Sailing by Looking in the Rearview Mirror: EPA's Unreasonable Deferral of Ballast-Water Regulation to a Now Ineffective Coast Guard

Liwen A. Mah

Major structural changes in government since national security became a dominant priority threaten to undermine regulatory protections of the nation's environment. One troubling environmental threat is the introduction of invasive species, especially those introduced by ballast water discharged from ships arriving in U.S. ports. In 2003, the Environmental Protection Agency (EPA) denied a petition—four years after receiving it—that sought to repeal an EPA rule exempting ballast water from regulation under the Clean Water Act (CWA). Despite having authority to regulate ballast water under the CWA, the EPA decided that the Coast Guard should regulate ballast water. Yet the Coast Guard is no longer able to tackle the problem due to its focus on national security in the wake of the terrorist attacks of September 11, 2001.

As the ballast water issue suggests, courts should not defer to an agency decision about its role relative to other agencies. Instead, courts should consider the legislative concept underlying the agency's authorizing statute and determine whether the agency's rationale is reasonable. Without this review by the judiciary, an agency might simply defer unpleasant or undesired regulatory tasks to a sister agency with no real power, leading to under-regulation.

Introduction ................................................................. 666

I. The EPA Is Trying to Avoid Regulating Ballast Water Under the Clean Water Act .................................................. 669

Copyright © 2004 by the Regents of the University of California.
* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2005; B.S., University of California Berkeley, 1994. I would like to thank Deborah Keeth, Kevin Golden, and Adrianna Kripke for their assistance and insight.
II. The EPA Interprets Its Responsibilities over Ballast Water by Using a Legal Framework that Relies on Historical Agency Roles and the Original Conception of Statutes.............................670

III. Agency Roles and Relationships Have Changed Dramatically, Preventing the Coast Guard from Fulfiling Its Historical Responsibilities.................................................................672
   A. The EPA Tries to Defer to a Coast Guard that No Longer Exists..................................................673
   B. The EPA Wrongly Defers to the Coast Guard Under the Pretense of Efficient Agency Collaboration........674

IV. The EPA Unreasonably Relies on Historical Coast Guard Capabilities and Congressional Conceptions..........................................................675
   A. By Asserting that Invasive Species in Ballast Water Are Another Agency's Problem, the EPA Flouts the CWA's Purpose ..............................................................................676
   B. Historical Agency Roles and Capabilities Do Not Make the EPA's Decision Reasonable........................677
   C. Relying on the Coast Guard Instead of the CWA Is Unreasonable.............................................679

V. Judicial Scrutiny Is Not Only Proper, but Necessary for an Agency's Deferral of Responsibilities to Other Agencies ..........680
   A. Courts Can Review Agency Decisions About Their Roles in Relation to Other Agencies ..................681
   B. Courts Should Decide Whether Agency Decisions About Their Roles Are Reasonable in Light of the Concept Underlying Their Regulatory Statutes........................................683
   C. Deferring to the Coast Guard Instead of Invoking the CWA Is Also Unreasonable if the EPA Has no Accountability for the Coast Guard's Success in Regulating Ballast Water Discharges.................................684

Conclusion........................................................................................................686

INTRODUCTION

If a container ship released millions of gallons of poison or hazardous waste into the San Francisco Bay, panic and terror would ensue. The public would demand that agencies do everything in their power to prevent the catastrophe from recurring. Yet such a catastrophe has been playing itself out over the past several years, with ships' ballast water as the medium and invasive species as the hazard.¹

¹ UNIVERSITY OF CALIFORNIA SEA GRANT EXTENSION PROGRAM, BALLAST EXCHANGE 3 (1999).
Seagoing ships pump ballast water from the ocean into onboard tanks in order to increase safety and maneuverability. Adjusting the quantity of ballast water changes a ship's depth and orientation in the sea, thus affecting the vessel's balance and stability. Cargo weight and placement, weather, and sea conditions affect the amount of ballast water needed for safe operation, so ships typically take in or release ballast water while a voyage is in progress, especially near ports.

Although the use of ballast water is necessary, it is also the "largest single vector of non-indigenous species," with ships inadvertently transporting thousands of species every day. These exotic species are more than just a curiosity. When released into a hospitable habitat, often near a port thousands of miles from their origin, these invasive species may flourish, decimate native organisms, disrupt food chains, and damage economies. For instance, in little more than a decade since ships' ballast water introduced the European zebra mussel into the Great Lakes, the multiplying mussels have regularly clogged intake pipes to cities and factories, aggressively attached to ships and marine structures, encouraged abnormal algae growth, hampered recreational areas, and threatened native organisms. The mussels' rapid population growth has cost the United States perhaps $3 billion to $5 billion in physical and ecological damage. Estimates of America's annual costs attributable to all invasive species, both aquatic and terrestrial, exceed $123 billion. To put this in grim perspective, the estimated insurance losses from the 2001 World Trade Center disaster were $40 billion to $50 billion.

In reaction to this threat, several environmental organizations petitioned the EPA in January 1999 to repeal an EPA rule, section

3. Id.
4. Id.
5. Id. at 39.
6. See UNIVERSITY OF CALIFORNIA SEA GRANT EXTENSION PROGRAM, supra note 1, at 2.
7. See id. at 3; see also Hugh McDiarmid Jr., Environmental Threats to Great Lakes Outpace Scientific Solutions, DETROIT FREE PRESS, Sept. 22, 2003 (describing effects of the even more destructive quagga mussel).
122.3(a),\textsuperscript{11} that excluded ballast water from regulation under the (CWA).\textsuperscript{12} According to the petition, other government efforts to regulate ballast water, such as by the Coast Guard, had failed to stem the tide of invasive species and "do not substitute for compliance with the CWA."\textsuperscript{13} More than four years later, the EPA announced that it was denying the petition.\textsuperscript{14} To justify this denial, the EPA presented several historical analyses, including interpretation of the CWA text, review of legislative history, and the reaction of Congress and other agencies to the EPA's promulgation of section 122.3(a). The EPA also recounted the history of interagency cooperation to control the introduction of invasive species in ballast water. Based on practical concerns as well as its interpretation of historical congressional intent, the EPA decided that "the Coast Guard has already taken the lead in dealing with the problem . . . and it would be duplicative if EPA also began regulating commercial shipping."\textsuperscript{15}

