ORAL ARGUMENT NOT SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKE CARRIERS' ASSOCIATION, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and LEE ZELDIN, Administrator, U.S. Environmental Protection Agency, Respondents.	)	Case No. 25-1027 (Consolidated with Nos. 25-1049 and 25-1052)

CORRECTED BRIEF OF AMICI CURIAE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY AND THE STATES OF ILLINOIS AND VERMONT SUPPORTING REVERSAL OF AGENCY ACTION

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AMICI CURIAE STATEMENT OF INTEREST

The *Amici Curiae* Brief of the Michigan Department of Environment, Great Lakes, and Energy (EGLE) and the States of Illinois and Vermont is filed under Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29(a).

EGLE is responsible for safeguarding Michigan's vast surface water by state law, the Michigan state constitution, and the ages-old public trust doctrine. Mich. Comp. Laws § 324.3103(1); Mich. Const. 1963, art 4, § 52; *Glass v. Goeckel*, 703 N.W.2d 58, 65 (Mich. 2005). Michigan must also "prevent the introduction of and minimize the spread of aquatic nuisance species within the Great Lakes." Mich. Comp. Laws § 324.3103a(1)(a).

Amici seek reversal of the *Vessel Incidental Discharge National Standards of Performance*, 78 Fed. Reg. 82,074 (Oct. 9, 2024) (Final Standards.) *Amici* are interested in these unlawful standards being vacated to ensure the Great Lakes and connected surface waters are not subject to environmentally destructive and expensive colonization by invasive species brought in by inadequately controlled vessels. Once this class of standards is finalized, EGLE and similarly situated state

environmental enforcement agencies will be largely preempted from enforcing additional requirements to safeguard Michigan's surface water, so it relies on the United States Environmental Protection Agency (EPA) promulgating lawful standards. *Amici* agree with the factual statements and arguments made by Petitioner California State Lands Commission and Petitioners Alliance for the Great Lakes, Environmental Law & Policy Center, Minnesota Environmental Partnership, and National Wildlife Foundation, and concur in the relief sought.

INTRODUCTION

Michigan is visible from outer space because its borders are drawn in by the coastlines of Lake Michigan, Lake Superior, Lake Huron, and Lake Erie, four of the five Great Lakes.[1] Those lakes, and connected surface waters, define how Michiganders see ourselves. It is not possible to overemphasize the importance of these inland seas, which contain 84% of our country's fresh surface water.[2] These inland seas constitute the world's largest freshwater ecosystem, provide drinking water to 10% of all Americans, and are home to 3,500 native species of plants and animals, including 350 fish species. 2019 Joint Great Lakes States Letter on Ballast Water and VIDA at 2, EPA-HQ-OW-2019-0482-0137 (JA__). And while it is possible to quantify the cost of managing invasive species ($99 million by Michigan from 2015–2024), it is impossible to put a dollar value on what could be lost.[3]

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[1] NASA Photo ISS070-E-99888, https://eol.jsc.nasa.gov/SearchPhotos/photo.pl?mission=ISS070&roll=E&frame=99888 (last accessed 12/10/25).

[2] Great Lakes Facts and Figures, https://www.epa.gov/greatlakes/great-lakes-facts-and-figures (last accessed 12/10/25).

[3] State of Michigan Invasive Species Program Annual Reports, https://www.michigan.gov/invasives/stateresponse (last accessed 12/15/25).

When Congress added the Vessel Incidental Discharges Act, 33 U.S.C. § 1322(p) (VIDA) to the Clean Water Act, it gave EPA clear direction to issue standards as protective as the current general permit,[4] unless it had new information justifying weaker standards. EPA ignored that clear direction by including no requirement for how vessels take up water to prevent spreading invasive species, claiming to have new information that the uptake requirement was unenforceable. But EGLE gave EPA evidence that it had successfully determined uptake compliance for nearly two decades. 89 Fed. Reg. 82,093; see also, e.g., Michigan 2022 Letter to EPA, EPA-HQ-OW-2019-0482-0820 at 2 (JA__). EPA's other justifications for eliminating the uptake requirement (unenforceability/impracticability, lack of clarity, outside operators' control, and speculative future action) are not in VIDA, making them arbitrary and capricious justifications requiring reversal.

This Court should make short shrift of EPA's unlawful attempt to weaken standards for incidental discharges from vessels in defiance of Congress's clear direction.

