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Jennifer A. Carpenter
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May 15, 2017

Ms. Samantha K. Dravis
Office of Policy
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Evaluation of Existing Regulations
(Docket No. EPA-HQ-OA-2017-
0190)

Dear Associate Administrator Dravis:

The American Waterways Operators is the national trade association for the tugboat, towboat and barge industry. AWO's 350 member companies own and operate barges and towing vessels operating on the U.S. inland and intracoastal waterways; the Atlantic, Pacific and Gulf coasts; and the Great Lakes. Our industry's 5,500 towing vessels and 31,000 barges comprise the largest segment of the U.S.-flag domestic fleet. The tugboat, towboat and barge industry provides family-wage jobs and ladders of career opportunity for more than 50,000 Americans, including 38,000 positions as mariners on board our vessels, and supports more than 300,000 jobs in related industries nationwide. Each year, our vessels safely, securely and efficiently move more than 760 million tons of cargo critical to the U.S. economy, including petroleum products, chemicals, coal, grain, steel, aggregates, and containers. Tugboats also provide essential services in our nation's ports and harbors, including shipdocking, tanker escort and bunkering.

On behalf of AWO's member companies, thank you for the opportunity to provide input on regulations promulgated by the U.S. Environmental Protection Agency that may be appropriate for repeal, replacement or modification, in accordance with Executive Order 13777, "Enforcing the Regulatory Reform Agenda." We applaud the Trump Administration for initiating this effort to alleviate unnecessary regulatory burdens and seeking feedback from the public to assist EPA in evaluating its regulations.

AWO's member companies are proud to be part of an industry that is the safest and most fuel-efficient of any surface transportation mode. We are deeply committed to building on the natural advantages of marine transportation and leading the development of higher standards of marine safety and environmental protection. In 1994, AWO became the first transportation trade association to adopt a code of safe practice and environmental stewardship for member companies; today, compliance with the Responsible Carrier Program is a condition of AWO membership. This commitment informs our view of EPA's request for comment. AWO seeks

to protect the marine environment in which our members operate while ensuring a practicable regulatory framework that allows for the continued safe and efficient movement of crucial maritime commerce, and eschewing costly, infeasible or ineffective regulations that could result in the diversion of cargo to other modes of transportation that pose increased safety and environmental risks.

In order to achieve these goals, towing vessels and barges must be governed by clear and practical federal statutes and regulations, consistently and uniformly applied and administered across the country, to ensure that that interstate maritime commerce moves safely and efficiently and is not disrupted by unworkable or contradictory local or regional requirements. As an overarching recommendation, AWO urges EPA to support the authority of federal lawmakers and regulators over interstate navigation, to view its regulation of discharges and emissions from vessels through this lens, and to promote consistency among its regional offices in decision-making that impacts the movement of interstate commerce by water. Many of the recommendations that we offer in our letter are related to this need.

Support Passage of the Commercial Vessel Incidental Discharge Act

EPA currently regulates discharges incidental to the normal operation of vessels, including ballast water, under the Clean Water Act's National Pollutant Discharge Elimination System permit program. The NPDES permit program was designed to regulate discharges from fixed, land-based facilities, and includes a state certification process that allows a state in which a permitted discharge will occur to add requirements to a permit over and above the requirements established by EPA. Recognizing that this is an ill-fitting framework for the regulation of discharges from vessels, which regularly and routinely cross state boundaries, EPA exempted vessel discharges from the NPDES permit program in 1973, when the regulations were originally promulgated. However, litigation brought by environmental advocacy groups led to a 2008 decision by the U.S. Circuit Court of Appeals for the Ninth Circuit requiring EPA to develop an NPDES permit for discharges incidental to vessel operations. In 2008, EPA issued the first Vessel General Permit, which was reissued in 2013. In addition to EPA-imposed discharge limits and recordkeeping and reporting rules, the current VGP¹ includes certification conditions added to the permit by 25 states, creating an overlapping patchwork of regulatory requirements with which vessel operators must comply.

This patchwork is further complicated by the fact that vessel discharges were already heavily regulated by U.S. Coast Guard under numerous other statutory authorities, including the Nonindigenous Aquatic Nuisance Prevention and Control Act, the National Invasive Species Act, and the Act to Prevent Pollution from Ships. In addition, since neither the NPDES permit program nor NANPCA and NISA preempts state regulation of vessel discharges, some states have independently instituted additional standards for ballast water and other vessel discharges. This dysfunctional regime of duplicative and sometimes conflicting federal and state regulations severely complicates compliance for vessel operators and mariners and requires American taxpayers to foot the bill for the administration of redundant federal and state regulatory programs.