This note discusses shifts in the administrative legal framework that could invalidate the EPA's decision. Part I summarizes the legal justification for the EPA's decision. Part II observes that under the historical legal framework, the EPA has sound legal arguments for deferring to the Coast Guard, especially in light of the difficulties in regulating the thousands of ships that discharge ballast water. Part III undercuts the assumptions anchoring the historical legal framework, however, by pointing out that agency roles and relationships have changed dramatically since the Clinton presidency and especially since September 11, 2001. Part IV argues that EPA wrongly relies on historical assumptions about congressional intent and the Coast Guard's role. Finally, Part V suggests tools for judicial scrutiny of agency deferrals to ensure that agencies do not frustrate the purpose of regulatory statutes over time. Many have argued why the CWA encompasses ballast water, either textually or conceptually. This note assumes that the scope of the CWA does include ballast water discharges and instead focuses on the inadequacy of the EPA's decision-making process in today's shifting administrative context.

\textsuperscript{11} 40 C.F.R. § 122.3(a) (2004); Petition from Pacific Environmental Advocacy Center et al. to Carol Browner, Administrator, EPA (Jan. 13, 1999) [hereinafter Petition], available at http://www.epa.gov/owow/invasive_species/petition1.html.
\textsuperscript{13} See Petition, supra note 11, § I.
\textsuperscript{14} EPA Decision on Petition for Rulemaking to Repeal 40 C.F.R. § 122.3(a), 68 Fed. Reg. 53,165 (Sept. 9, 2003) [hereinafter EPA Decision]. The EPA's dilatory decision came only after the petitioners sued under the Administrative Procedure Act to force the EPA to respond. See N.W. Env't Advocates v. EPA, 340 F.3d 853 (9th Cir. 2003) (approving a mediated settlement requiring the EPA's response by September 2003).
\textsuperscript{15} Paul Rogers, EPA won't Regulate Ship Ballast Discharge, SAN JOSE MERCURY NEWS, Sept. 3, 2003, at B1.
I. THE EPA IS TRYING TO AVOID REGULATING BALLAST WATER UNDER THE CLEAN WATER ACT

Congress enacted the CWA without explicitly mentioning whether it applies to ballast water. The EPA decided thereafter that the CWA did not apply to incidental discharges from a ship's normal operation and that ballast water fell within that type of incidental discharge.\(^\text{16}\) Now, the EPA argues that Congress agrees with (or at least tolerates) those decisions because: (1) the section 122.3(a) rule is based on legislative history, (2) Congress has never amended the CWA to expressly require the EPA to regulate ballast water, and (3) Congress has expressly required other agencies, like the Coast Guard, to address parts of the ballast water problem.\(^\text{17}\) Without explicit congressional instructions, the EPA has some discretion about whether or not to invoke the CWA for ballast water discharges.\(^\text{18}\)

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through pollution controls administered by the EPA.\(^\text{19}\) The CWA prohibits "point sources," including vessels or other floating craft, from discharging pollutants into the nation's navigable waters without a government-issued permit.\(^\text{20}\) Congress excluded "sewage from vessels" and "discharge incidental to the normal operation of a vessel of the Armed Forces" from the definition of pollutant.\(^\text{21}\) In 1973, soon after the CWA’s enactment, the EPA promulgated the rule in section 122.3(a) to also exclude "discharge incidental to the normal operation of a vessel" from the


\(^\text{17}\) EPA Decision, supra note 14, at 7-16.

\(^\text{18}\) Id. at 7.

\(^\text{19}\) 33 U.S.C. § 1251(a) (2000). Although this paper focuses on rule 122.3(a) and permits, other CWA provisions might apply to ballast water in a more limited scope. See Foster, supra note 16, at 118-25 (describing use of CWA section 303(d) to regulate intrastate bodies of water and section 404 to regulate filling or dredging, which might allow continued shipping and concomitant releases of ballast water).

\(^\text{20}\) See §§ 1311(a), 1362(14); Zellmer, supra note 8, at 1235.

\(^\text{21}\) § 1362(6)(A). The CWA defines pollutant as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” § 1362(6).
permit requirement. The EPA thus extended Congress's exclusion for Armed Forces vessels to all vessels used for transportation.

The EPA has justified this exclusionary rule based on the legislative history of the CWA. Relying on the CWA conference committee report, the EPA promulgated the rule because the committee "would not expect the [EPA] Administrator to require permits to be obtained for any discharges from properly functioning marine engines." The EPA therefore decided Congress would not have expected it to require CWA permits for any other type of normal, incidental discharge from a vessel. Since Congress has not modified this exclusionary rule, which the EPA promulgated contemporaneously with the CWA, the EPA now assumes that section 122.3(a) accurately reflects legislative intent.

More significantly, the EPA has noted that for years Congress recognized the problem of invasive species in ballast water but chose legislative solutions outside of the EPA's purview under the CWA. Rather than overruling section 122.3(a)'s exclusion or amending the CWA to apply to ballast water explicitly, Congress delegated responsibility to the Coast Guard to regulate ballast discharge through a series of legislative acts in the 1980s and 1990s. Although the EPA has recognized that it could legally regulate ballast water under the CWA, the agency has maintained that Congress's delegation to the Coast Guard indicates that Congress did not intend for the EPA to do so, but rather that Congress intended for the Coast Guard to take the lead in any effort to regulate ballast water to control invasive species.

