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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of PORT OF OSWEGO AUTHORITY, et al.,

Petitioners-Plaintiffs-Appellants,

- and -

LAKE CARRIERS' ASSOCIATION,

Petitioner-Intervenor-Appellant,

- against -

ALEXANDER GRANNIS, as COMMISSIONER of the NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and the NEW YORK
STATE DEPARTMENT ENVIRONMENTAL CONSERVATION,

Respondents-Defendants-Respondents,

- and -

NATURAL RESOURCES DEFENSE COUNCIL, INC. and NATIONAL WILDLIFE
FEDERATION,

Respondents-Intervenors-Respondents.

BRIEF FOR STATE RESPONDENTS

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PRELIMINARY STATEMENT

In 2008, the United States Environmental Protection Agency (“EPA”) issued a Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (the “General Permit”) to regulate the discharge of ballast water from shipping vessels operating in the Nation’s waters. Pursuant to § 401 of the federal Clean Water Act, New York issued a Certification of EPA’s General Permit for the protection of the State’s water quality. That Certification includes conditions designed to protect New York waters from the growing environmental and economic harms caused by aquatic invasive species pollution from shipping vessels operating in New York waters.

Petitioners-Plaintiffs-Appellants (“petitioners”) challenge the Certification on a myriad of grounds, from contending that DEC’s actions are not supported by the record to claiming that they violate the Commerce Clause and foreign treaties. In its Decision and Judgment dated May 21, 2009, Supreme Court, Albany County (Sackett, J.), rejected all their claims and dismissed the petition-complaint (“petition”).

Respondents the New York State Department of Environmental Conservation and its Commissioner Alexander Grannis (collectively, the “DEC” or “New York”) submit this brief to respond to the many arguments petitioners raise on appeal. At their core, petitioners’ claims fail to acknowledge that the Clean Water Act’s plain language expressly authorizes states to issue certifications for federal permits necessary to protect water quality in those states. Moreover, DEC issued the Certification in accordance with all applicable state laws. Accordingly, the court below correctly determined that DEC’s Certification is consistent with federal and state

statutes, regulations and precedents authorizing such environmentally protective conditions.

QUESTIONS PRESENTED

1. Whether New York's Certification was reasonable and supported by the record, where it limited the discharge of ballast water that may contain dangerous invasive species into New York waters.

2. Whether New York's narrative water quality standards provided a sufficient basis for the Certification conditions under the federal Clean Water Act.

3. Whether DEC could apply its Certification to vessels "transiting" New York waters to govern unplanned discharges of ballast water containing invasive species, without any "petition" under § 401(a)(2) of the Clean Water Act.

4. Whether New York's Uniform Procedures Act, not the State Administrative Procedure Act, governs certification of general permits issued under § 401 of the Clean Water Act.

5. Whether petitioners' SEQRA challenge is nonjusticiable — because they lack standing — and meritless.

6. Whether the Certification is consistent with the dormant Commerce Clause and the federal foreign relations power, where it is part of a permit issued by federal authorities.

STATEMENT OF THE CASE

A. Statutory Background

1. *The Clean Water Act's Permit Requirements*

The Clean Water Act is a comprehensive statute for the control and elimination of water pollution. *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). The purpose of the Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and its policies are “broad and uncompromising.” *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 494 (2d Cir. 2001). The Act’s cornerstone principle is that no pollutants may be discharged into navigable waters without a permit. 33 U.S.C. § 1311(a); *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion).¹ The permit requirement applies to any “point source,” including a “vessel or other floating craft.” 33 U.S.C. § 1362(14). All discharge permits must meet the requirements of § 301 of the Act, 33 U.S.C. § 1311, whether issued by EPA or by a State. 33 U.S.C. § 1342(a) and (b). Section 301, in turn, requires all discharges to adhere to technology-based and water quality-based “effluent limitations.”²

¹ These permits are generally referred to as “NPDES” permits, after the National Pollution Discharge Elimination System permit program under which they are issued. See 33 U.S.C. § 1342.

² An effluent limitation is “any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters” 33 U.S.C. § 1362(11).

Each permit must also ensure compliance with water quality standards that are adopted by States and approved by EPA. State water quality standards establish water quality goals for all waters within the State. *See* 33 U.S.C. §§ 1311(b)(1)(c), 1313; 40 C.F.R. § 131.2. Even if a point source complies with technology-based effluent limitations, the state water quality standards provide “a supplementary basis for effluent limitations” such that point sources “may be further regulated to prevent water quality from falling below acceptable levels.” *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976). EPA regulations require that discharge permits ensure compliance “with the applicable water quality requirements of all affected states.” 40 C.F.R. § 122.4(d).

State water quality standards may consist of “broad, narrative criteria,” i.e., those that use descriptive terms, in addition to those rendered in numerical form. *P.U.D. No. 1 v. Wash. Dept. of Ecology*, 511 U.S. 700, 716 (1994). “[S]tates may employ both quantitative and open-ended standards . . . [which] serve to ensure against under-inclusiveness in circumstances where it may be impossible to formulate a generalized quantitative standard applicable to all cases.” *Islander E. Pipeline Co, LLC v. McCarthy*, 525 F.3d 141, 144-45 (2d Cir. 2008) (citing *P.U.D. No. 1*).

2. State Certification of Federally Permitted Activities

Under § 401 of the Act, 33 U.S.C. § 1341, States issue certifications to ensure that federal permittees will comply with the Clean Water Act and state law. Any applicant for a federal license or permit to conduct any activity “which may result in

any discharge into the navigable waters” must first obtain a certification from the State in which the discharge will originate. 33 U.S.C. § 1341(a)(1). In addition, § 401(d) of the Act provides that “[a]ny certification . . . shall set forth any effluent limitations and other limitations . . . necessary to ensure that any applicant for a Federal license or permit will comply” with various provisions of the Act and appropriate state law requirements, including water quality standards. 33 U.S.C. § 1341(d).

The limitations and requirements set forth in the certification become conditions of the Federal permit. 33 U.S.C. § 1341(d); *American Rivers v. FERC*, 129 F.3d 99, 107 (2d. Cir. 1997). When State certifications employ water quality standards consisting of narrative criteria, these open-ended standards are “translated into” specific conditions with which permittees must comply. *P.U.D. No. 1*, 511 U.S. at 716; *Islander E. Pipeline Co, LLC*, 525 F.3d at 145.

B. The Clean Water Act and Vessel Aquatic Invasive Species Pollution

1. *The Impact of Invasive Species in Ballast Water*

Aquatic invasive species pollution is a serious, exigent threat to the nation’s waters. Unlike chemical pollution, the biological pollution of invasive species is self-replicating, so the problem worsens over time. Invasive species push native species to extinction, damaging commercial and recreational fisheries. A handful of organisms released into a new waterbody are able to reproduce and colonize entire watersheds. Through direct predation and competition for nutrients, these resilient invaders can degrade habitats, disrupt food chains, and threaten human health.

In New York, for example, Long Island Sound has been invaded by dozens of non-native species, just one of which — the Asian shore crab — has caused population declines of several native species such as the common mud crab, green crab, and Atlantic rock crab. R. 971-972.³ The Hudson River is infested with more than 100 non-indigenous species, including the Asian shore crab and Chinese mitten crab. R. 972-973. The Great Lakes are now home to more than 180 non-native species, including the notorious zebra mussel and other invasive fish and organisms which have radically altered the native ecosystem. R. 969-971. Interactions between the invasive round goby — a bottom-feeding fish from central Eurasia — and invasive mussels are implicated in recurring outbreaks of avian botulism in the Great Lakes, as filter-feeding mussels take up botulism from sediments and then are eaten by round gobies, which in turn are eaten by waterfowl that succumb to the toxin. R. 971. EPA has recognized that vessel ballast water is the principal way invasive species are introduced to the Great Lakes. R. 970.

The courts too have recognized that water contaminated with invasive species becomes a serious environmental hazard when it is used and released as ballast water. For example, the Ninth Circuit observed that invasive species tend not to have natural predators in their new environment, which allows them to multiply rapidly “and quickly take over an ecosystem.” *Northwest Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1013 (9th Cir. 2008). Indeed, invasive species “are a major or contributing cause of

³ “R.” refers to the Record on Appeal.

declines for almost half the endangered species in the United States.” *Id.* (citation omitted). Experts consider invasive species “one of the most serious, yet least appreciated, environmental threats of the 21st century.” *Id.* (citation omitted).

Among the invasive species transported via ballast water are bacteria that cause deadly disease. A 2001 EPA report warned of the serious threat to human health from invasive species, noting that in 1991, a strain of cholera suspected of originating in the bilge water of a Chinese freighter “caused the deaths of 10,000 people in Latin America.” *Northwest Env'tl. Advocates*, 537 F.3d at 1013 (citations omitted). The cholera strain “was then imported into the United States from Latin America in the ballast tanks of ships that anchored in the port of Mobile, Alabama.” *Id.* Luckily, there were no additional deaths from this pathogen, because the bacteria were detected in time. *Id.*

Invasive species also have devastating economic consequences. “[T]otal annual economic losses and associated control costs [are] about \$137 billion a year — more than double the annual economic damage caused by all natural disasters in the United States.” *Id.* (citations omitted).

2. EPA's Draft General Permit

On June 17, 2008, EPA proposed a draft General Permit for Discharges Incidental to the Normal Operation of Vessels, which covered a number of vessel pollutant discharges. R. 852-54 (CD #1, Proposed General Permit), 855.⁴ (A general

⁴ The draft General Permit was the result of a federal court challenge brought by environmental groups and six Great Lakes states, including New York. *See Northwest*.

permit identifies permit requirements for a class of pollutant dischargers, who then file their notices of intent to abide by the general permit's conditions.)

EPA did not propose any numeric limits for invasive species discharged in vessel ballast water. Instead, it proposed that vessels with ballast tanks perform "ballast water management practices." R. 854 (CD #1, Proposed General Permit at 13, 15). For oceangoing vessels, the proposed General Permit required "ballast water exchange" or "salt water flushing," the practice whereby vessels exchange their ballast tanks' contents with salt water beyond the Exclusive Economic Zone ("EEZ"), that is, at least 200 miles from shore. *Id.* at 16-18. This exchange of water is intended to purge brackish and freshwater invasive species in ballast tanks, and kill those remaining upon refilling the tanks with high salinity ocean water.⁵

Envtl. Advocates v. U.S. EPA, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005), and 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. 2006); *Northwest Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1020-21 (9th Cir. 2003) (holding that invasive species discharged by vessels are point source pollutants subject to the Clean Water Act's permit program).

⁵ There is no dispute that ballast water exchange is at best only partially effective in removing invasive species from vessel ballast tanks. Many scientific studies, including studies by EPA, have concluded that despite the flushing of ballast tanks with ocean water, some invasive species remain present in tanks' residual, unpumpable ballast water and sediments, and remain viable due to their high salt tolerance. See R. 974-975, 1241-1243. It is well-documented that these invasive species remaining after ballast water exchange are subsequently discharged by vessels, causing significant environmental damage. R. 974-975, 1241-1243.