The Commercial Vessel Incidental Discharge Act (S. 168/H.R. 1154) is bipartisan legislation that would rectify this untenable situation by establishing a uniform, national regime for the

¹ Final NPDES General Permit for Discharges Incidental to the Normal Operation of a Vessel, 78 Fed. Reg. 21938 (April 12, 2013).

regulation of ballast water and other vessel discharges. CVIDA would uphold the highest standards of environmental protection by retaining the ballast water discharge standard currently enforced by both EPA and the Coast Guard, which the independent EPA Science Advisory Board has deemed the most stringent standard currently achievable, and establishing a process to raise the standard over time as technology improves. CVIDA would also create complementary rather than duplicative roles for EPA and the Coast Guard. In recognition of the Coast Guard's maritime expertise and enforcement capability, and its long record of ensuring vessel safety, exercising oversight of vessel operations and equipment, and protecting U.S. waterways from pollutants and invasive species, CVIDA would establish the Coast Guard as the lead agency in charge of regulating discharges from vessels. In recognition of EPA's scientific expertise in evaluating and maintaining water quality, CVIDA would require the Coast Guard to consult with EPA in the development and review of discharge standards. AWO firmly believes that CVIDA is necessary to rationalize the regulatory regime for vessel discharges and provide much-needed certainty for vessel operators engaged in interstate commerce while enhancing environmental safeguards, and we respectfully request that EPA and the Trump Administration support the passage of CVIDA this year.

The passage of CVIDA is especially urgent due to the approaching expiration of the current VGP on December 18, 2018. In the absence of Congressional action, EPA will need to reissue the VGP for a second time, and AWO understands that work to develop "VGP 3.0" is already underway. This work is impacted by a 2015 decision by the Second Circuit Court of Appeals—again, the result of litigation brought by environmental advocacy groups—that found fault with the way in which EPA developed the current VGP and directed the agency to consider a variety of factors when the permit is reissued. These factors are unrelated to the safe and efficient operation of vessels in the real world, and are likely to result in a VGP 3.0 that will impose costly and infeasible requirements on vessel operators. EPA's work to develop VGP 3.0 will also involve the reassessment of many requirements of the current VGP about which AWO has repeatedly expressed concerns—most notably, its recordkeeping and reporting requirements, which for many vessel operators are the most costly and burdensome aspects of permit compliance, and which add immeasurably to the workloads of towing vessel crewmembers, taking time away from their safety-critical responsibilities. Until the passage of CVIDA, AWO understands that EPA must prepare to reissue the VGP, and we encourage EPA to engage in an inclusive and transparent process of consultation with stakeholders as it develops VGP 3.0 to ensure that these issues are adequately considered and addressed.

Reform the No Discharge Zone Designation Process

Separate and distinct from the regulation of incidental vessel discharges, the Clean Water Act also mandates the regulation of sewage discharges from vessels.² In general, such discharges are prohibited unless the vessel is equipped with a marine sanitation device that meets the performance standards set by EPA³ and the design, construction, installation and operation requirements established by the Coast Guard.⁴ In contrast to the NPDES permit program, the Clean Water Act expressly preempts the states from adopting or enforcing their own regulations with respect to the design, manufacture, installation or use of MSDs. However, Section 312(f)(3) of the Clean Water Act provides that:

² 33 U.S.C. §1322.

³ 40 C.F.R. §140 et seq.

⁴ 33 C.F.R. Part 159, Subparts A-D.

“if any State determines that the protection and enhancement of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply.”

EPA regulations implementing this provision at 40 C.F.R. §140.4(a) require states petitioning for permission to designate a “No Discharge Zone” to include “a certification that the protection and enhancement of the waters described in the petition require greater environmental protection than the applicable Federal standard,” as well as a map and description of the location of pump-out facilities within the proposed NDZ and the operating hours and water depths of those facilities, and information on the vessel population within the waters of the proposed NDZ.

