Statement of

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The Impacts of Vessel Discharge Regulations on Our Shipping and Fishing Industry

Before the
Subcommittee on Oceans, Atmosphere, Fisheries and Coast Guard
Committee on Commerce, Science and Transportation
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Good afternoon, Chairman Rubio and Members of the Subcommittee. I am Jim Farley, President of Kirby Offshore Marine, a division of Kirby Corporation, headquartered in Houston, Texas. Kirby, which has been in the maritime transportation business since 1969, is now the nation's largest operator of inland and coastal tank barges, employing some 4,600 Americans. On behalf of Kirby and its employees, thank you for the opportunity to testify at this very important hearing.

I am also speaking on behalf of the American Waterways Operators, the national trade association for the inland and coastal tugboat, towboat, and barge industry. Kirby is one of the almost 350 companies that enjoy membership in AWO, and serves on its Board of Directors and Executive Committee.

Thank you for your leadership in holding this hearing to explore the impacts of vessel discharge regulations on the U.S. shipping and fishing industries so early in the 114th Congress. The regulation of ballast water and other vessel discharges is a critical area in which the current regulatory regime serves neither the economy, the environment, nor the American taxpayer well. Today, two federal agencies regulate ballast water and other vessel discharges under two differing statutory authorities. And, because neither federal statute preempts state action, more than two dozen states have established their own state-specific requirements for many of those same discharges. This overlapping patchwork of federal and state regulations has made compliance complicated, confusing, and costly for vessel owners and mariners. It has been counterproductive to the goal of enhanced environmental protection as companies have delayed investment in costly treatment technologies because they lack assurance that such systems will be acceptable wherever a vessel calls. And, it has forced resource-constrained federal and state agencies to duplicate efforts and expend significant time and taxpayer money in a well-intentioned but unsuccessful effort to harmonize their requirements.

Your leadership is badly needed to fix this unacceptable situation. Indeed, this Congress has an unprecedented opportunity to enact legislation that improves the efficiency and effectiveness of our maritime transportation system while enhancing the protection of our nation's waterways. A scientific consensus now exists about the capabilities of currently available ballast water

treatment technology, and there is strong bipartisan congressional support for legislation to resolve redundant and conflicting regulatory authorities in this area. The establishment of a uniform federal framework for the regulation of vessel discharges will be good for the maritime industry and the men and women who work in it, good for shippers who rely upon marine transportation, good for the marine environment, and good for the American taxpayer. We were pleased to see the Committee act on this issue last year when it reported out S. 2094, the Vessel Incidental Discharges Act. The leadership of the Commerce Committee will be crucial if we are to seize the opportunity to enact legislation that accomplishes these objectives in the 114th Congress.

Let me tell you a bit about our company and our industry, which will help to explain why this legislation is so critical. The tugboat, towboat, and barge industry is the largest segment of the U.S. maritime fleet. Our industry operates 4,000 towing vessels and 27,000 dry and liquid cargo barges on the commercially navigable waterways that run through America's heartland, along the Atlantic, Pacific, and Gulf coasts, on the Great Lakes, and in ports and harbors around the country. Each year, towing vessels and barges safely, securely, and efficiently move more than 800 million tons of critical cargo, including agricultural products for export, coal to electrify our homes and businesses, petroleum products to fuel our cars, chemicals for manufacturing facilities, cement and sand for construction projects, and other building blocks of the U.S. economy. Tugboats also provide essential services in our nation's ports and harbors, including shipdocking, tanker escort, and bunkering.

For our part, Kirby operates over 1,300 vessels throughout the Mississippi river system, on the Gulf Intracoastal Waterway, along all three U.S. coasts, and in Alaska and Hawaii. Kirby transports bulk liquid products by tank barge, including petrochemicals, black oil, refined petroleum products, and agricultural chemical products, as well as dry-bulk commodities by oceangoing tug-barge units.

More than 30,000 American mariners are employed as crewmembers on towing vessels; these are good, family-wage jobs that offer great potential for career and economic advancement. I can testify to that from personal experience. Over half of Kirby's employees—some 2,500

Americans—work as crewmembers on our vessels. Their salaries range from about $45,000 a year for a deckhand in our inland fleet to over $130,000 a year for our captains and pilots, and our company provides them with comprehensive benefits and training and career development opportunities. Kirby can hire a high school graduate with no experience and, within a span as short as three to five years, provide him or her with the paid training and experience needed to climb our career ladder to a job paying six figures.

The current regulatory regime for ballast water and other vessel discharges places our mariners and our company in the difficult position of having to comply with overlapping and inconsistent regulations. The U.S. Environmental Protection Agency regulates ballast water and other vessel discharges under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit program; the U.S. Coast Guard regulates discharges of ballast water and hull fouling organisms under the National Invasive Species Act; and more than two dozen states have established their own requirements for various vessel discharges already covered by the EPA and Coast Guard regulations.

