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 15 *Diversity, Friends of the Earth and Marcelin Keever*

16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**
 18 **(San Francisco Division)**

19 CENTER FOR BIOLOGICAL DIVERSITY,
 20 a nonprofit corporation; FRIENDS OF THE
 21 EARTH, a nonprofit corporation; and
 MARCELIN KEEVER, an individual,

22 Plaintiffs,

23 v.

24 MICHAEL S. REGAN, in his official capacity
 25 as Administrator of the U.S. Environmental
 Protection Agency, and U.S.
 26 ENVIRONMENTAL PROTECTION
 AGENCY,

27 Defendants.

Case No. 3:23-cv-535

**COMPLAINT FOR DECLARATORY
 JUDGMENT AND INJUNCTIVE RELIEF**

(Clean Water Act, 33 U.S.C. §§ 1251–1389)

INTRODUCTION

1
2 1. The U.S. Environmental Protection Agency’s (EPA’s) failure to address pollution
3 from oceangoing vessels as required by the Clean Water Act has caused significant harm to aquatic
4 ecosystems. One type of vessel pollution, ballast water, is widely recognized as a major pathway for
5 the introduction and spread of aquatic invasive species and human and animal pathogens. Non-native
6 plants and animals, harmful algae, and diseases are carried in ballast water and cause great economic
7 and environmental damage when they are subsequently released into and invade new waters.

8 2. Once introduced into new waters, invasive species can reproduce and spread rapidly.
9 These invaders have devastated fisheries and caused irreversible environmental harm to coastal and
10 inland waters. For example, zebra mussels from ballast water discharges spread rapidly across the
11 country—from the Great Lakes to the Gulf and western states—in just two decades. Aquatic invasive
12 species cause \$9 billion in damages annually to our infrastructure for public water supplies, industry,
13 and energy generation systems.

14 3. Vessels also routinely discharge oil, grease, detergents, biocides, and other
15 contaminants into U.S. waters from deck washing, emissions scrubbers, plumbing systems, and fish
16 holds.

17 4. Inadequate regulation of water pollution from vessels puts communities at risk of
18 exposure to contaminated waters and water-borne diseases. These burdens may fall
19 disproportionately on environmental justice communities that lack access to clean water.

20 5. The Clean Water Act, as amended by the Vessel Incidental Discharge Act of 2018
21 (VIDA), required EPA to establish standards for ballast water and other incidental discharges by
22 December 4, 2020. 33 U.S.C. § 1322 (p)(4)(A)(i). To date, EPA has not established such standards.
23 Accordingly, EPA missed, and continues to miss, this statutory deadline, and is now over two years
24 late in establishing vessel discharge standards as mandated by Congress.

25 6. VIDA further requires the U.S. Coast Guard to issue regulations that implement the
26 vessel discharge standards no later than two years after EPA finalizes them. 33 U.S.C. § 1322(p)(5).
27 EPA’s delay in issuing the mandated standards has prevented the Coast Guard from proceeding with
28

1 this task and has allowed ship pollution to continue to wreak havoc on ecosystems and threaten
2 public health.

3 7. The Center for Biological Diversity and Friends of the Earth bring this lawsuit to
4 compel EPA to finalize its overdue standards for vessel discharges under the Clean Water Act.

5 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

6 8. This case arises under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, which vests
7 jurisdiction in district courts over challenges to the failure of the administrator of EPA to perform any
8 nondiscretionary act or duty required by the Act and to order the administrator to perform such act or
9 duty. 33 U.S.C. § 1365(a)(2).

10 9. As required by the Clean Water Act citizen suit provision, Plaintiffs provided
11 Defendants with notice of their intent to sue over the Clean Water Act violations alleged in this
12 Complaint more than 60 days ago. Defendants have not remedied those violations of law.

13 10. Venue is proper in the Northern District of California because EPA resides in this
14 district, Plaintiff Marcelin Keever resides in this district, and a substantial part of the events giving
15 rise to the claims occurred here, including because EPA's actions and omissions with respect to
16 vessel discharges affect waters in this district. 28 U.S.C. § 1391(e).

