

ORAL ARGUMENT NOT SCHEDULED
No. 25-1027
(Consolidated with Case Nos. 25-1049 and 25-1052)

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,

On Petition for Review of Final Agency Action from the United States
Environmental Protection Agency, 89 Fed. Reg. 82,074 (Oct. 9, 2024)

ENVIRONMENTAL PETITIONERS' REPLY BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), I certify that the parties, rulings, and related cases to this case are set forth below.

A. Parties:

Petitioners: Petitioner in Case No. 25-1027 is Lake Carriers' Association ("LCA"). Petitioner in Case No. 25-1049 is California State Lands Commission. Petitioners in Case No. 25-1052 are Alliance for the Great Lakes, Environmental Law & Policy Center, Minnesota Environmental Partnership, and National Wildlife Federation ("Environmental Petitioners").

Respondents: In each of the actions, Respondents are the United States Environmental Protection Agency ("EPA") and Lee Zeldin, Administrator of the EPA.

Intervenors: Environmental Petitioners are intervenor-respondents in LCA's Petition for Review in Case No. 25-1027. *See* Order, Doc. No. 2132301 (Aug. 27, 2025). Petitioner LCA is an intervenor-respondent in Environmental Petitioners' Petition for Review in Case No. 25-1052. *Id.* There are no other intervenors in any of the consolidated actions.

Amici Curiae: Michigan Department of Environment, Great Lakes, and Energy and the States of Illinois and Vermont filed an amicus brief seeking reversal of EPA's final agency action, promulgation of the *Vessel Incidental Discharge*

National Standards of Performance, 89 Fed. Reg. 82074 (Oct. 9, 2024), and agreeing with the factual statements and arguments made by, and concurring in the relief sought by, Environmental Petitioners and Petitioner California State Lands Commission. See Brief of Amici Curiae Michigan Department of Environment, Great Lakes and Energy and the States of Illinois and Vermont Supporting Reversal of Agency Action, Doc. No. 2151981 (Dec. 26, 2025).

B. Rulings Under Review

Petitioners in each of the consolidated proceedings seek this Court's review of EPA's final agency action, promulgation of the *Vessel Incidental Discharge National Standards of Performance*, 89 Fed. Reg. 82074 (Oct. 9, 2024).

C. Related Cases

The final agency action at issue in this proceeding has not been reviewed previously in this Court nor in any other court. There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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88 Fed. Reg. 71788 (Oct. 18, 2023).....6, 7, 8, 10, 11, 20
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GLOSSARY

2013 VGP	<i>Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel</i> , 78 Fed. Reg. 21938 (Apr. 12, 2013)
2013 VGP Response to Comments	2013 VGP: EPA’s Response to Public Comments (2013), EPA-HQ-OW-2019-0482-0405
Bailey Study	Bailey <i>et al.</i> , Efficacy of Ballast Water Management Systems Operating within the Great Lakes and St. Lawrence River (2017 – 2022) (2023), EPA-HQ-OW-2019-0482-0891
BAT	Best available technology economically achievable
BMP	Best Management Practice
Briski Study	Briski <i>et al.</i> , Evaluating Efficacy of a Ballast Water Filtration System for Reducing Spread of Aquatic Species in Freshwater Ecosystems (2014), EPA-HQ-OW-2019-0482-0419
BWMS	Ballast Water Management Systems
Canada 2020 Comment	Comment submitted by Martin Loken, Minister (Political), Embassy of Canada, Government of Canada (2020), EPA-HQ-OW-2019-0482-0624
Canada 2023 Comment	Comment submitted by Government of Canada (2023), EPA-HQ-OW-2019-0482-0831
Canadian Study	STX Canada Marine, Assessing the Feasibility of Ballast Water Treatment System Installation and Operation by Existing Vessels on the Great Lakes and St. Lawrence Seaway System (2015), EPA-HQ-OW-2019-0482-0452

Environmental Petitioners	Alliance for the Great Lakes, Environmental Law & Policy Center, Minnesota Environmental Partnership, and National Wildlife Federation
Environmental Petitioners' Comment	Comment submitted by AGL, NWF, <i>et al.</i> (2023), EPA-HQ-OW-2019-0482-0913
EPA	United States Environmental Protection Agency
EPA New Lakers Economic Analysis	EPA, Economic Analysis of New Lakers for the Supplemental Notice of Proposed Rulemaking for the Vessel Incidental National Standards of Performance (2023), EPA-HQ-OW-2019-0482-0889
Final Standards	<i>Vessel Incidental Discharge National Standards of Performance</i> , 89 Fed. Reg. 82074 (Oct. 9, 2024)
GLLCISP	Great Lakes and Lake Champlain Invasive Species Program
GSI 2014 Study	Great Ships Initiative, Land-based Performance Evaluation in Ambient and Augmented Duluth-Superior Harbor Water of Eight Commercially Available Ballast Water Treatment System Filter Units (2014), EPA-HQ-OW-2019-0482-0425
Industry Study	Choice Ballast, Technical Engineering Analysis & Economic Feasibility Study for Ballast Water Management System (BWMS) Installation and Operation on board U.S. Flag Great Lakes Fleet (Lakers) (2017), EPA-HQ-OW-2019-0482-0868
LCA	Lake Carriers' Association
LCA-Fincantieri Notes	Lake Carriers' Association-Fincantieri Bay Shipbuilding Meeting Notes (2017), EPA-HQ-OW-2019-0482-0492
Research and Development Plan	TenEyck <i>et al.</i> , Great Lakes Ballast Water Research and Development Plan Version 6 (2024), EPA-HQ-OW-2019-0482-1047

