

Issued: January 28, 2022

FEDERAL MARITIME COMMISSION

Docket No. 20-10; Petition No. P1-20

**Investigation into Conditions Created by Canadian Ballast Water Regulations in the
U.S./Canada Great Lakes Trade**

AGENCY: Federal Maritime Commission.

ACTION: Request for Comments

SUMMARY: Because of developments within Canada and the United States, the Federal Maritime Commission (Commission) is seeking additional public comments on a petition filed by the Lake Carriers' Association (Petitioner) alleging that conditions created by the Government of Canada (Canada) are unfavorable to shipping in the United States/Canada trade.

DATES: Submit comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. 20-10, by the following method:

- *Email:* secretary@fmc.gov. For comments, include in the subject line: "Docket No. 20-10, Comments on Conditions Created by Canadian Ballast Water Regulations in the U.S./Canada Great Lakes Trade." Comments should be attached to the email as a Microsoft Word or text searchable PDF document.

Docket: For access to the docket to read background documents or public comments received, go to the Commission's Electronic Reading Room at:

www2.fmc.gov/readingroom/proceeding/20-10/.

Unless otherwise directed by the commenter, all comments will be treated as confidential under 46 U.S.C. 42105 and 46 CFR 550.104.

FOR FURTHER INFORMATION CONTACT: For questions regarding submitting comments or the treatment of confidential information, contact William Cody, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

On March 6, 2020, the Lake Carriers' Association (Petitioner), a trade association made up of U.S. owners and operators of vessels serving the Great Lakes (Lakers), filed a petition alleging that conditions created by Transport Canada, an agency of the Government of Canada, are unfavorable to shipping in the United States/Canada trade, pursuant to Section 19(1)(b) of the Merchant Marine Act, 1920 (Section 19) codified in 46 U.S.C. 42101. Section 19 authorizes the Federal Maritime Commission (Commission) to investigate these conditions and to adopt regulations to "adjust or meet general or special conditions unfavorable to shipping in foreign trade". In this instance, the Petitioner requested that the Commission adopt regulations in order to remedy a condition it alleges will result in irreparable harm to Petitioner's members which are U.S. flag owners and operators of vessels on the Great Lakes.

Specifically, Petitioner argued that then-proposed regulations by Transport Canada which require the installation of ballast water management systems (BWMS) on Laker vessels serve no environmental purpose and because the cost of compliance is prohibitively high for U.S. vessels, Petitioner suggests that the real purpose of the regulations is to drive out U.S. vessels from this trade. Petitioner asked the Commission to issue a regulation to meet the unfair competitive conditions created by Transport Canada based on a finding that the Canadian regulations create

conditions unfavorable to the Petitioners. Petitioner provided a proposed regulation that would assess a fee of 300,000.00 U.S. dollars each time a Canadian vessel enters any U.S. port.

On June 16, 2020, the Commission issued a Notice of Investigation and Request for Comments (Notice). In the Notice, the Commission concluded the petition met the threshold requirements for consideration under the Commission's regulations and initiated an investigation into whether the proposed Transport Canada regulations create unfavorable conditions to shipping in the foreign trade of the United States. Notice of Investigation and Request for Comments: Canada Ballast Water 85 FR 37453 (June 22, 2020). The Commission designated the Deputy Managing Director to lead an investigation into the Petitioner's allegations and to prepare a report on the investigation's findings and recommendations for Commission consideration. *Id* at 37454.

As an initial step in the investigation, the Commission requested that interested persons submit views, arguments and/or data on the Petition. Between June 22, 2020, and July 22, 2020, the Commission received 21 comments. *Id*. The majority of comments received by the Commission supported the Petition and a small minority opposed. One main objection to the petition, raised by the Embassy of Canada in Washington, D.C.,¹ was that the regulatory process was ongoing, and, because the proposed regulations by Transport Canada were not final, any Commission action would be premature.

II. ADDITIONAL DEVELOPMENTS

Since the issuance of the June 2020 Notice and the subsequent receipt of comments, there have been developments which impact the Commission's consideration of the Petition including

¹ Unless otherwise directed by the commenter, all the comments received were treated as confidential. The Embassy of Canada requested that its comments not be treated as confidential, and they are available in the FMC reading room, <https://www2.fmc.gov/readingroom/proceeding/20-10/>.

proposed rules within the United States and the finalization of the Canadian rule.

On October 26, 2020, the Environmental Protection Agency (EPA), published a Notice of Proposed Rulemaking, Vessel Incidental Discharge National Standards of Performance, in the Federal Register. *See* Notice of Proposed Rulemaking: Vessel Incidental Discharge National Standards of Performance, 85 FR 67818 (October 26, 2020). Like the proposed Canadian rule, the EPA's proposed rule intends to reduce the environmental impact of vessel discharges, such as ballast water. Though similar in intent, the EPA's approach to Great Lakes ballast water in their proposed rule did not align with the proposed Canadian approach and will not have an effect on the U.S. Great Lakes fleet. The Notice of Proposed Rulemaking required that comments be received on or before November 25, 2020. The EPA's next action is not expected until sometime in 2022.

