



LAKE CARRIERS' ASSOCIATION



February 12, 2024

David Eng
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W
Washington, D.C. 20573

Via email to secretary@fmc.gov

Subject: Request to Proceed with Petition No. P1-20, Investigation into Conditions Created by Canadian Ballast Water Regulations in the U.S./Canada Great Lakes Trade - Docket No. 20–10

On March 6, 2020, the Lake Carriers' Association (LCA) filed Petition No. P1-20 with the Federal Maritime Commission (FMC) alleging that conditions created by Transport Canada, an agency of the Government of Canada, in their proposed ballast water regulations (Gazette Part I) on June 8, 2019 (Volume 153, Number 23), are unfavorable to U.S.-flagged Laker shipping in the United States (U.S.)/Canada trade, pursuant to Section 19(1)(b) of the Merchant Marine Act, 1920 (Section 19) codified in 46 U.S.C. §42101. LCA requested that the FMC investigate these conditions and to adopt regulations to adjust or meet them. The LCA also provided an update of information supporting the petition on March 4, 2022.

The LCA formally requests that the FMC proceed with a ruling on Petition No. P1-20. We are making this request due to the now rapidly approaching September 8, 2024 deadline for compliance with Transport Canada's ballast water regulations, our inability to convince the Canadian Government to change their requirements regarding ballast water loading in the Great Lakes, and the recent conclusion by the U.S. EPA in a supplemental notice of proposed rule (SNPR) that ballast water management systems (BWMS) do not exist that meet the Clean Water Act's best available technology economically achievable (BAT) standard for Lakers. This letter may be placed on the public docket.

Since LCA submitted its 2022 comments, we have engaged with Transport Canada and Members of the Canadian Parliament to discuss the work that our members have undertaken to address issues with the operation of BWMS on U.S.-flagged Lakers and explain why the Transport Canada

regulation should not apply to the loading of ballast water in Canadian waters of the Great Lakes. Transport Canada has been unreceptive to these discussions has not included the U.S.-flagged Laker operators or the LCA in their industry outreach and support activities related to the regulation of ballast water. Transport Canada has also *excluded* U.S.-flagged Lakers from interactions or programs available to Canadian vessels, such as:

- Excluding impacts to the U.S.-flagged Lakers in their Regulatory Impact Analysis Assessment of the regulation,
- Excluding the LCA and its members from the October 2022 Montreal ballast water workshop,
- Excluding U.S.-flagged Lakers from participation in their Ballast Water Innovation Program (BWIP) without the use of a Canadian-based company,
- Excluding U.S.-flagged Lakers from awards of BWIP funds, even though Canadian companies received U.S. grants funding for ballast water research, and
- Excluding U.S.-flagged Lakers from applying for an exemption to the Canadian ballast water regulations or an extension of the deadline for BWMS installation similar to the Transport Canada Marine Technical Review Board review provided for Canadian vessels. In our December, 2023 visit with Transport Canada, we were told the details of a similar program would be released “soon,” which is much too late for post-2008 Lakers to install a BWMS and comply with the regulations.

Transport Canada’s inclusion of the loading of ballast water and Canada’s domestic fleet in their implementation of International Convention for the Control and Management of Ship’s Ballast Water and Sediments, 2004 (BWM Convention) was not required by their party status to the BWM Convention. To the contrary, Transport Canada’s requirements and actions taken are contrary to the BWM Convention Regulation A-4 (Exemptions). The Transport Canada ballast water regulations also do not include similar text for vessels that may be loading ballast water along the Canadian eastern or western coasts. The regulation’s specific text addressing the Great Lakes and loading of ballast water appear to have the sole purpose of disadvantaging the U.S.-flagged Laker fleet.

Transport Canada has exercised its regulatory flexibility under the BWM Convention to extend “Laker” status to Canadian-flagged vessels sailing beyond Anticosti Island (the baseline, the line of demarcation for Great Lakes pilotage waters and SOLAS requirements). Some Canadian vessels will reflag annually and trade in the Caribbean Sea when the St. Lawrence Seaway closes during the winter. Others Canadian vessel operators claim to only “occasionally sail beyond Anticosti Island.” The Canadian Government and industry are also applying political pressure on the U.S. Government to honor in U.S. regulations the special status granted by the Canadian Government to those Canadian-flagged vessels. Transport Canada is not willing, however, to grant a similar approach to U.S.-flagged vessels occasionally calling on Canadian ports to load or discharge ballast water.

In further support of LCA’s claims, the U.S. Environmental Protection Agency’s (EPA) development of the Vessel Incidental Discharge Act (VIDA) National Standards of Performance proposed on October 26, 2020 (85 FR 67818), and with a supplemental notice on October 18, 2023 (88 FR 71788), continue to exempt existing Lakers (U.S. and Canadian) from any

requirement to install a BWMS and do not align U.S. ballast water management requirements to Transport Canada's requirements. Since the EPA is not expected to release the final VIDA regulations until late September 2024, which is after Transport Canada's ballast water regulations first take effect, the LCA is basing this request on the difference between Transport Canada's final regulation requirements and the EPA's proposed rule and SNPR requirements. The LCA believes this is a reasonable approach, as the EPA's rationale included in the SNPR appears to prohibit them from moving any closer to Transport Canada's requirements in the EPA's final rule.