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[4] *Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel*, 78 Fed. Reg. 21,938 (Apr. 12, 2013) (VGP).

BACKGROUND

What is ballast water and what does it have to do with invasive species?

It is easy to see why the Great Lakes are commonly referred to as America's great inland seas—on a clear day, standing on the Lake Michigan shore at Grand Haven, Michigan looking west to Milwaukee, Wisconsin, water stretches to the horizon, without any hint of a distant shoreline. The only noticeable difference between the ocean shore and the Great Lakes shore is the sweet breeze coming in off her freshwater waves. Giant ships can be seen in the distance, vanishing over the horizon from the bottom up, as if they are falling off the edge of the earth in slow motion. These ships, oceangoing vessels and lakers, are the vessels subject to the VGP and Michigan's permit requirements, which EGLE has overseen for decades under state law.

One aspect of these vessels' operations subject to the Final Standards is their use of ballast water. Ballast water is best understood as balancing water that vessels take up for stability. Generally, vessels take up ballast water at port before setting sail and discharge it at subsequent ports. This makes sense from the perspective of balance—as vessels add or remove cargo, they add or

remove ballast water to counterbalance weight and ensure stability throughout their voyage. Large vessels must use large amounts of ballast water to achieve balance, amounts best understood with reference to multiple Olympic-sized swimming pools.

The potential environmental problems presented by ballast water have less to do with the water itself and more with the organisms it may contain. Large vessel ports are heavily used by a wide variety of travelers and often harbor dangerous organisms, including invasive species. If vessels take up ballast water from ports without regard to the known (or likely) presence of invasive species, they could transport them to subsequent ports, introducing them into new waters. To counter this threat, among other things, the VGP prohibits vessels from taking up ballast water from "areas known to have infestations or populations of harmful organisms and pathogens[.]" VGP § 2.2.2.3 at 27–28 (JA__).

How can governments limit threats posed by ballast water and how do the Final Standards affect those efforts?

Protecting freshwater from invasive species requires multi-layered risk reduction because no single method can eliminate the risk of

introducing invasive species. Broadly, the VGP included three risk reduction steps: one, avoid taking up ballast water in areas with known or likely invasive species; two, exchange ballast water for saltwater ballast water mid-voyage to physically remove and kill freshwater invasives; and three, filter and treat ballast water before discharging it to kill additional invasives. [VGP at 27–28 (JA__)].[5] None of those three risk prevention steps are perfect, which is why the VGP (and Michigan state law) required using all three; see also Mich. Comp. Laws § 324.3103a(2)(a) and (b). Cumulative risk reduction comprised of partially effective preventative measures is a standard "belt and suspenders" approach to environmental protection. It makes sense here where recent data show treatment systems fail to meet discharge requirements.[6]

[5] The VGP also required "lakers," which only travel on the Great Lakes, to comply with two of these three risk reduction requirements, as the saltwater flush did not apply to them.

[6] Casas-Monroy, O. et al. (2025). Effectiveness of ballast water management systems in the Great Lakes based on a paired uptake-discharge sample design. *Environmental Monitoring and Assessment*, 197(6), 618.

Through VIDA, Congress mandated that the Final Standards "shall not be less stringent" than, among other things, the uptake requirement in Part 2.2.3 of the VGP. 33 U.S.C. § 1322(p)(4)(B)(iii)(I). Congress explained that EPA can only make the Final Standards weaker if new information justifying less protective requirements becomes available. 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa).

Relevant to uptake, the VGP states:

> Masters, owners, operators, or persons-in-charge of all vessels equipped with ballast water tanks that operate in waters of the U.S. must: . . . Minimize or avoid uptake of ballast water in the following areas and situations: . . . Areas known to have infestations or populations of harmful organisms and pathogens (e.g., toxic algal blooms). [VGP at 27–28 (JA__].

Before (and after) EPA issued and enforced the VGP with Coast Guard assistance, EGLE enforced ballast water management requirements under Michigan law. EGLE enforces ballast water management practices, including "minimizing ballasting operations . . . [i]n areas identified in connection with toxic algal blooms, outbreaks of known populations of harmful aquatic organisms and pathogens" and "[i]n areas where harmful aquatic organisms or pathogens are known to occur." [2000 Shipping Federation of Canada Code of Best Practices for

Ballast Water Management, through Mich. Comp. Laws § 324.3103a(a)].

