (as chairpersons of the task force) deem appropriate. Id.; see also id. § 4702(2), (4), (15).

\textsuperscript{51} Id. § 4711. "Secretary" is defined as the Secretary of the Department within which the Coast Guard is operating, which is currently the Department of Homeland Security. Id. § 4702(12).


\textsuperscript{53} Id. The members of the Invasive Species Council are the Secretaries of State, the Treasury, the Interior, Agriculture, Commerce, Transportation, and Defense, and the EPA Administrator. Id.

\textsuperscript{54} See Protect Your Waters, http://www.protectyourwaters.org/resources/#links (last visited Oct. 20, 2007) (providing a list of links to several state-specific websites). California and Michigan have taken the lead in passing state legislation controlling ballast water. CAL. PUB. RES. CODE §§ 71200–71271 (West 2007); MICH. COMP. LAWS § 324.3112(6)(2007); see also Papavizas & Kiern, supra note 44, at 287–88. Rhode Island has also addressed invasive species transported in ballast water. See R.I. GEN. LAWS § 46-17.3-2 (Supp. 2006).

\textsuperscript{55} See WIS. STAT. § 23.22 (2005–2006).

\textsuperscript{56} Id. § 23.22(2)(b)(1).

\textsuperscript{57} Id. § 23.22(2)(b)(5).

\textsuperscript{58} Id. § 23.22(5) (requiring the plan to include periodic inspections of boats entering
Wisconsin regulations specifically address the spread of invasive species from recreational boats.\(^{59}\) The law states that "[n]o person may place or use a boat or boating equipment or place a boat trailer in a navigable water if the person has reason to believe that the boat, boat trailer, or boating equipment has any aquatic plants attached."\(^{60}\) However, the penalties for violating this law are nominal: fifty dollars for the first offense and one hundred dollars for each subsequent offense in the same year.\(^{61}\) Other states have similar laws to control invasive species from spreading in their waterways.\(^{62}\)

In summary, both the federal government and state governments have recognized the threat of invasive species and the need to control and prevent their spread. The issue analyzed in *Northwest Environmental Advocates* resulted because a federal agency did not address a major source for the spread of invasive species, ballast water.\(^{63}\) This Comment suggests that recreational boats are another major source of invasive species, and thus must be addressed by the EPA, as mandated by the CWA.

### C. Northwest Environmental Advocates v. EPA\(^{64}\)

In January 1999, Northwest Environmental Advocates filed a

\(^{59}\) See WIS. STAT. § 30.715 (2005–2006); WIS. ADMIN. CODE NR § 109.08 (2003). The regulations prohibit people from distributing and removing aquatic plants, as well as intentionally introducing specific invasive species.

\(^{60}\) WIS. STAT. § 30.715(2). The law also allows law enforcement officers to order people to remove their boats from the water, or not to place their boats in the water, if the law enforcement officer believes aquatic plants or zebra mussels are attached. *Id.* § 30.715(4). Aquatic plants have been shown to spread both plant and animal invasive species. *See infra* Part IV.A.

\(^{61}\) WIS. STAT. § 30.80(1) (2005–2006). Maine has a similar prohibition against transporting and possessing invasive species with stricter penalties for repeat offenders; violation of the law allows for a forfeiture of up to $50 for the second offense and up to $500 for each subsequent violation. ME. REV. STAT. ANN. tit. 38, § 419-C (2001 & Supp. 2007).


petition with the EPA requesting the repeal of the NPDES exemption for "discharge[s] incidental to the normal operation[s] of a vessel" as a violation of the CWA; however, the petition was denied. Northwest Environmental Advocates appealed the denial to the United States District Court for the Northern District of California, demanding an injunction for the repeal of 40 C.F.R. § 122.3(a) ("the permit exemption") because it violated the CWA. On March 30, 2005, the district court granted summary judgment in favor of Northwest Environmental Advocates. On September 18, 2006, after several states intervened as plaintiffs, the court issued a permanent injunction against the EPA, vacated the permit exemption, and ordered the EPA to develop a new regulatory scheme without the exemption.

