Essay

Too Many Cooks in the Galley: Overlapping Agency Jurisdiction of Ballast Water Regulation

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In *Northwest Environmental Advocates v. EPA*,[1] a group of environmental organizations[2] asked the northern California district court to order the Environmental Protection Agency ("EPA") to promulgate regulations governing the release of ballast water from ships in United States ports.[3] EPA had previously exempted such discharges from regulation.[4] In response, the court found that Congress clearly intended that EPA regulate ballast water discharges,[5] under the Clean Water Act ("CWA"),[6] despite the fact that the United States Coast Guard had promulgated and administered ballast water regulations pursuant to its own congressional mandate in the National Invasive Species Act of 1996 ("NISA").[7] The district court's statutory interpretation of the CWA appears correct: EPA is without discretion under

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1 Nw. Envtl. Advocates v. EPA (*Nw. Envtl. I*), No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. Mar. 30, 2005), *remanded by* No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. Sept. 18, 2006).

2 The group included Northwest Environmental Advocates, The Ocean Conservancy, and Waterkeepers Northern California.

3 *Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *6–7.

4 *See* 40 C.F.R. § 122.3(a) (2008).

5 *Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *29.

6 Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

7 National Invasive Species Act of 1996, Pub. L. No. 104-332, 110 Stat. 4073 (codified as amended in scattered sections of 16 U.S.C.).

the CWA to decline to regulate the specific type of discharge that occurs when a ship docks at a United States port and releases its ballast.

In contrast, both the court's choice of remedy and analysis of the dual regulatory regime is bound to ensue merit reflection. After finding EPA's refusal to regulate ballast water discharge arbitrary and capricious, the court effectively commanded EPA to promulgate a regulatory regime governing ballast water discharge.[8] Ballast water discharge, however, is not an unregulated field; EPA regulations would duplicate those currently administered by the U.S. Coast Guard.[9] The court's tidy dismissal of EPA's challenges to such a dual system does not withstand closer scrutiny, which suggests that the judiciary may not be the appropriate entity to make such decisions. A comparison to the decisionmaking process used by the Office of Legal Counsel ("OLC"), an executive agency that resolves conflicts between agencies, demonstrates that the courts' scope of review may be too narrow. This Essay confronts congressional mandates to two agencies, where one has traditionally regulated and the other has abstained, and asserts that courts should avoid remedies commanding the inactive agency to regulate until the agencies have had sufficient time to present the matter to Congress.

Part I of this Essay explains the *Northwest Environmental* opinion and the court's interpretation of the CWA. Part I also describes the Coast Guard regulations of ballast water and the source of the Coast Guard's authority to regulate. Part II considers the *Northwest Environmental* court's conclusion that EPA regulation in conjunction with Coast Guard regulation is feasible. Finally, this Essay suggests that Congress is a more appropriate body to resolve questions about overlapping agency authority and that courts should abstain from imposing a remedy that effectively mandates the inactive agency to create a duplicative regulatory regime.

I. The History of Ballast Water Regulation and Northwest Environmental Advocates v. EPA

A. Ballast Water Defined

Ballast water is sea water that ships take on after unloading their cargo in order to adjust to changes in weight.[10] Ships discharge ballast

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8 Nw. Envtl. Advocates v. EPA (*Nw. Envtl. II*), No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476, at *31–32 (N.D. Cal. Sept. 18, 2006).

9 *See* 16 U.S.C. §§ 4713–4714 (2006).

10 *Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *4.

water at port when they load new cargo.[11] Some tanker vessels may take on tens of millions of gallons of ballast water in one location that they may then release in different bodies of water after journeys of thousands of miles.[12] In the United States, over twenty-one billion gallons of ballast water are released into national waters each year.[13]

The discharge of ballast water has ecological significance. "[M]ore than 10,000 marine species each day hitch rides around the globe in the ballast water of cargo ships."[14] The introduction of such nonnative species into United States ecosystems "may result in severe and irreversible impacts on environmental quality and biological diversity, on economic and recreational activities, and on public health."[15] These "aquatic nuisance species" ("ANS") may thrive in their new environments if they find themselves "free from the natural predators, competitors, pathogens, and parasites that previously kept their population in check."[16] ANS thus may threaten the survival of endangered species, degrade biodiversity by out-competing native species, and cause billions of dollars in damage to some industries.[17]