17 11. Pursuant to Civil Local Rule 3-2(c) and 3-2(d), the appropriate intradistrict assignment
18 of this case is either to the San Francisco Division or the Oakland Division.

19 **PARTIES**

20 12. The CENTER FOR BIOLOGICAL DIVERSITY is a national, nonprofit conservation
21 organization incorporated in California, with an office in Oakland, dedicated to the preservation of
22 biodiversity, native species, and ecosystems. The Center works through science, law, and policy to
23 secure a future for all species, great or small, hovering on the brink of extinction. The Center has over
24 87,000 members and more than 1.7 million online supporters worldwide. The Center has worked for
25 decades to safeguard water and aquatic habitats for people, plants, and animals. One of the Center's
26 main goals is to protect imperiled species and their habitats. The Center's oceans program works to
27 protect biodiversity and habitat in the oceans and the Great Lakes. The Center has worked for years
28 to protect ecosystems that are threatened by vessel discharges and aquatic invasive species.

1 13. Center members reside in areas and regularly work in, obtain food and water from,
2 visit, observe, recreate, and otherwise enjoy areas and water bodies across the nation that are or could
3 be impacted by vessel discharges and intend to continue doing so in the future. Plaintiffs' members
4 regularly derive professional, aesthetic, spiritual, recreational, economic, conservation, educational,
5 and other benefits from the natural habitats and wildlife that live in areas adversely impacted by
6 aquatic invasive species, ballast water pollution, and other vessel discharges and intend to continue
7 doing so in the future. The interests of Plaintiffs' members in the species, areas, and water bodies
8 impacted by ballast water and other vessel discharges are and will be directly, adversely, and
9 irreparably affected by Defendants' violations of the law.

10 14. Center members regularly use and enjoy fish, wildlife, water, and other natural
11 resources in places that are impacted by unregulated discharges from ships, including, but not limited
12 to, coastal areas of Big Lagoon, Humboldt Bay, San Francisco Bay, Monterey Bay, and Santa Cruz.
13 These members rely on these and other coastal areas for a variety of recreational, aesthetic,
14 educational, spiritual, and scientific benefits.

15 15. For example, Center members enjoy whale watching and other wildlife observation;
16 kayaking in bays and lagoons; hiking coastal trails; surfing; swimming; and exploring tidepools to
17 look for animals like sea stars, anemones, and urchins. The Center and its members also have
18 interests in protecting and recovering delta smelt, longfin smelt, coho salmon, and steelhead, and
19 other imperiled species. These recreational, aesthetic, educational, spiritual, and scientific interests
20 are harmed by invasive species and various pollutants that are in ballast water and other discharges
21 from ships, including oil and grease, heavy metals, and various chemicals and pathogens. These
22 interests would be served if EPA enacts regulations to control and prevent this pollution.

23 16. Plaintiff FRIENDS OF THE EARTH is a nonprofit environmental organization. It has
24 offices in Berkeley, California, and Washington, D.C., where it is incorporated. Friends of the Earth
25 is a membership organization consisting of over 225,000 members across all 50 states. Additionally,
26 Friends of the Earth has more than 5 million activist supporters on its email list throughout the United
27 States. It is also a member of Friends of the Earth International, which is a network of grassroots
28 groups in 74 countries worldwide. Friends of the Earth's mission is to protect our natural

1 environment, including air, water, and land, to achieve a healthier and more just world, using public
2 education, advocacy, legislative processes, and litigation. Friends of the Earth is concerned about the
3 adverse environmental impacts of vessels and shipping, among other issues. Friends of the Earth
4 works toward local and national regulation of vessel pollution to protect water quality from ballast
5 water and aquatic invasive species.

6 17. Members of Friends of the Earth rely on the organization to advocate for measures
7 that protect the environment from vessel pollution and ballast water. They observe wildlife and
8 recreate in areas that are adversely affected by vessel discharges. They have aesthetic, recreational,
9 educational, professional, and spiritual interests in the protection of water quality and aquatic
10 ecosystems. The interests of Friends of the Earth's members are injured by EPA's inaction in
11 promulgating vessel discharge standards.

