LAKE CARRIERS' ASSOCIATION

July 24, 2024

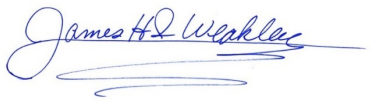
To: Office of Management and Budget

Subject: RIN: 2040-AF92 – Lake Carriers' Association Meeting with OMB for Docket ID No. EPA–HQ– OW–2019–0482

The Lake Carriers' Association (LCA) is submitting this information as a follow-up to our June 24th teleconference with the Office of Management and Budget (OMB) for RIN 2040-AF92 – Vessel Incidental Discharge National Standards of Performance for the Environmental Protection Agency Office of Water.

On behalf of our 13 members operating 44 U.S. flag Great Lakes vessels, we thank you for the opportunity to provide this information.

Sincerely,



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Meeting with Office of Management and Budget
July 24, 2024

Overview

The Lake Carriers' Association (LCA) represents 44 U.S.-flagged vessels that exclusively operate on the Great Lakes (i.e., Lakers). The U.S. Environmental Protection Agency (EPA) final rule for the Vessel Incidental Discharge National Standards of Performance (RIN 2040-AF92) will impact our members' vessels operating on the Great Lakes. The LCA submitted comments to the EPA proposed rulemaking (85 FR 67818) and the supplemental notice (88 FR 71788). The LCA comments covered many areas.

The information provided to the Office of Management and Budget (OMB) focuses on possible inclusion in the final rule of the following items with respect to the regulatory options for Laker ballast tanks and ballast water discharge standards:

- Definition of a New Laker and the compliance timeline for these vessels,
- Equipment standard as Best Available Technology Economically Achievable (BAT), and
- Requirements to achieve binational consistency.

The LCA agreed with EPA's position on many items, especially the exemption of all existing Lakers (including post-2008 Lakers) from ballast water discharge standard compliance in the proposed rule and supplemental notices and with establishing a new subcategory for New Lakers, but the LCA is concerned that EPA may fail to properly address many important items when determining options for Laker ballast water management (BWM) in the Great Lakes.

In general, the LCA disagrees with any EPA final rule that:

- includes an equipment standard (i.e., a requirement to install and operate type approved technology without the vessel needing to meet a specific effluent limit for the regulated pollutant) for New Lakers as BAT because no statutory authority or legal precedent exists for such action,
- incorporates binational consistency as another factor to be considered by EPA when establishing Laker requirements because it is unprecedented and contrary to the supplemental notice's assertion that the regulated community to which the proposed New Laker requirement applies

(i.e., U.S. Laker operators) requested that it be considered (a non-Laker trade association requested binational consistency for their vessels, not for Lakers),

- assumes that ballast water management systems (BWMS) compatible with Laker operations will be available by the time that the U.S. Coast Guard Vessel Incidental Discharge Act (Title IX of the Frank LoBiondo Coast Guard Authorization Act of 2018)(Vessel Incidental Discharge Act (VIDA)) implementation, compliance, and enforcement requirements ("USCG VIDA implementation regulations) takes effect, despite the ongoing BWMS operational issues on vessels operating in the Great Lakes and in the Great Lakes environment and the USCG type approval timeline essentially requiring New Lakers (i.e., built shortly after that regulation effective date) to use current BWMS, and

- claims the ability or authority to predict the future state of BWMS technology for New Lakers and establish requirements based on that prediction, given the historical interpretation of BAT as applying to current, not future, technology capabilities.

The following sections provide more information on the specific items listed above.

New Lakers

The LCA agrees with the EPA in establishing a new subcategory for New Lakers but disagrees with defining that subcategory and its compliance timeline based on the effective date of the USCG VIDA implementation regulations.