Since 2009, commercial vessels over 79 feet in length have been required to obtain coverage under EPA's Vessel General Permit in order to operate in U.S. waters. The VGP contains federal requirements for 27 types of vessel discharges, including ballast water, as well as federally enforceable state- and waterbody-specific discharge conditions added to the permit by states as part of the NPDES state certification process. In addition to federal and state VGP requirements, vessels must meet federal standards for ballast water and hull fouling discharges established by the Coast Guard. Vessels are also required to act in accordance with the state laws and regulations for vessel discharges applicable to the waters they transit.

This regulatory patchwork is a nightmare for a vessel operating in interstate commerce. A Kirby tug-barge unit moving petroleum from a refinery in Anacortes, Washington, to a fuel distribution center in Los Angeles must traverse the waters of three states: Washington, Oregon, and California. In addition to EPA limits on ballast water and other vessel discharges found in the VGP, the tug and the barge must comply with 25 supplementary, state-specific conditions added to the permit by Washington and California. They must also comply with Coast Guard

regulations to manage and discharge ballast water and hull fouling organisms. Finally, in each of the three states they transit, the vessels are subject to state laws and regulations, necessitating the submission of ballast water management reports to every state in which they will discharge ballast water (in addition to the reports required by the Coast Guard) and requiring the implementation of ballast water management practices in addition to those prescribed by EPA and the Coast Guard. That is five distinct regulatory regimes, and all of their attendant requirements, that the Kirby employees onboard the tugboat must be aware of and in compliance with over the course of a single voyage. Our inland tows face an even more egregious situation, traveling through the waters of as many as seven states on a voyage from Chicago to New Orleans. These examples, and the graphic attached to my testimony, underscore why clear, consistent federal rules for ballast water and other vessel discharges are desperately needed.

They also demonstrate why, as a matter of sound public policy, the NPDES permit program is the wrong framework for the regulation of discharges from vessels. The program, as EPA has acknowledged, was designed to control pollution from land-based, stationary sources, and has been largely administered and enforced by individual states—the basis of the state certification process. This process makes the program particularly ill-suited to regulate discharges from commercial vessels, which by their nature are mobile sources that operate and discharge in multiple states. For the first 35 years of the NPDES program's existence, vessel discharges were explicitly exempted by EPA regulation. EPA went to court to defend its exclusion of vessel discharges from the program, but in 2008 the Ninth Circuit Court of Appeals ordered EPA to regulate vessel discharges through the issuance of NPDES permits.

As a result, EPA proposed the VGP, a first-of-its-kind nationwide, general permit for vessel discharges to be administered and enforced by the agency and certified by individual states. The state certification process resulted in over 100 new, substantive requirements that were incorporated by EPA into its final permit, which it issued without allowing the regulated community an opportunity to comment on the state conditions and without considering the impact of the state conditions collectively. A group of maritime trade associations, including AWO, challenged EPA's management of the VGP state certification process in court. In 2011, the U.S. Court of Appeals for the D.C. Circuit ruled that EPA had no authority under the Clean

Water Act to alter or reject state conditions, even if they are infeasible or in direct conflict with other federal or state requirements. Recognizing the problem, the Court suggested that Congress must act to provide the maritime industry with a viable solution. We wholeheartedly agree.

I want to be clear that the broken regulatory regime for vessel discharges is not a problem of EPA's making. It is not a problem of the Coast Guard's making. It is a situation in which well-meaning agencies have been effectively set up to fail as they seek to harmonize regulations promulgated pursuant to different statutory authorities and, in EPA's case, to make the square peg that is the NPDES permit program fit the round hole that is mobile sources engaged in interstate and international commerce. With no relief available from the courts, it is up to Congress to lead and establish a uniform federal framework for the regulation of ballast water and other vessel discharges. There is no better time than now for Congress to take action on this very important issue.

Several years ago, faced with overlapping federal and state authorities and the absence of uniform national standards for the management and discharge of ballast water, the maritime industry was witnessing a competition among states to establish the most stringent ballast water treatment standards on the books. Under the logic of this competition, if the International Maritime Organization standard was good, a standard 100 or 1,000 times more stringent than the IMO standard must be better—even if those standards could not be achieved, or even measured, with existing technology. However, there is now a national consensus about the capability of current ballast water treatment technology. This consensus provides a strong scientific foundation for Congress to move forward with legislation to establish uniform national standards for vessel discharges.

In June 2011, an independent and expert panel of the EPA Science Advisory Board completed its study of the efficacy of current ballast water treatment systems and concluded that no current treatment technology can meet a standard 100 or 1,000 times more stringent than the IMO standard. The panel further concluded that wholly new treatment systems and measurement techniques would need to be developed to meet more stringent standards than IMO's.