Response to Comments	EPA, Comment Response Document (2024), EPA-HQ-OW-2019-0482-1031
Rup Study	Rup <i>et al.</i> , Domestic Ballast Operations on the Great Lakes (2010), EPA-HQ-OW-2019-0482-0878
Sen. Carper Comment	Comment submitted by Thomas R. Carper, Ranking Member, United States Senate (2020), EPA-HQ-OW-2019-0482-0753
USCG	United States Coast Guard
USCG-EPA Email	USCG Response to EPA Question about Ballast Uptake BMPs Enforcement (2024), EPA-HQ-OW-2019-0482 1034
USCG Study	U.S. Coast Guard, Ballast Water Treatment, U.S. Great Lakes Bulk Carrier Engineering and Cost Study: Volume II (2013), EPA-HQ-OW-2019-0482-0414
VIDA	Vessel Incidental Discharge Act

INTRODUCTION

Once again, EPA disregards its Congressionally mandated duty to regulate ballast water discharges from *all* Lakers. EPA's claim to have gotten the Final Standards right by splitting the baby to require an Equipment Standard Best Management Practice ("BMP") to install, operate, and maintain Ballast Water Management Systems ("BWMS") only for *new* Lakers, vessels not yet built, cannot stand. EPA violates the Vessel Incidental Discharge Act's ("VIDA") directives by allowing the 63 *existing* Lakers carte blanche to continue polluting the Great Lakes with aquatic nuisance species through ballast water discharges. Also, EPA violates VIDA's requirement to promulgate standards at least as strong as the 2013 VGP¹ by (1) not holding Lakers built after January 1, 2009 to the numeric ballast water discharge standard and (2) omitting the Uptake BMP.

For over three decades, EPA perpetuated an *ultra vires* exemption, avoiding its Clean Water Act duty to regulate vessel incidental discharges at all, until a court stepped in. *Nw. Env't Advocs. v. U.S. Env't Prot. Agency*, 537 F.3d 1006 (9th Cir. 2008). Next, EPA failed its statutory duty to protect the Great Lakes from invasive species with its 2013 VGP. Again, a court stepped in and rejected EPA's split the baby decision that required only post-2009 Lakers to meet the numeric discharge

¹ *Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel*, 78 Fed. Reg. 21938 (Apr. 12, 2013).

standard, remanding without vacatur for EPA to address pre-2009 Lakers. *Nat. Res. Def. Council v. U.S. Env't Prot. Agency (NRDC II)*, 808 F.3d 556, 584 (2d Cir. 2015).

After over two years of EPA inaction, Congress stepped in and passed VIDA. While drafting VIDA, “the concept of exempting Lakers was ... expressly rejected on a bipartisan basis.” Sen. Carper Comment at 3, JA_. Instead, recognizing the importance of the Great Lakes, Congress funded the Great Lakes and Lake Champlain Invasive Species Program (“GLLCISP”), 16 U.S.C. § 4730. But, GLLCISP’s research and decades of prior research show that existing BWMS are the only viable option to treat Lakers’ ballast water discharges and are feasible for *existing* Lakers to install, operate, and maintain. VIDA’s technology-forcing “best available technology economically achievable” (“BAT”) standard requires *all* Lakers to do so.

Instead, EPA proffers the very claims rejected in *NRDC II* by excluding existing Lakers from an Equipment Standard BMP. When EPA tried to exempt pre-2009 Lakers, the Second Circuit explained, “lack of supply of updated shipboard systems is not a legitimate reason to exempt pre-2009 Lakers ... [because] the purpose of BAT is to force technology to keep pace with need.” 808 F.3d at 576. The Court also rejected EPA’s operational constraints rationale for exempting pre-2009 Lakers, finding pre- and post-2009 Lakers similarly situated with respect to their “short voyages, high pumping rates, and freshwater environment” and Lakers’

“limitations in treating ballast water” did not make “such treatment impossible.” *Id.* at 577.

EPA needs to get this right. Lakers “account for over ninety-five percent of ballast water volumes transferred in the Great Lakes [and] are more likely than oceangoing vessels to spread invasive species.” *Id.* at 562. This Court must step in to order EPA to do what VIDA requires.

STATUTES AND REGULATIONS

A regulation not in prior addenda is in the Supplemental Statutory and Regulatory Addendum to Environmental Petitioners’ Reply Brief.

SUMMARY OF ARGUMENT

First, EPA’s failure to adopt any Equipment Standard BMP as BAT for existing Lakers is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” because VIDA does not exempt Lakers and EPA ignored evidence that BWMS are available technology for existing Lakers, conducted an improper economic achievability analysis for existing Lakers, and relied on false speculation about future research to delay regulation for no alternative to BWMS is under development. 5 U.S.C. § 706(2)(A).

Second, EPA violated VIDA by impermissibly weakening the Final Standards. At minimum, Congress directed EPA to require post-2009 Lakers to treat their ballast

water and to retain the Uptake BMP, and neither of VIDA's very limited exceptions to the stringency provision apply.

ARGUMENT

I. As VIDA Requires, BAT for Existing and New Lakers Is an Equipment Standard BMP.

Under EPA's Final Standards, existing Lakers only have to comply with six ballast water BMPs, like "[m]aintain a ballast water management plan" and "[p]eriodically clean ballast tanks," which are weaker than the 2013 VGP and do not require Lakers to treat their ballast water at all. 40 C.F.R. § 139.10(c)(1). These current BMPs are not BAT, which is intended "to press development of new, more efficient and effective technologies," *Nat. Res. Def. Council, Inc. v. U.S. Env't Prot. Agency*, 822 F.2d 104, 124 (D.C. Cir. 1987), and requires the "commitment of the maximum resources economically possible." *Env't Prot. Agency v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 74 (1980). If LCA's proposed misinterpretation of VIDA's terms "standards of performance" and "BMP" were adopted,² then all Lakers would be subject only to these weakened BMPs. The Court must not "rubber stamp" EPA's arbitrary and capricious decision to exclude existing Lakers from an Equipment Standard BMP. *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 72 F.4th 1324, 1336 (D.C. Cir. 2023).