II. THE EPA INTERPRETS ITS RESPONSIBILITIES OVER BALLAST WATER BY USING A LEGAL FRAMEWORK THAT RELIES ON HISTORICAL AGENCY ROLES AND THE ORIGINAL CONCEPTION OF STATUTES

The EPA's decision not to regulate ballast water raises fundamental questions pertaining to agency execution of congressionally delegated responsibilities. What is the extent of those responsibilities over time? When multiple agencies have congressionally delegated responsibilities to tackle a shared problem, what discretion do the different agencies have? Consideration of these questions reveals that by overemphasizing historical agency roles when deciding whether to regulate new areas such

22. 40 C.F.R. § 122.3(a) (2004).
24. See EPA Decision, supra note 14, at 13-14 (noting that courts defer to agency rules that are contemporaneous with the congressional act and that the agency has interpreted consistently).
26. See Zellmer, supra note 8, at 1241 (citing letter from EPA Assistant Administrator Charles Fox).
27. See EPA Decision, supra note 14, at 8-9.
as invasive species in ballast water, the EPA relies on a legal framework that torpedoes the very ecological systems it is authorized to protect.

Under traditional analysis and statutory construction, the EPA has much persuasive historical support for its decision not to regulate ballast water under the CWA. The EPA correctly points out that Congress has not clearly ordered it to regulate ballast water discharges by using the usual CWA framework, which allows point sources to discharge pollutants only by permit.\(^\text{28}\) If the EPA had never implemented section 122.3(a) through rulemaking, the petitioners would have had a stronger challenge to the EPA's unwillingness to use the CWA to regulate ballast water. Instead, the long-standing existence of the rule suggests that Congress might agree with the EPA's interpretation of the CWA.

The EPA's decision not to regulate ballast water rekindles the debate about whether an agency should attempt to follow the conception of its statutory mandate—to address the specific problems originally envisioned by the enacting Congress—or the concept of its statutory mandate—to address the type of problems Congress intended to remedy, including specific problems that the enacting Congress had not foreseen.\(^\text{29}\)

The assumption underlying the conception approach is that an agency has a static role unless Congress amends that role by further legislation.\(^\text{30}\) The assumption underlying the concept approach is that congressional intent is best fulfilled by allowing an agency to adapt its regulations to changing circumstances, because Congress realistically may be unable to reconsider specific, unforeseen problems that an agency will confront. Courts generally defer to an agency's interpretation of its own statutory mandate, unless that interpretation is contrary to the plain meaning of statute or is unreasonable.\(^\text{31}\) Reviewing agency interpretations in that light, the Supreme Court has sometimes considered and sometimes disregarded historical context when deciding whether an agency's action is consistent with its role delegated by Congress.\(^\text{32}\)

The EPA's decision is buttressed by courts' historically popular fondness for the conception approach over the concept approach when interpreting agencies' authorizing statutes. In FDA v. Brown & Williamson, the Supreme Court placed great weight on the conception of the Food and Drug Administration's (FDA) authority when deciding that

---

28. Id. at 11.
30. For a discussion of concept versus conception beyond the administrative context, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977).
the agency, in light of its long-standing choice not to regulate tobacco, could not suddenly begin regulating it without some further instruction from Congress. Likewise, a court could agree that Congress had not intended for the EPA to regulate ballast water, at least not under the CWA. The EPA implemented section 122.3(a) in 1973, shortly after Congress enacted the CWA, and at no time since has Congress explicitly said whether the EPA should regulate ballast water as a pollutant under CWA. Given that Congress learned of the problem of invasive species in ballast water within the last twenty years, regulation of ballast water was likely not part of the original congressional conception of the EPA’s responsibility.

III. AGENCY ROLES AND RELATIONSHIPS HAVE CHANGED DRAMATICALLY, PREVENTING THE COAST GUARD FROM FULFILLING ITS HISTORICAL RESPONSIBILITIES

Interestingly, the EPA decision presents legal justifications only after arguing the “practical and policy considerations” that support keeping section 122.3(a), perhaps to emphasize the modern zeitgeist of informal agency collaboration instead of rigid agency roles. Implying that the CWA is not the only effective tool against invasive species, the EPA decision notes that EPA and the Coast Guard signed a Memorandum of Agreement in the summer of 2001, establishing joint programs to develop technologies and standards for controlling invasive species in ballast water. Suggesting that EPA activity might be redundant, the EPA

34. See id. at 159-60 ("Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency’s expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.").
35. EPA Decision, supra note 14, at 2, 11; see also FDA, 529 U.S. at 160 ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). Perhaps recognizing that EPA should not be able to ignore the ballast water problem, Congress has now introduced bills that would give the EPA and Coast Guard “dual authority over ballast water.” EPA Won’t Require Permits for Ballast Water, DETROIT FREE PRESS, Sept. 12, 2003; see also Gene Schabath, Bill Would Ban Foreign Ships’ Ballast Water, DETROIT NEWS, Sept. 24, 2003 at E1. (describing legislation that would require ships to discharge 95% of their ballast water before entering the Great Lakes, “to offset the EPA ruling”). This continues a trend of legislation that acknowledges the ballast water problem and yet has not clarified whether the CWA should apply. See National Invasive Species Act of 1996, Pub. L. No. 104-332, 110 Stat. 4073; Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990, Pub. L. No. 101-646, 104 Stat. 4761; Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297 (1980) (preceding congressional recognition of ballast water problem).
36. See 136 CONG. REC. H8492 (1990) (noting that zebra mussels were introduced five years earlier in 1985).
37. EPA Decision, supra note 14, at 7-9.
38. Id. at 8.
A. The EPA Tries to Defer to a Coast Guard That No Longer Exists

The EPA decision, however, conveniently ignores that the squalls of homeland security threats have capsized the Coast Guard's capabilities. Although the Coast Guard's "core roles are to protect the public, environment, and U.S. economic and security interests," the agency's emphasis has shifted dramatically. Motivating this shift is the government's focus on terrorism and national security since the September 11, 2001 attacks, which in 2003 led to the Coast Guard's "substantially reinventing itself because of its new security role" with twenty-one other agencies in the new Department of Homeland Security. The Coast Guard's new responsibilities added to, rather than replaced, existing duties. In discussing the prospect of the Coast Guard fulfilling its non-security missions, a congressional oversight committee noted that "given the recent Coast Guard deployments in the Persian Gulf and in the Mediterranean and the implementation of Operation Liberty Shield . . . these goals will not likely be achieved." Furthermore, delays and cost increases in an overdue revamping of the Coast Guard's fleet threaten to "hinder the Coast Guard's ability to carry out its security and non-security missions." Even though the Coast Guard has efficiently used its resources, "[e]ven before September 11, the Coast Guard appeared hard-pressed to perform all its various missions at desired levels with available assets and resources." In spite of the recognized importance of the Coast Guard to national security, the administration's 2004 budget request was less than the Coast Guard's 2003 budget request. Against that backdrop, the General Accounting