3. DEC's Certification of the General Permit

On July 9, 2008, EPA asked New York to submit its § 401 certification for the proposed General Permit by August 23, 2008. R. 866-67.⁶ DEC publicly noticed its initial draft certification on August 6, 2008.⁷ R. 882-94. As initially proposed, the certification would have required existing vessels operating in New York waters to meet by a certain date the numeric limits on invasive species discharged set forth in the International Convention for the Control and Management of Ships' Ballast Water and Sediments (the "IMO Convention"), a treaty which is not yet in force, and which the United States has not ratified in part because of concerns that its standards are too weak.⁸ Although the draft certification would have applied IMO standards to existing vessels, it would have imposed numeric limits roughly 100 times more protective than IMO standards to new vessels. R. 887-88.

The only two public comments submitted on DEC's initial draft certification stated that the proposed limits were insufficient to protect New York waters against

⁶ EPA's regulations require State certifying agencies to submit their § 401 certifications for EPA's proposed (draft) permit, and to do so within 60 days from EPA's mailing of the draft, or else be deemed to have waived the right to certify. 40 C.F.R. § 124.53(c)(3).

⁷ Under New York law, § 401 certifications are subject to the public notice and comment procedures provided by ECL Article 70 — known as the "Uniform Procedures Act" — and its implementing regulations. ECL § 70-0107(3)(d); 6 N.Y.C.R.R. § 621.1(e).

⁸ See IMO, *Summary of Conventions* (Aug. 31, 2009), http://www.imo.org/conventions/mainframe.asp?topic_id=247. See also *Ballast Water Management: New International Standards and National Invasive Species Act Reauthorization: Joint Hearing before the Subcomms. On Coast Guard & Maritime Trans. and Water Resources & Env. of the H.R. Comm. On Trans. and Infrastructure, 108th Cong., 2nd Sess. (Mar. 25, 2004) at 12, 15.*

vessel invasive species pollution. R. 930 (CD #3, Natural Resources Defense Council (“NRDC”) and National Wildlife Federation (“NWF”) letters dated Aug. 27, 2008); see R. 1172. New York requested, and EPA granted, extensions to file its Certification to November 3, 2008. R. 868, 895, 904. DEC then publicly noticed an amended certification on October 8, 2008, proposing several more stringent conditions for General Permit-covered vessels operating in New York waters. R. 905-18.

Condition 1 of the amended certification required vessels on certain coastal voyages within the Exclusive Economic Zone to conduct ballast water exchange or flushing before entering New York waters. Condition 2 required existing vessels, by January 1, 2012, to meet numeric limits for invasive species discharges that are in some instances 100 times more protective than IMO standards. Condition 3 required vessels constructed on or after January 1, 2013, to meet invasive species numeric limits that are in some instances 1000 times more protective than IMO standards. R. 908-11.⁹ The proposal did not require the installation or use of any particular type of ballast water treatment system or technology to meet these limits. R. 940, 1236-37.

On November 3, 2008, after receiving further public comments, DEC issued its Certification for EPA’s General Permit, including Conditions 1, 2, and 3. R. 854 (CD

⁹ Conditions 2 and 3 contain numeric limits specific to different types and sizes of invasive species. R. 1229-30, 1250-51. The numeric limits for three types of indicator microbes are based on federal public health requirements, and are either the same or slightly stricter than IMO standards; these limits are the same in both Conditions 2 and 3. *Id.* For organisms between 10 and 50 micrometers in size, Conditions 2 and 3 set limits 100 and 1000 times stricter than IMO standards, respectively, and Condition 3 also sets numeric limits for bacteria and viruses. *Id.* Conditions 2 and 3 apply to General Permit-covered vessels entering New York waters, unless they operate exclusively in certain waterbodies and thus present diminished risks. See R. 966-67, 949, 1221-23.

#1, DEC Certification), 922. Along with the Certification, DEC issued a Response to Comments. R. 934-58. DEC determined under the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL") article 8, that the Certification would not have a significant adverse impact on the environment. R. 931-33. The bases for DEC's SEQRA determination included the Certification itself, the Department's Response to Comments, and all of the referenced materials and analyses provided therein. R. 933, 1173.

The Department issued its Certification after analyzing an extensive body of scientific studies, reports and information about the many environmental harms and continuing threats to New York presented by untreated ballast water discharges containing invasive species. R. 968-975. The Certification described how aquatic invasive species are capable of spreading across multiple waterways and harming natural resources. *Id.* DEC also discussed and analyzed the expert scientific bases for the pollution controls in its Certification conditions, including the bases for numeric limits. *Id.*; *see* R. 1216-1273.

Consistent with § 401, which requires that Certifications be based on existing provisions of state and federal law, the Certification conditions are based expressly upon various standards, limitations and requirements under state and federal statutes and regulations. R. 961-64. DEC relied on New York's duly promulgated and EPA-approved water quality standards, which include narrative criteria limiting "toxic and other deleterious substances" to "none in amounts that will . . . impair the waters for their best usages" and designated uses, including fish, shellfish and wildlife propagation

and survival, fishing, drinking water supply, and primary and secondary contact recreation. R. 963, citing 6 N.Y.C.R.R. § 703.2 and 6 N.Y.C.R.R. Part 701. DEC also relied on State statutes requiring prevention and control of water pollution and limiting discharges that cause or contribute to contravention of state water quality standards. R. 962-63, citing ECL §§ 17-0101, 17-0501.

Additionally, DEC's Certification relied upon state and federal antidegradation policies of maintaining and protecting existing instream water uses. R. 962-63, citing DEC Organization and Delegation Memorandum No. 85-40, Water Quality Antidegradation Policy, September 9, 1985, and 40 C.F.R. § 131.12. DEC relied as well on the fundamental requirements of the Clean Water Act. R. 961-64, citing 33 U.S.C. §§ 1251(a), 1311(b)(1)(C), 1313(c)(2)(A). Consistent with EPA regulations, DEC cited these Federal and State law provisions as the basis for its Certification conditions, and stated that those conditions could not be made less stringent and still comply with state law. R. 963-64, citing 40 C.F.R. §§ 124.53(e)(2), (3).

On December 17, 2008, DEC sent EPA a revised final General Permit Certification. R. 959-77. The Certification's exceptions include, for Condition 1's exchange/flushing requirement, a vessel safety exception, and exceptions for vessels operating exclusively in certain areas, including the Great Lakes-St. Lawrence Seaway System. R. 964-65. Condition 1's exemption for "lakers" applies to any vessels operating west of the mouth of the St. Lawrence River. R. 964. Condition 1 also contains an exemption for any vessels that meet the requirements of Conditions 2 or 3. R. 965. Conditions 2 and 3 provide time extensions for compliance with invasive species numeric

limits where necessary technology is unavailable or in short supply, or in cases of vessel-specific engineering constraints. R. 966-67. EPA included DEC's revised final Certification in its final General Permit. R. 1170-83.

4. *EPA's Final General Permit*

EPA issued its final General Permit on December 19, 2008, in essentially the same form as originally proposed. R. 985. Ballast water management practices remained as the permit's "technology-based effluent limits." R. 1004-10. For the permit's "water quality-based effluent limits," the General Permit stated that covered permittees' "discharge[s] must be controlled as necessary to meet applicable water quality standards in the receiving water body or another waterbody impacted by your discharges." R. 1019. EPA's final General Permit included § 401 certification conditions provided by various Indian tribes and states, including New York, and stated that these additional certification requirements "are enforceable conditions of this permit." R. 1052.

Notably, in its Response to Public Comments, EPA stated that General Permit-covered dischargers must take any additional measures necessary to meet the permit's own "narrative water quality-based effluent limitations [which] ensures that each state's specific standards must be met with respect to all discharges." R. 1210.¹⁰ EPA confirmed that the General Permit incorporates more stringent conditions, including numeric ballast water discharge conditions established by states through the § 401

¹⁰ Record cites in this paragraph are excerpts from EPA's Response to Public Comments at R. 854, CD #1.

certification process. R. 1180, 1184, 1190. EPA stated that dischargers were required to adhere to these conditions as necessary to meet state water quality standards. R. 1180, 1198. EPA reaffirmed the right of states to add any more stringent limits to federally-issued permits to assure compliance with state water quality standards as well as other requirements of state law. R. 1182, 1196. As EPA noted, “the entire structure of the Clean Water Act is designed to preserve state involvement in the protection of waters of the U.S.” R. 1215.

C. Proceedings Below

Petitioners commenced this hybrid article 78 - declaratory judgment action on December 18, 2008, asserting six causes of action: (1) that DEC failed to comply with the State Administrative Procedures Act (“SAPA”) and the ECL “in developing a new program for vessel operations”; (2) that DEC “is not authorized to create a new ballast water program through a 401 certificate”; (3) that DEC lacks authority “to regulate vessel transit”; (4) that DEC’s “decision to impose new requirements in a 401 certificate was arbitrary and capricious and an abuse of discretion”; (5) that DEC’s Negative Declaration failed to comply with SEQRA; and (6) that the Certification conditions “violate the Commerce Clause of the U.S. Constitution and impermissibly impede foreign relations with Canada.” R. 64-73. The NRDC and NWF intervened as respondents, and the Lake Carriers’ Association intervened as petitioners. R. 1547-48, 1608. The case was heard in Albany County Supreme Court on March 13, 2009. R. 1549-85.

By Decision and Judgment dated May 21, 2009, the court denied and dismissed the petition in all respects. R. 17-27. The court determined that DEC's Certification conditions were properly based upon existing requirements of law, as the Clean Water Act requires. These requirements included longstanding water pollution control statutes, and regulations consisting of narrative water quality criteria and establishing waters' best usages, all designed to protect and maintain water quality. R. 22-23. The court rejected the contention that additional statutory or regulatory authority was necessary. R. 25.

The court found beyond dispute that vessel ballast water is a source of significant potential and actual biological pollution for the State's waters. R. 23. The court also found that DEC's Certification conditions were rationally derived, and entitled to deference as reasonable and effective means for controlling harmful vessel invasive-species pollution. R. 24-25. Similarly, the court reviewed and found rational DEC's exceptions to the Certification conditions. R. 19-20, 25.

The court also reviewed the procedures employed by DEC in issuing the Certification and held that DEC complied with applicable laws. The court determined that DEC's public notice and comment process, conducted twice "in order to provide a thorough investigation," complied with the Uniform Procedures Act, ECL Article 70. R. 25. In addition, the court reviewed the basis for DEC's SEQRA determination, which included the Certification itself and DEC's Response to Comments, and found that DEC's Negative Declaration complied with SEQRA. R. 23-26. The court observed that DEC's extensive record reflected detailed analysis and expert evaluation of the

Certification's impact on the environment. R. 25. Based on its review of the record, the court concluded that DEC identified the environmental impacts that could reasonably be expected to occur from the Certification, took a "hard look" at them, and made a reasoned elaboration of the bases for the agency's SEQRA determination. R. 25-26.

