

1 Plaintiffs Northwest Environmental Advocates, et al. ("Plaintiffs") have been apprised of
2 this motion and **advise that they do not oppose it.** Plaintiff-Intervenor States of New York,
3 Illinois, Michigan, Minnesota, Wisconsin, and Pennsylvania (the "States") have been apprised of
4 this motion but have not yet taken a position on it.

5 In support of this Motion, the movants state the following.

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7 **DISCUSSION**

8 On September 18, 2006, this Court granted Plaintiffs' request for a permanent injunction,
9 remanding this matter to EPA for further proceedings consistent with the Court's orders, and
10 holding that "the blanket exemption for discharges incidental to the normal operation of a vessel,
11 contained in 40 C.F.R. § 122.3(a), shall be vacated as of September 30, 2008." This Court's
12 orders on liability and remedy were upheld by the Ninth Circuit Court of Appeals on July 23,
13 2008. See Northwest Env'tl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008). The Court of
14 Appeals noted that the Department of Justice had informed it by letter dated July 11, 2008, that
15 on June 17, 2008, EPA had published in the Federal Register certain draft "General Permits for
16 Discharges Incidental to the Normal Operation of a Vessel," 73 Fed. Reg. 34,296 (June 17,
17 2008), and that the public comment period on the draft permits was scheduled to close on August
18 1, 2008. See 537 F.3d at 1027. The Court of Appeals further stated: "The letter warns that a
19 final version may not be ready by the September 30, 2008, deadline established by the district
20 court, but the letter stops short of a request to extend the deadline. If the government chooses to
21 request an extension of the deadline, that request should be addressed to the district court." Id.

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23 Through a previous Joint Stipulation, the parties sought and obtained from this Court an
24 extension of the original date of vacatur from September 30, 2008, to December 19, 2008. In
25 compliance with that amended order, on or before December 19, 2008, EPA expects to finalize a
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1 permit governing such discharges. However, the movants request a second extension is in order
2 to give the regulated community the ability to prepare for the requirements of the final permit,
3 particularly as it relates to conditions imposed by states pursuant to section 401(c) of the CWA.
4 Specifically, the movants request that this Court modify its August 31, 2008 amended order by
5 postponing its vacatur of 40 C.F.R. § 122.3(a) until February 6, 2009, 48 days after the permit
6 covering the discharges is issued.
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8 This Court has ample authority to grant such relief. Its authority to modify the terms of
9 injunctive relief is inherent, A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir.
10 2002), and is derived both from its powers in equity and from Rule 60(b), which governs grounds
11 for relief from a final judgment, order or proceeding. Earth Island Inst. Inc. v. S. California
12 Edison, 166 F. Supp. 2d 1304, 1309 (S.D. Cal. 2001).

13 Two subsections of Rule 60(b) are relevant here. Subsection (5) of that Rule allows a
14 district court to relieve a party from a final judgment or order when “a prior judgment upon
15 which it is based has been reversed or otherwise vacated, or it is no longer equitable that the
16 judgment should have prospective application.” Under this rule, a court has “discretionary power
17 to modify an injunction when changing circumstances, or a better appreciation of the facts in
18 light of experience indicate existing injunctive orders are not well adapted to the purpose for
19 which they were made.” Central Valley Chrysler-Jeep, Inc. v. Goldstene, No. 04-6663, 2008 WL
20 2600786 at *2 (E.D. Cal. June 24, 2008). See also U.S. Syntex (U.S.A.) LLC v. Apotex Inc., No.
21 01-02214, 2005 WL 6042726 at *2 (N.D. Cal. Oct. 26, 2005) (court retains power to modify the
22 terms of its injunction in order to accommodate “changed circumstances”). Subsection (6) of
23 Rule 60(b), which allows a court to modify an order for “any other reason that justifies relief,” is
24 also relevant. It serves as a “catch-all provision,” conferring the Court with “broad discretion to
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1 relieve a party from final judgment upon such terms as are just.” Spacey v. Bugar, 207 F. Supp.
2 2d 1037, 1048 (E.D. Cal. 2001) (citations and internal quotations omitted).