² An Equipment Standard BMP is a "standard of performance" and a BMP as VIDA requires. *Env't Pet'rs' Intervenor-Respondent Br.* at 7–15.

A. EPA Improperly Rejected BWMS as BAT for Existing Lakers.

Congress acted with VIDA to stop the delay by EPA and LCA. It does not permit EPA's split the baby approach. EPA is required to issue standards of performance based on BAT. 33 U.S.C. § 1322(p)(4)(B)(i)(III). As the Record shows, a BWMS Equipment Standard BMP is BAT for *all* Lakers. Both EPA and LCA fail to identify any non-BWMS technology on the horizon because there is none.

1. BWMS Are “Available Technology” for All Lakers.

BWMS are “available technology” for existing Lakers. Nothing EPA or LCA raise in their briefs proves otherwise.

First, Great Lakes water conditions and Lakers' unique features apply equally to all Lakers, so are an invalid basis for EPA to treat existing Lakers differently by holding only new Lakers to the BWMS Equipment Standard. *NRDC II*, 808 F.3d at 577 (exempting pre-2009 Lakers based on “short voyages, high pumping rates, and freshwater environment” was arbitrary and capricious because post-2009 Lakers “appear to be similarly situated.”). And, as EPA admits, VIDA tasks the United States Coast Guard (“USCG”) with implementing “operational contingency measures” to address any potential cases where BWMS cannot operate, EPA Br. at 44, so, that is not a valid basis to reject BWMS as BAT for existing and new Lakers alike. The only relevant distinguishing characteristic between new and existing

Lakers is that existing Lakers must be retrofit with BWMS whereas new Lakers can incorporate BWMS during construction. Three separate engineering studies confirm that existing Lakers can be retrofit with BWMS. Industry Study, JA_, USCG Study, JA_, Canadian Study, JA_.

Second, EPA does not dispute that these studies show existing Lakers can be retrofit with BWMS. Instead, EPA raises “technical and operational challenges” that do not impact existing Lakers’ ability to install BWMS, only the cost of doing so. But, these so-called challenges would, at worst, require existing Lakers to slightly delay cargo unloading, sacrifice 0.5-2.5% of cargo space, install additional generators,³ or coat ballast tanks. If Laker owners did not want to coat ballast tanks, they could install UV BWMS which do not require such coating. 88 Fed. Reg. 71788, 71799 (Oct. 18, 2023). Such theoretical costs do not mean BWMS are not BAT, which requires “commitment of the maximum resources economically possible.” *Nat’l Crushed Stone Ass’n*, 449 U.S. at 74.

Finally, EPA and LCA incorrectly assert the Canadian Study only addresses Canadian Lakers. Had EPA properly considered the study, EPA would know that it expressly evaluates U.S. Lakers. Canadian Study at 1 (study’s goal is “Categoriz[ing] the existing Canadian and United States Great Lakes fleets ... to

³ These potential costs are exaggerated by EPA and LCA, as shown by the evidence in the Record. Env’t Pet’rs’ Intervenor-Respondent Br. at 20–22.

best address the feasibility of installation and operation of [BWMS] across the categories.”); *id.* at 35–42 (assessing feasibility of retrofitting self-unloader 1000’ Lakers which are “owned exclusively by USA operators.”). While the study did not directly consider Lakers with uncoated ballast tanks, it analyzed the feasibility of installing UV BWMS on U.S. Lakers, which work with uncoated tanks, making the study relevant evidence.

2. EPA’s Economic Achievability Analysis for Existing Lakers Is Flawed.

EPA expressly concedes it did not determine whether the BWMS Equipment Standard BMP for existing Lakers could be “reasonably borne” by the Laker Industry, showing that it “entirely failed to consider” whether the standard was “economically achievable” as BAT requires. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); Response to Comments at 143, JA_ (“EPA lacks the detailed information to determine that these costs can be reasonably borne by the industry.”). Instead, EPA improperly adopted the Industry Study’s cost estimates wholesale. 88 Fed. Reg. 71800; Response to Comments at 143, JA_. Also, EPA did not substantiate the Study’s key assumptions and inflated costs, making its economic achievability analysis arbitrary and capricious.

i. EPA Did Not Conduct the Proper Analysis.

To assess “economic achievability,” EPA must determine whether the standard can be “reasonably borne by industry,” but EPA admits it did not do so when excluding existing Lakers from the BWMS Equipment Standard BMP. 88 Fed. Reg. 71800 (citing *Chem. Mfrs. Ass’n v. U.S. Env’t Prot. Agency*, 870 F.2d 177, 262 (5th Cir. 1989)); Response to Comments at 143, JA_. For the New Laker Equipment Standard, EPA properly analyzed economic achievability in a 42-page document which “articulated its methodology, applied it to industry data, and presented the results.” *Nat’l Wildlife Fed’n v. Env’t Prot. Agency*, 286 F.3d 554, 563 (D.C. Cir. 2002), *supplemented sub nom. In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003). Conversely, for existing Lakers, EPA discusses economic achievability in only two paragraphs of its rulemaking with no discussion of whether the Laker Industry can reasonably bear the cost to comply, 88 Fed. Reg. 71800; 85 Fed. Reg. 67818, 67850 (Oct. 26, 2020). Therefore, EPA arbitrarily and capriciously “entirely failed to consider” whether an Equipment Standard BMP is economically achievable for existing Lakers. *State Farm*, 463 U.S. at 43. EPA’s counterarguments are meritless.

First, a cost estimate alone is insufficient to determine economic achievability. *Chem. Mfrs. Ass’n*, which EPA cites, does not hold differently. EPA Br. at 68. There, EPA’s “reasonable cost estimate” was only one component of its 230-page Economic Impact Analysis where EPA determined economic achievability

by analyzing “plant and product line closures, employment changes, profitability impacts, and regulatory costs as a percent of sales.” 52 Fed. Reg. 42522, 42550 (Nov. 5, 1987). The Fifth Circuit held that the cost estimate component of EPA’s economic achievability analysis only had to be “reasonable,” *i.e.*, not arbitrary and capricious, not that EPA’s economic achievability analysis only had to contain a reasonable cost estimate. *Chem. Mfrs. Ass’n*, 870 F.2d at 237–38.