SUMMARY OF ARGUMENT

First, the Certification is reasonable. Petitioners argue that the Certification conditions are arbitrary and capricious, but they do not dispute that aquatic invasive species pose a serious threat to the environment, economy, and public health of New York. The Certification conditions, which contain significant exemptions for safety and feasibility concerns, are reasonable measures to address that threat.

Second, the Certification is consistent with states' broad authority under the Clean Water Act. Under § 401 of the Act, states must issue Certification conditions that assure that discharges comply with federal law, and with the water quality standards set forth in state law. Petitioners mistakenly argue that existing New York water quality standards are an insufficient basis for Certification conditions, and that the Act barred New York from issuing the conditions without creating new provisions of state law. But the Act allows states to craft conditions as necessary to assure compliance with state water quality standards, which DEC reasonably did. Petitioners also contend that New York exceeded its authority under the Act by regulating vessels "transiting" New York waters — that is, vessels that are physically in New York

waters but do not plan to discharge ballast water there. But the Act allows states to regulate activities in New York that may result in discharges into its waters.

Third, DEC followed all of the procedures required by New York state law when it issued the Certification. Petitioners argue that DEC should have followed SAPA's rulemaking procedures, but the Uniform Procedures Act, not SAPA, governs the certification of general permits under § 401. Petitioners lack standing to assert their SEQRA claims, which are meritless in any event because DEC's negative declaration was reasonable and appropriate.

Fourth, the Certification is consistent with the United States Constitution. Petitioners' claims that New York violated the dormant commerce clause and the federal foreign relations power ignore the fact that the Certification was incorporated into a federal permit, issued by EPA, pursuant to federal law.

ARGUMENT

POINT I

THE CERTIFICATION CONDITIONS REASONABLY PROTECT NEW YORK WATERS FROM DANGEROUS INVASIVE SPECIES

DEC's certification conditions are reasonable and well-supported by the record. Petitioners' claim that they are arbitrary and capricious (Petitioners' Brief ("Br.") at 50-52, 63-67) is without merit.

"[W]here, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be

accorded great weight and judicial deference.” *Flacke v. Onondaga Landfill Sys.*, 69 N.Y.2d 355, 363 (1987). In judicial review of administrative actions, “the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.” *Id.*; see *Matter of RAGE v. Zagata*, 245 A.D.2d 798, 800 (3d Dep’t 1997), *lv. denied*, 91 N.Y.2d 811 (1998).

The Certification conditions are based on the Department’s technical expertise and extensive examination of the science of invasive-species pollution, as set forth in the record. R. 961-77; R. 925 (CD #2, Certification Reference Material including Studies and Reports). DEC exhaustively examined how invasive-species pollution creates serious, costly environmental problems. Ballast-borne aquatic invasive species threaten the very structure and function of native ecosystems, damaging waters’ biological integrity in contravention of the Act’s objective. See *United States v. Riverside Bayview*, 474 U.S. 121,132 (1985); *Northwest Env’tl. Advocates*, 537 F.3d at 1013. Once introduced, invasive species reproduce and multiply rapidly, and spread quickly to new waterways. Introductions of new invasive species of fish, insects and pathogens to New York waters and connected waters threaten to disrupt New York’s aquatic environment, perhaps permanently. R. 968-73, 1219-25.

Vessel discharges are the main source of ongoing invasive species introductions to the Great Lakes. R. 970, 1219. In the Lakes the rate of invasive-species invasions has been increasing, with a new invader discovered every 28 weeks. R. 1219, 1257-65. This increased invasion rate is directly correlated with international shipping activity.

R. 1249. Because invasive species multiply once released into new ecosystems, stringent limitations are necessary to prevent their harmful effects. The Certification conditions provide a reasonable means of confronting this threat.

The Certification conditions are also based on DEC's thorough consideration of the rapidly developing field of vessel ballast water treatment. R. 939-42, 973-75. The technology necessary to achieve the conditions' numeric limits is feasible and not cost prohibitive. R. 1226-30, 1237-40. Moreover, the Certification conditions include reasonable exceptions, including for situations where treatment technology is unavailable and for safety reasons. Thus, each condition is a reasonable measure designed to protect New York against an urgent threat.

A. Condition 1 Reasonably Requires Ballast Water Exchange for Vessel Coastal Voyages.

Condition 1 requires vessels covered by the General Permit¹¹ whose voyages originate in the United States or Canada to conduct ballast water exchange or flushing at least 50 miles from shore before entering New York waters. R. 964. The Certification explains that exchange or flushing "is widely recognized as a beneficial but imperfect way to reduce invasive species introductions in ballast water discharges." R. 975.

EPA's General Permit already requires ballast water exchange for vessels entering United States waters from beyond the Exclusive Economic Zone, i.e., 200 miles from shore. R. 1007. Condition 1 "extends the requirement of exchange or

¹¹ The final General Permit does not cover recreational vessels. See R. 1149-50.

flushing to certain other vessels that enter New York waters on coastal voyages, thereby reducing the likelihood of invasions from other coastal waters such as Chesapeake Bay.” R. 975.

Condition 1’s requirements apply to vessels originating east of the Great Lakes, including those from the Canadian Maritime provinces. These coastal voyages present significant risks of invasive-species pollution. For example, based on scientific studies the invasive viral hemorrhagic septicemia virus is believed to have entered the Great Lakes from Canadian Maritime waters. R. 1244-1245. This virus, which causes fish to bleed to death, has killed many fish of various species in New York waters. R. 1244-1245.

Ballast water exchange or flushing for coastal voyages may be achieved in the Gulf of St. Lawrence, as recognized by Coast Guard personnel and others. R. 1245-46.¹² Petitioners mistakenly argue that Condition 1 is arbitrary because it will require a visit to the open ocean for flushing by non-oceangoing vessels that operate only in the Great Lakes-St. Lawrence Seaway System. (Br. at 2). In fact, Condition 1 expressly exempts “vessels that operate exclusively in the Great Lakes-St. Lawrence Seaway System.” R. 964. Vessels are exempt under this provision when they operate west of the mouth of the St. Lawrence River. Specifically, Condition 1 exempts vessels that

¹² Petitioners claim that ballast water exchange in the Gulf may be prohibited in certain circumstances by Canadian regulations. (Br. at 61-62.) However, those regulations do not by their terms prohibit exchange in Gulf waters for non-transoceanic voyages. (See Br., attachment at 2.) Regardless, Condition 1 does not require exchange in the Gulf, and petitioners themselves assert that vessels “exchang[ing] in the lower St. Lawrence river and/or Gulf of St. Lawrence” is a regular practice. R. 1515.

operate “upstream of a line drawn from Cap-des-Rosiers to West Point, Anticosti Island and then to the north shore of the St. Lawrence River along a meridian of longitude 63 degrees West.” R. 964.¹³

Moreover, Condition 1 contains a safety exception, which ensures that vessel safety need not be risked or compromised in order to comply, and further guarantees that the Condition will not have an inappropriate impact on vessel operations. R. 965. Thus, Condition 1 is carefully drawn to impose only those requirements reasonably necessary to protect New York waters.

B. Conditions 2 and 3 Impose Reasonable Numeric Limits on Invasive-Species Discharges.

Petitioners’ challenge to the reasonableness of Conditions 2 and 3 is similarly misplaced. Condition 2 requires currently-existing vessels to meet numeric limits on invasive species discharges by 2012. R. 965. Condition 3 requires vessels constructed after January 1, 2013, to meet more protective numeric limits on invasive species discharges. R. 966-67. Each condition contains exceptions or time extensions for compliance when there is a shortage of necessary technology, vessel-specific engineering constraints, or other factors related to the availability of technology that are beyond the owner/operator’s control. R. 966, 967.

¹³ The line is drawn in red on the map at R. 1248, which is attached to this brief, in color as presented to the lower court. Petitioners’ brief acknowledges Condition 1’s exception, but incorrectly claims it is “in response to the current litigation.” (Br. at 16.) DEC’s final Certification was issued before the litigation commenced. See R. 28, 961.

Condition 2's numeric limits for invasive species discharges have ample scientific and practical foundation. "[C]onsidered to be approximately a 100-fold improvement over ballast water exchange . . . [they] are based partly on recommendations made by the International Study Group on Ballast Water and Other Ship Vectors." R. 975. Condition 2's limits also are based on widely discussed limits in recent federal legislative proposals actually supported by the shipping industry. R. 939, 975, 1226. In addition, in written comments last year to EPA, respected developers of ballast water treatment systems stated that extensive testing of existing, on board treatment technology has proven that numeric limits on invasive species discharges equivalent to those in Condition 2 can be met now. R. 1227-29.

Similarly, Condition 3's numeric limits on invasive species discharges (which are the same as Condition 2's for indicator microbes) are based on both the U.S. government's position in negotiations over the IMO Convention on ballast water and on sound science. These numeric limits, "considered to be approximately a 1000-fold improvement over ballast water exchange," were subsequently recommended by the California Performance Standards Advisory Panel in its Majority Report. R. 974. DEC's Certification relies on expert studies and reports, including studies performed in connection with recent legislation in California and reports submitted to the IMO. R. 973-75. For example, a recent California report on ballast water standards found that IMO standards would be "only a marginal improvement" on ballast water exchange for larger organisms, and are essentially the same as "unmanaged ballast

water” for smaller organisms such as bacteria and viruses. R. 973. Thus, the IMO standards would do little to protect New York’s waters. R. 973-75, 1233-34.

Petitioners’ criticism of DEC for relying on California’s studies is misplaced. It would have been irresponsible for DEC *not* to review as much scientific information as possible, from all sources, to carry out its responsibilities. DEC therefore reasonably relied on information from a variety of sources in setting the Certification’s numeric limits. R. 961-77. These included expert panels convened by California: the Advisory Panel on Ballast Water Performance Standards (which included experts from federal and state agencies, plus environmental and shipping interests), and the California State Lands Commission Advisory Panel (which included EPA, Coast Guard, Naval Research Laboratory, and Smithsonian Environmental Research Center representatives, other federal and state agency staff, as well as representatives from the environmental and shipping community). R. 1232-33. In addition, two of the numeric limits in Conditions 2 and 3 are based on longstanding federal water quality criteria governing the levels of “indicator microbes” (E. Coli and intestinal enterococci) that may be tolerated without threatening the safety of recreation on freshwater bathing beaches. R. 1229-30.