Two oft-cited examples demonstrate the extent of the threat posed by ANS introduced into the United States via ballast water. The first is the zebra mussel, discovered in the Great Lakes in the mid-1980s, which arrived from Europe and quickly flourished.[18] Zebra mussels clogged water pipes, attached to boat hulls and other nautical structures, and accumulated in masses on recreational beaches.[19] The economic costs of the proliferation are alarming: "Damages through 1995 were reported at up to $1.5 million at one factory, $3.7 million at a water treatment plant, and $6 million at a power plant, with ten-year costs estimated at $3.1 billion for the power industry and

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11 Andrew N. Cohen & Brent Foster, *The Regulation of Biological Pollution: Preventing Exotic Species Invasions from Ballast Water Discharged into California Coastal Waters*, 30 GOLDEN GATE U. L. REV. 787, 791 (2000).

12 *See id.*; *Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *4–5.

13 *Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *5.

14 *Id.* (quoting EPA, AQUATIC NUISANCE SPECIES IN BALLAST WATER DISCHARGES: ISSUES AND OPINIONS 4 (2001)).

15 Cohen & Foster, *supra* note 11, at 789.

16 Sarah McGee, *Proposals for Ballast Water Regulation: Biosecurity in an Insecure World*, 2001 COLO. J. INT'L ENVTL. L. & POL'Y 141, 142–43 (2001).

17 *Id.* at 143, 145.

18 Cohen & Foster, *supra* note 11, at 796.

19 *Id.*

$5 billion in all."[20] Additionally, zebra mussels continue to threaten native species and cause algal blooms.[21]

The second example demonstrates the potential public health consequences of ANS. A strain of cholera from a 1991 epidemic in South America, which resulted in more than 6,000 deaths, turned up in oysters and fish caught in Mobile Bay, Alabama.[22] Researchers believe that the cholera strain arrived in South America through ballast water from Asian ships.[23] Officials closed Mobile Bay to oyster harvesting and forestalled an American epidemic.[24] Several years later, however, over 400 people fell sick in Galveston, Texas, after eating oysters contaminated with a new bacterial strain closely resembling cholera.[25] The strain is common in Japan, India, and Taiwan, and scientists again suspect that ballast water is the source.[26]

B. The Clean Water Act

It is clear that ballast water discharge has deleterious economic and environmental effects. Regulation is thus imperative. The logical place to find the legislative response is the CWA, which Congress significantly amended in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[27] The CWA safeguards water quality by prohibiting the discharge of any pollutant from a point source into navigable waters of the United States without a National Pollutant Discharge Elimination System ("NPDES") permit.[28]

Congress has broadly defined "point source" to include any "vessel or other floating craft,"[29] and it has defined "pollutant" to include "biological materials."[30] Excluded from the definition of pollutant, however, is "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces."[31] As the regulatory body charged with implementing the CWA, EPA included this exclu-

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20 *Id.*

21 *Id.*

22 Brent C. Foster, *Pollutants Without Half-Lives: The Role of Federal Environmental Laws in Controlling Ballast Water Discharges of Exotic Species*, 30 ENVTL. L. 99, 106 (2000).

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 33 U.S.C. § 1251(a) (2006).

28 *See id.* §§ 1311(a), 1342(a)(1).

29 *Id.* § 1362(14).

30 *Id.* § 1362(6).

31 *Id.*

sion in one of its regulations promulgated in 1973, which is the regulation at issue in *Northwest Environmental*:

> The following discharges do not require NPDES permits: (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or *any other discharge incidental to the normal operation of a vessel*.[32]

Historically, and until *Northwest Environmental*, EPA relied on the final clause of the regulation to exempt ballast water discharge from the NPDES permit requirements, deeming such discharge incidental to the normal operation of a vessel.

Several environmental organizations petitioned EPA in 1999 to repeal the regulation because it conflicted with the CWA.[33] The petitioners claimed that nowhere in the CWA did Congress exempt "discharges incidental to the normal operation of a vessel" from the permit requirements.[34] EPA's subsequent denial of the petition resulted in the action at issue in the Northern District of California to determine whether EPA's denial was arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act ("APA"),[35] given Congress's directive to EPA in the CWA.[36]

Because the issue in the case was an agency's construction of a statute, the court employed a *Chevron* analysis.[37] The first question under *Chevron* is "whether Congress has directly spoken to the precise question at issue,"[38] in which case the court and the agency "must

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32 40 C.F.R. § 122.3 (2008) (emphasis added).