Based on the information presented by the EPA in the proposed rule and lack of information on new technologies in the supplemental notice, the LCA recommended the EPA develop a subcategory of Lakers as "New Lakers" and "reserve" the definition of and requirements for the New Lakers subcategory until new BWMS technology for Lakers is determined to be BAT (under the traditional interpretation of BAT per VIDA), is found to be operational in Great Lakes conditions, and has obtained USCG type approval. The New Laker subcategory should also be further subcategorized to address the five different types of Lakers previously supplied to EPA to ensure that the appropriate build date would apply to each of the identified five vessel subcategories as suitable technology becomes available to address each of the Laker types based on their different ballast water system arrangements and flow rate requirements.

At this time, no new technologies are being developed, tested, or under review by the USCG for a BWMS that could adequately operate on Lakers in Great Lakes conditions. Based on the history of BWMS development, testing, and type approval timelines, the supplemental notice's proposed use of the USCG VIDA implementation regulations effective date as a New Laker compliance timeline would be too soon for any new BWMS technology to be developed, tested, type approved, and available to Laker operators by the EPA proposed New Laker build date. Also, EPA

has admitted that current BWMS technology is not adequate for this application. The EPA's position in the supplemental notice would require the first New Lakers to install current BWMS technology that does not address the operability issues on Lakers in Great Lakes conditions.

By identifying New Lakers as "reserved" and withholding the definition and requirements until suitable technology is proven and available, EPA would adequately address that requirements for New Lakers should be established when technology meets VIDA's requirements. The five year "review and revision" cycle for the standards of performance required in VIDA Section 903(a)(4)(D) ensures that revised EPA and USCG regulations on the New Laker definition and requirements would be issued in a timely manner after the required technology has been demonstrated to be BAT.

Equipment Standard

The LCA disagrees with EPA defining BAT as an equipment standard requiring New Lakers to install and operate BWMS that have not been proven to operate consistently at Laker flow rates, may not "reliably achieve the numeric ballast water discharge standard" (88 FR 71796), have not yet been determined to reduce AIS concentrations in treated Laker ballast water to any consistent level, and are not consistent with the BAT or Best Management Practice (BMP) requirements of the VIDA.

The following EPA statements in the proposed rule (85 FR 67818) remain valid and should be sufficient to determine that an equipment standard is not acceptable in the Great Lakes and does not meet the requirements of BAT:

> "In addition, EPA determined that such an equipment requirement does not meet the "economically achievable" portion of the BAT requirement for this proposed rule. An equipment standard may require a costly installation and maintenance of a system only to be faced with an imperative for the vessel owner to modify the system to be able to operate the vessel as necessary or even to replace the system with newer technology in the near future. Vessels that operate exclusively in the Great Lakes have a significant lifespan as compared to seagoing vessels due to the freshwater conditions of the Great Lakes (85 FR 67850)."
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> "There are insufficient data at this time to establish an alternative equipment standard for Great Lakes vessels that is technically available and economically achievable. EPA has determined that implementing a carriage standard may be short-sighted and costly to the vessel community with an unknown level of effectiveness to reduce ANS discharges in the Great Lakes. Additional research is needed before EPA could identify a standard that reasonably satisfies the statutory BAT requirements consistent with Section 903(g)(2)(B)(viii) of the VIDA which establishes a program for EPA, in collaboration with other federal agencies,

> to research and develop BWMS for use by vessels operating on the Great Lakes (85 FR 67850)."

LCA notes that the research program referenced above has yielded very little data on BWMS performance on Lakers and has not demonstrated that any progress has been made toward developing BWMS that can operate on Lakers under Great Lakes conditions.

In the supplemental notice (88 FR 71788), the EPA describes its authority to impose an equipment standard on New Lakers by explaining the statutory factors the EPA considers in applying BAT and citing some court cases on the BAT authority of the Clean Water Act (CWA), such as "BAT reflects the highest performance in the industry and may reflect a higher level of performance than is currently being achieved based on technology transferred from a different subcategory or category, bench scale or pilot facility studies, or foreign facilities" (88 FR 71797). The LCA agrees that BAT is the highest performing treatment technology in an industrial category or subcategory, as required by the VIDA, and the VIDA specifically defined BAT by citing the current CWA definition of the term, meaning that VIDA does not provide any direction to or authority for the EPA to create a new, novel interpretation of BAT.