Petitioners suggest that New York was unreasonable in not limiting its conditions to the standards set in the IMO Convention. (Br. at 65.) The United States has not ratified the Convention, which is not in force because only 18 nations have

ratified it.¹⁴ The United States was so concerned with the weakness of the Convention's standards that it insisted on a provision allowing nations to develop more stringent controls.¹⁵ Indeed, the United States advocated a standard 1,000 times more protective than the Convention's standard — in other words, essentially the same standard as Condition 3.¹⁶

Petitioners argue that Conditions 2 and 3 are arbitrary and capricious because they are “technologically and economically infeasible.” (Br. at 64.) In fact, Conditions 2 and 3 do not take effect until 2012 and 2013, respectively, and each condition allows for extensions of the deadlines if “there is a shortage in supply of the technology necessary to meet the limits set forth in this certification.” R. 965-966. Moreover, petitioners' argument misunderstands the purpose of the Clean Water Act, which is to force the development of new technology by setting stringent standards for discharges. Indeed, EPA issued the General Permit recognizing that ballast water treatment technologies “are rapidly developing.” R. 1154-55, 73 Fed. Reg. 79,478-79 (Dec. 29, 2008). It was not arbitrary or capricious for DEC to condition the General Permit in

¹⁴ Even for those nations that ratify, the Convention will not become legally binding until a year after 30 nations representing 35 percent of world shipping tonnage ratify. See IMO, *Summary of Conventions* (Aug. 31, 2009), http://www.imo.org/conventions/mainframe.asp?topic_id=247.

¹⁵ See IMO Convention, art. 2. An outline of the Convention's main features is available at http://www.imo.org/Conventions/mainframe.asp?topic_id=867.

¹⁶ See *Ballast Water Management: New International Standards and National Invasive Species Act Reauthorization: Joint Hearing before the Subcomms. On Coast Guard & Maritime Trans. and Water Resources & Env. of the H.R. Comm. On Trans. and Infrastructure*, 108th Cong., 2nd Sess. (Mar. 25, 2004) at 12, 15.

a way consistent with EPA's understanding and with the technology-forcing purpose of the Clean Water Act. *Cf. City of Albuquerque v. Browner*, 97 F.3d 415, 422 (10th Cir. 1996) ("The power of states under the Act is underlined by their ability to force the development of technology by setting stringent water quality standards that EPA can enforce against upstream polluters."); *U.S. Steel Corp v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) ("The company argues that the [water quality-based] limitations . . . are impossible to achieve with present technology. Even if this is true, it does not follow that they are invalid. It is clear from . . . the Act, and the legislative history, that the states are free to force technology.") (internal citations omitted); *Matter of Texaco, Inc. v. Flacke*, 114 Misc. 2d 660, 661 (Sup. Ct., Albany Co. 1982) (same).

Nor do the Conditions require anyone to do the impossible. Condition 2 provides reasonable variances for technology availability or installation constraints. R. 966. And the compliance date for newly constructed vessels under Condition 3 is years later than California's deadline — not sooner, as petitioners claim.¹⁷ See Br. at 3, 64. Depending on vessel class size, California requires newly constructed vessels to meet numeric limits for invasive species discharges by the beginning of either 2010 or 2012. R. 1232. New York's Condition 3 establishes numeric limits for vessels newly constructed on or after January 1, 2013. R. 1232, 966. As DEC stated in the

¹⁷ Petitioners confuse New York's 2012 compliance date for existing vessels to meet Condition 2 with California's subsequent compliance dates for existing vessels to meet the more protective numeric limits in Condition 3. (Br. at 64.) New York requires those more protective limits only for newly constructed vessels, not for existing vessels. R. 965-967, 1225-1226.

Certification, “[t]his additional time is intended to alleviate possible congestion problems for shipyards or possible supply problems for equipment vendors that might occur if simultaneous compliance were required in New York and California.” R. 974-75.

The cost of compliance with the Conditions is reasonable, both in terms of overall vessel costs and shipping revenues, and in the context of the enormous costly impacts from untreated discharges of invasive species. *See* R. 941-42, 1237-40. Dangerous activities like the discharge of invasive species may appropriately be controlled in such a way that the cost of those activities is borne by those who engage in them.

Finally, petitioners argue that the Conditions are arbitrary because they fail to create a formal procedure to coordinate the implementation of the Conditions with Coast Guard approval requirements. (Br. at 65.) DEC was not required to include such a procedure in the Certification. And there is no evidence that a conflict between DEC’s Conditions and Coast Guard requirements would actually arise, so this problem is not before the Court. Moreover, the Conditions allow for extensions of time for compliance provided there is “sufficient justification,” such as “factor[s] related to the availability and installation of technology beyond the vessel owner/operator’s control, that delays the technology being available and installed in time to comply with this standard.” R. 966.

The timing of, scientific basis for, and reasonable exceptions to the Conditions demonstrate that they are rational, responsible requirements for protecting water quality.

POINT II

NEW YORK'S CERTIFICATION IS CONSISTENT WITH STATES' BROAD AUTHORITY UNDER THE CLEAN WATER ACT

New York's Certification was well within the broad authority granted to states by the Clean Water Act. Petitioners contend that New York exceeded that authority in a variety of ways, but each argument is without merit. Water quality standards in New York law provided a sufficient legal basis for the Certification conditions, so DEC was not required to promulgate any additional regulations before issuing the Certification. Nor was DEC barred by the Act from regulating "vessel transit" — vessels that enter New York waters without plans to discharge invasive species there but that may do so in an emergency, accident or other unplanned discharge. The Certification should therefore be upheld.

A. New York's Water Quality Standards Were a Sufficient Basis for the Conditions.

1. *DEC Was Not Required to Promulgate a Regulation Establishing Numeric Values for New York's Narrative Water Quality Standards.*

New York's Certification Conditions were properly based on existing provisions of Federal and State law, including State regulations establishing narrative water quality standards. Petitioners argue that before DEC could issue a Certification based on New York's narrative water quality standards, it was required to promulgate new

state regulations in which those narrative water quality standards were translated into numeric criteria. As the Supreme Court has explained, the Clean Water Act imposes no such requirement.

State conditions in § 401 certifications are proper if they are based in existing legal requirements, that is, if they are “necessary to assure compliance” with the Clean Water Act and “appropriate requirements of State law.” 40 C.F.R. § 124.53(e)(1). The Certification was based on New York State water quality standards, which include narrative criteria and designated uses, both of which are proper bases for state certification. *See P.U.D. No. 1*, 511 U.S. at 714-15. It was also based on fundamental provisions of the Clean Water Act requiring that water quality standards be met and the integrity of waters maintained, and on State and Federal antidegradation policy requirements for protecting existing instream water uses. R. 961-63 (citing, *e.g.*, 33 U.S.C. §§ 1251(a), 1311(b) (1)(C) and 1313(c)(2)(A), and 40 C.F.R. §§ 131.3(e), 131.6(d) and 131.12(a)(1)).

The Certification relies in part on narrative criteria limiting “toxic and other deleterious substances” in numerous classes of state waters to “none in amounts that will adversely affect the taste, color or odor thereof, or impair the waters for their best usages.” 6 N.Y.C.R.R. § 703.2.¹⁸ It also relies on the uses designated for classes of waters set forth in 6 N.Y.C.R.R. Part 701, which include fish, shellfish and wildlife propagation and survival, fishing, drinking water supply, and primary and secondary

¹⁸ Section § 703.2's narrative standard specifies that it applies to Class AA, A-Special, A, B, C, and D fresh surface waters, Class SA, SB, SC, I and SD saline surface waters, and Class GA, GSA and GSB groundwaters.

contact recreation. Both the narrative criteria and the designated uses are longstanding, duly promulgated, EPA-approved State regulations. R. 1163.

The Certification is also based on State statutes, which require “use of all known available and reasonable methods to prevent and control the pollution” of state waters consistent with public health and propagation of fish and wildlife, and prohibit discharges that would either “cause or contribute to” contravention of water quality standards. R. 962-63 (citing ECL §§ 17-0101, 17-0501, and 6 N.Y.C.R.R. § 700.1(a)(4) (defining “pollution” in pertinent part as “the presence in the environment of conditions and/or contaminants in quantities . . . that are or may be injurious to human, plant or animal life”)).

Petitioners erroneously contend that DEC was required to ignore these non-numeric aspects of New York law when it issued the Certification. Their argument is flatly contradicted by EPA, which states, “Narrative criteria can be the basis for limiting specific pollutants where the State has no numeric criteria for those pollutants.” EPA, *NPDES Permit Writers’ Manual* 93 (Dec. 1996).¹⁹ Section 401(d) provides that a “certification . . . shall set forth any effluent limitations and other limitations . . . necessary to assure” that permittees will comply with the Clean Water Act and “any other appropriate requirement of State law set forth in such certification.” New York’s narrative water quality standards are “appropriate requirements of State law,” as the Supreme Court made clear when it held that “open-ended criteria” in a

¹⁹ The relevant chapter is online at http://www.epa.gov/npdes/pubs/chapt_06.pdf.

state's narrative standards may be "translated into specific limitations" in a § 401 Certification. *P.U.D. No. 1*, 511 U.S. at 716.

At issue in *P.U.D. No. 1* was the State of Washington's § 401 certification, which imposed numeric requirements for minimum water-flow in the Dosewallips River in connection with a federally licensed hydroelectric project. The certification's numeric requirements were based on Washington's narrative water quality standards, rather than on specific numeric criteria in Washington law. As here, Washington's water quality standards included both narrative criteria²⁰ and the designated uses of the river (including "[s]almonid [and other fish] migration, rearing, spawning, and harvesting"). *P.U.D. No. 1*, 511 U.S. at 706 n.1. The Court rejected arguments that such "[designated-]use requirements are too open ended, and that the Act only contemplates enforcement of the more specific and objective 'criteria.'" *P.U.D. No. 1*, 511 U.S. at 715. It noted that "criteria" under the Act "are often expressed in broad, narrative terms." *Id.* at 716. Thus, the Court held, "the Act permits enforcement of broad, narrative criteria based on, for example, 'aesthetics.'" *Id.* It was therefore appropriate for the state to impose numeric limits in a § 401 certification on the basis of narrative criteria in State law. *Id.*; see also *Islander E. Pipeline Co, LLC v. McCarthy*, 525 F.3d 141, 144-45 (2d Cir. 2008) ("[S]tates may employ both quantitative and open-ended standards . . . [which] serve to ensure against under-inclusiveness in

²⁰ Washington's narrative water quality standards at issue in *P.U.D. No. 1* provided, for example, that "toxic, radioactive or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use." *P.U.D. No. 1*, 511 U.S. at 716 (citations omitted).

circumstances where it may be impossible to formulate a generalized quantitative standard applicable to all cases.”²¹

Each of the State and federal law provisions that DEC cited is an independent basis for New York’s Certification under § 401; together they form a comprehensive foundation for the Certification. They constitute “appropriate requirements of State law” or requirements of the Act under § 401(d) of the Act. DEC’s Certification conditions assure that General Permit permittees will comply with these existing provisions of law, as required by Section 401. *P.U.D. No. 1*, 511 U.S. at 711. Petitioners’ claim that DEC lacks authority to rely on these provisions of law in issuing the Certification is meritless.

