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Lynn M. Muench  
Senior Vice President - Regional Advocacy

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VIA FACSIMILE

Mr. Ronald L. Wooten  
Director  
West Virginia Office of Miners' Health, Safety and Training  
State of West Virginia  
1615 Washington Street  
East Charleston, WV 25311

RE: West Virginia Proposed Legislative Rule  
Title 56, Series 14

Dear Mr. Wooten:

The American Waterways Operators (AWO) is the national trade association representing the inland and coastal tugboat, towboat and barge industry. AWO is comprised of more than 300 individual companies, with a geographic scope ranging from New England to Alaska, and throughout the interior river system of the United States, including extensive operations along the Ohio and Kanawha Rivers.

We appreciate the opportunity to express our concerns regarding the Proposed Legislative Rule, Title 56, Series 14, from the West Virginia Office of Miners' Health, Safety and Training. We respectfully submit that this rule is ill-advised and should not be adopted for the following reasons:

- Interstate commerce is an area clearly referenced in the U.S. Constitution as being exclusively subject to federal, as opposed to state, regulation, a fact that has been confirmed on numerous occasions by the U.S. Supreme Court;
- The towing industry and the U.S. Coast Guard already have a partnership in place to proactively address safety issues on vessels;
- The Coast Guard is in the process of promulgating a rule on towing vessel inspection;
- Members of AWO must comply with the Responsible Carrier Program, which already has worker safety components; and,
- Overregulation could impede the towing industry's operations in the state.

### The Role of Federalism

First and foremost, the imposition of a state inspection regime runs afoul of the constitutional balance between state and federal areas of responsibility. As the U.S. Supreme Court most recently stated in its 2000 *Intertanko v. Locke* decision, “the Court had little difficulty in finding state vessel requirements were pre-empted by federal laws which governed the certification and standards of operation.” In this proposed rule, West Virginia is seeking to have all required training be “recorded on an MSHA 5000-23 form, a copy of which shall be maintained at the facility for a period of at least one year.” By assigning itself as a reviewer of requirements promulgated by the U.S. Department of Labor’s Mine Safety and Health Administration, the state risks violating the constitutional standard of federalism, thereby rendering its proposed rule subject to invalidation by federal courts.

### Industry-Coast Guard Partnership

The proposal to introduce state inspections appears to presuppose a governmental neglect of the industry that does not exist in practice. In fact, members of industry are committed to the safety of their vessels and the individuals who work aboard them, and have been more than willing to cooperate and collaborate with the appropriate authorities to achieve these goals. For example, AWO has worked with the Coast Guard over the past 15 years, via the Coast Guard-AWO Safety Partnership, to address safety concerns throughout our industry. The Safety Partnership has addressed and produced guidelines on towing vessel crew fatalities, a river crisis action plan, barge inspection consistency, crew endurance management and over 30 other issues.

The issue of crew endurance is of particular relevance to mariner safety, as fatigue has been identified as a significant cause of accidents. AWO first established a working group on fatigue in 1997. As a result of the work of AWO and the Coast Guard in this area over the past decade, member companies have increasingly incorporated scientifically-sound crew endurance management principles into their operations by making changes to the working environment onboard vessels, employing light and noise management, and encouraging crewmembers to adopt a healthier diet and exercise. The industry and the Coast Guard continue to collaborate through the Safety Partnership to refine crew endurance while improving the working environment of the mariners.

### Coast Guard Development of Rule on Towing Vessel Inspection

AWO has been a vigorous supporter of the Coast Guard’s development of a new towing vessel inspection regime. This process began in 2003 after AWO requested that the Coast Guard make the industry’s vessels subject to inspection, a rare request for any industry to make. In response, Congress passed the Coast Guard and Maritime Transportation Act of 2004, a bill that added towing vessels to the list of vessels subject to federal inspection, and authorized the Coast Guard to “establish by regulation a safety management system appropriate for the characteristics, methods, and nature of service of towing vessels.” Industry’s goals throughout this process have been to create an inspection system that is risk-based and targets the most common causes of towing vessel accidents. As these proactive steps indicate, the industry is committed to

achieving the highest degree of safety for our personnel and our vessels, and is not attempting to avoid compliance with needed standards.

### Responsible Carrier Program

The towing industry has been so committed to improving safety, in fact, that it has done a large amount to regulate itself while a Coast Guard-led inspection regime framework is being developed. Members of AWO, for example, are required to comply with the Responsible Carrier Program (RCP), a safety management system that came about after an industry-wide risk assessment in 1994. The RCP is an award-winning program that has been recognized as a safety standard by the Coast Guard and state governments across the country. The governments of Washington and California, for example, have referenced the RCP in their state regulations. Among its features, the RCP requires companies to develop a safety policy, create safety rules in areas including non-skid surfaces and flammable and combustible liquids, and implement a policy for the use of personal protective equipment. Compliance with the RCP and a high degree of responsibility on the part of individual companies have contributed to a decrease in the number of fatalities per year in the industry from 28 in 1997 to 8 in 2007.

### Industry in the State

In addition to its safety record, the towing industry makes a large contribution to the state's economic well-being and its stewardship of the environment. In 2006, for example, the Port of Huntington alone received or shipped 58.3 million tons of coal and 10.4 million tons of petroleum products. The industry positively impacts the condition of roads by moving 70 semi-truckloads of products onto a single barge. With regard to pollution, barges on the Ohio River carry the equivalent of 1,010,250 railroad car loadings of coal every year. This lowers the amount of pollutants put into the air throughout West Virginia by replacing trains with barges, a significant substitute considering that transport by rail emits 39 percent more carbon dioxide than does transport by inland barge. Subjecting vessels to redundant and unnecessary regulations could very well have the effect of discouraging waterborne commerce in the state, thereby depriving West Virginia of a substantial portion of these economic and environmental benefits.

AWO greatly appreciates being able to begin a dialogue with your agency on the industry's commitment to worker safety in West Virginia and throughout the country. Based on the reasons expressed above, however, we believe that approval of this rule should not be granted.

Thank you for the opportunity to comment on this proposed rule. If you would like further information, AWO would be pleased to provide it.

Sincerely,

A handwritten signature in cursive script that reads "Lynn M. Muench". The signature is written in black ink and is positioned above the printed name.

Lynn M. Muench