1. The Court's Decision

The court's standard of review for the EPA's regulation was found in the Administrative Procedure Act ("APA") and Chevron U.S.A., Inc. v. National Resources Defense Council. The APA states that "the court 'shall' set aside any agency decision that the court finds is 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with [the] law' or a decision that is 'in excess of statutory jurisdiction, authority, or limitations.'" The Chevron standard for reviewing an agency's statutory construction contains two parts. First, the court looks to see whether Congress spoke to the question at issue. Second, if Congress has done so, the court and agency "must give effect to the unambiguously expressed intent of Congress." If Congress has not spoken to the question, the court decides "whether the agency's answer is based on a permissible construction of the statute."

65. 40 C.F.R. § 122.3(a) (2007).
67. Id.
68. Id. at *13. The court also addressed a number of jurisdictional issues to determine that the court had jurisdiction to decide the case. Id. at *3–5.
70. Id. at *15 (vacating the exemption effective September 30, 2008).
72. Id. (quoting 5 U.S.C. § 706(2)(A), (C) (2000)).
74. Id. at 843.
75. Id.
The court, applying the *Chevron* standard, determined that the CWA "directly states that the EPA must form NPDES permit requirements for discharges incidental to the normal operation of a vessel, including ballast water." The court stated that an NPDES permit is required when an activity "1) discharges, i.e. adds, 2) a pollutant 3) to navigable waters 4) from 5) a point source." The court applied this test to ballast water.

Ballast water, the court determined, introduces pollutants from the outside world and thus qualifies under the discharges or addition definition of the CWA. The court noted, "ballast water discharges clearly introduce biological materials from outside sources" by referencing the introduction of zebra mussels to the Great Lakes.

Ballast water met the pollutant requirement because it can contain fish remains, which are biological materials. The CWA does have exceptions, but ballast water does not meet any exception. The CWA excludes "'sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces.'" However, sewage is regulated by the Marine Sanitation Devices statute, thus it does not apply to ballast water, and an exemption for military vessels was Congress's decision.

The "navigable water" requirement was easily met and not disputed because ballast water is obviously discharged in the "waters of the United States."

Lastly, the CWA defines a point source as a "vessel or other floating

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81. 33 U.S.C. § 1362(6)(A); see also supra notes 18–20 and accompanying text.


craft. The from element is used to show the connection between the discharge, pollutant, and point source, which was clearly met because ballast water comes from a ship.

The court also addressed the EPA's argument that Congress acquiesced to the permit exception by not overturning it through legislation. The court approached this argument with "extreme care" and found the defendant had not demonstrated "overwhelming evidence of acquiescence by Congress."

2. The Remedy

The Plaintiffs focused on ballast water as the reason the permit exemption violated the CWA and the NPDES; thus, the court focused on ballast water in its decision to grant permanent injunctive relief as the remedy. Accordingly, on September 30, 2008, the "vessel discharge" permit exemption will be vacated.

To determine the appropriateness of this remedy, the court first discussed ballast water. The court recognized that "ballast water is essential to the proper functioning of cargo ships"; however, the court also recognized that it transfers organisms between bodies of water. For example, cargo ships brought zebra mussels into the Great Lakes from the Caspian Sea region through ballast water.