39. Id.
41. See Challenges Facing the Coast Guard as it Transitions to the New Department: Hearing Before the Senate Subcommittee on Oceans, Atmosphere, and Fisheries, Committee on Commerce, Science, & Transportation, 110th Cong. i, 1 (Feb. 12, 2003) [hereinafter GAO Testimony] (designating the implementation and transformation of DHS as a high-risk area).
42. Id. at 1.
43. Subcommittee Memorandum, supra note 40, at 3.
44. Id.
45. RONALD O'ROURKE, CONGRESSIONAL RESEARCH SERVICE, HOMELAND SECURITY: COAST GUARD OPERATIONS—BACKGROUND AND ISSUES FOR CONGRESS 2 (2002).
46. See id. at 3; Subcommittee Memorandum, supra note 40, at 3; see also Meredith Cohn, Better security ordered at ports, BALTIMORE SUN, Oct. 24, 2003, at 1A ("Although the Coast Guard has estimated that [port] security improvements will cost $7.3 billion, only about $400 million has been allocated from federal sources").
Office (GAO) has noted that "development has not begun on a long-term strategy that outlines how [the Coast Guard] sees its resources... being distributed across all of its various missions, as well as a timeframe for achieving desired balance among missions."47

In addition to the Coast Guard’s wavering capacity to fulfill its primary national security mission, the continuing reorganization of the agency poses barriers to any interagency efforts. As the GAO noted in a report for the Senate:

Such barriers include agencies' concerns about protecting jurisdictions over missions and control of resources, differences in procedures, processes, data systems that lack interoperability, and organizational cultures that may make agencies reluctant to share sensitive information... Specifically, our work has shown that the Coast Guard faces formidable challenges with respect to establishing effective communication links and building partnerships... with external organizations.48

Despite its efforts, the Coast Guard is under-funded and cannot even meet its national security obligations. The agency will therefore unlikely be able to fulfill its share of any interagency efforts to regulate ballast water.

B. *The EPA Wrongly Defers to the Coast Guard Under the Pretense of Efficient Agency Collaboration*

The Coast Guard’s evolution from a multifaceted agency to one with the overriding priority of national security undercuts the EPA’s assertion that “it would be duplicative if EPA also began regulating commercial shipping” to address invasive species.49 In evaluating the reasonableness of any agency’s deferral of its responsibilities, courts must balance agencies’ ability to fulfill what Congress intended with the executive branch’s prerogative about how agencies interact.

The EPA and the Coast Guard’s current obsession to redefine their roles is just the latest step in a trend that began with a 1971 memorandum from the Office of Management and Budget (OMB) to the EPA, requiring “OMB clearance for all EPA decisions that affected the policies of other federal agencies, imposed significant costs on non-federal...

47. See GAO Testimony, *supra* note 41, at 6 (designating the implementation and transformation of DHS as a high-risk area).
48. *Id.* at 7.
49. See Rogers, *supra* note 15.
sectors, or created additional demands on the federal budget." Later, President Reagan's Executive Order 12,291 gave OMB further oversight over agencies' regulatory activities and ensured that no agency would be autonomous in defining and executing its mission. Under the pretext of reforming the planning and coordination of agencies' regulatory programs, President Clinton ordered agencies to "maximize net benefits" when choosing whether to regulate. The size of these benefits depends greatly on other agencies' activities. For instance, if the Coast Guard regulates the discharge of ballast water effectively, little additional benefit would come from additional regulatory activity by the EPA or other agencies. Envisioning the Coast Guard of old, the EPA pretends that it does not need to regulate ballast water under the CWA because the Coast Guard has alternative regulatory authority and because the agencies plan to cooperate on promoting standards and public awareness. In truth, the Coast Guard has no regulatory power comparable to the EPA's CWA authority, either in scope or in effect.

IV. THE EPA UNREASONABLY RELIES ON HISTORICAL COAST GUARD CAPABILITIES AND CONGRESSIONAL CONCEPTIONS

Unfortunately, when agencies have free rein to "cooperate," the dynamism of agency missions and resources can lead to neglect of critical regulatory programs. Protecting its own resources, an agency has an incentive to exploit statutory ambiguities and pass the buck to other agencies. This incentive grows when, as during the time since September 11, 2001, the government suddenly reallocates resources among agencies in response to political shifts. Compared to the rigidly defined roles of agencies before the rise of the regulatory state, the flexibility of agencies to coordinate regulations with one another is generally accepted as constructive. Nevertheless, an agency that exercises this flexibility may act, or fail to act, in derogation of the concept or congressional purpose behind regulatory statutes.

A. By Asserting that Invasive Species in Ballast Water Are Another Agency's Problem, the EPA Flouts the CWA's Purpose

In light of the Coast Guard's constrained ability to manage the harmful invasive species transported in ballast water, the EPA decision not to regulate ballast water fails to meet the CWA's purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."\(^{55}\) Invasive species can destroy chemical integrity by "bioaccumulation of toxics that are passed up the food chain."\(^ {56}\) They can destroy physical integrity by proliferating "to clog water pumps and disrupt water supply, [and] threaten stability of... levese."\(^ {57}\) They destroy biological integrity by "consumption of native species and their food sources, dilution of native species through cross-breeding, alteration of native species' habitats, and poisoning of native species."\(^ {58}\) The San Francisco Regional Water Quality Control Board therefore called invasive species "one of the greatest threats to the integrity of the San Francisco Estuary ecosystem, perhaps as great as any pollutant under the Clean Water Act."\(^ {59}\)

Using a concept approach in interpreting the CWA with respect to its purpose, the EPA could regulate ballast water to prevent this destruction.\(^ {60}\) Invasive species in ballast water were not part of the original congressional conception of the CWA, since Congress only later recognized the problem of invasive species.\(^ {61}\) Nevertheless, the EPA acknowledges the possibility of using its CWA authority to prevent discharges of untreated ballast water in territorial waters.\(^ {62}\) In responding to the petition to repeal the section 122.3(a) exclusion for incidental discharges from vessels, the EPA's assistant administrator said:

I share your view that non-indigenous species pose a serious threat to the ecological health of the Nation's waters and the economies they support. I also agree that the Clean Water Act provides EPA with broad authority for controlling the discharge of pollutants, and that authority could be extended to the control of ballast water discharges from vessels in some cases.