33 *Nw. Envtl. I*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373, at *6 (N.D. Cal. Mar. 30, 2005), *remanded by* No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. Sept. 18, 2006).

34 *Id.*

35 Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). Section 706(2) of the APA outlines the applicability of judicial review to an agency's denial of a petition. *See* 5 U.S.C. § 706(2) (2006).

36 *See Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *6–7.

37 *See id.* at *10–11 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984))).

38 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

give effect to the unambiguously expressed intent of Congress."[39] Plaintiffs relied exclusively on the plain language of the CWA to assert that ballast water discharges constitute (1) discharges (2) of a pollutant (3) into the navigable waters of the United States (4) from a point source.[40] The court agreed, noting that "[b]allast water discharges clearly introduce biological materials from outside sources," that the biological materials contained are pollutants, that discharges occur in navigable waters such as the San Francisco Bay and Great Lakes, and that ballast water discharges "clearly arise 'from' a 'point source,' as vessels are specifically referenced in [the CWA]."[41]

The CWA exempts from permit requirements (1) discharges of pollutants more than three miles from shore[42] and (2) sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces,[43] which are regulated by a different provision of the CWA.[44] The court found, however, that neither of the CWA's exemptions for vessel discharges applied to ballast water discharges in port:

> [G]iven the clear language of the CWA, the statute requires that discharges of pollutants from non-military vessels into the nation's lakes, rivers, and harbors occur only under the regulation of an NPDES permit. The Court finds that the language of the CWA demonstrates the "clear intent" of Congress to require NPDES permits before discharging pollutants into the nation's navigable waters.[45]

EPA conceded that Congress's intent, at least in 1972 when the CWA was passed, was clear from the plain language in the statute.[46] EPA instead asserted a congressional acquiescence defense, claiming that EPA was reasonable in denying the petition because Congress had assented to the exemption by leaving it in place for thirty years despite subsequent amendments to the CWA.[47] The court found this argument unpersuasive given the clear definitions of "pollutant," "discharge," and "source" in the CWA.[48] Therefore, the court saw no

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39 *Id.* at 842–43.

40 *See Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *26.

41 *Id.* at *27–28.

42 *See* 33 U.S.C. § 1362(7), (8), (12)(A) (2006).

43 *See id.* § 1362(6)(A).

44 *See id.* § 1322.

45 *Nw. Envtl. I*, 2005 U.S. Dist. LEXIS 5373, at *29.

46 *Id.*

47 *Id.*

48 *See id.* at *30.

need to engage in step two of the *Chevron* analysis—determining whether EPA's decision to deny the petition was reasonable.[49] Despite several amendments to the CWA since 1972, none of which overrode EPA's exemption, the court refused to "replace the plain text and original understanding of a statute with an amended agency interpretation" absent "overwhelming evidence of acquiescence" such as Congress's explicit consideration of and refusal to overturn EPA's regulation.[50] Accordingly, the court held that "EPA acted in excess of its statutory authority under [the APA] in exempting an entire category of discharges from the NPDES permit program and denying plaintiffs' petition to rescind [the regulation]," and the court granted summary judgment in favor of the plaintiffs.[51]

C. The Choice of Remedy and the Overlap with the Coast Guard

Northwest Environmental effectively ordered EPA to engage in rulemaking to regulate ballast water discharges pursuant to the CWA.[52] The mandate was the result of a second appearance before the California district court in which the court granted the plaintiffs permanent injunctive relief, vacating EPA's exemption as of September 30, 2008.[53] In this second action, the court acknowledged that although the "EPA has exempted vessel discharges from the NPDES for the past 30 years, the problem of invasive species in ballast water has not gone unaddressed,"[54] and the court confronted the existing ballast water regulatory regime administered by the Coast Guard.[55]

Coast Guard regulation of ballast water discharges began when Congress demonstrated concern with the introduction of ANS into native ecosystems in 1990 when it passed the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 ("NANPCA"),[56] which was later amended by NISA.[57] The Coast Guard implemented NISA and wrote regulations requiring each ship carrying ballast water to file a report twenty-four hours before entering a United States port and to

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49 *Id.* at *30–31.

50 *Id.* at *33–34 (quoting Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170 (2001)); *see also id.* at *36–37.

51 *Id.* at *39–40.

52 *Nw. Envtl. II*, No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476, at *31–32 (N.D. Cal. Sept. 18, 2006).