Canada's use of its "deemed compliance," or equipment standard, is further admission that BWMS cannot reliably meet the ballast water discharge standard in the challenging conditions of the Great Lakes, particularly for U.S.-flagged Lakers, many of which have higher ballast water volumes and flow rates than their Canadian counterparts. Transport Canada has granted waivers of its ballast water regulations for oceangoing vessels with type approved BWMS that were not able to properly operate in the Great Lakes. We are aware of one instance where a vessel that was not granted such a waiver by the U.S. Coast Guard (USCG) was granted a waiver by Transport Canada. That vessel left a U.S. port in ballast and transited to a Canadian Port to load an outbound cargo and discharge its ballast water.

The LCA has been proactive in addressing invasive species issues when needed. The Transport Canada regulation negatively impacts the operation of U.S.-flagged Lakers while providing no discernable impact on reducing invasive species in Canadian waters. Transport Canada claims that to protect Great Lakes Canadian ports from the spread of invasive species from other Canadian Great Lakes ports, the organisms must be killed twice: once prior to discharge in a U.S. port, if transported after being loaded in a Canadian port and discharged in a U.S. port, and a second time if the dead organism is loaded in a U.S. port and subsequently discharged in a Canadian port.

The following information is an update of the information the LCA previously provided to the FMC:

1. **Final Transport Canada Ballast Water Regulations: SOR/2021-120 (June 4, 2021)(Canadian Gazette, Part II, Volume 155, Number).** LCA's previous submissions did not include the final Canadian ballast water regulation that included the requirement for BWMS to be installed on post-2008 Lakers by September 8, 2024, and continued to include requirements applicable to loading ballast water in Canadian Great Lakes ports. A copy is provided in Attachment A.
2. **Updating the inventory of USCG type-approved BWMS:** Since Table 5 of LCA's July 20, 2020, comments was submitted, the USCG has type approved additional BWMS. LCA reviewed the additional USCG type approved BWMS for applicability and potential suitability to U.S.-flagged Lakers. This review did not change LCA's conclusions described in the Petition and LCA's July 20, 2020 comments to the FMC that no USCG type approved BWMS are suitable for use on U.S.-flagged Lakers. An updated table is included as Attachment B.

3. Updating the composition of the U.S.-flagged Laker fleet's pre-2009 and post-2008 vessels:

Since the 2022 LCA comments, the following changes in fleet composition have occurred:

- a. the post-2008 Laker M/V MARK W BARKER was commissioned and is in service,
- b. the pre-2009 Laker M/V JOSEPH H. THOMPSON has been removed from service and has been scrapped,

The LCA is not providing updated trade, cargo, or financial impacts in this letter, but will provide such information upon request by the FMC.

Summary

Taking into account the information presented, previously submitted comments, and interactions with Transport Canada, the LCA does not change the LCA's conclusion in Petition No. P1-20 that Transport Canada's ballast water regulations "create a 'special condition unfavorable to shipping in the foreign trade under Section 19 and under the Commission's regulations, 46 CFR Part 550.301(c) and (e)." The LCA believes the preponderance of evidence presented in our Petition in our July 20, 2020, and March 4, 2022 comments, and in this submission, demonstrate the unfavorable conditions created by Transport Canada's final ballast water regulations are designed to assure that the U.S./Canada trade is all but reserved for the Canadian-flagged fleet and is a taking of U.S. export cargoes.

Transport Canada has not released its enforcement policy regarding its ballast water regulations. We were informed that Transport Canada would release it in July 2024 for a regulation that goes into force on September 8, 2024. U.S. Laker operators are provided no process for an exemption or extension and no information regarding penalties for non-compliance until two months before this regulation goes into effect for post-2008 Lakers. They have no choice but to install and operate equipment that is not required by the U.S. Government and is unlikely to meet the discharge standard or meet the vessel's operational requirements, or they can walk away from the business, handing it to Canadian-flagged vessels. If they choose to install the equipment, they will have to remove the multimillion dollar investment when the U.S. Government determines that new technology exists that meets the BAT standard. Transport Canada is forcing U.S.-flagged vessels operators engaged in foreign trade to Canada to walk away from that market.

We request a ruling before our U.S.-flagged Lakers will be impacted by the September 8, 2024, Transport Canada compliance date.

On behalf of our 13 members operating 43 U.S.-flagged Great Lakes vessels, we thank you for the opportunity furthering our petition.

Sincerely,



James. H.I. Weakley

Attachments:

- A. Final Transport Canada Ballast Water Regulations (June 4, 2021)
- B. Updated Inventory of USCG Type Approved BWMS
- C. Updated List of U.S.-flagged Laker Fleet

cc: Chairman Daniel B. Maffei
Commissioner Rebecca F. Dye
Commissioner Louis E. Sola
Commissioner Carl W. Bentzel
Commissioner Max Vekich
General Counsel Phillip C. Hughey