12 18. Plaintiff MARCELIN KEEVER is the Oceans and Vessels Program Director for
13 Plaintiff FRIENDS OF THE EARTH. She lives in San Francisco, California, with her spouse and
14 two children. She has always lived near the coast and recreates in the Pacific Ocean, San Francisco
15 Bay, Lake Tahoe, and various other water bodies with her family. She is concerned about the ongoing
16 threats from ballast water discharges and other vessel pollution from ocean-going vessels. She is also
17 aware of the dangers posed by ballast water and other vessel pollution to the waters that she and her
18 family recreate in and utilize for drinking water. Her interests are injured by EPA's inaction in
19 promulgating vessel discharge standards.

20 19. Plaintiffs and their members are harmed by EPA's failure to issue standards for vessel
21 discharges. EPA's inaction contributes to vessel discharges that pollute the aquatic ecosystems and
22 wildlife in which the Center and Friends of the Earth and their members have an interest. That
23 pollution diminishes water quality and the opportunities that these organizations and their members
24 have to experience, study, and enjoy the aquatic habitat and wildlife where ballast water discharges
25 occur.

26 20. In addition, EPA's inaction in regulating ballast-water discharges raises the risk of
27 exposure to infection by pathogens introduced in ballast water, from water contact during recreational
28

1 activities, wildlife-viewing, citizen science projects, professional research, environmental restoration
2 work, environmental education and other activities.

3 21. The Center and Friends of the Earth and their members, and their interests in aquatic
4 ecosystems and wildlife, are also adversely affected by the introduction of animal pathogens in
5 ballast water. Those pathogens infect animals, including corals, snails, freshwater mussels, octopus,
6 lobster, marine and freshwater shrimp, sea urchins, marine and freshwater fish, sea turtles, crocodiles,
7 marine and freshwater birds, seals, sea lions, dolphins and whales, and other animals.

8 22. Plaintiffs commented on the vessel discharge performance standards that EPA has thus
9 far proposed. Specifically, they identified several deficiencies in EPA's proposed standards and
10 recommended changes that would make the standards more protective of water quality. Plaintiffs are
11 harmed by EPA's ongoing delay in promulgating final standards that will protect their interests in
12 preventing harm to aquatic ecosystems from vessel pollution and invasive species. By not
13 promulgating any final standards EPA has illegally shielded its defective proposed standards from
14 judicial review, while keeping in effect identical standards that have already been held to be
15 unlawful.

16 23. An order from this Court declaring that EPA is in violation of the Clean Water Act
17 and its implementing regulations, and directing EPA to issue lawful ballast water discharge standards
18 by the dates set forth in the Prayer for Relief, will remedy Plaintiffs' injuries. Final standards that
19 comply with the Clean Water Act will help EPA protect water quality as well as reduce the risks and
20 harm from aquatic invasive species.

21 24. Defendant EPA is a federal agency charged under the Clean Water Act with restoring
22 and maintaining the chemical, physical, and biological integrity of U.S. waters. It is the agency
23 responsible for issuing vessel discharge standards.

24 25. Defendant Michael Regan is the Administrator of the U.S. Environmental Protection
25 Agency and is sued in his official capacity. Mr. Regan is ultimately responsible for ensuring that EPA
26 complies with and fully implements the Clean Water Act in accordance with Congress's mandates
27 and intentions.

28

STATUTORY FRAMEWORK

1
2 26. The Clean Water Act is the nation’s strongest law protecting water quality. Congress
3 passed it to “restore and maintain the chemical, physical, and biological integrity of the Nation’s
4 waters.” 33 U.S.C. § 1251. Congress created the Clean Water Act to end water pollution and to
5 protect water quality, which provides for the protection and propagation of fish, shellfish, and
6 wildlife, provides for recreation, and protects public health. *Id.* § 1251(a).

7 27. To achieve its goal, the Act prohibits the discharge by any person of any pollutants
8 into U.S. waters that is not authorized by a permit. *Id.* § 1311. Only with a water pollution discharge
9 permit may anyone lawfully discharge pollution into U.S. waters. *Id.* § 1342. Permits are to include
10 technology-based effluent limits, as well as more stringent limits when necessary to meet water
11 quality standards. *Id.* §§ 1311-1317; *see also Natural Resources Defense Council v. U.S. Env’tl. Prot.*
12 *Agency*, 822 F.2d 104, 123-24 (D.C. Cir. 1987).