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86. Id. at *12.
87. Id. at *12. The court discussed several opinions in reaching its decision, relying heavily on the "extreme care" and "overwhelming evidence" standards established by Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC), 531 U.S. 159, 169–70 (2001).
88. Nw. Envtl. Advocates v. EPA, No. C 03-05760 SI, 2006 WL 2669042, at *1, *3–15 (N.D. Cal. Sept. 18, 2006). The court noted that the only portion challenged by the plaintiffs was the "vessel discharge" exemption, and the court limited its remedy to only the exemption. Id. at *1 n.1.
89. Id. at *15. Unless, of course, the EPA takes action prior to September 30, 2008, in compliance with the court's decision.
90. Id. at *3. The court noted how ships take on ballast water at one port and do not discharge it until reaching the next port, releasing the organism into a new ecosystem. Id.
91. Id. (citing Declaration of Deborah A. Sivas in Support of Plaintiffs' Motion for Summary Judgment, Exhibit C, at 4, Nw. Envtl. Advocates v. EPA, No. C 03-05760 SI, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006)). The court also noted the economic impact caused by zebra mussels by pointing out that between 1989 and 1995 they cost industries an estimated $70 million. Id. The court went on to note that the costs could be as high as $137 billion a year. Id. at *4 (citing Declaration of Deborah A. Sivas in Support of Plaintiffs' Motion for Summary Judgment, Exhibit H, at 8, Nw. Envtl. Advocates v. EPA, No. C 03-05760 SI, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006)).
Additionally, the court recognized that the invasive species problem has not gone unaddressed by Congress.\textsuperscript{92} Congress has put the Coast Guard in charge of regulating ballast water through the NANPCA,\textsuperscript{93} which was later amended by NISA.\textsuperscript{94} Coast Guard regulations require ships with ballast water to file reports with the Coast Guard twenty-four hours prior to arriving at port\textsuperscript{95} and also require ships to have a ballast water management plan.\textsuperscript{96}

Although the EPA pushed the court to limit its decision to only ballast water, the court found that "its remedy should apply to all discharges from vessels, not just ballast water."\textsuperscript{97} The EPA's strongest argument was that discharges other than ballast water that fit the permit exemption are \textit{de minimis} sources of pollution.\textsuperscript{98} The EPA "is permitted . . . to exempt \textit{de minimis} sources of [pollution] from pollution controls."\textsuperscript{99} The court refused to address this argument because it was untimely, the court had no way of evaluating the contention, and the court was unsure it was appropriate because it was reviewing CWA mandates rather than an agency decision.\textsuperscript{100} However, the court left the door open for the EPA to "consider whether any vessel discharges

\textsuperscript{92} See Nw. Envtl. Advocates, 2006 WL 2669042, at *4; see also supra Part III.A.
\textsuperscript{95} 33 C.F.R. § 151.2041 (2007).
\textsuperscript{97} Nw. Envtl. Advocates, 2006 WL 2669042, at *8 (emphasis added). The court did note that the EPA is free to regulate different discharges in different ways. Id. at *8 n.9.
\textsuperscript{98} Id. at *9. The EPA also challenged that the decision was beyond the scope of the plaintiffs' complaint and that the plaintiffs lacked standing. The court quickly dismissed these arguments, finding that the plaintiffs' complaint was against all vessel discharges and that the plaintiffs' declaration of concerns other than ballast water confers standing. Id.
\textsuperscript{99} Ober v. Whitman, 243 F.3d 1190, 1195 (9th Cir. 2001); Nw. Envtl. Advocates, 2006 WL 2669042, at *9 (using the same quotation).
\textsuperscript{100} Nw. Envtl. Advocates, 2006 WL 2669042, at *9.
produce only de minimis pollution."  

Using its discretion to grant equitable relief, the court did not vacate the regulation immediately because of the regulation’s long history and the dramatic impact such an action would have on the shipping industry. However, the court acknowledged that “the potential harm that ballast waters represent to our nation’s ecosystems [led] the [c]ourt to conclude that there is an urgency to promulgating new regulations that EPA has not, to this point . . . acknowledged.” Thus, the court balanced the need for a new regulation and the time the EPA needs to adequately develop the regulation. The court, recognizing the agency’s expertise, gave the EPA wide latitude to address the issue and explained that “[a]bsent a compelling justification, [it would] not act further to supervise how EPA responds to this order.”