Shortly after the EPA SAB report was published, the state of New York agreed to withdraw one of its state conditions to the VGP, which would have required vessels operating in New York waters to install ballast water treatment systems meeting a standard 100 times more stringent than the IMO standard beginning in 2013. In an October 2011 letter to the EPA Administrator, the New York Department of Environmental Conservation wrote that the state believes "a strong, uniform national standard is the best approach to our mutual goal of ensuring that vessels install and use achievable and cost-effective technology to treat ballast water discharges that will dramatically limit the introduction and spread of aquatic invasive species." The letter continued, "A national approach to this ballast water issue is clearly preferable to a plethora of potentially conflicting state standards."

In 2012, the Coast Guard published a final rule establishing a ballast water treatment standard equivalent to the IMO standard. Citing the EPA SAB report, the Coast Guard wrote that "[t]he numeric limitations in today's final rule represent the most stringent standards that [ballast water treatment systems] currently safely, effectively, credibly, and reliably meet." EPA also relied on the EPA SAB's conclusions to develop the 2013 Vessel General Permit, in which it set a ballast water treatment standard corresponding to the IMO and Coast Guard standards.

Since the Coast Guard and EPA aligned their ballast water treatment standards, the states have quickly followed suit. None of the states that certified the 2013 VGP with conditions added a more stringent ballast water treatment standard than that established by EPA within the permit. Most notably, in 2013, the California State Lands Commission officially acknowledged that California's statutory ballast water performance standards—which called for the implementation of a standard 1,000 times more stringent than the IMO standard beginning in 2014—could not be met with current ballast water treatment technology. Acting on the Commission's recommendation, the California legislature acted to delay implementation of these standards. Of the states that have established or proposed to establish state-specific ballast water discharge standards, California was the last to concur with the findings of the EPA SAB.

This consensus changes not only the regulatory landscape, but the legislative landscape as well. Congress can capitalize on this accord among the scientific community, the federal government,

and the states to improve the regulation of vessel discharges by enacting a single set of uniform national standards that preempt state regulation, with a requirement for the federal standards to become increasingly stringent as treatment technology improves over time. Such legislation would improve the maritime industry's ability to deliver the nation's waterborne commerce efficiently and effectively by providing consistency and certainty, and would enhance our nation's commitment to the continued protection of its waterways. It would also benefit the American taxpayer by ending the costly duplication of effort by federal and state agencies that results from the current statutory and regulatory patchwork.

Kirby and the other member companies of AWO are partners in a shared commitment to environmental stewardship. Maritime transportation is the safest and most energy-efficient mode of freight transportation. AWO's members are dedicated to building on these natural advantages and leading the development of higher standards of marine safety and environmental protection. Twenty years ago, AWO became the first transportation trade association to adopt a code of safe practice and environmental stewardship for member companies, the AWO Responsible Carrier Program. Since 2000, third party-audited compliance with the RCP, which exceeds federal regulatory standards, has been a condition of membership in the association.

I share this with you to emphasize that our goal in urging congressional action is <u>not</u> to avoid high standards. Our company and our industry have established a strong and continuously improving environmental record, and we recognize that making responsible environmental practice a top priority is both good policy and good business. The problem is not <u>that</u> vessel discharges are regulated; it is <u>how</u> they are regulated. The current unclear and inconsistent regulatory system makes compliance confusing and investment decisions uncertain.

Let me emphasize again that the only way to fix this broken regulatory regime is for Congress to act, and act soon. Although the Coast Guard, EPA, and state regulators are currently in agreement about achievable <u>standards</u> for ballast water treatment, the way that they administer and enforce that standard is at best duplicative, and at worst incompatible. The strong bipartisan support for the Vessel Incidental Discharge Act introduced last Congress—which was sponsored by Chairman Rubio and cosponsored by more than one-third of the Senate, including the

chairman and ranking member of the Commerce Committee—demonstrates that the problem, and the urgent need for a solution, is well understood. Today's hearing is another encouraging affirmation of the understanding of the leadership of this Subcommittee, and of your commitment to bring clarity and certainty to the regulation of vessel discharges.

On behalf of Kirby and all of the other the businesses that operate vessels that carry the cargo that drives our economy, that provide high-quality jobs for men and women across the United States, and that seek to protect the marine environment in which they operate, I respectfully urge the Committee to lead the introduction and passage of legislation in the 114th Congress that establishes a uniform, science-based, consensus-driven federal framework for the regulation of ballast water and other vessel discharges.

