



Government of Canada
Embassy of Canada

Gouvernement du Canada
Ambassade du Canada

July 22, 2020

Docket No. 20-10,
Comments on Conditions Created by Canadian Ballast Water Regulations in the U.S./Canada Great Lakes Trade

Rachel E. Dickson
Secretary, Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C.
20573-0001

Dear Sec. Dickson:

Canada takes note of the petition filed with the Federal Maritime Commission (FMC) by the Lake Carriers Association (LCA) and the associated FMC investigation into whether Canada's proposed ballast water regulations create unfavourable conditions to shipping in the foreign trade of the U.S.

Canada shares this letter on a voluntary basis in recognition of the history of cooperation between our two countries on the Great Lakes and without prejudice to any Canadian position, rights or obligations including those that may exist pursuant to international law and from treaties between Canada and the U.S.

Sustaining a vibrant Great Lakes marine trade is in our shared interest, as this industry directly supports over 78,000 jobs and over \$28 billion in annual business revenue in our two countries. We also cooperate under the 2012 *Great Lakes Water Quality Agreement* (GLWQA) to reduce the environmental and economic impacts associated with the introduction and spread of invasive species in this region. Our joint indicators for invasive species in this region are poor and declining, notably due to the spread of species already introduced.ⁱ The U.S. Coast Guard (USCG) estimates that the invasion of Zebra Mussels directly costs the U.S. roughly \$1 billion per year.ⁱⁱ Another invasive species, the Ruffe, causes over \$300 million in annual damages to Great Lakes commercial and recreational fisheries.ⁱⁱ

In light of this, Canada respectfully disagrees with the LCA's petition. Canada's objective in proposing the draft regulations is to further protect the environment and economy from costly species invasions, and to address its obligations under the *International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004* (the Convention). Canada's proposal is fair and would not establish unfavourable conditions for shipping in the foreign trade of the U.S.

Canada

Canada would caution against interpreting any Canadian draft rule as an intention to enforce a regulation (in connection with FMC Regulation 46 CFR 550.102). Canada's regulatory development process is ongoing and a final regulation has not yet been promulgated. Transport Canada remains in discussions with the USCG and the U.S. Environmental Protection Agency (EPA) towards compatible requirements for Great Lakes ships. Absent a final Canadian rule, Canada is therefore surprised by the FMC's action, which runs counter to the long-standing practice in both our countries of respect for the other's regulation-making processes.

LCA Claims of Unfavourable Conditions

Despite considering the petition and investigation to be premature, Canada also respectfully disagrees with the LCA's argument that, if promulgated, Canada's proposed regulation would meet the conditions set out in FMC Regulation 46 CFR 550.301(c)* concerning:

- *Non-discrimination*: The LCA does not explicitly justify its claim that Canada's proposal is discriminatory. Transport Canada's proposed regulations do not discriminate, as they would apply the same standards to Canadian and U.S. ships that do business in Canadian waters of the Great Lakes.
- *Fairness*: Fairness in this case is not defined by relative costs of compliance, but rather the imposition of the same environmental obligations on ships of both fleets. This allows vessel owners to identify the most economically efficient solutions to achieve their environmental obligations, taking into account commercial factors such as vessel design and capacity. It should be noted that commercial decisions to seek economies of scale are commonly associated with greater capital investments.

That said, Canada respectfully disagrees with the LCA's cost estimates for compliance by Canadian and U.S. vessels. Canada has calculated the costs of installation and operation of a ballast water management system (BWMS) on all ships in the U.S. Great Lakes fleet to be roughly \$133 million over 25 years,ⁱⁱⁱ which is not unreasonable in light of the cost of invasive species (e.g. \$300 million annually just for the Ruffe on the Great Lakesⁱⁱ). While Canada would prefer that this investment in the environment be made—and has called for U.S. regulators to align with Canada in requiring this—the U.S. investment to comply with Canada's proposal would likely be substantially below \$133 million. This is because commercial factors have historically resulted in a limited number of U.S. ships doing regular business in Canada.

- *Justification under international agreement*: The Convention is a generally accepted international agreement, whose 84 parties represent 91% of the world's merchant shipping tonnage. The Convention applies to the Great Lakes and the U.S. has agreed to take it into account through Annex 5 of the GLWQA.