EGLE enforces the uptake requirement using forms submitted by vessel owners and operations that certify compliance with the uptake requirement.[7] See generally Mich. Comp. Laws § 324.3103a. There is no parallel reporting requirement in the VGP, making enforcement of the federal standard more difficult. VGP at Appendix H, (JA__).

Zebra mussels—a case study of invasion by ballast water.

A brief history of zebra mussels in the Great Lakes showcases the irreversible economic and ecological harms wrought by invasive species. Zebra mussels are freshwater mussels native to southern Russia and

[7] EGLE Ballast Water Management Reporting Form, https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Forms/WRD/Ballast-Water/EQP0600-Ballast-Water-Management-Reporting-Form.pdf?rev=86f8aee8b41f42dc898d5f0913946694 (last accessed 12/12/25).

Ukraine.[8] They cannot live long in saltwater.[9] In the 1980s, zebra mussels entered the United States as stowaways in ballast water from a Black Sea port, and were first discovered in the Great Lakes in 1988.[10] Two years later, they spread to all the Great Lakes.[11] This invasion occurred before the three risk reduction steps were standard practice. And, now that zebra mussels are here, they have cost Michigan and other Great Lake states dearly.

From the ecological perspective, zebra mussels are harmful because they compete with native mussels, and they alter the ecosystem in ways that harm additional native aquatic species. Zebra mussels eat phytoplankton and other suspended organic materials that native mussels need to survive, leaving less food for native species.[12] In Lake St. Clair, the Detroit River, much of western Lake Erie, and the upper

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[8] NOAA, Great Lakes Aquatic Indigenous Species Information System, *Dreissena polymorpha,* https://nas.er.usgs.gov/queries/greatLakes/FactSheet.aspx?Species_ID=5&Potential=N&Type=0&HUCNumber=DGreatLakes (last accessed 12/10/25).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

St. Lawrence River, zebra mussels have killed off native clams.[13] Zebra mussels do not eat blue-green algae that cause harmful algal blooms, leading to more frequent harmful algal blooms.[14] The way zebra mussels eat and discard different particles impacts nutrient cycling, leading to nuisance algae nearshore and fewer algae in deeper waters.[15] This has dire impacts for lake whitefish populations.[16]

Zebra mussels also create problems for people who use Great Lakes water because they clog pipes to power plants, drinking water plants, and other facilities, and can corrode steel and concrete, impacting the structural integrity of piping and any installation at the waters' edge.[16] And for the ordinary people who just want to spend a day fishing, they may be stymied by zebra mussels damaging small boat engines, fishing gear, or navigational buoys and dock pilings.[17]

These harms are costly and ongoing. While the dollar value of invasive species harms is typically calculated for all invasive species,

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

because of their overwhelming numbers and impact, it is reasonable to estimate that zebra mussels cost governments, business, and ordinary Michiganders upwards of $100 million single year, with no letup in sight.[18] Other Great Lakes states, like Illinois, suffer similarly significant environmental and economic harms. Further to the east, Lake Champlain, sometimes called the "sixth Great Lake," is now almost entirely colonized by zebra mussels, causing ecological and economic impacts for bordering Vermont.

Golden mussels are a "least wanted" invasive species threatening the Great Lakes.

Many other foreign species threaten our Great Lakes, currently held back by, among other things, the uptake requirement. One example is the golden mussel, an invasive freshwater mussel that could reach and infest the Great Lakes through contaminated ballast water, just like zebra mussels did decades ago.

[18] Annual Losses to Great Lakes Region by Ship-bound Invasive Species at least $200 Million, D. Lodge and D. Finnoff, https://www.invasive.org/gist/products/library/lodge_factsheet.pdf (last accessed 12/12/25).

Since 2013, golden mussels have been on the Great Lakes and St. Lawrence Governors and Premiers' list of "least wanted" aquatic invasive species.[19] Years ago, when EPA proposed the VGP, New York sought treatment requirements for the golden mussel, which EPA deemed unnecessary, considering other risk prevention measures. VGP: EPA's Response to Public Comments (2013), EPA-HQ-OW-2019-0482-0405 at 1169 (JA__).

Golden mussels form colonies containing up to 250,000 individual mussels in one square meter.[20] For perspective, that is the equivalent of two full Big Houses (University of Michigan's football stadium, the largest stadium in the Western hemisphere), plus all the tailgaters outside, and the whole University of Michigan police force, packed into an area one quarter the size of a standard ping pong table.[21]

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[19] "Least wanted" list, Great Lakes St. Lawrence Governors and Premiers, https://www.gsgp.org/media/tavmm5bn/least-wanted-ais-brief-8-2023.pdf (last accessed 12/10/25).