53 *Id.* at *2.

54 *Id.* at *13.

55 *Id.* at *13–14.

56 Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, 16 U.S.C. §§ 4701–4751 (2006).

57 National Invasive Species Act of 1996, 16 U.S.C. §§ 4701–4751 (2006).

have a ballast water management plan.[58] These requirements were initially voluntary but became mandatory in 2004 after the Secretary of the Department of Transportation determined in 2002 that voluntary compliance was extremely low.[59] The Coast Guard regulations further require that any ship with ballast water tanks that enters United States waters from beyond 200 miles of the coastline engage in certain practices designed to minimize ANS introduction.[60] Essentially, the Coast Guard requires that vessels flush their tanks with sea water because most coastal and freshwater organisms that travel in ballast tanks cannot survive in deep ocean water.[61]

In the second proceeding before the northern California district court, the parties debated the choice of remedy given the existing Coast Guard regime. EPA argued that the federal government had acted effectively to prevent the introduction of ANS through the Coast Guard regulations, and it asked the court to limit its remedy to vacating only the final agency action—EPA's denial of the plaintiffs' petition.[62] The court found, however, that "[w]hile the Coast Guard regulations provide a starting point in the defense against invasive species, they are not completely effective at addressing the problem."[63] In addition, the court held that "the Coast Guard regulations [did] not relieve EPA of its duty to follow the mandates that Congress has established."[64] The court thus granted plaintiffs permanent injunctive relief, vacating EPA's regulation as of September 30, 2008, and giving EPA a two-year window to develop a system of ballast water management consistent with the CWA.[65] After that date, any vessel equipped with ballast water tanks that did not possess a valid NPDES permit would be in violation of the CWA.

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58 33 C.F.R. §§ 151.2041(b), 151.2035(a)(7) (2008).

59 Mandatory Ballast Water Management Program for U.S. Waters, 69 Fed. Reg. 44,952, 44,953 (July 28, 2004).

60 33 C.F.R. § 151.2035(b). The Coast Guard mandates that ships carrying ballast water into the Exclusive Economic Zone ("EEZ") of the United States must employ one of the following: (1) complete ballast water exchange outside of the EEZ, (2) retain the ballast water, or (3) engage in an alternative environmentally sound method approved by the Coast Guard before entering the EEZ. *Id.*

61 McGee, *supra* note 16, at 157–58.

62 *Nw. Envtl. II*, No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476, at *29–30 (N.D. Cal. Sept. 18, 2006).

63 *Id.* at *36 (citing Plaintiff's Reply Brief, Exhibit A, which notes that "[w]hile we have made significant progress domestically under the current legislative framework, there is no question that this framework needs to be upgraded to move us to a greater level of protection").

64 *Id.*

65 *Id.* at *33, 37.

II. Is Northwest Environmental *Good Law?*

Northwest Environmental raises several questions regarding overlapping agency authority. EPA's exemption from regulation of all activities incidental to the normal operation of vessels was contrary to the clear intent of Congress and was thereby *ultra vires* to the CWA.[66] It is dangerous, however, when a court effectively orders an agency to impose regulations over and above those already promulgated by another agency. A court that finds dual directives from Congress, with only one agency taking the charge, should abstain from imposing a remedy that commands the inactive agency to regulate.

The court in *Northwest Environmental* was correct in concluding that Congress's language implies that both EPA and the Coast Guard should jointly regulate ballast water discharge. Statutory analysis of the CWA reveals that the NPDES permit program does not exempt ballast water discharges from vessels entering United States ports.[67] EPA conceded as much.[68] Further, the language in NISA demonstrates that Congress's mandate to the Coast Guard with respect to ballast water regulation was neither an accidental nor intentional overruling of its previous grant of authority to EPA.[69] Instead, an important savings clause in NISA reveals Congress's clear intent that its directive to the Coast Guard should in no way interfere with EPA's regulatory burden under the CWA: "The regulations issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the [CWA]."[70] The argument, then, that NISA directed the Coast Guard to promulgate ballast water regulations to the exclusion of action by EPA must fail.

The court's analysis was tidy because the court viewed Congress's legislative scheme for ballast water regulation as conducive to overlapping agency jurisdiction. This is because "the CWA adopts a flexible approach to controlling water pollution, allowing EPA to adjust its regulations as new technologies appear and existing technologies are improved."[71] The court believed that the NPDES permit program's inherent flexibility would allow it to exist in conjunction with the

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66 *Id.* at *42.