Second, EPA “actually considered the issue” of its Section 308 authority to request information from Lakers during the rulemaking, so there is no waiver. *Engine Mfrs. Ass’n v. U.S. Env’t Prot. Agency*, 88 F.3d 1075, 1084 (D.C. Cir. 1996); Response to Comments at 130, JA_ (EPA could request “additional information from the Great Lakes vessel industry ... through a CWA section 308 information request.”). And, Section 308 is not the only path for EPA to determine economic achievability for existing Lakers; it could use a proxy in lieu of revenue data, as it did for new Lakers. *Env’t Pet’rs’ Opening Br.* at 22; EPA New Lakers Economic Analysis, JA_. But, EPA cannot “throw up [its] hands” and avoid its duty to conduct the required analysis as it did here. *See NRDC II*, 808 F.3d at 578.

Third, an agency must “reasonably consider the relevant issues” even if the Administrative Procedure Act does not impose a general obligation to conduct “empirical or statistical studies.” *Magnetsafety.org v. Consumer Prod. Safety Comm’n*, 129 F.4th 1253, 1261 (10th Cir. 2025) (quoting *Fed. Commc’ns Comm’n*

v. Prometheus Radio Project, 592 U.S. 414, 423, 425, 427 (2021)). Here, EPA failed to consider the relevant issue of economic achievability. *Magnetsafety.org*, on which EPA relies, is inapplicable because, there, EPA still satisfied its statutory duty to estimate the regulation's costs and benefits, even if it did not conduct its own studies to obtain more accurate estimates. *Id.* at 1259–61.

Finally, despite not examining revenue, EPA claims a BWMS Equipment Standard BMP for existing Lakers would “measurably reduce operating revenues.” EPA Br. at 67. But, EPA did not measure the impact to revenue at all. *Id.* EPA's unsubstantiated, unmonetized assertions do not speak to economic achievability. In fact, purported economic impacts from “lost” cargo space and hold times are exaggerated and unsupported by the Record. Env't Pet'rs' Intervenor-Respondent Br. at 21. Further, a Laker would only need additional drydocking time if it chose to use a chemical addition system, which is only one of many BWMS available.

ii. EPA Improperly Adopted the Laker Industry's Cost Estimates.

EPA arbitrarily and capriciously adopted the Industry Study as its cost estimate without analyzing the Study's key assumptions, which are invalid.

First, despite EPA's Brief's claim, during the rulemaking, EPA expressly adopted the Industry Study as its cost estimate. Response to Comments at 143, JA_ (“EPA estimated the cost for the existing Laker fleet to install BWMS at \$649 million....”) (emphasis added); 88 Fed. Reg. 71800 (citing Industry Study as basis

for this estimate). EPA mentioning the USCG and Canadian Studies' estimates, without analyzing why those estimates are a fraction of the Industry Study estimate or determining whether such costs can be reasonably borne by industry, does not remedy EPA's failure to determine economic achievability. 88 Fed. Reg. 71800. If EPA had analyzed the economic achievability of these non-industry estimates, which range from \$2 million to \$8.4 million, it likely would conclude they are economically achievable since EPA found installing \$4.5 million BWMS economically achievable for new Lakers. EPA New Lakers Economic Analysis at 15, JA_.

Second, Environmental Petitioners raised “with sufficient specificity reasonably to alert” EPA whether the “industry produced study made assumptions that inflated costs.” Environmental Petitioners' Comment at 3, JA_; *California Communities Against Toxics v. Env't Prot. Agency*, 928 F.3d 1041, 1049 (D.C. Cir. 2019) (citation omitted). Regardless, when EPA bases most of its cost analysis on a single model, it must justify the model's assumptions “even if no one objects to it during the comment period” as part of its “affirmative ‘burden of promulgating and explaining a non-arbitrary, non-capricious rule.’” *Small Refiner Lead Phase-Down Task Force v. U.S. Env't Prot. Agency*, 705 F.2d 506, 534–35 (D.C. Cir. 1983) (quoting *Nat'l Lime Ass'n v. Env't Prot. Agency*, 627 F.2d 416, 433 (D.C. Cir. 1980)).

Finally, the Industry Study’s estimates have obvious flaws that EPA completely failed to analyze. Env’t Pet’rs’ Opening Br. at 22–24. LCA’s Intervenor Brief does not explain why a Laker would rationally choose to install a type of BWMS costing \$20 million more and taking up 5,000–11,000 ft³ more cargo hold space, the equivalent of 2–4.5 40’ shipping containers.⁴ Industry Study at 21, 31, JA_, _. EPA adopting this Industry Study when the “industry had an incentive to estimate on the high end” is arbitrary and capricious. *Sw. Airlines Co. v. Transp. Sec. Admin.*, 650 F.3d 752, 757 (D.C. Cir. 2011).

3. Congress Funded Research to Protect the Great Lakes, Not Delay Regulation.

EPA incorrectly claims VIDA’s Legacy Clause and GLLCISP provisions show Congressional intent to exempt existing Lakers to allow for future technology to develop. But, Congress’s clear intent was for EPA to act immediately to regulate all Lakers and protect the Great Lakes. Env’t Pet’rs’ Intervenor-Respondent Br. at 17–18.

First, EPA’s non-sensical claim that the Legacy Clause would apply to existing Lakers because an exemption from a standard is a requirement to meet a

⁴ LCA does not explain how additional generators or fuel costs account for the \$20 million difference between the Industry’s chemical addition BWMS estimate and the USCG’s UV BWMS estimate, Industry Study at 25, 36, JA_, _; USCG Study at 26, 35, JA_, _, or how a generator would take up 5,000–11,000 ft³, when a single generator only requires 6’ by 12’ of space. LCA-Fincantieri Notes at 3, JA_.