* This FMC regulation concerns rules that "are discriminatory or unfair as between carriers ... from the U.S. and their foreign competitors and which cannot be justified under generally accepted international agreements or practices and which operate to the detriment of the foreign commerce or the public interest of the U.S."

The LCA is mistaken in its analysis of the Convention as an instrument that focuses only on ballast water discharges into waters under the jurisdiction of a party. The Convention also addresses the uptake of ballast water in its globally applicable regulations.

It includes a requirement for ships to develop and implement an approved ballast water management plan (BWMP) to meet minimum ballast water management standards, which apply regardless of the location of discharge. The ship's flag state must survey the ship and certify that its ballast water management complies with the Convention. The parties have agreed to apply the Convention's requirements to ships of non-parties so as to ensure no more favourable treatment for such ships.

Canada's proposed approach is therefore justified under the Convention. A BWMP that anticipates releasing unmanaged ballast water into the environment (e.g. to capitalize on a local exemption, as the LCA proposes) would not be consistent with the Convention and could not be approved. A ship with such a plan could not be certified and could not operate in ports of Convention parties.

- *Non-detriment to commerce:* Canada's proposed regulation would have minimal impact on the LCA's business. According to LCA data, roughly 96% of its business is in carrying cargo between U.S. Great Lakes ports, with only 4% of its tonnage carried being loaded or discharged in Canada.^{iv} Under Canada's proposal, Canada would continue to welcome the trade of U.S. ships that meet the Convention's requirements. As Canadian and international competitors would be required to do the same, the proposal would increase environmental protection while maintaining a level economic playing field.
- *Public Interest:* In Canada's view, it is in the public interest to prevent the further spread of over 180 non-native species that have become established in various parts of the Great Lakes.^v Canada and the U.S. have jointly recognised the need to address these risks through Annexes 5 and 6 of the GLWQA. Canadian and U.S. studies are clear that Great Lakes ships pose a significant risk of spreading these species.^{vi,vii} Species distribution across various Great Lakes ecosystems is not uniform, and an average of 24 new non-native species were spread into each Great Lake from elsewhere in the basin between 2007 and 2017.^{viii}

Canada respectfully disagrees with the LCA's claim that non-native species moved to the U.S. side of the Great Lakes in unmanaged ballast water of U.S. Great Lakes ships pose no risk to Canada. Canada's ongoing research into this issue bears out the opposite conclusion, and supports Canada's call for the U.S. to take action to address the environmental risks posed by its ships.^{vi,ix} The LCA concedes that Canadian regulations are warranted if they protect Canada's environment, which would be the case under the proposed regulations. For example, they would address the risk that a U.S. ship could move a species in ballast from a Canadian Lake Erie port and discharge it at a U.S. Lake Superior port from where the species could spread downstream to new Canadian locations with consequent environmental and economic impacts.

Just as with the LCA's claim under 46 CFR 550.301(c), Canada also respectfully disagrees with the LCA's claim that Canada's proposed rule is "otherwise unfavourable" under 46 CFR 550.301(e). Canada notes that the LCA has not specifically defined how Canada's proposed approach is "otherwise unfavourable", and has offered no specific support for its claim in this regard.

Canada's Proposed Approach

Canada's proposed regulations would address its obligations under the Convention, further protecting Canada's environment and economy (and the shared regional environment and economy) from costly species invasions. Canada's proposed rule was developed following eight years of dialogue with industry (including the LCA, as well as Canadian and international shipowners), scientists, engineers, U.S. federal and state officials (including FMC staff and commissioners), and international partners.

In the interests of binational cooperation and compatibility, the proposed regulations fully address longstanding LCA and FMC requests to exempt transiting U.S. Great Lakes ships from Canadian ballast water requirements. In light of the subject matter of the proposed regulation, transiting ships are described in terms of their ballasting operations: those vessels that do not load or release ballast water into waters under Canadian jurisdiction. Despite environmental risks, this decision (which exempts roughly 96% of the LCA's trade, as requested) reflects Canada's view that it would be more effective for the U.S. to regulate vessels carrying cargo between U.S. ports. However, it would not be responsible for Canada to exempt LCA vessels doing business in Canadian ports. Doing so would confer an advantage on LCA ships in the cross-lakes trade by allowing them to avoid investments in the environmentally protective technology that their competitors would have to install. Doing so would also increase the risk of spreading invasive species in the Canadian and U.S. waters of the Great Lakes.