67 *Nw. Envtl. I*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373, at *29 (N.D. Cal. Mar. 30, 2005), *remanded by* No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. Sept. 18, 2006).

68 *See id.* at *29–30.

69 *See id.* at *35.

70 16 U.S.C. § 4711(b)(2)(C) (2006).

71 *Nw. Envtl. II*, 2006 U.S. Dist. LEXIS 69476, at *39.

Coast Guard regulations, and it thus dismissed EPA's arguments about the "practical difficulties" of regulating ballast water discharges.[72]

To make its point, the court gave examples of the "numerous tools [EPA] has under the CWA."[73] The CWA contemplates two pollution control techniques: technology-based standards that specify both the equipment and the procedures required with regard to discharges[74] and water-quality standards that specify the permissible level of pollution in a specific body of water.[75] An NPDES permit thus either limits the amount of pollutant a shipowner may discharge into a body of water, or it requires that the ship operate with the "best available technology economically achievable."[76] The court reasoned that the CWA's pollution benchmark of the "best available technology economically achievable" may often "include many of the measures that the Coast Guard has required through its regulations."[77] In other words, the court reasoned that EPA could institute a system through which a shipowner could obtain an NPDES permit simply by complying with existing Coast Guard requirements.

The court further noted that the CWA allows EPA to issue individual permits or "general permits" that regulate an entire class of dischargers.[78] The general permit covers "an entire class of hypothetical dischargers in a given geographical region and [is] issued pursuant to administrative rulemaking procedures."[79] General permits that allow regulation of "large numbers of vessels" at once would further lessen the administrative burden on EPA in the court's view.[80] With this reasoning, the court dismissed EPA's claims of hardship or redundancy if forced to regulate.

A. How the Court Oversimplified

The California district court's ruling ordering EPA to regulate in an area where it has traditionally abstained and where another agency has presided raises several questions. First, is EPA's task as simple as

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72 *Id.* at *38.

73 *Id.* at *38–39, 43.

74 *See* 33 U.S.C. §§ 1311(b)(1)(A), 1316 (2006).

75 *See id.* §§ 1311(b)(1)(C), 1313.

76 *Id.* §§ 1311(b)(2)(A), 1342(a)(1); *see also* 40 C.F.R. § 122.44(a)(1), (d)(1) (2006).

77 *Nw. Envtl. II*, 2006 U.S. Dist. LEXIS 69476, at *43.

78 *Id.* at *6–7.

79 *Id.* at *7 (quoting Natural Res. Def. Council v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002)).

80 *Id.* at *38.

the court makes it seem? Second, is dual jurisdiction good policy for regulators and vessel owners in this case? This Part addresses these questions in turn.

1. Dual Regulation of Ballast Water Discharge in Practice

Unsatisfied with the Coast Guard's regulation, some states have taken the initiative to develop ballast water discharge permit programs of their own. In *Fednav, Ltd. v. Chester*,[81] a group of shipping entities sought invalidation of Michigan's Ballast Water Statute[82] on the grounds that Congress preempted state regulation in this field with the Coast Guard program.[83] The Michigan statute instituted a permit system similar to the NPDES of the CWA; however, it imposed stricter methods of ballast water treatment than the Coast Guard required for any ship with ballast water tanks sailing into Michigan ports.[84] The shippers complained that the Coast Guard had not approved any of Michigan's methods and that the cost of implementing them was prohibitive.[85]

In evaluating the shippers' claim, the District Court for the Eastern District of Michigan concluded that NISA unequivocally contemplated joint federal and state jurisdiction to combat ANS.[86] The court mentioned the NISA savings clause referencing the CWA as indicative that Congress intended that states participate in ballast water regulation.[87] Not only did NISA contemplate such state participation, according to the *Fednav* court, but so did the Coast Guard, which "has made clear its belief that for better or worse, states have the right to enact laws such as the Ballast Water Statute."[88] The court also concluded that "states can restrict water pollutants more stringently than the federal government pursuant to the Clean Water Act, [and thus] NISA's citation to it necessarily contemplates the possibility of some

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81 Fednav, Ltd. v. Chester, 505 F. Supp. 2d 381 (E.D. Mich. 2007).

82 MICH. COMP. LAWS § 324.3112(6) (2007).

83 *Fednav*, 505 F. Supp. 2d at 389.