2. *DEC Was Not Required to Identify Impaired Waterbodies.*

Petitioners also argue that DEC was required to “follow a process to define which water bodies are impaired,” listing which particular waterbody segments in New York are impaired by invasive species, before issuing its § 401 Certification. Br. at 42-43. No such requirement exists. Indeed, the Supreme Court made clear in *P.U.D. No 1* that there is “no textual support for” an “unreasonable” interpretation of the Act that “would in essence require the states to study to a level of great specificity each

²¹ Petitioners attempt to distinguish *P.U.D. No. 1* and *Islander E. Pipeline Co., LLC* as applying only to “individual CWA permitting decision[s]” with “site specific” records (Br. at 23, 51), but that is irrelevant. Nowhere did the Court state that the authority provided to states by § 401(d) is inapplicable to general permits. EPA expressly rejected this view in issuing the General Permit. See Statement of the Case Section B.4, *supra*; *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989) (holding that states may enforce their own stringent water quality standards by denying § 401 certification for nationwide general permit); *Northwest Envtl. Advocates*, 537 F.3d at 1010-11 (explaining the difference between site-specific individual permits and general permits with area-wide applicability).

individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the waters' designated uses." *Id.* at 717-18. Instead, the Court held that the Act, by requiring permitted activities to comply both with narrative criteria and designated uses, allowed "States to ensure that each activity — even if not foreseen by the criteria — will be consistent with . . . [designated] uses . . . of water." *Id.* at 717; *Islander E. Pipeline Co.*, 525 F.3d at 144-45; see R. 1159-68 (further describing the role of narrative water quality standards in controlling invasive species).

Equally flawed is petitioners' related argument that the Certification was arbitrary because DEC did not specifically list waterbodies impaired by invasive species in its biennial "Water Quality Report" and "List of Impaired Waters Requiring a Total Maximum Daily Load ("TMDL") of pollutants. Br. at 47-49. Under § 303(d) of the Clean Water Act, "there need be no [impaired waters] listing and no TMDL calculation" until after effluent limitations have proven ineffective in meeting water quality standards. *Pronsolino v. Nastri*, 291 F.3d 1123, 1136 (9th Cir. 2002), citing 40 C.F.R. § 130.2(j). Because the effluent limitations in EPA's General Permit have just come into effect, the listing and TMDL development suggested by petitioners is premature. Moreover, because invasive species are biological pollutants that reproduce and multiply, there is no "safe" maximum daily amount of invasive species a waterbody can receive without violating water quality standards. As explained by DEC, while the impacts to state waters from invasive species "are obvious, there is typically no standard against which to quantify a water quality impairment caused by invasive

exotic species or to set a water quality-based TMDL target.” R. 1365. DEC further explained that the TMDL list “is *not* defined as, nor intended to be, a comprehensive list of waters that meet a threshold of *Impaired*,” but rather includes “only those impaired waters for which development of a [TMDL] . . . is necessary to address the impairment.” R. 1359 (emphasis in original).

3. ***The Conditions Assure Compliance With New York’s Water Quality Standards, Not With Unpromulgated Technology-Based Standards.***

Petitioners wrongly argue that the Certification conditions are impermissibly “technology-based,” rather than “water quality-based.” (Br. at 52-54.) This argument ignores the plain terms of the Certification, which make clear that New York’s water quality standards – not some unpromulgated technology-based standards – are the basis for the Certification conditions. R. 963-964. Moreover, the Certification does not “mandate the use of certain technologies” (Br. at 52); DEC does not require the installation of any particular technology to meet the Certification conditions. R. 940.

Conditions 2 and 3 place numeric limits on discharges of invasive species; they say nothing about the technology to be used in achieving those limits. Condition 1 does not establish a standard for the quality of technology to be used on vessels. It merely requires certain pollution-control practices (flushing or exchange of ballast water) for vessels on coastal voyages. Condition 1 is based on DEC’s judgment that flushing or exchange is necessary to assure compliance with New York’s water quality standards. *See Matter of Chasm Hydro, Inc. v. N.Y.S. Dep’t of Envtl. Conserv.*, 58 A.D.3d 1100, 1101 (3d Dep’t 2009) (noting that under § 401, DEC “has authority to regulate

[licensees'] activities in order to protect water quality"), *lv. granted*, 12 N.Y.3d 710 (2009). That judgment is entitled to deference.

Petitioners claim that "only water quality-based conditions to a Section 401 certificate are authorized by the CWA." (Br. at 45.) The Act contains no such bar. The regulations they cite say only that Certification conditions must be based on existing principles of State law. Specifically, petitioners cite 40 C.F.R. § 124.53, which requires that State conditions be "necessary to assure compliance with [the Clean Water Act and] appropriate requirements of State law." They argue that DEC "has never promulgated technology requirements under state law" and thus may not include "technology requirements" in the Certification. (Br. at 52.) But the Act gives states the authority to include in certifications "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations." 33 U.S.C. § 1311(b)(1)(C).

To make sure that discharges comply with State water quality standards, it is often necessary to require specific pollution-control practices. If this Court were to announce that DEC cannot create Conditions requiring specific practices, it would undermine § 401, because requirements like Condition 1 are often the best way to assure compliance with state water quality standards. Nothing in the Clean Water Act prevents DEC from requiring specific operational practices to assure compliance with New York's water quality standards.

The Act states that except where “expressly provided . . . nothing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution.” 33 U.S.C. § 1370. Petitioners have failed to identify any express prohibition that applies to the Certification Conditions. Because the Act gives states broad authority to create Certification conditions that assure compliance with state water quality standards, and because New York properly based its Conditions on existing requirements in state law, the Conditions should be upheld.

B. New York Was Not Required to Exempt Vessels “Transiting” Its Waters, Nor to Invoke § 401(a)(2).

1. *New York Has Jurisdiction under the Act to Regulate Vessels Transiting New York Waters.*

Petitioners and amici mistakenly argue that New York lacks jurisdiction under the Clean Water Act to apply its Conditions to vessels “transiting” New York, meaning vessels that use New York waters without plans to discharge ballast water in them. (Br. at 54-57; World Shipping Council (“WSC”) Br., *passim*.) The Act requires no such exemption.

New York’s Certification applies to all vessels covered by the General Permit when operating in New York waters; the Conditions do not apply outside New York waters. R. 964-67. It makes no exception for vessels that do not plan to discharge

ballast water, because of concerns about “the unintentional discharge of invasive species, disease organisms and other pollutants” that could impair State waters. R. 968.

Petitioners mistakenly argue that New York has no authority to regulate vessels that do not plan discharges because § 401(a)(1) refers to certifications “from the State in which the discharge originates or will originate.” Br. at 54-55. But the rest of § 401(a)(1) extends its certification requirement to “applicant[s]” for “Federal . . . permit[s] to conduct *any activity* including, but not limited to, the . . . operation of facilities which *may result in any discharge* into the navigable waters . . .” 33 U.S.C. § 1341(a)(1) (emphasis added). The Supreme Court has affirmed that § 401’s “terms have broad reach, requiring state approval any time a federally licensed activity ‘may result in a discharge.’” *S.D. Warren Co. v. Me. Bd. of Env’tl. Prot.*, 547 U.S. 370, 380, (2006). The Supreme Court has also observed that § 401(d) “expands the States’ authority to impose conditions on the certification,” beyond “water quality limitations specifically tied to a ‘discharge,’” noting “[t]he text refers to the compliance of the *applicant*, not the discharge.” *P.U.D. No. 1*, 511 U.S. at 711. (emphasis added). Thus, whenever an operation may result in a discharge, DEC may impose conditions necessary to ensure that the applicant complies with water quality standards.

DEC’s Certification conditions properly regulate vessel activities in New York waters that may result in unplanned discharges of ballast water containing invasive species. Appellants themselves acknowledge that vessels routinely take in and discharge ballast water, which “provide[s] proper stability and trim, minimizes hull

stress, aids or allows maneuvering, and reduces ship motions of roll and pitch.” R. 36. “As a ship loads or unloads cargo or takes on or consumes fuel, the ship must accommodate changes to its displacement by taking on or discharging ballast water.” R. 36. Vessels also may discharge ballast water “as they encounter rough seas, or as they transit through shallow coastal waterways.” R. 364. As the full title of the General Permit itself indicates, ballast water discharges containing invasive species are “incidental to the normal operation of vessels.” Thus, DEC properly concluded that the operation of vessels in transit “may result in . . . discharge into the navigable waters.” 33 U.S.C. § 1341(a)(1).

Aside from the plain text of the Act and the record, petitioners’ argument is contradicted by common sense. To create an exemption for vessels not planning to discharge ballast water would involve unconscionable risks. Petitioners argue in effect that New York must allow vessels carrying dangerous or even deadly organisms in their ballast tanks to traverse New York waters, trusting that unplanned discharges will not be necessary. But unplanned discharges are not unusual. Accidents or emergencies, for example, may result in discharges; several major incidents have occurred in or near New York waters in the last five years alone.²² There is no reason

²² There are many well-documented incidents of vessels running aground and puncturing their hulls, such that ballast water can be released and/or ballast tanks punctured in a way that puts their contents in direct communication with the sea, lake, or river. Examples include the 2004 grounding of a cargo barge in the St. Lawrence River (see U.S. Coast Guard, “Coast Guard Responds to Salt Spill,” July 27, 2004, www.piersystem.com/go/doc/443/43792/), the 2006 grounding of the cargo vessel *Toro* in the St. Lawrence River near the New York-Quebec boundary (see U.S. Coast Guard, “Motor Vessel *Toro* Runs Aground in St. Lawrence Seaway,” Sept. 7, 2006, www.piersystem.com/go/doc/443/131988/), the 2006 grounding of the cargo vessel *New Delhi Express* in the Kill Van Kull, within about 250 feet of the NY-NJ boundary (see U.S. Nat’l Trans. Safety Bd.,

to assume such incidents will not happen again, and nothing in the Clean Water Act requires New York to make such a gamble. Because New York is entitled to regulate the “operation of facilities which may result in any discharge into the navigable waters,” 33 U.S.C. § 1341(a)(1), it was entitled to regulate vessels transiting New York waters.