“(nonexistent) standard” must be rejected. EPA Br. at 72; *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024) (Court must adopt best reading of statute). Nor does the Legacy Clause show Congressional intent to exempt existing Lakers; if Congress so intended, it would have done so expressly, like it did for other vessels. *Lackey v. Stinnie*, 604 U.S. 192, 205 (2025) (quoting *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019)) (“Atextual judicial supplementation is particularly inappropriate when ... Congress has shown that it knows how to adopt the omitted language or provision.”); Sen. Carper Comment at 2, JA_ (“Had Congress intended ... that Lakers NOT be regulated, it would have included a specific provision to that effect.”).

Second, as EPA concedes, it is “entirely speculative whether future developments” would lead to any technology beyond currently available BWMS. EPA Br. at 73. GLLCISP’s seven-year Great Lakes Ballast Water Research and Development Plan, which EPA cites, only addresses two research questions involving testing technology: evaluating whether (1) “existing BWMS available on the global market can treat Great Lakes ballast water effectively” and (2) “stand-alone filtration is a viable, beneficial option.” Research and Development Plan at 9–10, JA_. This confirms Canada’s point that “[d]espite efforts over more than a decade by Canada, the U.S., vessel owners, Great Lakes research institutes, the Great Lakes Ballast Water Collaborative, and other working groups, no meaningful

options outside of type-approved BWMS have emerged.” Canada 2023 Comment at 9, JA_.

All research in GLLCISP’s Plan will finish in September 2026, before EPA’s Final Standards are effective.⁵ Research and Development Plan at 11, JA_. Existing Lakers can use this research to select a BWMS and BWMS effectiveness will greatly improve as “shipowners and crews move beyond the steep learning curve.” Bailey Study at 8, JA_. VIDA only authorized research funding through 2023, 16 U.S.C. § 4730(7), and EPA does not identify any research after the Plan ends. Because EPA cannot identify any research to develop solutions besides available BWMS or filtration-only BMPs, its regulatory delay based on a speculative technological breakthrough “runs counter to the evidence before the agency.” *State Farm*, 463 U.S. at 43.

B. EPA Improperly Rejected a Filtration-Only BMP.

Under VIDA, EPA must issue a BMP if a numeric standard is infeasible or if the BMP is “reasonably necessary ... to carry out the purpose and intent of” VIDA. 33 U.S.C. § 1322(p)(4)(B)(ii). A filtration-only BMP for existing Lakers carries out VIDA’s purpose of “reasonable progress toward the national goal of eliminating discharges of all pollutants,” 33 U.S.C. § 1322(p)(4)(B)(i)(III), because filtration-

⁵ EPA’s Final Standards do not become effective until USCG’s VIDA regulations, statutorily due by October 9, 2026, become effective and USCG can determine the regulations’ effective date. 33 U.S.C. § 1322(p)(5)(A).

only systems can reduce the concentration of living organisms by up to 99.9%. GSI 2014 Study at 47, JA_,_. The other filtration study EPA’s Brief cites finds “filtration is a desirable option for ballast water management [and] [t]he filtration unit used in our tests significantly reduced abundances of copepods and cladocerans,” Briski Study at 251, JA_, which reduces the likelihood of invasive species establishment. EPA New Lakers Economic Analysis at 21, JA_ . EPA improperly rejected this BMP because it did not meet EPA’s pre-determined numeric standard, in violation of VIDA’s requirements. *NRDC II*, 808 F.3d at 570.

II. EPA’s Final Standards Violate VIDA’s Stringency Provision by Exempting Post-2009 Lakers and Omitting the Uptake BMP.

A. EPA Must Hold Post-2009 Lakers to the 2013 VGP’s Numeric Ballast Water Discharge Standard.

The 2013 VGP requires post-2009 Lakers to meet the numeric standard, 2013 VGP § 2.2.3.5.3.3 at 39, JA_, which they do by installing, operating, and maintaining BWMS. *See, e.g.*, 89 Fed. Reg. 82074, 82095–97 (Oct. 9, 2024). At *minimum*, Congress required EPA to hold post-2009 Lakers to this standard. 33 U.S.C. § 1322(p)(4)(B)(iii)(I). Instead, as EPA’s Brief confirms, EPA violates VIDA by backsliding to exempt post-2009 Lakers, for neither limited exception to VIDA’s stringency provision applies.

1. EPA Fails VIDA's "Material Technical Mistake" Exception.

EPA's incorrect interpretation of "material technical mistake" is not accorded any deference. *Loper Bright*, 603 U.S. at 400. Instead, the Court must adopt the best reading of the term, which is that it applies only to mistakes that are technical, not any mistake on a technical subject, as shown by Congressional intent and prior interpretation of the same term. Env't Pet'rs' Opening Br. at 33–35. EPA cannot weaken the Final Standards by exempting post-2009 Lakers from the numeric standard because EPA did not identify any mistake of a technical nature, no mathematical error or computer glitch, it made when issuing the 2013 VGP.

Contrary to EPA's claim, "material technical mistake" is ambiguous, even using the "ordinary meaning" of the words, as it is unclear whether "technical" modifies the mistake type or the subject on which a mistake was made. EPA Br. at 80–81. Under a narrower and proper interpretation, "technical" modifies the mistake type, so only mistakes "relat[ing] to the knowledge, machines, or methods used in science and industry"⁶ satisfy the exception (*i.e.*, EPA making a mathematical error when calculating the concentration of living organisms). Under EPA's erroneous interpretation, "technical" modifies the subject of the mistake, allowing EPA to weaken the Final Standards for *any* mistake, an "action, decision, or judgment that

⁶ Technical, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/technical> (last visited June 11, 2026).

produces an unwanted or unintentional result,”⁷ so long as the “mistake” was on a technical subject (*i.e.*, a new Administrator weakening a prior standard made based on a reasoned rulemaking record by claiming it “produce[d] an unwanted ... result”).