13 28. EPA issues two types of water pollution permits, individual and general permits.
14 General permits may cover multiple dischargers for a category of similar sources, such as facilities
15 with similar operations and the same types of wastes. 40 C.F.R. § 122.28. EPA has used a general
16 permit for vessel discharges, which are currently regulated by a general permit issued in 2013.

17 29. In 2018, Congress passed the Vessel Incidental Discharge Act (VIDA), which
18 amended the Clean Water Act with respect to the regulation of incidental vessel discharges from non-
19 military, non-recreational vessels 79 feet or greater in length into waters of the U.S. *See Pub. Law*
20 *115-282* (Dec. 4, 2018). In place of EPA establishing, implementing, and enforcing effluent limits for
21 vessels’ incidental discharges through the permit process, the VIDA amendments essentially split
22 these tasks between EPA and the U.S. Coast Guard, with EPA establishing the effluent limits as
23 performance standards, subject to the same Clean Water Act requirements as normal effluent
24 limitations, and the Coast Guard implementing and enforcing the limits established by EPA, through
25 regulations issued by the Coast Guard.

26 30. To that end, VIDA mandated that, “[n]ot later than 2 years after December 4, 2018”—
27 that is, by December 4, 2020—EPA “shall promulgate Federal standards of performance for marine
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1 pollution control devices for each type of discharge incidental to the normal operation of a vessel.” 33
2 U.S.C. § 1322(p)(4)(a)(i).

3 31. VIDA also required the U.S. Coast Guard to develop regulations that govern the
4 implementation, compliance, and enforcement of EPA’s standards within two years of EPA’s
5 promulgation of those standards—that is, by December 4, 2022. *Id.* § 1322(p)(5).

6 **FACTUAL BACKGROUND**

7 32. Vessel pollution contributes to a range of environmental and public health problems.
8 Pollutants from vessels include aquatic invasive species, oil and grease, toxic chemicals, metals,
9 plastics, and pathogens. Vessel waste streams originate from ballast water tanks, boilers, engine
10 exhaust emission controls, graywater, and other systems. Tens of thousands of domestic and foreign
11 vessels discharge these pollutant streams into our nation’s waters.

12 33. Each year cargo vessels dump about 52 billion gallons of ballast water into U.S.
13 waters, which is a primary pathway introducing invasive species and pathogens into the U.S. Ships
14 fill and discharge tanks with large volumes of water that serve as ballast, in order to adjust buoyancy
15 and trim and compensate for changes in cargo loads. This ballast water, transported across oceans,
16 often carries harmful plants, animals, and pathogens that can and do wreak havoc on local
17 ecosystems, cause irreparable environmental damage, and spread disease. Studies estimate that
18 aquatic invasive species have caused hundreds of billions of dollars of damage globally over the last
19 50 years.

20 34. Because invasive non-native species often lack natural predators to control their
21 populations, they can spread quickly and radically transform local ecosystems. Thousands of such
22 non-native species have invaded North American waters, some of which have caused enormous
23 harm. For example, zebra and quagga mussels, native to Russia and Ukraine, spread through Europe
24 and then were carried across the Atlantic in ballast water. Released into the Great Lakes, they became
25 extremely abundant and fouled beaches and boat hulls, clogged pipelines supplying water to cities
26 and power plants, damaged navigational equipment, harmed fisheries, and decimated native mussel
27 populations, with the cumulative economic cost estimated at \$3.1 to \$5 billion according to EPA’s
28 Great Lakes National Program Office. The mussels quickly spread across much of the eastern and

1 midwestern United States, causing similar types of damage, and in the 2000s showed up in western
2 states.

3 35. In San Francisco Bay, which is believed to be the most invaded estuary in the world,
4 ballast water is the dominant mechanism introducing new invasive species from overseas. Several
5 species of invasive clams have displaced native species and reduced plankton populations, which
6 form the base of the pelagic food web. These events, in turn, have likely contributed to the
7 endangerment of local fish populations such as the threatened delta smelt, an endemic fish that faces
8 extinction.