2. *New York Has Not Applied the Conditions to Vessels Operating in Other States.*

New York has not attempted to apply its Conditions to vessels in the waters of other states. Petitioners argue that “DEC is imposing” its Certification conditions on vessels discharging outside of New York waters (Br. at 55), and that DEC “can only enforce its 401 Certificate on vessels that discharge in New York waters.” (Br. at 57.) It is true that DEC noted concerns about the interstate effects of ballast water discharges. But DEC has not imposed its conditions on any such discharges. EPA’s General Permit is a *federal* permit, enforceable by EPA. To the extent that petitioners seek to prevent EPA from enforcing the General Permit against upstream dischargers whose discharges may affect New York waters, they have sued the wrong entity. EPA, not DEC, is the party that will enforce the permit. There is no case or controversy between petitioners and DEC as to this issue.

Petitioners mistakenly contend that *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), limits New York’s ability to enforce the General Permit containing

Marine Accident Brief, Accident No. DCA-06-MF-013, www.nts.gov/publicatn/2007/MAB0702.pdf), and the 2009 grounding of an oil barge in Long Island Sound (see U.S. Coast Guard, “Heating oil barge runs aground near Execution Rocks,” Jan. 22, 2009, www.uscgnewyork.com/go/doc/802/250221/).

New York's Certification conditions. (Br. at 57; *see also* WSC Brief at 10). *International Paper* held that the Clean Water Act preempted a Vermont state court action, based on Vermont nuisance law, against a discharger based in New York. *See Arkansas v. Oklahoma*, 503 U.S. 91, 100 (1992). The discharger was governed by a permit issued under the State's § 402(b) permit program. *Arkansas*, 503 U.S. at 100. In this case, by contrast, New York has not attempted to enforce the Conditions against anyone, much less a discharger in another state. Moreover, the limits recognized in *International Paper* on affected states' input into state-issued permits "do not in any way constrain the EPA's authority to require a point source to comply with downstream water quality standards." *Arkansas*, 503 U.S. at 106.

If petitioners' argument is that DEC, when creating the Conditions, was prohibited by the Act from considering the dangers posed by discharges in other states, they are mistaken. Concern about inter-state discharges is built into the Clean Water Act, particularly the enforcement procedures for General Permits such as this one. Under the Act, states considering certification may consider inter-state pollution effects, and EPA may enforce the General Permit to address them. New York acted appropriately within this structure.

States considering § 401 certification must assure that any discharges within their borders will comply with both state and federal law. 40 C.F.R. § 124.53. And federal law prohibits the issuance of discharge permits "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of *all affected States*." 40 C.F.R. § 122.4(d) (emphasis added). This regulation directs

that “permits be conditioned to ensure compliance with downstream water quality standards.” *Arkansas*, 503 U.S. at 106.²³ Insofar as the administrative record in this case reflects concerns about invasive species that cross state lines, DEC was simply following the plain requirements of federal law.

DEC has not, however, attempted to enforce its regulations against dischargers in other states, or even to apply the Conditions to them. The conditions by their terms do not apply to vessels operating in other states. If concerns should arise about discharges in other states affecting New York’s waters, EPA has the power to enforce the General Permit against such discharges.

Thus, it was appropriate for DEC to consider — along with the other factors involved in creating the Conditions — risks posed by biological pollutants that cross state lines. But DEC has never attempted to impose conditions on discharges in other states, or claimed the power to do so.

3. *New York Was Not Required to Petition EPA Under § 401(a)(2).*

Petitioners mistakenly argue that New York should have “petitioned” EPA under § 401(a)(2) of the Act, 33 U.S.C. § 1341(a)(2). Br. at 56. But § 401(a)(2) imposes no mandate on states, and does not limit states’ ability to formulate § 401 certifications. It is a provision giving the Administrator of EPA discretion to hold

²³ See also *City of Albuquerque*, 97 F.3d at 422 (“The power of states under the Act is underlined by their ability to force the development of technology by setting stringent water quality standards that the EPA can enforce against upstream polluters.”); *In re Dominion Energy Brayton Point, L.L.C.*, 2006 EPA App. LEXIS 9 at *370-79, 12 E.A.D. 49 (EAB 2006) (EPA-issued permit for permittee located in Massachusetts properly included more stringent limitations based on affected State of Rhode Island’s narrative water quality standards).

hearings on discharges with inter-state effects; it has no bearing on what issues states may or may not address in § 401 certifications.

Section 401(a)(2) provides that if the EPA Administrator, in her discretion, determines that a discharge in one state may affect the quality of waters of another state, the Administrator must notify the affected state. 33 U.S.C. § 1341(a)(2). If the affected state confirms that the discharge will affect its water quality and files an objection to the issuance of the permit, the Administrator convenes a hearing, at which she makes recommendations to the permitting authority, which in turn adds conditions to the permit to protect the affected state. *Id.* Section 401(a)(2) makes no provision for a state to “petition” for its invocation. Nor does it say anything about vessel transit.

Section 401(a)(2) is irrelevant to the issues in this case. Its provisions have not been invoked, and this case does not involve a suggestion by the Administrator or any state that any conditions in the General Permit are inadequate to protect against inter-state effects from pollutant discharges.²⁴ The EPA Administrator, having had the opportunity to review the General Permit’s enforceable limitations including state certifications, has made neither the discretionary determination nor the notification required to invoke them. *See Northwest Envtl. Advocates v. U.S. EPA*, 268 F. Supp. 2d 1255, 1262 (D. Ore. 2003) (determination by EPA Administrator under 33 U.S.C.

²⁴ On the contrary, by issuing their § 401 certifications and conditions, states are “in effect saying that the proposed activity *will* comply with State water quality standards (and other CWA and State law provisions . . .).” EPA Water Quality Handbook § 7.6.3 (emphasis in original), available at <http://www.epa.gov/waterscience/standards/handbook/chapter07.html>.

§ 1313 (c)(4)(B) is a condition precedent to invoking statute, and court can not render determination committed to Administrator's discretion).

Nor did New York have any reason to ask the Administrator to invoke § 401(a)(2). Petitioners and amici argue that New York should have invoked § 401(a)(2) before creating conditions that apply to vessels "transiting" New York. As discussed above, New York had the authority to create those conditions because of concerns about unplanned discharges. Section 401(a)(2) does nothing to limit that authority.

Finally, the World Shipping Council's amicus brief argues that New York cannot regulate vessel transit because it "failed to avail itself of its statutory remedy." WSC Br. at 9. But § 401(a)(2) does not create any procedures by which states can "petition" the Administrator to regulate out-of-state discharges, so there is no "statutory remedy" for New York to invoke.²⁵ Nor does this case involve any out-of-state discharges for which New York needed a remedy; if there is a need to enforce the General Permit against dischargers in other states, it will be EPA, not New York, that pursues any necessary remedies. Thus, there was no requirement — and no reason — for New York to invoke § 401(a)(2).

²⁵ Petitioners' brief notes that EPA allows States to "request a hearing" to determine whether a permit should include additional conditions. (Br. at 56, citing EPA, Water Quality Handbook § 7.6.3, at <http://www.epa.gov/waterscience/standards/handbook/chapter07.html>.) But nothing in the quoted language suggests that EPA requires states to do so, or that any adverse consequences follow from states' failing to request a hearing.

POINT III

DEC FOLLOWED ALL OF THE PROCEDURES REQUIRED BY NEW YORK STATE LAW

The procedures DEC followed in issuing the Certification were consistent with all relevant state laws. Petitioners argue that SAPA's rulemaking requirements apply to § 401 certifications of general permits, but they are mistaken. Petitioners also bring a SEQRA challenge, but they lack standing to do so, and their SEQRA arguments are meritless in any event.

A. DEC's Issuance of the Certification Was Governed by the UPA, Not SAPA.

DEC's Certification was issued in accordance with the Uniform Procedures Act ("UPA"), ECL Article 70, and its implementing regulations, including public notice and comment procedures. Petitioners argue that § 401 certifications of general permits are also subject to the rule-making requirements of the State Administrative Procedures Act ("SAPA"), but they are wrong.

The Uniform Procedures Act ("UPA") provides that "certifications under section 401" of the Clean Water Act "shall be subject to the procedures provided in this article" — that is, ECL Article 70's procedures for major permit proceedings. ECL § 70-0107(3)(d); 6 N.Y.C.R.R. § 621.1(e). *See* R. 1170-73. Petitioners contend that general permits and conditions issued under § 401 should be treated differently from individual permits, because a general permit is necessarily a "rule" of "general applicability" within the meaning of SAPA, N.Y. A.P.A. § 102(2)(a). But general permits are not rules under state law.

This is evident from the UPA provisions dealing with general permits issued under the State Pollution Discharge Elimination System ("SPDES"), the state equivalent to the NPDES permit program at issue here. The UPA expressly addresses general permits for "ballast discharges from vessels," and states that "[g]eneral permits shall be governed by the procedures set forth in this article for the review of major projects." ECL § 70-0117(5)(a), (e). Thus, state law does not consider general permits for ballast discharges to be rules; instead, they are considered permits for major projects. There is no reason to treat § 401 certifications of federal general permits differently than state general permits.

Even if § 401 certifications of general permits could be considered rules under state law, the Conditions in this case would not constitute rules under SAPA precedent. The Certification conditions would not be rules subject to SAPA because they give DEC significant discretion in their enforcement. The Court of Appeals has held that "only a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation" under SAPA. *Matter of Roman Catholic Diocese v. N.Y.S. Dep't of Health*, 66 N.Y.2d 948, 951 (1985). The Certification conditions are not "fixed, general principles" of this kind because they contain various exceptions, including for vessel-specific engineering constraints, where necessary technology is unavailable, for vessels operating exclusively in certain geographic areas, and for safety. R. 964-67.

In a comparable case, the Court of Appeals held that administrative guidelines on enforcement of state health and safety regulations were not rules under SAPA because they gave the personnel who enforced them “significant discretion, and allow[ed] for flexibility in the imposition of penalties” in light of the particular circumstances of the case. *Matter of N.Y.C. Transit Auth. v. N.Y.S. Dep’t of Labor*, 88 N.Y.2d 225, 229 (1996). The guidelines in that case applied throughout the State, just as the Conditions do. Nonetheless, they did not “establish a rigid, numerical policy invariably applied across-the-board to all claimants without regard to individualized circumstances or mitigating factors.” *Id.* at 230 (quotations omitted). They were therefore not rules under SAPA.

Other cases have recognized that SAPA does not apply where agencies retain this kind of discretion in the regulatory scheme. In *Matter of Palette Stone Corp. v. State Office of Gen. Servs.*, 245 A.D.2d 756 (3d Dep’t 1997), this Court recognized that contract standards issued by the Office of General Services are not rules where they give the agency discretion to grant or deny price reductions, because a rule is “a mandatory procedure that is applied across the board without discretion.” *Id.* at 758. Similarly, the Second Department held that a State policy establishing areawide Medicaid eligibility for van service providers was not a rule, because agencies retained discretion to review each eligibility application individually. *Matter of Ex-L Ambulette, Inc. v. Comm. of N.Y.S. Dep’t of Soc. Svcs.*, 268 A.D.2d 431, 432 (2d Dep’t 2000), *lv. denied*, 95 N.Y.2d 753 (2000).