Because “material technical mistake” is ambiguous, the Court should rely on extrinsic materials. *Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 339 (D.C. Cir. 2020). Congress describes the exceptions to VIDA’s stringency requirement as “very limited.” Errata to S. Rep. No. 115–89 (2019) at 12. EPA’s misinterpretation would be anything but. Congress wrote VIDA to ensure that standards of performance strengthen over time without backsliding and requires EPA to reevaluate the standards every five years. 33 U.S.C. § 1322(p)(4)(D)(i). It would not have granted EPA a blank check to weaken any standard simply because it is on a technical subject and the new Administrator rejects a reasoned rulemaking. EPA’s retort that its Final Standards “only” invoke the exception four times when issuing twenty standards does not disprove that its interpretation is overbroad because EPA’s misinterpretation would allow it to exempt post-2009 Lakers, the “most important ballast-mediated pathway of secondary spread [of invasive species] within the Great Lakes,”⁸ from regulation.

⁷ Mistake, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/mistake> (last visited June 11, 2026).

⁸ Rup Study at 263, JA_.

Further, Congress adopted VIDA’s “material technical mistake” language from the NPDES program,⁹ showing Congress’s intent the term be construed according to its “pre-existing regulatory interpretations,” and Congress is “presumed to have had knowledge of the interpretation given to the incorporated law.” *Hikvision USA, Inc. v. Fed. Comm’n Comm’n*, 97 F.4th 938, 946 (D.C. Cir. 2024). Therefore, the Court should adopt the Fifth Circuit’s interpretation that “technical mistake” refers to “only errors in mathematical calculations, computer errors, clerical mistakes and the like,” rather than mistakes in “findings of ‘technical’—as opposed to unsophisticated—fact.” *Texas Mun. Power Agency v. Adm’r of U.S. Env’t Prot. Agency*, 836 F.2d 1482, 1491 (5th Cir. 1988).

Finally, *NRDC II* offers no lifeline to EPA. *NRDC II* did not order EPA to reconsider the 2013 VGP holding post-2009 Lakers to the numeric standard; rather, it found EPA’s exemption of pre-2009 Lakers arbitrary and capricious. 808 F.3d at 576–77, 584. Congress enacted VIDA in 2018, after *NRDC II*, and is “presumed to have had knowledge” of it. *Hikvision*, 97 F.4th at 946; *see also* Sen. Carper Comment at 2–3, JA_ (discussing *NRDC II* and VIDA deliberations). Congress expressly adopted the 2013 VGP as the legal baseline, without exempting Lakers. 33 U.S.C. § 1322(p)(4)(B)(iii)(I). EPA using a 2009 dividing line to hold post-2009

⁹ Errata to S. Rep. No. 115–89 (2019) at 12.

Lakers to the numeric standard is not arbitrary and capricious, rather it is the *minimum* EPA must do under VIDA.

2. EPA Fails VIDA's "New Information" Exception.

VIDA's "new information" exception only applies if "information becomes available" that "was not reasonably available when the Administrator promulgated the [2013 VGP]," and "would have justified the application of a less stringent standard at the time of promulgation." 33 U.S.C. § 1322(p)(4)(D)(ii)(II)(aa). EPA's rulemaking Record does not identify any such "new information."

First, EPA's Brief does not dispute that two of the five post-2009 Lakers were built *prior* to the 2013 VGP, so information about their ability to meet the numeric ballast water discharge standard was "reasonably available" to EPA before the 2013 VGP. Nor does EPA dispute two of the three Lakers built after the 2013 VGP have taken steps to meet a numeric standard, one by installing a BWMS; another coating its ballast tanks.

Second, EPA claims USCG issuing a compliance extension from the numeric standard shows that post-2009 Lakers "are not presently capable of meeting the numeric standard." EPA Br. at 84. But, EPA provides no evidence of when or why USCG issued extensions or what information USCG relied on, nor is any such information in the Record. As EPA admits, USCG compliance extensions can be issued for "up to five years or until implementation of USCG regulations that change

the discharge standard.” 88 Fed. Reg. 71804. The mere fact that at one-point USCG issued extensions is not “new information” about post-2009 Lakers’ ability to meet the standard *now*, particularly after GLLCISP’s seven-year research program dedicated to getting BWMS installed on Lakers. Research and Development Plan, JA_. Because EPA does not identify any actual information available only after 2013 demonstrating these post-2009 Lakers cannot meet the standard, VIDA’s “new information” exception is inapplicable. Env’t Pet’rs’ Opening Br. at 35–38.

3. There Is No “Operational Constraints” Exception to VIDA’s Stringency Provision.

EPA inaccurately asserts “operational constraints” Lakers may experience after installing BWMS allow EPA to weaken its Final Standards. EPA Br. at 86. But, there is no “operational constraints” exception to VIDA’s stringency provision. As EPA admits, under VIDA, “operational contingency measures” necessary when BWMS cannot be operated “[a]ll under the Coast Guard’s rulemaking authority.” EPA Br. at 44. So, if Lakers face operational difficulties meeting the standard, USCG could issue a regulation, such as the Canadian “deemed compliance” approach, which deems Lakers in compliance with the numeric standard so long as they install, operate, and maintain BWMS. *See, e.g.,* Canada 2020 Comment, at 3, JA_. And, these purported “operational constraints” are not evidence of a “mistake” or “new information,” for they were raised, examined, and rejected during the 2013 VGP

rulemaking. Env't Pet'rs' Opening Br. at 34 (citing 2013 VGP Response to Comments).

B. EPA Must Include the Uptake BMP.

The Uptake BMP is a commonsense requirement in the 2013 VGP instructing vessels to avoid taking up ballast water in areas with known infestations of invasive species, sewage outfalls, and other contaminants. As EPA's Brief confirms, EPA unlawfully weakened the Final Standards by omitting it; VIDA's "new information" exception does not apply.