For a pollutant as significant as untreated ballast water, Congress would have likely intended for the EPA to employ the CWA without any further directive from Congress.

\(^{56}\) EARTHJUSTICE, supra note 9.
\(^{57}\) Id.
\(^{58}\) Id.
\(^{59}\) Id.
\(^{60}\) See supra § II.
\(^{61}\) See supra § III.
\(^{62}\) Letter from J. Charles Fox, Assistant Administrator, EPA, to Craig Johnston, Pacific Environmental Advocacy Center (Apr. 6, 1999).
B. Historical Agency Roles and Capabilities Do Not Make the EPA’s Decision Reasonable

The EPA’s history of not employing the CWA to combat invasive species is not decisive because “[unexercised powers of an agency] are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise.” For instance, *National Petroleum Refiners Ass’n v. FTC* upheld the Federal Trade Commission’s interpretation of a statute that was ambiguous about the agency’s authority to promulgate substantive rules defining standards of impermissible, unfair competition. The Federal Trade Commission (FTC) for decades had not exercised this authority. During all those years, Congress had never expressly clarified or indicated whether the FTC had such delegated authority, though Congress did enact subsequent statutes that explicitly granted or withheld such authority for the FTC with respect to certain industries. Importantly, the statute did not prohibit the FTC from exercising such authority.

Similarly, the EPA has admitted that it has authority to use the CWA to regulate ballast water discharges, even though Congress has not expressly ordered it to employ the CWA for this purpose. In the wake of the EPA Decision not to regulate ballast water under the CWA, Congress is considering bills to give the Coast Guard and the EPA dual authority over the issue. However, this does not mean that the EPA’s interpretation is correct. To the contrary, Congress, knowing the severity of the ballast water problem, is likely reacting to the EPA Decision with “understandable caution” by initiating more explicit legislation.

The EPA regulation by the CWA would be consistent with existing statutory demands, unlike the situation in *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court saw that the FDA’s sudden efforts to

65. Id. at 693-94.
66. Id. at 695-97 (noting that Congress may have been more specific about FTC’s authority in later statutes not because FTC did not already have the authority, but because “uncertainty, understandable caution, and a desire to avoid litigation” warranted the additional clarity in the statutory text).
68. Schabath, supra note 35; Doug Haddix, *Destructive Stowaways*, COLUMBUS DISPATCH, Oct. 28, 2003, at 1A (noting that a bill requiring the agencies to cooperate in creating standards by 2011 for treating ballast water had stalled in both House and Senate committees).
69. See Nat’l Petroleum Refiners Ass’n, 482 F.2d at 696 (describing why Congress might act to clarify an agency’s duties in legislation subsequent to the enactment of the agency’s authorizing statute).
regulate tobacco were inconsistent with the statutory command. The FDA’s longstanding disavowal of authority was thus consistent with statutory requirements. Here, without any longstanding disavowal, the EPA is arguing that an old rule, section 122.3(a), which excluded “discharge incidental to the normal operation of a vessel” from regulation under the CWA, is consistent with the statutory conception. The EPA primarily justifies its rule not from an explicit statutory directive, but from legislative history: “[The Conference Committee] would not expect the Administrator to require permits to be obtained for any discharges from properly functioning marine engines.”

The EPA Decision wrongly assumes a static view of congressional intent and of agencies’ roles and capabilities. Nearly all of the evidence that the EPA marshals to support its position predates September 11, 2001. For instance, the EPA Decision argues that the legislation enacted since Congress learned of the ballast water problem indicates that Congress would not have wanted the EPA to employ the CWA as a solution. However, that legislation delegated authority to a Coast Guard that is unlike today’s organization. Any pre-September 11 congressional acquiescence or indifference to the EPA’s rule excluding ballast water from regulation should not be presumed to apply now. The fact that Congress has chosen to deploy additional tools and agencies to fight invasive species proves only that Congress is concerned about invasive species, not that the EPA’s choice to avoid using the CWA is correct. As the Supreme Court held in National Petroleum Refiners Ass’n v. FTC:

[w]here there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency’s viewpoint and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the de facto ratification argument is unwise. In such circumstances, we must perform our

70. Brown & Williamson, 529 U.S. at 133-35 (2000) (finding that Congress only authorized FDA to regulate drugs with “safe” uses, and tobacco is never safe).
71. Id. at 145-46.
72. EPA Decision, supra note 14, at 2.
73. Id.
74. Supra § I.
75. EPA Decision, supra note 14, at 3–6; see also Petition, supra note 11, § IV (arguing that 1996 congressional action to exempt incidental discharges from Armed Services vessels is evidence that Congress did not intend the exclusion to apply to non-Armed Services vessels); EPA Decision, supra note 14, at 16 (arguing that congressional review of the CWA in 1977, 1981, and 1987 prove that Congress acquiesced to EPA’s section 122.3 exclusion).
customary task of coming to an independent judgment as to the statute's meaning....