84 *See id.* at 388 ("These rules provide that an oceangoing vessel can sail into a Michigan port pursuant to a general permit if it either certifies it will not discharge ballast water, or it agrees to discharge its ballast water only after using one of the four MDEQ approved methods of treating ballast water: '(1) hypochlorite, (2) chlorine dioxide, (3) ultra violet light radiation preceded by suspended solids removal, and (4) deoxygenation.'").

85 *Id.* at 389.

86 *Id.* at 393; *see also* 16 U.S.C. § 4701(a)(15) (2006) ("[R]esolving the problems associated with aquatic nuisance species will require the participation and cooperation of the Federal Government and State governments.").

87 *Fednav*, 505 F. Supp. 2d at 394.

88 *Id.* at 394–95.

disuniformity in ballast water regulation."[89] The court saw no need for uniformity in the arena of ballast water regulation because "NISA does not mandate the same method of treatment for ballast water from all ships; instead, it permits alternative methods of treatment so long as they are deemed to be at least as effective as salt-water exchange."[90]

Fednav demonstrates that the *Northwest Environmental* court oversimplified EPA's ability to regulate ballast water discharge under the CWA. Under the CWA, any state that wishes to administer its own permit program may do so, conditioned on approval by the EPA Administrator.[91] "Under this cooperative federalism scheme, EPA establishes the minimum requirements that must apply to all entities regulated under the CWA, and states may adopt more stringent standards where they see fit."[92] States with approval to implement their own permit systems may thus impose on shippers new technology requirements similar to Michigan's despite a more lax federal standard. The *Northwest Environmental* court characterized EPA regulation as a unitary federal scheme that could fit into the existing Coast Guard regime.[93] The CWA, however, relies on the states to implement permit systems, which may impose ballast discharge methods above and beyond those acceptable to the Coast Guard.[94]

2. Policy Considerations Overlooked by the Court

A closer analysis of overlapping agency jurisdiction reveals the danger of significant practical burdens should EPA regulate ballast water discharges. Most onerous to the regulated community is the increase in cost associated with regulation under the CWA. The shipper plaintiffs in *Fednav* claimed the costs of implementing one of Michigan's approved methods of ballast water discharge would be one million dollars per ship.[95] Admittedly, and as noted in *Northwest Environmental*, EPA may indeed condition NPDES permits on approved Coast Guard methods of discharge rather than impose alternate ones, thus eliminating technology implementation costs for permit appli-

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89 *Id.*

90 *Id.* at 395; *see also* 16 U.S.C. § 4711(b)(2)(B)(iii) (2006).

91 33 U.S.C. § 1342(b) (2006).

92 *Nw. Envtl. II*, No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476, at *8 (N.D. Cal. Sept. 18, 2006) (internal quotations omitted); *see also* 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1 (2008).

93 *See Nw. Envtl. II*, No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476, at *43 (N.D. Cal. Sept. 18, 2006).

94 *See Fednav*, 505 F. Supp. 2d at 394–95.

95 *Id.* at 389.

cants.[96] If EPA turns administration over to states desiring to run their own NPDES permit programs, however, for the 8,400 ships equipped with ballast water tanks docking in United States ports in 2005,[97] the financial costs of technology implementation are troubling at best. The *Northwest Environmental* and *Fednav* courts, however, too easily dismiss the implementation costs of multiple regulatory schemes.

Even if EPA retained sole administration of NPDES permits for vessels equipped with ballast water tanks, the courts also underestimate the administrative burden on shipowners and regulators. Compliance with the CWA is more extensive than completion of a form; an applicant must engage lawyers to determine the permit requirements of the jurisdiction, sort out potential conflicts between jurisdictions, and implement systems to satisfy reporting requirements to multiple agencies. Moreover, the CWA authorizes both civil and criminal penalties for violations that include fines for each day of violation and incarceration.[98]

B. Leaving Room for Congress

Given the additional information revealed by *Fednav* that states can impose stricter ballast water discharge regimes, the preceding arguments reveal that *Northwest Environmental*'s mandate to EPA may not be good policy. Paradoxically, the *Northwest Environmental* court recognized this in dicta, stating that "EPA may be correct in its argument that the Coast Guard would have been the most appropriate agency to regulate vessel discharges. That judgment, however, was for the Congress, not this Court, to make."[99] The *Fednav* court also acknowledged the bad policy it was upholding: "It may be true that the detriment to the shipping industry of inconsistent regulations for ports in different states far outweighs any benefit to the environment that Michigan's statute provides"; however, "[t]he problem with this argument is not in any internal illogic, but instead that it is made to the wrong branch of government."[100]

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96 *See Nw. Envtl. II*, 2006 U.S. Dist. LEXIS 69476, at *43.