For a permanent injunction to be an appropriate remedy, two requirements must be met: “(1) the likelihood of substantial and immediate irreparable injury; and (2) the inadequacy of remedies at law.” Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.

A permanent injunction was the correct remedy in this instance because of the irreparable harm caused by invasive species and the inadequacy of other remedies. Invasive species cause irreparable harm because they spread rapidly, threaten native species, and are almost impossible to eliminate. Money damages are insufficient given these circumstances, and the threat posed by invasive species requires an enforceable timetable, rather than a simple remand, to sufficiently

101. Id. This Comment argues that invasive species spread by recreational boats are not de minimis pollution. See infra Part V.A.
103. Id.
104. Id.
105. Id. The court understood that the EPA has expertise in formulating a practical regulation; its only concern was that the new regulation conform to the CWA in a manner specified by the EPA. Id. at *10 n.10.
106. Id. at *7 (quoting Dream Palace v. County of Maricopa, 384 F.3d 990, 1010 (9th Cir. 2004)).
109. Id.
110. Id. (citing Amoco Prod. Co., 480 U.S. at 545 (stating that environmental injury can seldom be remedied by money damages)).
and promptly address the problem.\textsuperscript{111}

As a result of this case, the EPA has until September 30, 2008, to create regulations that will place vessel discharges under the NPDES permit program and fulfill the mandates of the CWA.\textsuperscript{112} While the court did acknowledge that ballast water spreads invasive species, the remainder of this Comment will look at the manner in which recreational boats spread invasive species to inland waterways. Applying the same analysis the court used for ballast water, this Comment suggests that the EPA must address recreational boats in the new regulation it develops to meet the mandates of the CWA and to stop the spread of invasive species.

IV. \textit{NORTHWEST ENVIRONMENTAL ADVOCATES V. EPA, THE CLEAN WATER ACT, AND THE REQUIREMENT THAT THE ENVIRONMENTAL PROTECTION AGENCY REGULATE RECREATIONAL BOATS}

A. Recreational Boats and the Spread of Invasive Species Between Waterways

As discussed earlier, both state and federal governments have recognized the dangers of invasive species and their potential transportation and spread by recreational boats.\textsuperscript{113} In fact, recreational boats are seen as the primary means by which zebra mussels, the most well known invasive species, are transported between unconnected water bodies.\textsuperscript{114} Many of the inland lakes in which zebra mussels

\textsuperscript{111} \textit{Id.} The court gave the EPA two years to address the problem, which the court viewed as an adequate amount of time because the EPA was familiar with the problem, the Coast Guard had already promulgated some regulations, the law is flexible to establish regulations, and the shipping industry would have time to adjust. \textit{Id.} at *12-13. The plaintiff-intervenors (Great Lakes states) requested that the EPA implement immediate controls, but the court found this impractical. \textit{Id.} at *13.

\textsuperscript{112} \textit{Id.} at *11-13. The court did acknowledge the adverse economic impact of this deadline on the shipping industry, but expressed confidence in the EPA's expertise and discretion and the ability of the industry to prepare for the consequences of the new regulation. \textit{Id.} at *14.

\textsuperscript{113} \textit{See supra} Part III.

\textsuperscript{114} Ladd E. Johnson et al., \textit{Overland Dispersal of Aquatic Invasive Species: A Risk Assessment of Transient Recreational Boating}, 11 ECOLOGICAL APPLICATIONS 1789, 1790 (2001). For example, there is speculation that the zebra mussels recently found in Lake Mille Lacs, a very popular Minnesota fishing lake, may have hitched a ride on boats. Such speculation has fueled fears that the heavy boat traffic on Lake Mille Lacs could spread zebra mussels to other inland waters. Doug Smith, \textit{More Zebra Mussels Move in: It's Still Unclear What Impact the Invasive Species Will Have on Lake Mille Lacs}, STAR TRIB. (Minneapolis, Minn.), Aug. 13, 2005, at 1B.
recently have been found are frequented by boaters who have also used known zebra mussel lakes.\footnote{115}{Johnson et al., supra note 114, at 1790.}