C. Relying on the Coast Guard Instead of the CWA Is Unreasonable

The Coast Guard's efforts have been ineffective in stemming the tide of invasive species. Although the Coast Guard has taken some steps under its statutory authority to research the ballast water problem, create guidelines for vessels' discharges, and monitor ships' records, the EPA's own study, even before September 11, 2001, found that the Coast Guard's ballast water program "does not sufficiently protect against [invasive species] spread from ballast water discharges." In spite of both this finding and the inevitable shift in the nation's priorities after September 11, 2001, the EPA optimistically claimed on September 27, 2001 that the "Coast Guard is expected to take several actions in the near future to better incorporate new and more effective ballast water treatment technologies... [providing] the most effective approach for preventing [invasive species] introductions."

If the EPA had responded to the 1999 Petition sooner, its justifications would have been more compelling. Instead, the EPA is passing off the responsibility of regulating ballast water to the Coast Guard, an agency that cannot even meet the demands of its national security mission. The EPA is participating in joint committee work to research technologies for ballast water treatment and create an environmental impact statement for the Coast Guard's guidelines for

---

77. 482 F.2d 672, 697 (D.C. Cir. 1973).
78. One of the best case studies illustrating how the Coast Guard and other agencies inspect ships in practice resulted from a six-month investigation by Doug Haddix. Haddix, supra note 68 ("[A]t least four significant invasive water pests attributed to ballast tanks have been discovered in the Great Lakes since the Coast Guard rules took effect 10 years ago"). Regarding Coast Guard regulation of ships' ballast water in the Great Lakes region, Haddix notes that although the Great Lakes law carries penalties, no fines have been levied against shippers, according to U.S. Coast Guard records obtained... through the federal Freedom of Information Act.

Five warning letters have been issued, the Coast Guard said.

In fact, the Coast Guard has never produced a report on [its] mandatory ballast-water exchange program for the Great Lakes. Thousands of pages of ballast-water reports submitted by ships during the past decade have yet to be entered into a computer database.

Id.

80. Id.; see, e.g., Memorandum of Understanding between the Coast Guard and EPA regarding EIS activities under NEPA for NANPCA rulemaking (Aug. 2003), available at http://www.epa.gov/owow/invasive_species.
81. See supra § IV.
vessels discharges. None of these actions, however, have the regulatory bite of the CWA.

In particular, the CWA includes a citizen-suit provision that gives private actors standing in federal court to hold the EPA accountable for ensuring that polluters comply with CWA requirements. Compliance with the Coast Guard's guidelines, on the other hand, is currently voluntary. Without any citizen-suit provision, it is questionable whether the public could directly hold the Coast Guard accountable for enforcing those guidelines. EPA under-enforcement of the CWA, which allows discharges only by permit, would violate statutory text and procedures. Under-enforcement of Coast Guard guidelines, in contrast, does not clearly violate any statute and might too easily be excused as being within the Coast Guard's prosecutorial discretion, which merits court deference. By passing its responsibility "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" to the Coast Guard while knowing that today's Coast Guard is ineffective in combating invasive species, the EPA ensures that invasive species will continue to cause economic and ecological damage in America.

V. JUDICIAL SCRUTINY IS NOT ONLY PROPER, BUT NECESSARY FOR AN AGENCY'S DEFERRAL OF RESPONSIBILITIES TO OTHER AGENCIES

To address cases such as the EPA's ballast water decision, courts need to evaluate whether an agency's passing the buck is unreasonable, not just in the context of original legislative intent and historical agency roles, but also in the context of today's administrative realities. When deciding whether an agency is appropriately deferring responsibility to another agency, a court's failure to consider agencies' current roles and capabilities might result in two undesirable outcomes. First, an agency, protective of its own resources, might succeed in expending another agency's limited resources instead. This could result in inefficient governance. Second, the misguided assumption that historical agency relationships are static might increase the risk that political influence from the executive branch will override congressional intent and

82. See EPA Decision, supra note 14, Attachment 1.
84. See 33 C.F.R. 151 (2003).
86. See Heckler v. Chaney, 470 U.S. 821, 833 (1985) (holding that court cannot review agency's decision not to undertake enforcement action unless the statute provides enforcement guidelines for the agency); Arnow v. NRC, 868 F.2d 223 (7th Cir. 1989) (extending to NRC the Chaney doctrine presuming unreviewability of agency non-enforcement decisions). For a criticism of this doctrine, see Sunstein, supra note 85, at 675-683.
contradict the statutory concept. An executive who prefers less regulation could simply direct agencies, whenever possible, to defer to underfunded, understaffed agencies that realistically will be unable to enforce the regulations. These effete agencies may in turn try to defer to private industries that will be unable or unwilling to accomplish what Congress intended. Courts can minimize these undesirable outcomes by preventing agencies from tailoring their responsibilities based solely on static, historical evidence while ignoring the current regulatory environment. Sailing by looking in the rearview mirror jeopardizes the effectiveness of congressional delegation of regulatory authority to agencies.

A. Courts Can Review Agency Decisions About Their Roles in Relation to Other Agencies

Despite the trend toward interagency cooperation and flexibility, agencies must acknowledge that their expertise does not include knowing how well other agencies can substitute for their own efforts. Courts need not defer to an agency's regulatory interpretation if it is contrary to statutory requirements, purposes, and policies. Nor must courts defer to an agency's interpretation of its own statutory responsibilities if that interpretation is unreasonable. Most importantly, courts may carefully review whether one agency's interpretation of its responsibilities with respect to another agency's responsibilities is correct. An agency has some latitude in interpreting its mission, but an agency's interpretation of its role in relation to other agencies that overlap the same regulatory area merits less deference. Courts do not presume that an agency has