97 *See* EPA Fact Sheet: District Court Decision Vacating the Federal Regulation Excluding Discharges Incidental to Normal Vessel Operations from Clean Water Act Permitting as of September 30, 2008 (2007), *available at* http://www.epa.gov/owow/invasive_species/VesselFactSheet.pdf [hereinafter EPA Fact Sheet].

98 33 U.S.C. § 1319(c)(1), (d) (2006).

99 *Nw. Envtl. II*, 2006 U.S. Dist. LEXIS 69476, at *36 n.12.

100 *Fednav*, 505 F. Supp. 2d at 396.

It is beneficial for courts to bring to light a dual mandate from Congress because it allows the relevant agencies and Congress to address whether the scheme makes sense. Both the *Northwest Environmental* and *Fednav* courts correctly point out that the proper forum to debate the appropriateness of a certain agency's authority is before Congress.[101] A court should thus stop short of issuing an affirmative command to an agency to regulate where it has traditionally abstained and another has occupied the field. The best forum for the debate is Congress. Indeed, "[t]he prime responsibility for making statutory meaning clear is on the Congress."[102]

If a court were to bring to Congress's attention dual directives to agencies, in devising a statutory solution to the overlap, Congress should adopt the decisionmaking process already in place in the executive branch to resolve similar queries. While not empowered with legislative authority, the OLC, an office in the Department of Justice, has a framework for addressing overlapping agency authority that is more comprehensive than that of the federal courts. The executive branch, like the courts, has an "ancillary duty" to interpret the law, which is derived from "the function of the President in the performance of his Article II duties, including the execution of the law."[103] Because OLC is an executive branch entity, however, "jurisdictional and prudential limitations do not constrain OLC as they do courts."[104] The principal role of OLC is to advise the President and executive branch lawyers in response to their legal questions.[105] Requests from agencies regarding disputes between two or more of them are among the questions OLC resolves.[106] While OLC's legal advice has been characterized as "quasi-judicial" in nature, OLC's legal opinions do not carry the force of law.[107] Congress should apply the OLC frame-

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101 *See id.* (stating that the question of whether inconsistent regulations outweigh any benefit to the environment "is a policy decision that Congress must make"); *Nw. Envtl. II*, 2006 U.S. Dist. LEXIS 69476, at *36 n.12.

102 Border Pipe Line Co. v. Fed. Power Comm'n, 171 F.2d 149, 152 (D.C. Cir. 1948).

103 Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1315 (2000).

104 Memorandum from Walter E. Dellinger et al. to John Ashcroft, Attorney Gen., et al. (Dec. 21, 2004) (discussing "Principles to Guide the Office of Legal Counsel"), *in* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 app. 2 at 1606 (2007) [hereinafter Principles of OLC].

105 *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, *supra* note 104, at 1576–77.

106 Moss, *supra* note 103, at 1307–08.

107 *See id.* at 1309.

work when overlapping agency jurisdiction may require a legislative fix.

OLC has not published an opinion regarding ballast water regulation, presumably because *Northwest Environmental* seeks to create a dispute where there had been none. Should EPA and the Coast Guard present OLC with such a question, however, the OLC's analytical method would be more comprehensive than that of the courts. This is because OLC is not bound by the *Chevron* construct when analyzing agency regulations.[108] Indeed, the "OLC typically and appropriately considers not only judicial precedent but also executive branch tradition and precedent in the form of attorney general and OLC opinions."[109]

With respect to executive branch tradition and precedent, the *Northwest Environmental* court took no note of the collaborative effort between EPA and the Coast Guard with regard to ANS research and rulemaking.[110] EPA's position when it denied the initial petition to repeal its exemption was that "the Agency determined that actions by the federal government under other statutes specific to ballast water were likely to be more effective and efficient in addressing the concerns raised in the petition than reliance on NPDES permits."[111] Nevertheless, EPA participated constructively in the development of ballast water regulation in order to offer its environmental expertise.