[20] United States Geological Survey—Nonindigenous Aquatic Species—Golden Mussels Species Profile, https://nas.er.usgs.gov/queries/FactSheet.aspx?speciesID=3653, (last accessed 12/10/25).

[21] M. Tait, The World's Largest Stadiums by Seating Capacity, https://tfcstadiums.com/largest-stadiums-seating-capacity-world/ (last accessed 12/10/25).

Like zebra mussels, golden mussels are hardy, hungry mussels that consume the same microscopic organisms and organic matter that native Great Lakes bivalves need.[22] Golden mussels present the same serious threats to the biodiversity and health of Michigan waters that other invasive mussel species do, and more, because, unlike zebra mussels, golden mussels tolerate low-calcium waters, which means that they can colonize waters zebra mussels cannot.[23] They also tolerate saltwater better than zebra mussels, making saltwater flushing less effective prevention.[24]

When EPA issued the Final Standards, there were no known infestations of golden mussels in United States water. Still, the administrative record contains two academic papers addressing the risk of golden mussels invading the Great Lakes and a technical report from National Oceanic and Atmospheric Administration (NOAA).

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[22] USGS—Nonindigenous Aquatic Species.

[23] *Id.*

[24] *Id.*

The first academic paper discussed a study funded by the Michigan Invasive Species Grant Program.[25] The study created a model, using golden mussels as a potential invader, to determine how to prioritize ports for treatment to minimize the likelihood of invasive species spreading throughout the Great Lakes. *Id.* at 403 (JA__). Nothing in the paper supported eliminating uptake requirements. If anything, the study supported enhanced treatment at ports most likely to harbor and spread invasive species. *Id.* at 420–424 (JA__).

The second academic paper showcased a model of how invasive species, including the golden mussel, could spread throughout the Great Lakes through ballast water.[26] The authors noted that the golden mussel "has the potential to generate similar economic and ecological costs" to the zebra mussel, and could be widespread within two years after introduction. *Id.* at 2, 19 (JA__). Based on the model, which showed how quickly the golden mussels would spread throughout the

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[25] Network centrality as a potential method for prioritizing ports for aquatic invasive species surveillance and response in the Laurentian Great Lakes, EPA-HQ-OW-2019-0482-0195 at 435 (JA__).

[26] A Spatial Modeling Approach to Predicting the Secondary Spread of Invasive Species Due to Ballast Water Discharge, EPA-HQ-OW-2019-0482-0427 (JA__).

Great Lakes, the authors concluded that "prevention is still the best policy[.]" *Id.* at 21 (JA__). Nothing in this paper supported removing the uptake requirement; to the contrary, it strongly supported keeping it to prevent introducing golden mussels at all.

NOAA's technical report identified the golden mussel as a species that could be introduced through transoceanic shipping.[27] The report detailed information about the risk of the species entering the Great Lakes, and likely impacts upon arrival. *Id.* at 650–671 (JA__). The report indicated that there was a "low" risk of golden mussels being introduced to the Great Lakes based on the no-longer-accurate fact that golden mussels were only present in South American and Asian ports. *Id.* at 654 (JA__). The report flagged golden mussels as high risk for potential establishment in the Great Lakes, with associated high negative impacts to environmental and socio-economic values for the Great Lakes. *Id.* at 668–671.

A few weeks after EPA issued the Final Standards, the first infestation of golden mussels was found in the United States at

[27] NOAA Technical Memorandum GLERL-169, A Risk assessment of potential Great Lakes aquatic invaders, EPA-HQ-OW-2019-0482-0769-01 at 653 (JA__).

California's Port of Stockton.[28] In response, California released a comprehensive golden mussel response framework.[29] The Coast Guard has not issued a federal emergency order or taken any other action to prevent the spread of golden mussels, despite the known infestation and the serious risks golden mussels present. Neither has EPA.

To date, golden mussels have not been detected in the United States outside California.

ARGUMENT

I. EPA unlawfully excluded the uptake requirement from the Final Standards, threating the Great Lakes with colonization by invasive species.