9 36. Water-borne diseases and toxic, bloom-forming algae have also been introduced to
10 new locations through ballast water. Two bacterial pathogens that cause serious and sometimes fatal
11 human disease were found in fish and shellfish in Gulf Coast waters, again introduced by ballast
12 water. In one case, infected Texas oysters, shipped to other parts of the country, caused outbreaks of
13 gastrointestinal disease in 13 states.

14 37. Because poor and minority communities are often served by substandard water and
15 wastewater treatment systems—as illustrated by recent drinking water crises in Flint, Michigan, and
16 Jackson, Mississippi—there are clear environmental justice implications to EPA’s failure to comply
17 with its legal obligations. As is often the case, the greatest risks and impacts from government
18 inaction fall on overburdened environmental justice communities. The people most likely to get sick
19 or die because of EPA’s failure to prevent the introduction of waterborne diseases in ballast
20 discharges are people of low wealth and people of color.

21 38. There are a variety of other harmful pollutants discharged from vessels. Oil, grease,
22 chemicals, and other residues run off from deckwashing, bilgewater, and boiler blowdown. Discharge
23 from exhaust scrubbers often contains oils, polycyclic aromatic hydrocarbons, metals, selenium, and
24 nutrients. Toxic biocides leach from vessel hull coatings and other anti-biofouling systems. Fish
25 holds discharge effluent from dirty ice, organisms, and fish waste. Wastewater from bathing, sinks,
26 and laundry—also called graywater—contains pollutants such as detergents, soaps, nutrients and
27 pathogens. Garbage and plastic debris can also make its way from decks and cargo holds into the
28 ocean and other waters.

1 39. The 2013 vessel general permit, which in the absence of updated standards still
2 controls, is inadequate to protect the environment and public health. In *Natural Resources Defense*
3 *Council v. U.S. Env'tl. Prot. Agency*, 808 F.3d 556 (2d Cir. 2015), the Second Circuit Court of
4 Appeals held that the 2013 vessel general permit failed to meet the the Clean Water Act's technology
5 and water quality requirements, which Congress enacted to prevent the spread of pollutants including
6 aquatic invasive species and pathogens.

7 40. At a time when the nation needs strong protections against water pollution and
8 invasive species, EPA is abdicating its duties to promulgate vessel discharge standards to address
9 ballast water and other vessel pollution.

10 **EPA'S FAILURE TO PERFORM A STATUTORY DUTY**

11 41. For 36 years, EPA unlawfully exempted discharges incidental to the normal operation
12 of vessels from the permitting program. *See* 38 Fed. Reg. 13,528 (May 22, 1973). A federal court of
13 appeals invalidated and vacated the regulation. *Nw. Env'tl. Advocates v. U.S. Env'tl. Prot. Agency*, C
14 03-05760 SI, 2006 WL 2669042, at *15 (N.D. Cal. Sept. 18, 2006), *aff'd* 537 F.3d 1006 (9th Cir.
15 2008). This decision meant that vessels were prohibited from discharging without a Clean Water Act
16 permit.

17 42. In 2008, EPA issued a vessel general permit. *See* Notice of Availability, 73 Fed. Reg.
18 79,473 (Dec. 29, 2008). The State of Michigan, environmental groups, and industry groups
19 challenged the 2008 vessel general permit. Michigan and environmental groups settled with EPA, and
20 the Court denied the industry's petition for review in 2011. *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1,
21 12 (D.C. Cir. 2011).

22 43. In December 2013, EPA issued a new vessel general permit to replace the expiring
23 2008 permit. 78 Fed. Reg. 21,938 (Apr. 12, 2013).

24 44. In 2015, the Second Circuit Court of Appeals held that the 2013 vessel general permit
25 failed to comply with the law. *See generally Natural Resources Defense Council v. U.S. Env'tl. Prot.*
26 *Agency*, 808 F.3d 556 (2d Cir. 2015). A unanimous panel held that EPA, in issuing the 2013 vessel
27 general permit, was arbitrary and capricious for failing to consider a more stringent standard for
28 ballast water, and found that the available evidence showed the 2013 permit's technology-based

1 effluent limits did not reflect the best available technology. *Id.* at 571. The Court also faulted the
2 permit's exemption of Great Lakes vessels. *Id.* at 577. The Court further held that the 2013 permit's
3 narrative water quality-based effluent limitations did not ensure compliance with water quality
4 standards and that the failure to include monitoring and reporting requirements for those limits was
5 arbitrary and capricious. *Id.* at 578, 584. The Second Circuit remanded the vessel general permit for
6 further proceedings on these issues, but allowed the 2013 permit to remain in place until EPA issued
7 a new vessel general permit.