Over the past 40 years, NDZs have proliferated, and in practice, the statutory and regulatory provisions intended to ensure that they are feasible for the vessels operating in them have proved to be insufficient. Time and time again, EPA’s regional offices have approved state petitions, presented with little justification, for waters where pump-out facilities are inadequate to meet the needs of commercial vessels operating therein. AWO has repeatedly raised objections to EPA asserting our member companies’ inability to utilize pump-out facilities identified by states in NDZ petitions, but to no avail. To our knowledge, no EPA regional office has ever rejected a state’s NDZ petition.

AWO’s concerns are rooted in the unique physical and operational characteristics of towing vessels. Many towing vessels are not equipped to hold sewage onboard and, instead, treat and discharge sewage using MSDs certified by the Coast Guard to meet EPA performance standards. When a No Discharge Zone is designated, the towing vessels operating in or transiting it may no longer utilize these federally approved MSDs, and must be retrofitted to accommodate sewage holding tanks. These retrofits can be costly and difficult, if not impossible, to engineer due to towing vessels’ small size.⁵ Even if the installation of sewage holding tanks did not pose a serious problem, safely and efficiently disposing of sewage from those holding tanks utilizing existing pump-out facilities would be unworkable. The vast majority of pump-out facilities that AWO has assessed in the course of its work on this issue are not accessible or available to towing vessels, nor compatible with their operations. Many pump-out facilities are reserved for the exclusive use of specific, often government-owned and operated, vessels. Many more are located at marinas that are designed to accommodate small recreational vessels and have berthing, draught and capacity limitations that render their pump-out facilities unusable for towing vessels, as well as daylight or seasonal operating hours that are unsuitable for an industry that operates around the clock. However, these facts have not prevented EPA’s regional offices from determining that such pump-out facilities are adequate and reasonably available for the purposes of approving state NDZ petitions.

⁵ A 2015 assessment conducted by Herrera Environmental Consultants for the State of Washington’s Department of Ecology found the average retrofit cost is \$161,500 to \$300,000 for a towing vessel, up to \$350,000 for a fishing vessel, and up to \$650,000 for a passenger vessel.

To address these concerns, AWO respectfully requests that EPA implement reforms, either by regulation or policy, to improve the consistency and practicability of the NDZ designation process. We offer the following recommendations for the agency's consideration:

- Require states to attest in certifications submitted pursuant to 40 C.F.R. §140.4(a)(1) that the waters described in the petition are impaired by the discharge of treated sewage from federally approved MSDs. Because the current certification requirement is not specific, it is up to each state to determine the process by which the certification is made. However, whatever the process, no certification AWO has reviewed has proved (and very few have attempted to prove) that the use of MSDs has caused or contributed to water quality impairments in a proposed NDZ. AWO believes that before a state may petition EPA to prohibit discharges from federally approved MSDs, it should be required to conclusively demonstrate that such discharges cause or contribute to water quality impairments.
- Define the terms “adequate” and “reasonably available” as they appear in 40 C.F.R. §140.4(a): “the Administrator will determine within 90 days whether adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels using such waters are reasonably available.” As explained above, EPA’s regional offices have routinely affirmed the adequacy and availability of pump-out facilities despite evidence from the affected commercial vessel community that these facilities are inadequate for and/or unavailable to them. AWO believes that the regional offices should be required to base their determinations regarding the adequacy and availability of pump-out facilities on a consistent set of criteria that take the needs of commercial vessels into account.

Delay Implementation of Tier 4 Engine Emissions Standards

In 2008, EPA set stringent emissions standards for new marine engines.⁶ These included so-called “Tier 4” standards, which mandate reductions in the emissions of sulfur and nitrogen oxides for new marine diesel engines over 800 horsepower. To achieve the required NO_x reductions, higher horsepower engines must utilize exhaust gas recirculation, and lower horsepower engines must incorporate catalytic exhaust after-treatment technology, also called exhaust scrubbing. Beginning this year, no engine manufacturer may manufacture a new marine diesel engine between 800 and 1,300 horsepower—a range into which many towing vessel engines fall—that does not meet Tier 4 standards.

When the supply of engines certified to previous EPA emissions standards runs out, towing vessel operators will need to have ready access to Tier 4 engines in this horsepower range that include exhaust scrubbing technology. However, while engine manufacturers have made investments in the development of Tier 4-compliant technology for larger, higher horsepower marine diesel engines, it is AWO’s understanding that there has not been a concentrated effort to scale the technology for smaller, lower horsepower engines, and that such engines are not yet commercially available. We are very concerned that, when the time comes that an AWO member company needs to secure a Tier 4 engine of the correct size and horsepower for a new towing vessel, there may be none on the market, or the few that are may be very costly.