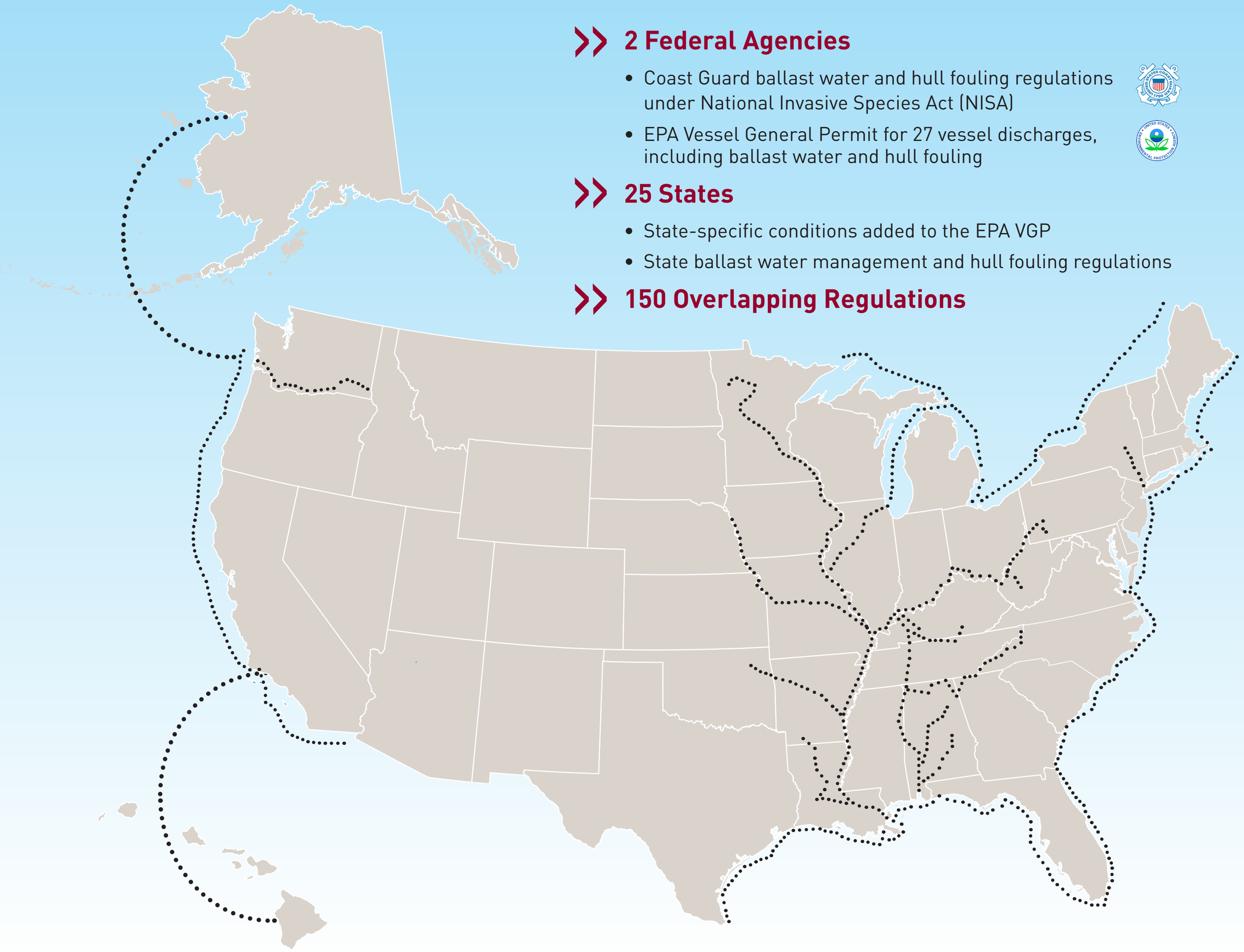
Thank you again for the opportunity to testify today on a matter of great importance to our company, our industry, to the U.S. economy, and to the nation's marine environment. We appreciate your leadership and we look forward to working with you to advance our mutual goal of a safe, secure, environmentally sound maritime transportation system that is good for America, for American businesses, and for the Americans who work in our industry.

THE AMERICAN WATERWAYS OPERATORS

An Unworkable Regulatory System

FOR BALLAST WATER AND OTHER VESSEL DISCHARGES

U.S. mariners and vessel operators face an extremely challenging compliance burden with two federal agencies and 25 states all regulating vessel discharges in overlapping and inconsistent ways.



2 Federal Agencies

- Coast Guard ballast water and hull fouling regulations under National Invasive Species Act (NISA)
- EPA Vessel General Permit for 27 vessel discharges, including ballast water and hull fouling

25 States

- State-specific conditions added to the EPA VGP
- State ballast water management and hull fouling regulations

150 Overlapping Regulations

Congressional leadership is needed to replace this broken system with a uniform, science-based, federal framework for the regulation of ballast water and other vessel discharges.

SUPPORT A UNIFORM FEDERAL FRAMEWORK
for the regulation of ballast water and other vessel discharges.