EPA cannot rely on "bald assertions about inconsistency of enforcement" to justify omitting the Uptake BMP. *Sierra Club v. Env't Prot. Agency*, 719 F.2d 436, 458 (D.C. Cir. 1983). Yet, EPA baldly asserts "conversations with the USCG" are "new information," but only cites one email about USCG's enforcement actions. USCG-EPA Email, JA_. USCG's failure to bring an enforcement action for violating the Uptake BMP does not make that BMP unenforceable. Under EPA's faulty reasoning, any standard for which an agency fails to actively bring an enforcement action is unenforceable and subject to rescission. USCG brought only ten ballast water BMP enforcement actions for two of the six BMPs in eight years. *Id.* Yet, EPA maintained the rest of the BMPs in the Final Standards, excluding only the Uptake BMP. 40 C.F.R. § 139.10(c)(1).

EPA's Brief incongruously maintains that the States did not refute that the Uptake BMP's restrictions are "not feasible to follow and enforce" despite acknowledging that Michigan provided 18 years of vessels' self-reported compliance. EPA Br. at 117. EPA implying that self-reporting is not a valid method to determine regulatory compliance flies in the face of modern environmental regulation, like NPDES permitting, which heavily rely on facilities self-reporting compliance to regulators. *See, e.g.*, 40 C.F.R. § 122.41(1)(6) (NPDES permittees must self-report noncompliance within 24 hours). Regardless, EPA misinterprets VIDA, flipping the "new information" exception on its head, by asserting it will issue a weaker standard that omits the Uptake BMP unless States provide new information.

Finally, industry groups raised the purported difficulty of complying with the Uptake BMP to EPA prior to the 2013 VGP, so the information in the VIDA Record EPA cites was "reasonably available" to EPA, which properly rejected such claims when issuing the 2013 VGP. *See, e.g.*, 2013 VGP Response to Comments at 837–38, JA_. EPA's Uptake BMP omission therefore fails VIDA's "new information" exception and "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition and set aside those portions of EPA's Final Standards addressed herein. On remand, EPA should be ordered to conduct a proper BAT analysis and adopt Final Standards that include an Equipment Standard BMP for existing Lakers, hold post-2009 Lakers to the numeric standard, and include the Uptake BMP.

DATED: June 12, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that the foregoing Environmental Petitioners' Reply Brief contains 5,000 words excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), in compliance with the word limit for this Brief established by this Court's order Doc. No. 2147493. As permitted by Federal Rule of Appellate Procedure 32(g)(1), I have relied upon the word count feature of Microsoft Word in preparing this certificate. The foregoing Brief was composed in Times New Roman font, 14-point. This Brief complies with the applicable typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6).

DATED: June 12, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2026, the foregoing Environmental Petitioners' Reply Brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the CM/ECF system, which will provide electronic notice to counsel of record for all parties in the consolidated action.

DATED: June 12, 2026

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ORAL ARGUMENT NOT SCHEDULED
No. 25-1027
(Consolidated with Case Nos. 25-1049 and 25-1052)

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,

On Petition for Review of Final Agency Action from the United States
Environmental Protection Agency, 89 Fed. Reg. 82,074 (Oct. 9, 2024)

ENVIRONMENTAL PETITIONERS' REPLY SUPPLEMENTAL
STATUTORY AND REGULATORY ADDENDUM

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This Supplemental Statutory and Regulatory Addendum contains the following regulation not previously submitted in Petitioners' or Respondent's Statutory and Regulatory Addenda. All statutes and all other regulations cited in Environmental Petitioners' Reply Brief have been previously submitted.

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Subpart C. Permit Conditions

40 C.F.R. § 122.41

§ 122.41 Conditions applicable to all permits (applicable to State programs, see § 123.25).

Effective: November 8, 2024

[Currentness](#)

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

(1) The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under section 405(d) of the CWA within the time provided in the regulations that establish these standards or prohibitions or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement.

(2) The Clean Water Act provides that any person who violates section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed \$25,000 per day for each violation. The Clean Water Act provides that any person who negligently violates sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or both. Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$5,000 to \$50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$100,000 per day of violation, or imprisonment of not more than 6 years, or both. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more

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than \$250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than \$500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in section 309(c)(3)(B)(iii) of the CWA, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$1,000,000 and can be fined up to \$2,000,000 for second or subsequent convictions.

(3) Any person may be assessed an administrative penalty by the Administrator for violating section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act. Administrative penalties for Class I violations are not to exceed \$10,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$25,000. Penalties for Class II violations are not to exceed \$10,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$125,000.

(4) The civil monetary penalty amounts listed in this section may not reflect recent inflation adjustments EPA is required to make. The current maximum and minimum statutory civil penalty amounts are located in § 19.4.

(b) Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

(c) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(d) Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

(e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

(f) Permit actions. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(g) Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) Duty to provide information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

(i) Inspection and entry. The permittee shall allow the Director, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of credentials and other documents as may be required by law, to:

- (1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
- (2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
- (3) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
- (4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

(j) Monitoring and records.

- (1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.
- (2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.
- (3) Records of monitoring information shall include:
 - (i) The date, exact place, and time of sampling or measurements;
 - (ii) The individual(s) who performed the sampling or measurements;
 - (iii) The date(s) analyses were performed;
 - (iv) The individual(s) who performed the analyses;
 - (v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

(k) Signatory requirement.

(1) All applications, reports, or information submitted to the Director shall be signed and certified. (See § 122.22)

(2) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

(l) Reporting requirements.—

(1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

(i) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in § 122.29(b); or

(ii) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under § 122.42(a)(1).

(iii) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan;

(2) Anticipated noncompliance. The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) Transfers. This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act. (See § 122.61; in some cases, modification or revocation and reissuance is mandatory.)