In the supplemental notice, EPA "acknowledges that a numeric standard … would better ensure … pollution reduction" (88 FR 71798) but states that absent technology that can reliably achieve a discharge standard an equipment standard is consistent with the "technology-forcing" nature of BAT. However, the cited court cases (i.e., (NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987), Southwestern Elec. Power Co., 920 F.3d at 1003) did not involve an equipment standard. Both cases discuss "technology-forcing" with regard to BAT and New Source Performance Standards, but neither case involves an equipment standard nor cites an applicable authority that would allow the EPA to impose an equipment standard on New Lakers under BAT. Therefore, the cited cases do not support EPA's contention that an equipment standard can be considered BAT. The LCA also wants to note that VIDA does not include New Source Performance Standards and does not include equipment standards in the definition of Best Management Practices (33 U.S.C. 1322 (p)(1)(H)).

We also have not found any example of the CWA BAT standard resulting in the imposition of an equipment standard. Vessel marine sanitation device (MSD) requirements are an example of an equipment standard, but the applicable portion of the CWA does not include a requirement for the vessel MSD performance standard to be based on BAT.

The CWA history of BAT resides in the development of Effluent Guidelines for the various point source industrial discharges by the EPA Office of Water, Office of Science and Technology, Engineering and Analysis Division. Effluent Guidelines is the only EPA program to develop regulations using BAT. In the approximately 40-year history of BAT levels of control for the Office of Water, no equipment standard has been used to define BAT by the EPA Office of Water.

The supplemental notice does not provide any information regarding its authority to establish a regulatory precedent regarding applying BAT to New Lakers when VIDA specifically defines BAT as the CWA interpretation of that term that existed as of the date of enactment of VIDA.

EPA was tasked by VIDA to develop requirements based on BAT. Technology identified as BAT historically has been capable of operating consistently at the required flow rate and operating environment for the required application and has demonstrated a measured performance level that becomes the performance standard for that application.

At this time, no new technologies are being tested or under review by the EPA or the USCG that could specifically meet the requirements of Laker operations in Great Lakes conditions. The supplemental notice would require the first New Lakers to install and operate what is essentially current BWMS technology and does not address the problems of current BWMS technology not being tested in Great Lakes conditions and significantly slowing Laker loading and unloading operations due to BWMS inability to handle Great Lakes environmental conditions. The main issue is that BWMS are mechanically unreliable, cannot be operated at their designed flow rates, and significantly impact Laker ballasting operations under Great Lakes conditions. The EPA also does not provide any shipboard testing data that illustrate that requiring Lakers to operate current technology reduces aquatic invasive species concentrations in treated Great Lakes ballast water to any specific level.

Operational information from 2022 Great Waters Research Collaboration sampling (funded by EPA) showed that:

- Installed BWMS was operational about 60 percent of the time due to system faults, waiting for maintenance, decrease in flow rates, or time constraints set by the cargo operations,
- BWMS flow rates were routinely operated less than 50 percent of the total rated capacity (TRC) of that equipment, impacting vessel loading and agreements with clients,
- When operable, the BWMS were in “downgrade mode” (i.e., flow drops below 50 percent TRC) about 14 percent of operational time,
- Vessels frequently waited extended periods (i.e., weeks or months) for servicing, parts and maintenance, and
- Increased demand on crew for troubleshooting the operation of the BWMS due to the need to focus on starting cargo operations.

These attempts at BWMS operation illustrate the inability of current BWMS technology to conform to the operation of a U.S.-flagged Laker, the potential safety impacts to Laker crewmembers, and BWMS incompatibility with ship systems.

Based on the information available, BWMS equipment applicable to Lakers cannot be defined as BAT, as required by the VIDA. BAT is not the mere act of installing and operating equipment. BAT is finding equipment that has been determined to be the best at reducing pollution while enabling the regulated facility to continue normal operations.