88. See, e.g., Paul Clancy, State Delays Project to Eliminate Invasive Zebra Mussels; Funds Unavailable, Leaving Contractors on Hold for a Moment, VIRGINIAN-PILOT, Nov. 1, 2003, at B3.
89. See, e.g., Rebecca Rosen Lum, Port of Oakland—no money, new security rules, CONTRA COSTA TIMES, Oct. 28, 2003, at A4 (noting that in response to funding shortfalls for improving port security systems, "[Homeland Security Secretary] Ridge has suggested that the private sector should fund the measures").
90. Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988) (holding that a court "need not accept an agency's interpretation that frustrates the underlying congressional policy"); N.Y. State Dep't of Social Servs. v. Bowen, 846 F.2d 129, 134 (2d Cir. 1988) (finding no due deference when an agency's interpretation is contrary to statutory language and purpose and defies common sense); Hart v. Bowen, 799 F.2d 567, 570 (9th Cir. 1986) (finding no due deference when an agency's interpretation is contrary to statutory purpose).
93. Bowen v. Am. Hospital Assoc., 476 U.S. 610, 642-43 n.30 (1986) (refusing to defer to any one agency's interpretation of promulgated antidiscrimination regulations); Div. of Military & Naval Affairs v. FLRA, 683 F.2d 45, 48 (2d Cir. 1982) (holding that "no great deference is due an agency interpretation of another agency's statute").
expertise about other agencies' roles.\textsuperscript{94} Court deference would be misplaced. "When interpretive authority is split between several different agencies, it may be unrealistic to apply traditional deference principles. If twenty-seven different agencies have placed twenty-seven different glosses on a statute, the court may not accept them all."\textsuperscript{95}

A court will likely apply close scrutiny to an agency's characterization of its inaction as discretionary non-enforcement. Close scrutiny seems especially appropriate in the rulemaking context, where agency inaction affects the fate of many, not only the fate of a few as in agency adjudications.\textsuperscript{96} If a change in factual premise spurs the public to petition an agency to make, modify, or repeal an existing rule, a court can review whether agency inaction and its prospective implications are consistent with the agency's statutory responsibilities. The outcome of this review may turn on whether the court takes a conception or a concept view of the statutory responsibilities.

Even an agency's longstanding interpretation may be impermissibly at odds with a statute's concept. As in \textit{National Petroleum Refiners Ass'n v. FTC}, which upheld the FTC's innate authority to make substantive rules despite never having exercised that authority before, the EPA's historical avoidance of using the CWA to regulate ballast water is not determinative.\textsuperscript{97} In \textit{National Petroleum Refiners}, the agency exercised its latent authority against gasoline retailers, even though Congress had not clearly spoken on the FTC's authority in that specific circumstance.\textsuperscript{98} In the face of such ambiguity about congressional intent, the court could neither defer to Congress by means of statutory text nor defer to the agency's rule. In the FTC's authorizing statute, the original congressional intent, the conception, almost assuredly did not envision that the agency would someday regulate gasoline retailers' labeling of octane ratings to ensure fair trade practices. Nevertheless, as ambiguous as the conception may have been with respect to gasoline octane ratings, the FTC's purpose, the concept behind the FTC's authorizing statute was clear. The

\textsuperscript{94} Bowen, 476 U.S. at 642 n.30; see also Russell L. Weaver, \textit{Deference to Regulatory Interpretations: Inter-Agency Conflicts}, 43 ALA. L. REV. 35, 41-43 (noting that deference assumes that a single agency has primary responsibility for a regulatory scheme, and no single agency is expert at interpreting interagency responsibilities).

\textsuperscript{95} Weaver, supra note 94, at 67; see also KMart Corp. v. Cartier, Inc., 486 U.S. 281, 293 n.4 (1988) (analyzing agencies' varying interpretations of the same phrase in different statutes and contexts). \textit{But see} Chicago Mercantile Exch. v. SEC, 883 F.2d 537, 547 (7th Cir. 1989) (finding that when agencies have competing interpretations, the "disagreement doesn't make the court the recipient of interpretive powers").

\textsuperscript{96} See Am. Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) (holding that agency decisions whether to deploy a rule are "more likely to turn upon issues of law" than fact-specific, enforcement decisions and are thus more likely to merit court review).

\textsuperscript{97} See 482 F.2d 672, 673-74 (D.C. Cir. 1973).

\textsuperscript{98} See id.
National Petroleum Refiners court thus asked whether the agency’s rule and decision were consistent with that concept. 99

Courts must have a way to determine if an agency’s use of congressionally delegated authority is consistent with legislative intent. 100 In making this determination, a court need not defer to an agency’s interpretation of its responsibilities if statutes, even impliedly, contradict that interpretation. 101 An “agency will not always render better or even correct interpretations merely because it has authored a regulation or has superior expertise.” 102

B. Courts Should Decide Whether Agency Decisions About Their Roles Are Reasonable in Light of the Concept Underlying Their Regulatory Statutes

A court should decide whether section 122.3(a) and the EPA decision not to repeal that rule are consistent with the concept of the CWA. The conception of the CWA undoubtedly did not include the problem of invasive species in ballast water. In enacting the CWA, Congress did not foresee that the EPA might someday need to regulate zebra mussels and mitten crabs, which can threaten clean water “as great as any pollutant under the Clean Water Act.” 103 As in National Petroleum Refiners, Congress simply has not spoken clearly. A court would thus need to determine whether the EPA decision is consistent with the CWA concept, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 104 despite the EPA’s longstanding choice not to employ the CWA to fight invasive species.

As in Halverson v. Slater, where the D.C. Circuit prohibited the Department of Transportation from transferring the Coast Guard’s responsibilities to another agency despite the lack of any express statutory provision prohibiting the transfer, the CWA does not expressly prohibit the EPA from working with other agencies to accomplish its mission. 105 The Halverson court, however, reviewed the entire statutory

99. Id.
102. Weaver, supra note 94, at 54.
103. See EARTHJUSTICE, supra note 9 (quoting the San Francisco Regional Water Quality Control Board).
context and decided that Congress would not have intended the reassignment of the Coast Guard's responsibilities. Similarly, a court reviewing the EPA's delegation of its responsibility to regulate pollutants from point sources to the Coast Guard should consider the various regulatory statutes to determine whether Congress would have intended for the EPA to avoid regulating ballast water under the CWA.