⁶ 40 C.F.R. Part 1042.

AWO is also concerned about the costs associated with operating Tier 4 engines on towing vessels. Engines that include exhaust scrubbing technology require the addition of diesel exhaust fluid, a urea solution, to enable the NO_x reduction reaction. The purchase of urea will add significant costs to operators' fuel expenses,⁷ and the complexity and maintenance needs of exhaust scrubbing systems may require operators to add engineers to their crews, which have the potential to impede the profitability and growth of AWO member companies. Further, the performance of exhaust scrubbing technology is unproven in the inland operating environment, in which towing vessels often idle for long periods of time.

As a result of these concerns, AWO strongly urges EPA to review and reevaluate the implementation timeline for Tier 4 standards for engines under 1,300 horsepower, and in particular, for engines between 800 and 1,000 horsepower, in consultation with engine manufacturers and vessel manufacturers and operators. Through this review, EPA should aim to ascertain whether the current timeline is practicable and whether lower horsepower Tier 4 engines are technologically feasible and commercially available in sufficient quantities. The review should also include a reassessment of whether the costs of developing, manufacturing, installing and operating Tier 4 engines exceed the environmental and economic benefits for engines in this horsepower category. This review should be conducted before vessel operators find themselves with little or no option to obtain compliant engines.

Other Concerns

AWO also notes the following policy issues of concern and would appreciate an opportunity to discuss them further with the relevant offices at EPA:

- Under Subtitle C of the Resource Conservation and Recovery Act,⁸ generators of hazardous waste must be assigned a hazardous waste identification number; without an identification number, disposal facilities will not accept hazardous waste. EPA has authorized the states to assign identification numbers to hazardous waste generators. However, AWO member companies have had difficulty securing identification numbers for their vessels, which frequently travel between and among states and may initiate the disposal of hazardous waste in different geographic locations. In 2001, EPA issued a memorandum⁹ to RCRA policy managers within its regional offices recommending that cruise ships be assigned a single identification number by the state in which their corporate office or main port of call is located. However, AWO member companies report that many states are unaware of this policy or resistant to its adaptation to towing vessels. AWO encourages EPA to issue new policy directing states to assign a single hazardous waste identification number to vessels that are homeported in that state upon the request of the vessel operator, or directing EPA regional offices to assume responsibility for assigning identification numbers to vessels.

⁷ One AWO member company has estimated that the cost of urea necessary to operate a Tier 4-compliant engine will add an additional \$7.10 per 1,000 horsepower per hour, totaling an additional annual cost of between \$125,000 and \$300,000 for a single towing vessel of average size.

⁸ 40 C.F.R. Parts 260-273.

⁹ "Cruise Ship Identification Numbers and State Required Annual Reporting Components," RCRA Online Number 14580.

- Over the past several years, EPA Region 5 has worked with the State of Illinois' Environmental Protection Agency and the City of Chicago's Department of Public Health to investigate companies for Clean Water Act and Clean Air Act compliance. In particular, EPA Region 5 issued requests for information under Section 308 of the Clean Water Act¹⁰ to several towing vessel companies operating in the Chicago Area Waterways System, requiring them to report on their transportation and management of petroleum coke, or petcoke, over concerns that petcoke may blow from barges into the water. Although this reporting requirement has been lifted, the impacted AWO member companies were subjected to increased recordkeeping and reporting burdens, and AWO was troubled by the region's lack of consultation with the industry prior to the requirement's imposition. Recently, Region 5 has turned its attention to other bulk cargoes and required the installation of air quality monitors at facilities that handle and store manganese. Taken together, these actions by EPA Region 5 have the potential to have a chilling effect on the transportation of very important bulk commodities in the Chicago area. AWO respectfully requests that EPA work with EPA Region 5 to ensure that environmental protection is appropriately balanced with the economic considerations.

Thank you again for the opportunity to comment on EPA's evaluation of regulations that may be appropriate for repeal, replacement or modification. We would be pleased to answer any questions or provide further information as EPA sees fit.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Carpenter".

Jennifer A. Carpenter
Executive Vice President & COO

¹⁰ 33 U.S.C. §1318.