Zebra mussels and other invasive species “hitch” rides on recreational boats as adults by attaching to anchors, hulls, and aquatic plants attached to the boat or trailer, or as larvae in water found in live wells, bait buckets, or bilge systems.\footnote{116}{Id.} Experts recommend, although few heed their advice, that all water from bait buckets, live wells, and bilges be drained, and all plants on a boat or trailer be removed prior to placing a boat in any new body of water.\footnote{117}{Id. at 1796.}

A study on zebra mussels conducted at Lake St. Clair\footnote{118}{Id. at 1794.} found that 5.3% of all boats and trailers leaving boat landings had aquatic plants attached to them, which, in turn, were hosts for zebra mussels.\footnote{119}{Id. at 1790.} Zebra mussel larvae were found in all areas where water accumulated on boats, and the study concluded that live wells and engine cooling water are the most likely means by which these larvae are transported.\footnote{120}{Id. at 1798.} The study clearly established the potential of recreational boats to transport invasive plant and animal species.\footnote{121}{See supra Part III.}

This study provides just one example of a method by which recreational boats transport and spread invasive species. Congress and state legislatures have already recognized recreational boats as potential sources of invasive species to inland water bodies.\footnote{122}{Cf. Nw. Envtl. Advocates v. EPA, No. C 03-05760 SI, 2006 WL 2669042, at *9 (N.D. Cal. Sept. 18, 2006).} Thus, as its rapid spread demonstrates, the pollution from recreational boats in the form of invasive species is not de minimis.\footnote{123}{Id. at 1790.}
B. Regulation of Recreational Boats by the EPA to Comply with the Clean Water Act

The ability of recreational boats to spread invasive species, when analyzed in the same manner as ballast water in *Northwest Environmental Advocates*, produces the same result: the EPA must address recreational boats when it develops a new legislative scheme; an exemption for recreational boats would violate the CWA.

An NPDES permit is required when an activity “1) discharges, i.e. adds, 2) a pollutant 3) to navigable waters 4) from 5) a point source.” As *Northwest Environmental Advocates* discussed, invasive species are pollutants because the CWA includes biological material as pollutants.

A recreational boat is itself an addition to the water because recreational boats are launched and landed and transported from lake to lake. More importantly, though, the potentially invasive species attached to the boat, trailer, or anchor, or in water carried on board, would also constitute additions because they would come from outside the body of water and be added to (and left in) the water. Thus, everything listed as a pollutant under the CWA on the boat or trailer, including the invasive species themselves, can be considered “additions” to the water.

The CWA states that vessels are point sources. Therefore, because recreational boats are vessels, they are also point sources.

As studies have shown, and the federal and some state governments have recognized, invasive species (pollutants) are discharged (added) as a result of “hitching” rides on recreational boats (point sources), thus establishing the “from” element.

Not all waterways may necessarily fall within the federal statutory

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127. *See Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (stating that an addition comes from outside what is currently in the water). I am not suggesting that a boat is a pollutant—it is a point source. However, I am raising the point to highlight the fact that recreational boats, and everything on them, are new to a waterway when they are launched.
129. *See supra* Part IV.A.
130. *See supra* Part III.A–B.
scheme as “navigable waters.” However, the vast majority of waterways that recreational boats use are permanent bodies of water that are included under the CWA. Even completely intrastate bodies of water may fall under Congress’s Commerce Clause authority due to the effect that recreational use of these waters has on interstate commerce. Consequently, the ability of recreational boats to transfer between bodies of water will ensure that the navigable water requirement is met.

Thus, recreational boats (point sources) may discharge (add) a pollutant (invasive species) into a navigable water (inland lake or other water body), creating a requirement for an NPDES permit. Absent such a permit, discharges are illegal. Furthermore, these discharges are not de minimis pollution because one boat can permanently introduce a new species to a water system. Therefore, discharges from recreational boats are subject to the EPA’s pollution control, and the CWA requires that the EPA regulate recreational boats.