On June 23, 2021, Transport Canada issued its final rule. The general approach to the regulation of Great Lakes ballast water did not change. However, while the effective date of the final rule remains 2024, the rule delayed implementation until 2030 for vessels built prior to January 1, 2009.

III. INVESTIGATION AND ADDITIONAL REQUEST FOR COMMENTS

The Commission is continuing to investigate whether the proposed Transport Canada regulations create unfavorable conditions to shipping in the foreign trade of the United States. The Deputy Managing Director position no longer exists, and the Commission has therefore designated the General Counsel to lead the ongoing investigation into the Petitioner's allegations and to prepare a report on the investigation's findings and recommendations for Commission consideration. Considering the developments noted earlier, the Commission desires additional information. Thus, in furtherance of this investigation interested persons are requested to submit

views, arguments and/or data on the Petition no later than 30 days after this publication.

Submitted comments may address any aspect of the petition, but the Commission is specifically interested in comments on the following topics:

A. The application of the final Canadian regulation. The Commission believes that a majority of the U.S. flagged commercial vessels operating on the Great Lakes were built prior to 2009. The Commission seeks more information about the specific number of U.S. vessels to which the Canadian rule will apply, and the timing for when the Canadian rule will apply to those vessels.

Pre-2009: How many U.S. flag vessels operating on the Great Lakes in the U.S./Canada trade were built prior to January 1, 2009?

Post-2009: How many U.S. flag vessels operating on the Great Lakes in the U.S./Canada trade were built in 2009 or later?

Historical Trade: For both categories of vessels, what is the amount or percent of their historical and anticipated Canadian trade relative to their U.S. trade? Please specify the measure used to quantify the answer, for example is the measure based on the value of goods/revenue, the number of port calls, or any other metric.

Canada/U.S. Flagged: What amount or percent of the historical trade is carried by U.S. flagged vessels and what percent is carried by Canadian flagged vessels? Please specify the metrics used to quantify the answer.

B. The impact of the final Canadian regulation. The Commission believes that the phased implementation of the Canadian rule could delay, and possibly eliminate, the impacts of the rule on a portion of U.S. flagged vessels. The Commission seeks specific information about the types of impacts and the timing of those impacts relative to the 2024 and 2030

implementation dates. The Commission also seeks information about the overall impact, if any, of final Canadian regulation on the Commission's consideration of the Petition:

Contractual Impacts: Will the final Canadian regulation affect the ability of U.S. flag vessels to negotiate contracts for the U.S./Canada trade? What are the specific or estimated economic impacts? When will any economic impacts first be realized?

Repair/Design Impacts: At what date will affected U.S. flag vessels be impacted by vessel repair/design considerations in order to achieve compliance with the Canadian regulations? What are the estimated costs of compliance under the final Canadian regulation?

Business Model: Will the final Canadian rule drive any changes in business models for U.S. flagged vessels?

For any impacts identified above, please be specific as to when an economic impact will present and upon what data the impact is based. Please identify any distinctions in impacts based on type of cargo, vessel, expiration date of contract, implementation date of proposed contract or type of carriage agreement.

C. Other considerations. The Commission's role in this investigation is solely to determine if there exist "conditions unfavorable to shipping in foreign trade" under 46 U.S.C. 41201. In making this determination there are other matters that may be outside the control or the authority of the Commission but nevertheless should be considered during the Commission's investigation and recommendations.

EPA Rule: How should the Commission consider the status of the EPA's proposed rule?

International Convention: Is the 2004 Ballast Water Management Convention (International Convention for the Control and Management of Ships' Ballast Water and

Sediments, 2004) relevant to this Petition? Is the Canadian rule required or optional under the Convention? Have other parties to the Convention enacted a similar provision?

Developments: What industry or scientific developments have an impact on this Petition? Have there been any relevant developments since the Commission's initial request for comments in June 2020?

Changes: Have any of the analyses or projections provided to the Commission by the Petitioner changed? If so, provide the Commission with any data that has changed since the filing of the Petition and that has not been captured through answers to the questions above.

D. Commission's future actions. The Commission's investigation is ongoing and will consider all relevant information and potential actions, including:

Other Information: Do other sources of relevant information or data exist that should be considered? Where is that information/data located?

Fee: The original petition requested that the Commission issue a regulation that would assess a fee of 300,000.00 U.S. dollars each time a Canadian vessel enters any U.S. port. Is this request still valid and are there other corrective actions that should be considered, including requests to other agencies under 46 U.S.C. 42102(a)?

Comments in response to the questions above, or other feedback, should include objectively quantifiable data to back up any numerical or statistical information provided rather than generalized information/arguments for or against the petition.

By the Commission.

William Cody,
Secretary