8 45. In 2018, two weeks before the 2013 permit was due to expire and a revised vessel
9 general permit was due, Congress enacted the Vessel Incidental Discharge Act of 2018 (VIDA),
10 which amended the Clean Water Act.

11 46. In place of the Clean Water Act's requirement that EPA issue a new vessel general
12 permit to manage vessel discharges when the existing (2013) permit expired on December 19, 2018,
13 VIDA required EPA to establish vessel discharge performance standards within two years of the date
14 of enactment:

15 Not later than 2 years after December 4, 2018, the Administrator, in concurrence with
16 the Secretary . . . , shall promulgate Federal standards of performance for marine
17 pollution control devices for each type of discharge incidental to the normal operation
18 of a vessel that is subject to regulation under this subsection.

18 33 U.S.C. § 1322(p)(4)(A)(i).

19 47. Thus, EPA was required to establish standards by December 4, 2020. 33 U.S.C.
20 § 1322(p)(4). The U.S. Coast Guard was required to promulgate regulations governing the
21 implementation, compliance, and enforcement of EPA's standards by December 4, 2022. *Id.*
22 § 1322(p)(5).

23 48. On October 26, 2020, EPA published a Notice of Proposed Rulemaking in the Federal
24 Register, with a November 25, 2020, deadline for submission of public comments. *See* 85 Fed. Reg.
25 67,818 (Oct. 26, 2020). The Notice proposed to establish performance standards for the treatment of
26 ballast water discharges that were identical to the standards in the 2013 permit. *Id.* EPA proposed
27 these standards despite the Second Circuit's decision in *Natural Resources Defense Council v. U.S.*
28 *Env'tl. Prot. Agency*, 808 F.3d 556 (2d Cir. 2015).

1 49. Plaintiffs submitted comments that EPA’s proposed performance standards were
2 inadequate for several pollutants, including ballast water, citing the Second Circuit’s 2015 decision.
3 The comments also provided recommendations to strengthen the discharge standards for ballast water
4 and other vessel discharges to better protect water quality and aquatic ecosystems.

5 50. To date, EPA has not issued a final rule establishing standards for vessel incidental
6 discharges, including ballast water discharges. Now more than two years late, EPA has missed, and
7 every day continues to miss, its congressionally mandated deadline to establish vessel discharge
8 standards.

9 51. By missing (and continuing to miss) its deadline, EPA has delayed (and continues to
10 delay) the development and promulgation of implementing regulations by the U.S. Coast Guard,
11 which were statutorily due no later than December 4, 2022. 33 U.S.C. § 1322(p)(5)(A)(i) (requiring
12 Coast Guard to promulgate implementing regulations no later than two years after EPA promulgates
13 performance standards).

14 52. EPA is in violation of the Clean Water Act, as amended by VIDA, and must be
15 compelled to promptly issue final vessel incidental discharge performance standards.

16 **CLAIM(S) FOR RELIEF**

17 **(Violation(s) of the Clean Water Act)**

18 53. Plaintiffs reallege and incorporate the allegations in Paragraph 1 through 52 of this
19 Complaint.

20 54. The Clean Water Act, as amended by VIDA, mandates that EPA, “not later than 2
21 years after December 4, 2018, . . . shall promulgate Federal standards of performance for marine
22 pollution control devices for each type of discharge incidental to the normal operation of a vessel.” 33
23 U.S.C. § 1322(p)(4)(A)(i). That deadline, December 4, 2020, has passed.

24 55. As of the filing of this Complaint, EPA still has not issued federal standards for
25 marine pollution control devices for vessel discharges, including ballast water. EPA is over two years
26 late in issuing these standards. EPA remains in violation of the Clean Water Act, as amended by
27 VIDA, each day that EPA fails to issue federal standards.

28