The plain text of VIDA mandates that EPA issue Final Standards as protective as the VGP. 33 U.S.C. § 1322(p)(4)(B)(iii)(I). VIDA includes an exception if EPA receives new information that, if available at the time the VGP was promulgated, would have justified not

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[28] California Department of Fish and Wildlife, Invasive Non-Native Golden Mussel Discovered in the Sacramento-San Joaquin Delta, 10/31/2024, https://wildlife.ca.gov/News/Archive/invasive-non-native-golden-mussel-discovered-in-the-sacramentosan-joaquin-delta (last accessed 12/11/2025).

[29] California Golden Mussel Response Framework, https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=231231&inline (last accessed 12/11/25).

including the protections. 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa). In this rulemaking, EPA justified removing the uptake requirement for four reasons found nowhere in VIDA: enforcement difficulties (an illogical claim countered by evidence from enforcing states), lack of clarity, impracticability, and possible future emergency actions. 89 Fed. Reg. 82093 (citing 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa)). But that statutory provision only authorizes EPA to issue a less stringent requirement than the VGP if information "not reasonably available" when the VGP was promulgated "would have justified the application of a less-stringent standard of performance at the time of promulgation." 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa)). It does not authorize EPA to remove conditions on **any other basis.**

EPA's flawed reading of its authority under VIDA may not stand. This Court, not EPA, determines when EPA acts within its lawful authority, and the agency has failed to do so here. *Loper Bright Enters v. Raimondo*, 603 U.S. 369, 412 (2024) ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."); see also 5 U.S.C. § 706(2)(A) and (C). VIDA does not give EPA authority to remove the

uptake requirement based on claimed unenforceability/impracticability, lack of clarity, relationship to outside factors, or theoretical future emergency actions. 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa).

EPA's justification for removing the uptake requirement is outside the scope of its authority under VIDA. As the agency's own words demonstrate, the only portion of its justification based in VIDA is the statutory citation at the end:

> This [decision not to include the uptake requirement] is based on extensive conversations with the USCG and comments received indicating that such requirements are not practical to implement or enforce. During these conversations, new information from implementation of the VGP became available indicating that these conditions are not well-defined and are typically beyond the control of the vessel operator during the uptake and discharge of ballast water. Additionally, it is difficult for enforcement agencies to assess whether a vessel operator took appropriate actions as necessary to comply with these requirements. Therefore, it is not practical to continue to require that vessels minimize or avoid uptake of ballast water in those areas and situations. 33 U.S.C. § 1314(b)(2)(B) and 1322(p)(4)(D)(ii)(II)(aa). [89 Fed. Reg. 82093.]

A. EPA's so-called "new information" about difficulty enforcing the uptake provision was countered by evidence from states that enforce it.

During this rulemaking, EPA received evidence from states that successfully determined compliance with the uptake requirement.

Specifically, EGLE explained to EPA that Michigan's public records collected during enforcement of state ballast water laws showed that vessel owners and operators could comply with the uptake requirement, one of the best management practices (BMPs) at issue in this rulemaking:

> [T]he information EGLE has collected demonstrates that oceangoing and nonoceangoing vessels are not only implementing BMPs but are also consistently maintaining compliance with BMPs respective to the vessel's type. **It is important to note that the BMPs the USEPA proposes to exclude from VIDA Standards due to impracticability are the same BMPs that oceangoing vessels are reporting to be implementing and maintaining compliance with since 2002**. [Michigan 2022 Letter to EPA, EPA-HQ-OW-2019-0482-0820 at 2 (JA__) (emphasis added)].

Similarly, Wisconsin advised EPA that it received no communication from vessel operators indicating an inability to meet the uptake requirement. Wisconsin 2023 Comment, EPA-HQ-OW-2019-0482-0908; (JA__.) Fifteen states supported keeping the uptake requirement.[30]

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[30] Hawaii Department of Land and Natural Resources, EPA-HQ-OW-2019-0482-0668 at 3 (JA__); Washington Department of Ecology, EPA-HQ-OW-2019-0482-0803 at 3 (JA__); California State Lands Commission, EPA-HQ-OW-2019-0482-0722 at 21–22 (JA__); Massachusetts Executive Office of Energy and Environmental Affairs, EPA-HQ-OW-2019-0482-0724 at 2 (JA__); Oregon Department of Environmental Quality, EPA-HQ-OW-2019-0482-0746 at 1–2 (JA__);

EPA was also presented with a **lack of evidence** that the Coast Guard had found uptake noncompliance, in the form of a two-page email confirming that none of the ten BMP violations in Coast Guard inspection and enforcement records from 2016–2024 related to uptake. USCG EPA Uptake BMP Correspondence, EPA-HQ-OW-2019-0482-1034 at 1 (JA__). Nine were failures to maintain ballast water management plans, and one was failure to rinse an anchor and anchor chains. *Id.* EPA relied on this email to determine that the uptake requirement "[is] not practical to implement or enforce." 89 Fed. Reg. 82093 (citing "extensive conversations" with the Coast Guard).