(4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(i) Monitoring results must be reported on a Discharge Monitoring Report (DMR) or forms provided or specified by the Director for reporting results of monitoring of sludge use or disposal practices. As of December 21, 2016 all reports and forms submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in [40 CFR 127.2\(b\)](#), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to report electronically if specified by a particular permit or if required to do so by state law.

(ii) If the permittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR Part 136, or another method required for an industry-specific waste stream under 40 CFR subchapters N or O, the results of such monitoring shall be included in the calculation and reporting of the data submitted in the DMR or sludge reporting form specified by the Director.

(iii) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

(5) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

(6) Twenty-four hour reporting.

(i) The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A report shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The report shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. For noncompliance events related to combined sewer overflows, sanitary sewer overflows, or bypass events, these reports must include the data described above (with the exception of time of discovery) as well as the type of event (combined sewer overflows, sanitary sewer overflows, or bypass events), type of sewer overflow structure (e.g., manhole, combine sewer overflow outfall), discharge volumes untreated by the treatment works treating domestic sewage, types of human health and environmental impacts of the sewer overflow event, and whether the noncompliance was related to wet weather. As of December 21, 2025 or an EPA-approved alternative date (see [40 CFR 127.24\(e\)](#) or [\(f\)](#)), all reports related to combined sewer overflows, sanitary sewer overflows, or bypass events submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in [40 CFR 127.2\(b\)](#), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart

D to part 3), § 122.22, and 40 CFR part 127. 40 CFR part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of 40 CFR part 127, permittees may be required to electronically submit reports related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section by a particular permit or if required to do so by state law. The Director may also require permittees to electronically submit reports not related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section.

(ii) The following shall be included as information which must be reported within 24 hours under this paragraph.

(A) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See § 122.41(g).

(B) Any upset which exceeds any effluent limitation in the permit.

(C) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours. (See § 122.44(g).)

(iii) The Director may waive the written report on a case-by-case basis for reports under paragraph (l)(6)(ii) of this section if the oral report has been received within 24 hours.

(7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (l)(4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (l)(6). For noncompliance events related to combined sewer overflows, sanitary sewer overflows, or bypass events, these reports shall contain the information described in paragraph (l)(6) and the applicable required data in appendix A to 40 CFR part 127. As of December 21, 2025 or an EPA-approved alternative date (see [40 CFR 127.24\(e\)](#) or [\(f\)](#)), all reports related to combined sewer overflows, sanitary sewer overflows, or bypass events submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in [40 CFR 127.2\(b\)](#), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. 40 CFR part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of 40 CFR part 127, permittees may be required to electronically submit reports related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section by a particular permit or if required to do so by state law. The Director may also require permittees to electronically submit reports not related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section.

(8) Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

(9) Identification of the initial recipient for NPDES electronic reporting data. The owner, operator, or the duly authorized representative of an NPDES-regulated entity is required to electronically submit the required NPDES information (as specified in appendix A to 40 CFR part 127) to the appropriate initial recipient, as determined by EPA, and as defined in [§ 127.2\(b\)](#) of this chapter. EPA will identify and publish the list of initial recipients on its Web site and in the Federal Register, by state and by NPDES data group [see [§ 127.2\(c\)](#) of this chapter]. EPA will update and maintain this listing.

(m) Bypass—

(1) Definitions.

(i) Bypass means the intentional diversion of waste streams from any portion of a treatment facility.

(ii) Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice—

(i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible, at least ten days before the date of the bypass. As of December 21, 2025 or an EPA-approved alternative date (see [40 CFR 127.24\(e\)](#) or [\(f\)](#)), all notices submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in [40 CFR 127.2\(b\)](#), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. 40 CFR part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of 40 CFR part 127, permittees may be required to report electronically if specified by a particular permit or if required to do so by state law.

(ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (l)(6) of this section (24-hour notice). As of December 21, 2025 or an EPA-approved alternative date (see [40 CFR 127.24\(e\)](#) or [\(f\)](#)), all notices submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in [40 CFR 127.2\(b\)](#), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. 40 CFR part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of 40 CFR part 127, permittees may be required to report electronically if specified by a particular permit or if required to do so by state law.

(4) Prohibition of bypass.

(i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (m)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.

(n) Upset—

(1) Definition. Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(2) Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph (n)(3) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An upset occurred and that the permittee can identify the cause(s) of the upset;

(ii) The permitted facility was at the time being properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (l)(6)(ii)(B) of this section (24 hour notice).

(iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

(4) Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

(Clean Water Act (33 U.S.C. 1251 et seq.), Safe Drinking Water Act (42 U.S.C. 300f et seq.), Clean Air Act (42 U.S.C. 7401 et seq.), Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.))

Editorial Note: In paragraphs (j)(2), (4) and (l)(4)(ii), there are references to 40 CFR part 503. These references are to a proposed rule which was published at [54 FR 5746](#), Feb. 6, 1989. There is currently no part 503 in the Code of Federal Regulations.

Credits

[[48 FR 39620](#), Sept. 1, 1983; [49 FR 38049](#), Sept. 26, 1984; [50 FR 4514](#), Jan. 31, 1985; [50 FR 6941](#), Feb. 19, 1985; [54 FR 255](#), Jan. 4, 1989; [54 FR 18783](#), May 2, 1989; [58 FR 18016](#), April 7, 1993; [65 FR 30908](#), May 15, 2000; [72 FR 11211](#), March 12, 2007; [80 FR 64097](#), Oct. 22, 2015; [85 FR 69197](#), Nov. 2, 2020; [89 FR 88655](#), Nov. 8, 2024]

SOURCE: [45 FR 33418](#), May 19, 1980, as amended at [48 FR 14153](#), Apr. 1, 1983, unless otherwise noted.

AUTHORITY: The Clean Water Act, [33 U.S.C. 1251 et seq.](#)

Notes of Decisions (538)

Current through June 9, 2026, 91 FR 34787. Some sections may be more current. See credits for details.

End of Document

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