C. NPDES Permits Are Inappropriate for Recreational Boats

Although commercial ships with ballast water will need NPDES permits, requiring permits for recreational boats is not appropriate. The regulatory scheme the EPA implements for ballast water will have to be different than the scheme for recreational boats. The schemes for recreational boats could range from very complex and restrictive to very minimal. States could also develop an approved permit program.

This Comment recommends that NPDES permits should never be
issued to a recreational boat because of the danger and damage caused by invasive species.\textsuperscript{142} In fact, it would be better environmentally (and probably politically), to avoid developing a permit system for recreational boats altogether. The EPA should address the issue, like many states,\textsuperscript{143} by making it illegal for boats and trailers to introduce any invasive species into a waterway. This can be done by preventing boats from launching into waters with any vegetation attached to the boat or trailer, and by requiring that boats be drained of all water before entering a new waterway. The result of such requirements would be enhanced national recognition of the problem, regulations in states that do not currently protect their waters, and potentially more funding to combat the invasive species problem.

Some may not believe this to be a very effective way to address the issue, but to date, few effective means of preventing invasive species from spreading have been developed. The best way to prevent the spread is by educating the public and punishing those who do not take simple preventive measures, such as removing water and vegetation from boat trailers. With greater awareness of the problem and more actions taken to prevent invasive species from spreading, fewer water systems will become infected by new invasive species.\textsuperscript{145} The EPA, by enforcing the CWA, can and should be another tool to combat the invasive species problem.\textsuperscript{146}

V. CONCLUSION

Invasive species are a serious threat to the environment and economy. Both plants and animals can be invasive and cause serious harm to bodies of water. Ballast water is a major source for the introduction of invasive species to the Great Lakes and other regions. As a result of their use in these commercial shipping waters, recreational boats have spread invasive species to inland, non-commercial bodies of water. Although the federal and various state governments have

\textsuperscript{142} See supra Part IV.A.

\textsuperscript{143} See supra Part III.B.

\textsuperscript{144} This Comment contends that under the CWA such actions are already illegal. However, the EPA needs to recognize their illegality.

\textsuperscript{145} Many websites and organizations, some sponsored by federal agencies other than the EPA, are currently trying to educate recreational boaters. See, e.g., Protect Your Waters, http://www.protectyourwaters.org (last visited Oct. 21, 2007).

recognized the dangers of invasive species, the EPA continues to allow a regulatory exemption from regulation for a major source of invasive species—recreational boats.

Because discharges, like that of ballast water, can spread invasive species, the EPA has been in violation of the CWA and the NPDES by exempting "discharges incidental to the normal operation of a vessel" from regulation.\textsuperscript{147} The EPA has until September 30, 2008, to come up with a system to include ships with ballast water in the NPDES.\textsuperscript{148} However, as the court in \textit{Northwest Environmental Advocates} clearly stated, the entire exemption will be vacated, and their ruling extends beyond ballast water.\textsuperscript{149}

To fully comply with the CWA and NPDES, the EPA will have to formulate a way to include not only large vessels with ballast tanks in the NPDES but also to address recreational boats as point source polluters that transport invasive species. While ballast waters from large ships are responsible for introducing many invasive species to larger bodies of water like the Great Lakes, recreational boats have been the primary source of spreading invasive species to inland waterways.

This Comment suggests that the EPA must develop a regulatory scheme for recreational boats that will educate boaters about invasive species and punish those who do not take necessary steps to prevent invasive species from spreading. If the EPA chooses to address only large shipping vessels while still exempting recreational boats from the NPDES, it is subjecting itself to further litigation. A regulatory scheme that effectively addresses recreational boats could help prevent the spread of invasive species to more of the nation's waters.

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\textsuperscript{148} Id.
\textsuperscript{149} Id. at *7–10.