Florida Department of Environmental Protection, EPA-HQ-OW-2019-0482-0785 at 1–2 (JA__); Delaware Department of Natural Resources and Environmental Control, EPA-HQ-OW-2019-0482-0787 at 3–4 (JA__); Alaska Department of Environmental Conservation, EPA-HQ-OW-2019-0482-0741 at 5 (JA_); Maryland Department of Natural Resources, EPA-HQ-OW-2019-0482-0804 at 3 (JA_); Michigan Department of Environment, Great Lakes, and Energy, EPA-HQ-OW-2019-0482-0729 at 5–6 (JA__); Minnesota Pollution Control Agency, EPA-HQ-OW-2019-0482-0702 at 3–4 (JA_); New York Office of the Attorney General, EPA-HQ-OW-2019-0482-0686 at 2–3 (JA_); Ohio Department of Natural Resources, EPA-HQ-OW-2019-0482-0927 at 2 (JA_); Pennsylvania Department of Environmental Protection, EPA-HQ-OW-2019-0482-0801 at 3 (JA_); Wisconsin Department of Natural Resources, EPA-HQ-OW-2019-0482-0705 at 3–4 (JA_).

It does not logically follow that the Coast Guard's failure to find deficiencies in vessels' compliance with the uptake requirement, combined with the lack of deficiencies for **nearly every other requirement** means that the uptake requirement is unenforceable. Otherwise, by the same logic, every requirement except maintaining a ballast water management plan and washing anchors/anchor chains is also unenforceable.

Practically, requiring permittees to submit reports makes enforcement easier. That may be why Michigan can readily assure compliance with the uptake requirement. Thus, the answer to the alleged unenforceability of the uptake requirement is to add a reporting requirement. Moreover, nothing in VIDA authorizes EPA to rely on claimed enforcement difficulties to weaken the VGP standards.

EPA attempted to bolster the unenforceability justification with industry complaints about impracticability. 89 Fed. Reg. 82093. But those comments made arguments unrelated to invasive species. *Id.* Specifically, industry argued that it was not practical to avoid taking up ballast water at night, near sedimentation, or in relation to combined sewer overflows. LCA 2020 Comment EPA-HQ-OW-2019-0482-0700 at

13-14 (JA__). Nothing in VIDA excuses EPA from requiring vessel operators to take necessary steps to prevent introducing invasive species to the Great Lakes, just because the steps are hard. 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa).

B. EPA's claimed new information that the uptake requirement was unclear does not justify removing it.

EPA claims new information revealed that the VGP's uptake requirement was not clearly written. 89 Fed. Reg. 82093. But this is not a lawful justification to remove it under VIDA. 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa). Instead, if its prior permit condition was unclear, EPA should **rewrite** it. As Justice Alito explained with reference to a permit for discharging raw sewage into the Pacific Ocean, EPA is the federal agency responsible for using technical expertise to safeguard our nation's water resources:

> Determining what steps a permittee must take to ensure that water quality standards are met is EPA's responsibility, and Congress has given it the tools needed to make that determination. If EPA does what the CWA demands, water quality will not suffer. [*San Francisco v. EPA*, 145 S. Ct. 704, 720 (2025)].

Even if the uptake requirement was unclear, that does not change the serious risk of taking up ballast water from infested waters. VIDA does not authorize a reduction in stringency based on unclear drafting.

C. EPA's claimed new information that the uptake requirement made vessel operators respond to conditions beyond their control did not justify removing it.

EPA's claim that new information showed the uptake requirement was based on conditions largely outside of the vessel operator's control does not warrant removing the requirement either. 89 Fed. Reg. 82093. Many permits require permittees to act differently in response to conditions they cannot control, like the weather, or the available process-water. For example, EPA requires that concentrated animal feeding operation permits contain BMPs related to risky conditions created by weather, which is outside farmers' control. 40 C.F.R. § 412.4(c). Similarly, if a mining company uses groundwater containing hydrogen sulfide, its permit will have sulfide limits. And if a facility uses chlorinated municipal water, its permit may have limits related to chlorine, even if nothing in its process involves chlorine.