3 Since this Court entered its injunction in September 2006 and amended that injunction at
4 the parties’ request in August 2008, there have been important developments that militate
5 strongly in favor of extending the date of vacatur of the exclusion. As stated above, on or before
6 December 19, 2008, EPA expects to finalize a permit governing certain discharges previously
7 covered by the exclusion. As part of the permitting process, beginning in July 2008, states were
8 given the opportunity to certify that the draft permit meets certain requirements, pursuant to
9 section 401 of the Clean Water Act. Many of those certifications contain conditions that will be
10 incorporated into the final permit and will be applicable in each state’s respective waters.
11 Certain state certifications are still being developed and have not yet been submitted to EPA.
12 Many vessels that will be subject to this final permit operate in multiple state waters and must
13 meet the conditions set forth in multiple state certifications. The conditions in many state
14 certifications, however, will only become publicly available once EPA finalizes and issues the
15 final permit on or before December 19, 2008. When EPA has finalized the permit, the Agency
16 expects to make the final permit, including any conditions submitted by the states under section
17 401, informally available on its website soon after signature. EPA expects to forward a formal
18 notice of availability of the final permit to the Office of the Federal Register for publication
19 promptly after finalization of the permit. EPA expects publication in the Federal Register will
20 occur approximately 2-3 weeks after the notice is forwarded to the Office of the Federal Register.
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23 Under these circumstances, the movants respectfully request that the Court extend the
24 vacatur date until February 6, 2009, in order to give the regulated community the ability to
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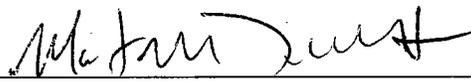
1 prepare for the requirements of the final permit, particularly as it relates to conditions imposed by
2 states pursuant to section 401 of the CWA.

3 **CONCLUSION**

4 Movants respectfully submit that there is good cause for the proposed modification of the
5 Court's injunction and Judgment for the brief postponement of the vacatur until February 6,
6 2009. Plaintiffs do not oppose the requested relief. The movants respectfully request entry of the
7 attached proposed order embodying that modification.
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9 Respectfully submitted and agreed to this 18th day of December, 2008:

10 RONALD J. TENPAS
11 Assistant Attorney General
12 Environment and Natural Resources Division

13 By: 
14 MARTIN F. McDERMOTT, Attorney
15 Environment and Natural Resources Division
16 Environmental Defense Section
17 U.S. Department of Justice
18 P.O. Box 23986
19 Washington, D.C. 20026-3986
20 Phone: (202) 514-4122
21 Fax: (202) 514-8865
22 *Attorney for Defendant*

23 *Of Counsel:*
24 DAWN M. MESSIER
25 Office of General Counsel
26 U.S. EPA
Ariel Rios Building, 2355A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

27 /s/ Brian K/ McCalmon
28 BRIAN K. MCCALMON
29 K & L Gates LLP
30 1601 K Street, N.W.
31 Washington, D.C. 20006-1600
32 *Attorney for the Shipping Industry Ballast Water
Coalition*

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[PROPOSED] ORDER

Upon consideration of the movants' Motion requesting further modification of this Court's *Order Granting Plaintiffs' Motion for Permanent Injunctive Relief* and related *Judgment*, filed in this action on September 18, 2006, as amended on August 31, 2008, it is hereby ORDERED that the exemption for discharges incidental to the normal operation of a vessel, contained in 40 C.F.R. § 122.3(a), is vacated as of February 6, 2009. In all other respects, the Court's previous orders shall remain unchanged and in effect.

DATED: 12/17/08



Hon. Susan Illston, United States District Judge

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2008, the foregoing MOTION TO FURTHER MODIFY THE COURT'S SEPTEMBER 18, 2006 ORDER GRANTING PLAINTIFFS' MOTION FOR PERMANENT INJUNCTIVE RELIEF AND THE RELATED JUDGMENT, and PROPOSED ORDER have been served electronically through the Court's ECF system on counsel of record.

/s/ Martin F. McDermott
Martin F. McDermott