The EPA may transfer technology from another industry as the basis for BAT, but the LCA has not found any example of BAT resulting in an equipment standard. Also, when developing discharge standards or transferring technology from another industry, the technology used as the basis for BAT must be shown to be fully operational at the intended flow rate for use. Historically, CWA Effluent Guidelines do not significantly reduce the output capacity of the regulated industry, but that is what the supplemental notice is proposing to do with New Lakers. Neither the EPA nor the USCG have provided any data illustrating that any BWMS operates consistently or at the required flow rate on Lakers. Since BWMS negative impacts on Laker operations have not yet been resolved, the currently available USCG type approved BWMS should be not considered BAT for Lakers, including New Lakers as proposed in the supplemental notice and no new BWMS technology should be required to be installed and operated on New Lakers until those problems have been resolved.

In the supplemental notice, EPA states that "An equipment standard could allow vessels flexibility to operate BWMSs in challenging water conditions through use of operational contingency measures, however, these implementation details would be determined in the USCG regulations."

The LCA disagrees with the above statement for the following reasons:

1. An equipment standard does not allow flexibility because the equipment is required to be operated even if the BWMS significantly impacts ballasting flow rates.

2. Operational contingency measures should not be determined by the USCG VIDA implementation regulations. Contingency measures should be developed by the EPA in the national standards of performance because this is the only means through which the impacts on vessel operations can be assessed while the standards are being developed. Contingency measures are similar to BMPs because they are practices that reduce discharges of pollutants.

3. Requiring New Lakers to install and operate BWMS that do not operate consistently in the Great Lakes could actually delay the development and implementation of future BWMS technology that may be operable in the Great Lakes.

BAT technology for Lakers must align with:

- Vessel loading requirements,

- Vessel unloading requirements,
- Great Lakes and St. Lawrence Seaway customer agreements that permit Great Lakes commodities to be delivered reliably in their weather-limited navigation season,
- Available technology service networks, and
- Vessel manning and labor requirements.

For the reasons previously mentioned, the LCA disagrees with the EPA defining BAT (or BMPs) as an equipment standard when the VIDA does not authorize that determination. LCA believes that EPA's decision to define BAT (or BMPs) as an equipment standard without a clear Congressional authorization is contrary to law, is inconsistent with the plain language of VIDA itself, and runs afoul of the Supreme Court's recent decision overturning the Chevron doctrine in Loper Bright Enterprises et al v. Raimondo. In that case, the Court held that an agency can only act where the Congress has provided clear authorization and where the agency's actions are consistent with the statute, and LCA believes defining BAT and BMP as an equipment standard fails both tests.

Best Management Practices

The LCA concurs with EPA's decision in the 2020 proposed rule (85 FR 67818) ("proposed rule") to exclude the 2013 VGP and current USCG requirement (33 CFR 151.2050(b)) for vessel operators to minimize or avoid uptake of ballast water in the listed areas and situations because, as EPA stated "such measures are not practical to implement and enforce as individual standards because these conditions are usually beyond the control of the vessel operator during the uptake and discharge of ballast water". The LCA commented on the proposed rule's VIDA National Standards of Performance that "Operationally, these would be difficult, at best, with which to comply."

Binational Consistency

The LCA objects to the regulation considering "binational consistency" as a factor in determining New Laker requirements. The LCA notes that "binational consistency" with Canada is not an element referred to in the CWA or VIDA, and the LCA has not found it mentioned in any prior CWA regulatory proceeding, especially not as a reason to impose a specific requirement like an equipment standard. This would also set a new precedent for the CWA.