This makes sense—permitting is not meant to punish facilities for operational choices, it is intended to control pollutants. Here, the pollutants at issue are invasive species, and every vessel operator must operate in a manner that prevents their spread. Nothing in VIDA authorizes EPA to remove requirements based on their relationship to factors outside of vessel operators' control. And EPA regularly requires permittees to operate differently when conditions outside of their control change. As a result, it was unlawful under VIDA for EPA to remove the uptake requirements because of the claimed relationship to conditions outside vessel operators' control.

D. VIDA does not authorize EPA to remove the uptake requirement based on possible future actions.

EPA further justified its decision to remove the uptake requirement with possible future actions. 82 Fed. Reg. 82093. But Congress did not authorize EPA to rely on potential future acts to justify weakening standards. Instead, Congress authorized EPA to issue **additional** emergency BMPs "necessary to reduce the reasonably foreseeable risk of introduction or establishment of an aquatic nuisance species[.]" 13 U.S.C. § 1322(p)(4)(E). And the APA prohibits federal

agencies from relying on speculation to justify their actions. *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988) ("[M]ere speculation" do not constitute "adequate grounds upon which to sustain an agency's action."). Thus, EPA's claimed additional support for removing the uptake requirement is baseless.

First, EPA speculated that owners and operators might develop vessel-specific ballast water management plans that "could describe coordinating with local authorities to identify areas and situations of concern and any opportunities to mitigate potential issues." 89 Fed. Reg. 82093. But EPA did not explain what such vessel-specific requirements were, nor how they could provide protection equal to the VGP requirement to avoid taking up water from ports with, among other things, known infestations. *Id.* EPA then went on to assert, without support, that if vessel operators made these "important considerations" it would somehow "provide for environmental protection but allow vessel operators to tailor measures specific to their vessel operations and routes." *Id.* VIDA does not authorize EPA to replace concrete requirements from the VGP with speculative, non-enforceable steps. Moreover, this kind of baseless speculation is forbidden

"arbitrary and capricious" agency action under the APA. 5 U.S.C. § 706(2)(A).

Under the APA, agencies must provide rationale for taking different approaches to similar problems. Waiting to respond until an emergency, instead of developing preventative controls, is arbitrary and capricious. For example, when EPA issued coal slurry impoundment regulations, EPA did not include requirements for older ponds, instead establishing requirements to respond after imminent leaks were discovered. *Util Solid Waste Activities Grp. v. E.P.A.*, 901 F.3d 414, 433 (D.C. Cir. 2018). This Court determined that EPA acted arbitrarily and capriciously because of, among other things, the known risks caused by legacy ponds. *Id.* at 434. The Court's succinct reasoning in that case applies equally here: "[T]he EPA's decision to shrug off prevention regulation makes no sense." *Id.* VIDA does not allow EPA to substitute voluntary, unenforceable vessel-specific considerations for VGP requirements.

Second, EPA also argued that it could issue emergency BMPs in response to any emerging threat under VIDA. 89 Fed. Reg. 82093 (citing 33 U.S.C. § 1322(p)(4)(E)(i)). But the plain text of VIDA does not

allow EPA to use potential emergency BMPs instead of keeping the VGP's requirements in place. Moreover, the emergency has already arrived, and EPA has done **nothing**. Golden mussels are at our shores, threatening to enter and spread through the Great Lakes if the Final Standards go into effect. EPA's own inaction since last October when golden mussels were discovered at Port Stockton shows it will not issue emergency BMPs anyway.

CONCLUSION AND RELIEF REQUESTED

EPA unlawfully excluded the uptake requirement from the Final Standards, leaving them less protective than the VGP, in violation of both VIDA and the APA. EPA's unlawful conduct threatens to expose Michigan's surface water to colonization by harmful invasive species. For these reasons, this Court should mandate that EPA issue lawful standards instead.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and this Court's 11/26/2025 Order because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this amicus brief contains no more than 5,000 words. This document contains 4,578 words.

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CERTIFICATE OF SERVICE

I certify that on January 5, 2026, the foregoing document was electronically served on all parties or their counsel of record through the CM/ECF system.

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