The Certification's exceptions similarly vest DEC with significant discretion, belying petitioners' characterization of its conditions as rules. For example, the Department may extend the implementation date for Conditions 2 and 3 based upon requests from individual General Permit-covered vessels demonstrating to DEC that either the technology necessary for certain vessels, or other vessel-specific factors beyond the individual owner/operator's control, justify the extension request. R. 966-67. Moreover, the Conditions contain exceptions where the "master of the vessel determines that compliance" would threaten the safety of the vessel or its crew." R. 965. Thus, even if SAPA applied here — which it does not, for the reasons discussed above — the Certification Conditions' discretionary exceptions render SAPA rulemaking procedures inapplicable.

Moreover, this construction of state law avoids potential conflict with federal law. Federal law requires States to submit § 401 certifications within 60 days of EPA's mailing of its proposed permit; if they do not, they waive the right to certify. 40 C.F.R. § 124.53(c)(3). SAPA, however, prohibits the adoption of a rule unless the agency has published a notice of proposed rulemaking, allowed 45 days for public comment, N.Y. A.P.A. § 202, which would leave DEC only 15 days to perform the analysis necessary to draft an appropriate certification. Moreover, under petitioners' reading, the period of public comment would be a meaningless formality. Any "substantial revision" of a proposed rule triggers an additional 30-day public comment period, *see* N.Y. A.P.A. § 202(4-a), which DEC could not allow without passing the federal 60-day deadline. If SAPA's rulemaking provisions were to apply here, it would be virtually impossible.

for DEC to comply with both SAPA and federal requirements. The Court should construe state law in a way that avoids any such conflict.

B. Petitioners' SEQRA Challenge Is Nonjusticiable and Meritless.

1. *Petitioners Lack Standing under SEQRA Because Their Claims are Speculative, Generalized and not within SEQRA's Zone of Interests.*

Petitioners lack standing to raise a SEQRA claim. A party seeking to bring a SEQRA challenge must meet two criteria to establish standing. First, it "must show that it would suffer direct harm, injury that is in some way different from that of the public at large." *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1991). Second, the non-speculative, non-generalized injury asserted must "fall within the zone of interests protected by the statute invoked." *Id.* at 773. Petitioners' claims fail both tests. The harms they assert are speculative and generalized. Their principal concerns are about economic injury, which is not within the zone of interests SEQRA was intended to protect.

The zone-of-interests requirement "ensures that a group or an individual whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Matter of Transactive Corp. v. N.Y.S. Dep't of Soc. Svcs.*, 92 N.Y.2d 579, 587 (1998) (quotations omitted). Thus, "a SEQRA challenger must demonstrate that it will suffer an injury that is environmental and not solely economic in nature." *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 687 (1996). Petitioners have not demonstrated that they will suffer any injury that is

environmental, rather than economic, in nature. Their main concern with the Certification is the economic costs it will impose on shipping, which is of course not an interest protected by SEQRA. It is apparent, as it was in *Plastics*, that petitioners' speculative allegations, "though couched as environmental harms . . . by and large amount to nothing more than allegations of added expense [petitioners] might have to bear." *Plastics*, 77 N.Y.2d at 777. They are "economic injury [that] does not confer standing to sue under SEQRA." *Id.*

Petitioners speculate that the Certification will have environmental consequences, claiming that "as shipping cargo diverts from marine vessels to trucks," there will be "climate change impacts from such diversion", "significantly increasing truck and rail emissions", and "localized environmental justice concerns because low-income populations will likely endure more truck traffic due to reduced vessel operations in New York State ports." Br. at 38. But none of these claims involve environmental injuries to petitioners. Moreover, the injuries petitioners invoke are too speculative.

Petitioners' alleged injuries strongly resemble the "ephemeral allegations of harm threatening plaintiffs" that the Court of Appeals found not to confer SEQRA standing for "fail[ure] to allege any threat of cognizable injury . . . different in kind or degree from the public at large." *Plastics*, 77 N.Y.2d at 777-78. Petitioners and amici offer no evidence to support their claim that "shipping in the Great Lakes Region will effectively stop" because compliance with the Certification conditions will be so expensive. (Seafarers International Union ("SIU") Br. at 16.) There is no reason to

think any changes in vessel traffic would be economically significant enough to alter the “community character” of the port cities. These eventualities are far too speculative to support a claim for SEQRA standing. *Matter of Bolton v. Town of S. Bristol Planning Bd.*, 38 A.D.3d 1307, 1308 (4th Dep’t 2007) (dismissing SEQRA challenge to negative declaration for lack of standing); *Matter of Buerger v. Town of Grafton*, 235 A.D.2d 984, 985 (3d Dep’t 1997) (same), *lv. denied*, 89 N.Y.2d 816 (1997).

Because the injuries petitioners allege are too speculative, and because the interests petitioners seek to protect are fundamentally economic, and not environmental, in nature, petitioners do not have SEQRA standing.

2. *DEC’s Negative Declaration Is Rational and Supported by the Record.*

DEC’s “Negative Declaration” (R. 931-33) — a determination that the Certification will not have a significant adverse environmental impact — was rationally based on the facts and applicable law. In reviewing an agency’s SEQRA determination, courts uniformly have held that their role is not to choose among alternatives, second-guess the result reached or substitute their judgment for that of the governmental decision-makers. *Akpan v. Koch*, 75 N.Y.2d 561, 570-71 (1990); *Flacke v. Onondaga Landfill Sys.*, 69 N.Y.2d at 363. Where the SEQRA lead agency (1) identifies relevant areas of environmental concern; (2) takes a “hard look” at them, and (3) makes a reasoned elaboration of the basis for its determination, a negative declaration is proper and the review procedure comes to an end. *See Matter of Merson v. McNally*, 90 N.Y.2d 742, 751-52 (1997); *Matter of Cathedral Church of St. John the*

Divine v. Dormitory Auth., 224 A.D.2d 95, 98-101 (3d Dep't 1996), *lv. denied*, 89 N.Y.2d 802 (1996).

DEC's Certification was issued after the agency identified and took a hard look at the relevant areas of environmental concern. In this case the overriding factor, both factually and legally, is the ongoing, significant adverse environmental impact caused by vessels' untreated discharges of ballast water containing invasive species. DEC's Negative Declaration identified, examined and discussed these harmful impacts. R. 932-33. DEC further explained that its Certification conditions "are those required to meet both the established standards set forth in the federal Clean Water Act and the Department's Water Quality Standards so as to maintain the best usage of the State's waters." R. 933. Moreover, the Negative Declaration expressly referenced and incorporated the Certification, DEC's Response to Comments, and all reports and studies cited therein. R. 933, 1173. DEC's Certification and Response demonstrate the agency's exhaustive identification and examination of the relevant environmental issues. R. 934-77.

In *Matter of Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674, 682 (1988), the Court recognized that "the question of significance is ultimately a policy decision, governed by the rule of reasonableness," and that the agency may rely upon the expertise of agency staff in determining the environmental significance, if any, of a proposed action. The agency also may rely on the expertise of extra-agency sources in issuing a negative declaration where the agency looked at potential impacts and reasonably exercised its discretion. *Buerger*, 235 A.D.2d at 985-86; *Matter of Byer v.*

Town of Poestenkill, 232 A.D.2d 851, 854-55 (3d Dep't 1996). As the Court below found, DEC's SEQRA determination was based on an extensive record reflecting detailed analysis and expert evaluation of the environmental impacts that could reasonably be expected to occur from the Certification. R. 25-26. In addition, DEC identified and examined petitioners' purported environmental concerns.

DEC looked at other states' ballast water regulatory experiences and found no evidence of the shipping diversions or community impacts conjured by petitioners. R. 933, 1174. The Negative Declaration expressly noted that "States with ballast water regulatory programs, such as California and Michigan, have not experienced a significant reduction in port activity attributed to ship operators avoiding regulatory requirements by diverting to ports in other states." R. 933. DEC reasonably concluded that "no significant change in transportation routing, transportation modes or the vitality of port communities are likely to occur as a result of imposing limitations on ballast water discharges, necessary for protecting the State's water quality." R. 933.

Petitioners also assert that Condition 1 would require re-routing of certain vessels — those that enter the St. Lawrence system on coastal voyages — and that this change in course would result in increased use of fuel and emission of pollution. (Br. at 35-36.) But their estimate of 200 affected voyages per year (R. 1516) is exaggerated. First, if it represents the total number of vessels that enter the St. Lawrence system, some of those vessels will not have to flush because they are bound for Quebec or Montreal, not New York. Second, some of the vessels will not be required to re-route, because they have legitimate safety reasons for staying close to shore — that is, for not

traveling to the middle of the Gulf of St. Lawrence to flush — and therefore are exempt from Condition 1 under its safety exemption. R. 965.²⁶ Third, most or all of the relevant vessels will have to be in compliance with Condition 2 by January 2012, and therefore will be exempt from Condition 1 in two years. Thus, petitioners' contention that during these two years, there will be only 200 re-routings per year — less than one per day — is a small impact, given the already-heavy vessel traffic in the Gulf of St. Lawrence. Even petitioners' exaggerated number does not suggest a significant impact.

The SIU amicus brief contends that DEC failed to consider the risks to ship safety involved in requiring “laker” vessels to voyage into deep waters to exchange ballast water. They claim that lakers “are not equipped to endure a full open-ocean ballast water exchange.” (SIU Br. at 7.) But the Certificate provides an exemption from the exchange requirement “if the master of the vessel determines that compliance with this condition would threaten the safety or stability of the vessel, its crew, or its passengers.” R. 965. The Conditions do not require any vessel to put itself in danger.

As to the consequences of vessel ballast water discharges that may undergo chemical treatment, DEC explained that any such discharges must comply with existing state and federal water quality standards, and General Permit limits, thereby mitigating any impacts. R. 933, 1173-74, 1240-41. Petitioners also express concern

²⁶ Moreover, vessels entering the Gulf of St. Lawrence between Nova Scotia and Newfoundland (the broadest of the three straits accessing the Gulf) would actually travel a shorter route, not a longer one, if they re-routed through the middle of the Gulf instead of hugging its U-shaped southern shore. (A map showing the Gulf of St. Lawrence is at R. 1248; and is attached to this brief in color.)

about harm to “endangered and threatened species” in ballast tanks (Br. at 40), but fail to identify any credible reports about endangered species finding their way into ships’ ballast tanks. Ironically, two of the endangered species for which petitioners express concern — the Northern Riffleshell mussel and the Deepwater Sculpin — are threatened by competition from aquatic invasive species.²⁷ While petitioners have identified no credible concerns about threats to endangered species from the Certification, concerns about vessel-discharged invasive-species are significant and well-documented; those species pose major threats to native and endangered species in New York and throughout the country. R. 23, 968-73; *Northwest Env’tl. Advocates*, 537 F.3d at 1013. The entire purpose of the General Permit, and the State’s Certification of it, is to protect native ecosystems and the fish and wildlife in them.