Two memoranda between EPA and the Coast Guard demonstrate their commitment to collaboration. The first, signed in 2001, established their goals and methods of working together to research and test environmental technology for ballast water treatment.[112] The agreement "is based on the premise that despite the obvious precedence of each agency's own mission, there are situations in which such sharing can actually increase the effectiveness of each agency's ability to accomplish its mission."[113] Through the agreement, the agencies agreed to exchange technical information and to evaluate and develop

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108 *See Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, *supra* note 104, at 1588–89.

109 *Id.* at 1589.

110 *See generally Nw. Envtl. I*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. Mar. 30, 2005), *remanded by* No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. Sept. 18, 2006).

111 EPA FACT SHEET, *supra* note 97.

112 *See* Memorandum of Agreement Between the EPA and the U.S. Coast Guard 1 (June 12, 2001), *available at* http://www.epa.gov/owow/invasive_species/ballast_report_attch2.pdf (discussing collaborative environmental technology verification).

113 *Id.* at 4.

environmental technologies for ANS management.[114] The second memorandum, signed in 2003, established procedures through which EPA would monitor the Coast Guard's NISA rulemaking to ensure compliance with the National Environmental Policy Act[115] and its environmental impact analysis.[116] The agencies intended the memorandum to "serve as a potential model for future ballast water management activities between the two agencies as regulatory standards are developed and implemented over time."[117] The Coast Guard also agreed to incorporate input from EPA wherever possible in its rulemaking, and both agencies affirmed their ongoing collaboration on ballast water discharge methods and ANS management.[118]

As stated, if a dispute were to arise between EPA and the Coast Guard that the agencies submitted to OLC for resolution, the executive branch lawyers would look to agency policy and practice in addition to the applicable law.[119] The existing relationship between the agencies and their commitment to a collaborative, rather than duplicative, approach to regulation is an important factor that the *Northwest Environmental* court did not consider. "OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch . . . ."[120] Thus an internal executive branch analysis of the "best view of the law, which in turn requires consideration of relevant office precedents, executive practice, and statements of the law from other executive branch officials,"[121] is more comprehensive than an analysis by the courts.

Further, an OLC analysis, unlike that in *Northwest Environmental*, acknowledges the practical consequences of dual regulation. Whenever possible, OLC seeks the views of all affected agencies before giving final advice.[122] "The involvement of affected entities

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114 *See id.* at 3–4.

115 National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2006)).

116 *See* Memorandum of Understanding Between the U.S. Coast Guard and the EPA 1 (Aug. 21, 2003), *available* at http://www.epa.gov/owow/invasive_species/ballast_report_attch3.pdf (discussing EIS activities under NEPA for NANPCA rulemaking).

117 *Id.*

118 *See id.* at 3–4.

119 *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, *supra* note 104, at 1589.

120 Principles of OLC, *supra* note 104, at 1606 (emphasis omitted) (discussing guidelines of practice written by former OLC attorneys).

121 Moss, *supra* note 103, at 1324.

122 *See* Principles of OLC, *supra* note 104, at 1609.

serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered."[123] The rationale of such a policy is to take advantage of an agency's substantive expertise and to prevent overlooking important consequences.[124] Such an approach is prudent, especially in a case where an agency that previously abstained from regulating an already-regulated field receives a court mandate to act.

The OLC's method of analysis demonstrates the utility of a broad, consultative inquiry that looks at agency policy and tradition. Congress's investigative powers are similarly broad. As the body responsible for dual directives to agencies, Congress thus should have the chance to address ensuing overlapping agency jurisdiction once alerted to it by the courts. The courts are simply not equipped to assess fully the consequences of adding a second regulator to a field. *Northwest Environmental* reveals as much. The court was correct in finding EPA's exemption of ballast water contrary to the plain language of the CWA, but the court should not have effectively ordered EPA to enact rules by the court's chosen date. Instead, EPA and the Coast Guard should have had an opportunity to present the matter to Congress, which could impose a more comprehensive and credible choice of remedy.

Conclusion

Northwest Environmental provides an example of a court directing an agency to act where it has historically abstained. When Congress has explicitly directed an agency to act, it is correct for a court to make clear to the agency its responsibilities. When another agency with a similar statutory mandate from Congress traditionally has regulated, however, the courts should pause before blindly instituting an additional regulatory regime. A more comprehensive analysis of the issues, such as the one undertaken by OLC, avoids the inadequacy of the court's remedial analysis. After ruling on the statutory interpretation question, the court should have left the choice of remedy to Congress.

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123 *Id.*

124 *Id.*