Canada's draft regulation is also compatible with the U.S. Vessel Incidental Discharge Act (VIDA) adopted by Congress in 2018, and can be understood in VIDA's terms as a proposal that existing Great Lakes vessels fit a BWMS as a best-management practice (BMP). Doing so would increase environmental protection substantially by reducing the spread of non-native organisms in ballast water, while also addressing concerns raised by Great Lakes vessel owners that BWMS might not consistently meet performance standards due to challenging water quality conditions there.

Canada would note that the proposed regulation that the LCA finds unfair is significantly more flexible than current U.S. rules for subject Canadian Great Lakes vessels (e.g. those constructed in or after 2009). The EPA has recently argued that Great Lakes vessels should avoid inaction in the face of technology-forcing regulations, and should not avoid or delay the timely installation of BWMS intended to limit the spread of highly invasive and harmful species on the Great Lakes.^x Canada concurs that action is needed by Great Lakes ships to protect the environment on an appropriate timeline.

Binational Compatibility

Canadian and U.S. regulators are working to amend their ballast water requirements, in accordance with the Convention and VIDA, respectively. Canada has yet to issue final ballast water regulations, and Transport Canada officials remain in regular communication with their counterparts at USCG and EPA with a view to maximizing compatibility between the eventual requirements of both countries.

Given this ongoing binational discussion, Canada encourages the FMC to engage with relevant agencies within the U.S. government. In the meantime, Canada reiterates its observation that the FMC investigation is premature and inconsistent with past practice between our two countries. There would be greater benefit in both countries eventually comparing final Canadian regulations with the final U.S. national ballast water standard expected under VIDA.

Sincerely,



Martin Loken
Minister (Political)
Embassy of Canada

ⁱ The Governments of Canada and the United States. State of the Great Lakes 2019 Highlights report.

ⁱⁱ United States Coast Guard. 2012. Regulatory Analysis and Final Regulatory Flexibility Analysis: Final Rule Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. waters.

ⁱⁱⁱ Calculation based on the installation and operating costs in the 2015 Transport Canada report *Transactions on Ballast Water Treatment Systems for the Great Lakes*.

^{iv} Calculation based on annual levels of U.S. Great Lakes fleet tonnage traded in Canada 2009-2019. Data as presented in the LCA petition, and overall annual levels of U.S. Great Lakes fleet tonnage, sourced from LCA website: <http://www.lcaships.com/reports/>

^v NOAA Great Lakes Restoration Initiative, https://www.regions.noaa.gov/great-lakes/index.php/great_lakes-restoration-initiative/invasive-species/

^{vi} DFO. 2014. Science Advice from the National Risk Assessment for Ballast Water Introductions of Aquatic Nonindigenous Species to Canada. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2013/064, sourced at: <https://waves-vagues.dfo-mpo.gc.ca/Library/352514.pdf>.

^{vii} 2018 Great Lakes Ship Ballast Monitoring Project Technical Report, May 2018, Cangelosi et al, sourced at: https://minds.wisconsin.edu/bitstream/handle/1793/78497/LSRI-GWRC-TR-GLSBM-1_FINALv2_31May2018.pdf

^{viii} The Governments of Canada and the United States. State of the Great Lakes 2017 technical report.

^{ix} DFO. 2019. The risks of spreading aquatic invasive species to Canada by moving unmanaged ballast water from Canada to the U.S. within the Great Lakes region. DFO Can. Sci. Advis. Sec. Sci. Resp. 2019/030, sourced at: <https://waves-vagues.dfo-mpo.gc.ca/Library/40868205.pdf>.

^x Environmental Protection Agency. Respondent EPA's Reply In Support Of Motion To Dismiss Petitioners' Cases As Moot. Document 270, Case 14-39, United States Court of Appeals for the Second Circuit. Part D, pp. 9-11.