Just as petitioners’ speculative claims are insufficient to confer SEQRA standing, they do not detract from the legality of DEC’s Negative Declaration. DEC’s SEQRA regulations regarding determinations of environmental significance require consideration of “impacts that may be reasonably expected to result from the proposed action.” 6 N.Y.C.R.R. § 617.7(c)(1). Not included therein are “theoretical possibilities . . . steeped in nothing more than unsupported speculation.” *Matter of Fisher v. Giuliani*, 280 A.D.2d 13, 21 (1st Dep’t 2001). Because there is no evidence of petitioners’ asserted impacts, such impacts are not “reasonably expected” and do not

²⁷ The Northern Riffleshell is threatened by the infestation of zebra mussels, an invasive species. U.S. Fish and Wildlife Service, *Northern Riffleshell: 5-Year Review*, at 11-12 (Fall 2008), http://ecos.fws.gov/docs/five_year_review/doc2544.pdf. The Deepwater Sculpin is threatened by alewives and rainbow smelt, two invasive species. DEC, *Deepwater Sculpin Fact Sheet*, <http://www.dec.ny.gov/animals/26179.html>.

require consideration under SEQRA. “[S]peculative consequences need not be evaluated prior to issuance of a negative declaration . . . [thus] petitioner’s SEQRA challenge . . . is without merit.” *Matter of Schultz v. N.Y.S. DEC*, 200 A.D.2d 793, 795 (3d Dep’t 1994) (citations omitted), *lv. denied*, 83 N.Y.2d 758 (1994).

In this case, DEC issued its Certification after identifying the relevant areas of environment concern, taking a hard look at them, and making a reasoned elaboration of the basis for its determination. The Department’s action is entirely rational, responsible and consistent with applicable law.²⁸

POINT IV

THE CERTIFICATION DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

New York’s certification is consistent with the United States Constitution. Petitioners’ constitutional challenges, which are based on constitutional limits on laws enacted by states, overlook the fact that New York’s certification is part of a federal permit issued by EPA and authorized by Congress.

A. No Dormant Commerce Clause Issue Exists Because Congress Affirmatively Authorizes States to Issue Water Quality Certifications for Federal Permits.

Petitioners ask the Court to evaluate the Certification pursuant to the dormant Commerce Clause — that is, the principle that action by States must not unduly

²⁸ Petitioners’ claim that DEC “fail[ed] to comply with the State’s Waterfront Revitalization and Coastal Resources Act” (Br. at 39) was not pled in their petition, is outside the record below and consequently may not be raised on this appeal. *Snyder v. Wetzler*, 84 N.Y.2d 941, 942 (1994); *Bender v. Peerless Ins. Co.*, 36 A.D.3d 1120, 1121 (3d Dep’t 2007).

burden interstate commerce. *See S. Pac. Co. v. Ariz.*, 325 U.S. 761, 769 (1945). But the dormant Commerce Clause does not apply to actions by the federal government, and the Certification petitioners challenge was part of a federal discharge permit issued by EPA, expressly authorized under § 401 of the Clean Water Act.

It is beyond dispute that Congress's authority over commerce includes the ability to authorize states to regulate commerce. *New York v. United States*, 505 U.S. 144, 167 (1992). In exercising its power over commerce, Congress in the Clean Water Act specifically authorized States to issue water quality certifications for federal permits. 33 U.S.C. § 1341. Petitioners cannot bring a dormant Commerce Clause challenge to conditions that are incorporated into an EPA-issued permit. "Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). *See Fednav, Ltd v. Chester*, 547 F.3d 607, 624 (6th Cir. 2008) (observing that "[w]e would lose our constitutional bearings" by holding that "the Commerce Clause, in its dormancy, strikes down state regulation that Congress, in *actively exercising* its power under the Clause, expressly contemplated" (emphasis in original)).

B. The Certification Does Not Conflict with the Federal Foreign Relations Power.

Petitioners argue that the Certification violates the principle that "states cannot enact laws which intrude upon the federal government's power to conduct foreign relations." Br. at 60. This argument also lacks merit, because § 401 certifications are

incorporated into federal permits; the Conditions are effective only because the federal government has adopted them.

Petitioners mistakenly assert that the Certification violates the Free Navigation provision of the Boundary Waters Treaty of 1909, 36 Stat. 2448. *See Br.* at 60-61. But Article I of the Treaty states that it is subject to federal laws:

The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries²⁹ equally, *subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally without discrimination to the inhabitants, ships, vessels and boats of both countries.*

Id. (emphasis added). Because the Treaty expressly recognizes the validity of laws and regulations like the Clean Water Act, the establishment or enforcement of pollution control requirements are acceptable so long as they do not prevent navigation on equal terms for all vessels. As explained above, the State's Water Quality Certification applies equally to all vessels, regardless of national origin.

Moreover, New York's Certification is consistent with the Treaty's fundamental concern about protecting water quality. Article IV of the Treaty states that "[i]t is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or

²⁹ Petitioners misstate this provision by quoting nothing after the word "countries." (*Br.* at 61).

property on the other." See R. 938. Thus, New York's Certification does not conflict with the Boundary Waters Treaty.

CONCLUSION

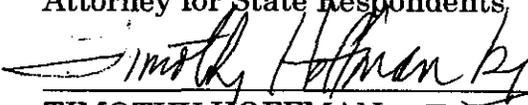
For the foregoing reasons, Supreme Court's Decision should be affirmed.

Dated: October 22, 2009
 Albany, New York

Respectfully submitted,

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ATTACHMENT

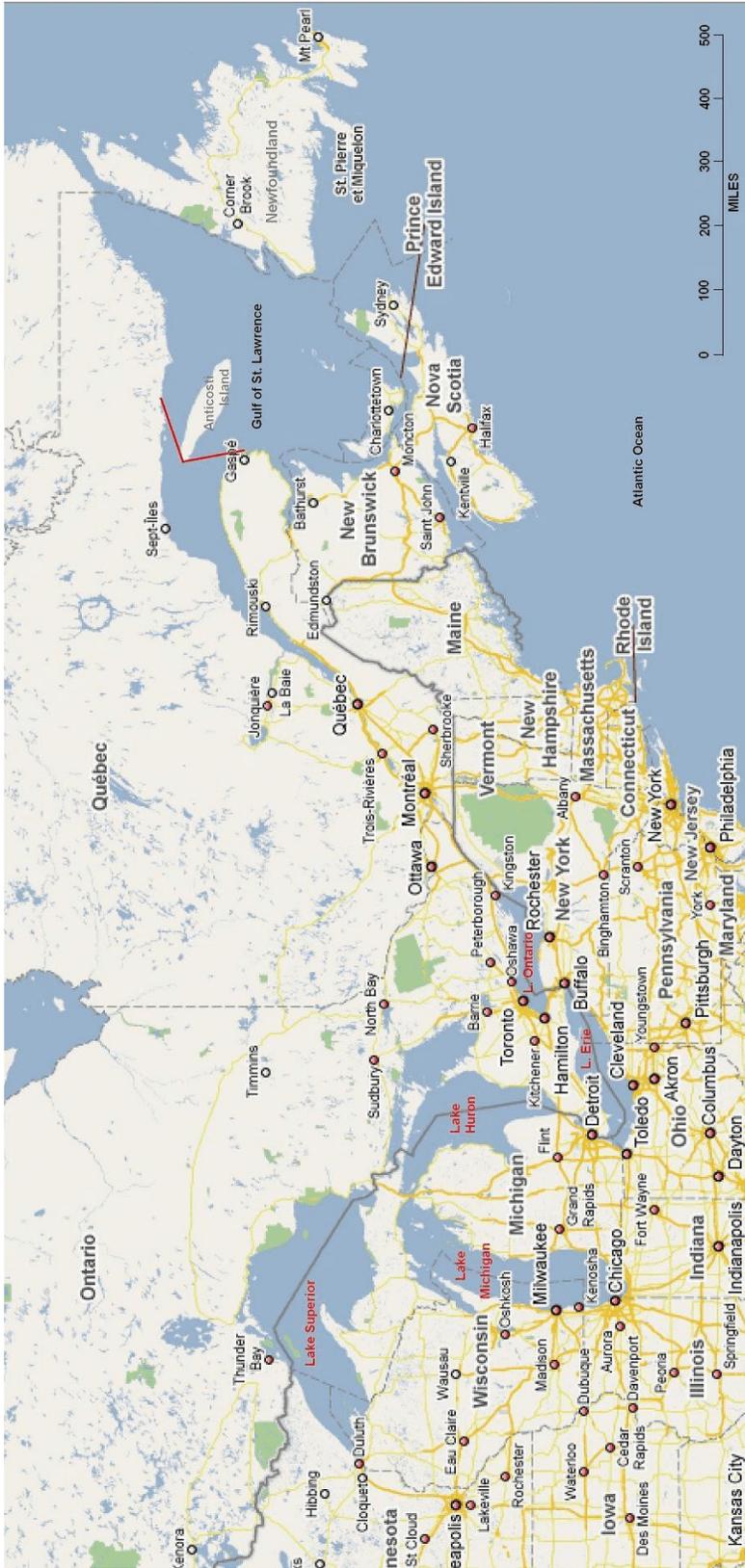


Figure 1: Overview of New York River and adjacent waters, including the Great Lakes (Lakes Superior, Michigan, Huron, Erie, and Ontario) and the St. Lawrence River which flows northeastward from Lake Ontario into the Gulf of St. Lawrence.

New York’s Certification Condition No. 1 provides exemptions from the ballast water exchange/flushing requirement for vessels that remain within specified water bodies. For example, vessels that operate exclusively within waters of New York Harbor and Long Island Sound are exempt. Vessels that operate exclusively in the Great Lakes - St. Lawrence Seaway System (upstream of a line from Cap-des-Rosiers to West Point, Anticosti Island and then to the north shore of the St. Lawrence River along a meridian of longitude 63 degrees West) are also exempt from Condition No. 1. A safety exemption is also available to all vessels under Condition No. 1.

The red line in Figure 1 shows the outer (eastern) limit of the Condition No. 1 exemption for vessels that operate exclusively in the Great Lakes - St. Lawrence Seaway System. The line (drawn from Cap-des-Rosiers to West Point, Anticosti Island and then to the north shore of the St. Lawrence River along a meridian of longitude 63 degrees West) is at the mouth of the St. Lawrence River, where the river flows into the Gulf of St. Lawrence. Vessels that remain upstream of this line (as far westward as Duluth, Minnesota, on Lake Superior) are exempt from the ballast water exchange/flushing requirement of New York’s Certification Condition No. 1.