Only judicial review can ensure that the EPA continues to carry out the purpose of the CWA over time. The EPA relies heavily on an early, timeless conception of CWA. The EPA claims that section 122.3(a) merits special deference from the courts because: (1) the EPA, the agency that administers the CWA, promulgated that regulation; (2) section 122.3(a) is contemporaneous with the CWA's enactment and thus its conception; (3) the EPA has consistently followed section 122.3(a); (4) the choice to create section 122.3(a) falls within the EPA's expertise; and (5) Congress has acquiesced to section 122.3(a) and its conception of the CWA. These reasons ignore evidence that the EPA is the only agency currently equipped to stem the tide of invasive species introduced by ballast water now that the terrorist attacks of September 11, 2001, have changed the role of the Coast Guard. Changes in the factual premises underlying section 122.3(a) over time should compel a reviewing court to consider the concept behind the CWA, not an outdated conception.

C. Deferring to the Coast Guard Instead of Invoking the CWA Is Also Unreasonable if the EPA Has no Accountability for the Coast Guard's Success in Regulating Ballast Water Discharges

Most importantly, in reviewing whether the EPA's avoidance of employing the CWA is reasonable, a court should consider the agency's oversight of the Coast Guard. In National Park & Conservation Ass'n v. Stanton, the National Park Service decided to delegate its obligation to manage a National Scenic River to a local council, perhaps in the spirit of cooperating with regional stakeholders. Congress wanted to encourage local cooperation in managing the river, but the Park Service's delegation to the local council was deemed unlawful because the council was not bound to the same statutory obligations as the Park Service.

106. Id.
109. 54 F. Supp. 2d 7 (D.D.C. 1999) (holding that National Park Service could not delegate authority to organizations over which it had no control).
110. See id. at 9-10.
111. Id. at 18 ("[E]xtensive legislative history shows that Congress was aware of the unique situation in the Niobrara (i.e., largely privately owned land), and strongly encouraged local participation in the management of the area.").
112. Id. at 18.
The court focused not only on the text of the statute, but also on the Park Service's lack of control over the delegatee. Of particular importance was that the Park Service "retains no oversight over the Council, no final reviewing authority over the Council's actions or inaction, and the Council's... interests are likely to conflict with the national environmental interests that NPS is statutorily mandated to represent." This lack of control conflicted with the will of Congress, and "[n]othing in the statutes or legislative history gives NPS the discretion to completely abdicate its responsibilities."

National Park & Conservation Ass'n v. Stanton indicates that a deferring agency must retain final reviewing authority over the delegatee. Although the EPA Decision at issue here makes some arguments that rationalize keeping section 122.3(a) based on legislative history, the rule and the EPA Decision to retain it are unreasonable because the EPA knows that the Coast Guard is unable to fulfill the EPA responsibility "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Even the EPA's own study of the problem revealed that the Coast Guard has been impotent in maintaining, let alone restoring, the physical and biological health of waters and ecosystems.

While encouraging agencies to cooperate and make efficient use of their resources is sensible, courts must ensure that the EPA does not push its congressionally delegated responsibility onto a sister agency and then feign surprise when the sister agency fails to fulfill that responsibility. Similar to the statute discussed in National Park & Conservation Ass'n, nothing in the CWA gives the EPA the discretion to completely abdicate its responsibilities. Although the Coast Guard ultimately must answer to Congress and so is unlike the local council delegatee in National Park & Conservation Ass'n, the key principle still holds that the EPA must retain meaningful, final authority to ensure that American waters and species are protected from invasive species introduced by ballast water. The EPA must have an intelligible method to assess whether the Coast Guard is successfully fighting waterborne invasive species. The EPA must also have a plan to use its available tools, such as CWA permits, to

113. ld. at 20.
114. Id. ("NPS may enter into cooperative agreements with local entities in carrying out its obligations, the fact remains that the administration of such areas is still the responsibility of NPS to a local entity.").
115. Id. at 7.
116. EPA Decision, supra note 14, at 7, 11.
accomplish that task if the Coast Guard cannot. Anything less is unreasonable.

CONCLUSION

Invasive species introduced in ballast water have threatened the integrity of the nation's waters, which the EPA is supposed to protect. Despite having authority to regulate this area under the Clean Water Act, the EPA prefers to defer to the Coast Guard, or at least to a historical version of the Coast Guard that once might have had the resources to regulate ballast water effectively. Today's Coast Guard cannot realistically focus on anything other than national security, however. Thus, the EPA's deferral to the Coast Guard is unreasonable.

The EPA, like the Coast Guard and other agencies, is eager to look at its mission anew and reshape its role in an era when environmental protection receives less attention than the economy and terrorism. Responding to criticism about a sharp decline in the agency's issuance of violation notices and fines under the George W. Bush administration, EPA Administrator Mike Leavitt said, "The agency has what we refer to as 'smart enforcement'... Our focus is on enforcement that changes behavior in a positive way." This suggests that the EPA is now less interested in the heavy-handed, alienating tactics of citing and fining polluters, and in costly, time-consuming referrals for prosecution.

The EPA's reliance on the Coast Guard's ballast water regulations, which encourage compliance with voluntary guidelines and aim to educate shippers about how to discharge or treat ballast water properly, is in the spirit of "smart enforcement." Unfortunately, the result has been a continued explosion of invasive species in the nation's waterways. This unchecked invasion is contrary to the EPA's responsibility under the CWA to protect waters of the United States.

In today's era of downsized government and "smart enforcement," agencies face the additional pressure to protect their resources. When faced with a new area of regulation within their concept and purpose, agencies will be tempted to avoid regulating unless Congress explicitly instructs them. Instead, they will prefer to sail by looking in the rearview

122. See id.
123. See supra note 78.
124. See supra note 79.
mirror, relying on historical regulatory roles of agencies and the literal instructions, or conception, of Congress.

When Congress has given an agency authority under a statute, as is the case with the EPA authority under the CWA, the courts have a critical responsibility to review the agency’s choice not to regulate. Courts should not defer to an agency’s interpretation of its own statutory authority in relation to other agencies. Nor should courts ignore the ability of a delegatee agency to accomplish its mission. Although agency cooperation with other agencies can be efficient and effective, courts must ensure that agencies such as the EPA do not pass regulatory responsibility to other agencies that are beyond their influence and authority.