The supplemental notice states "EPA has heard from the regulated community that such consistency is important for vessel companies engaged in binational trade and allows them to better protect the shared Great Lakes waters" (88 FR 71802). The quoted statement is misleading. The docket does not include any comment from a U.S.-flagged vessel operator requesting that EPA impose an equipment standard on Lakers or duplicate in part or in whole the Canadian ballast water regulatory regime. The Chamber of Shipping of America's (CSA) comments on the proposed rule requested a consistent set of U.S. and Canadian regulatory requirements for the Great Lakes but did not express a preference for an equipment standard for Lakers. The CSA primarily represents operators of vessels in international trade, while LCA represents only operators of U.S.-flagged Lakers. We are not aware of any Lakers represented by CSA.

We believe that the U.S. agencies should develop regulations consistent with U.S. laws, regulations and legal precedents. Canada is free to base their regulations on Canadian laws or other criteria. If there is a significant difference, either country is free to refer the matter to the U.S.-Canada Regulatory Cooperation Council to reduce unnecessary differences. Canada was well aware of the VIDA, the VGP, the CWA and the various Coast Guard regulations and authorities. TC chose to go a different path and the Canadian government and industry are now calling for harmonization, which they define as the U.S. adopting the Canadian regulatory approach. The extent to which either Canadian or U.S. (or both) Great Lakes ballast water regulations should be changed to be more consistent with each other is for the U.S.-Canada Regulatory Cooperation Council process to decide, not the EPA. The LCA also believes that EPA's decision to use regulatory consistency with Canada as new criteria also runs afoul of the Supreme Court's recent ruling overturning the Chevron doctrine in Loper Bright Enterprises et al v. Raimondo. As previously mentioned, the Court held that an agency can only act where the Congress has provided clear authorization and where the agency's actions are consistent with the statute, and LCA believes including regulatory consistency with Canada fails both tests.

Ability to develop a Less-Stringent Standard of Performance

The LCA is aware that some commenters did not agree with the EPA developing less-stringent standards of performance compared to the existing the EPA Vessel General Permit (VGP). Sec. 903(a)(4)(D)(ii)(II)(aa)(BB) of the VIDA provides an exception for a less-stringent standard of performance than is included in the 2013 VGP in cases where information becomes available that was not available when the 2013 VGP was issued. The EPA has reviewed BWMS performance data, the USCG has been tracking BWMS operational issues, and both have been made aware of BWMS operational challenges occurring since the 2013 VGP was issued. The EPA VIDA performance standards provide a good starting point to openly disclose the issues and rectify problems with BWM in the United States (U.S.), update previous EPA statements on this topic, and move forward with standards and requirements that can be achieved by the shipping industry – especially in the Great Lakes.

Summary

The LCA interacted with the EPA frequently to discuss the issues and express our concerns over how the final regulation may be developed. The LCA wants a final regulation that protects the Great Lakes and the many businesses that are vital to the U.S. economy and follows the requirements of VIDA.

The LCA agrees with the EPA not requiring the existing fleet of U.S.-flagged Lakers to install and operate BWMS equipment that does not meet BAT and impacts vessel operation. The LCA also agrees with establishing a new subcategory of New Laker and provided EPA with a different approach to the new subcategory.

The LCA disagrees with EPA:

- On the proposed definition of and compliance timetable for New Lakers as no new BWMS technology will receive USCG type approval by the likely effective date of the VIDA regulations and none currently exist that meet Laker operational needs,
- Defining BAT as equipment standard for New Lakers because no statutory requirement or regulatory precedent exist for such action, and
- Incorporating binational consistency as another factor considered by EPA because no regulatory precedent exists for such action and other frameworks exist to address regulatory differences (Regulator Cooperation Council, Boundary Waters Treaty and Great Lakes Water Quality Agreement).

The LCA appreciates this opportunity to meet with OMB and provide additional context to comments. The LCA comments submitted to the EPA are available in Docket Documents EPA HQ OW-2019-0482-0683, EPA HQ OW 2019 0482 0700, EPA-HQ-OW-2019-0482-0683, EPA-HQ-OW-2019-0482-0961, EPA HQ-OW-2019-0482-0793, and EPA-HQ-OW-2019-0482-0979.