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Peter J. Schrappen, CAE
Vice President – Pacific Region

September 14, 2022

RE: Response to California Office of
Administrative Law's Decision of Disapproval of
Regulatory Action for the California Air Resource
Board's Commercial Harbor Craft Rule

To Whom it May Concern,

The American Waterways Operators (AWO) is the tugboat, towboat, and barge industry's advocate, resource, and united voice for safe, sustainable, and efficient transportation on America's waterways, oceans, and coasts. Our industry makes up the largest segment of the U.S.-flag domestic maritime fleet and represents the most sustainable mode of freight transportation, producing 43 percent less greenhouse gas emissions than rail and more than 800 percent less than trucks. Tugboat, towboat, and barge operations are particularly significant in California, which ranks third among states in waterborne commerce by tonnage and fourth in economic impact, with more than \$12.2 billion in annual economic activity driven by the domestic maritime transportation industry.

Introduction

On September 9, 2022, the California Office of Administrative Law (OAL) published a Decision of Disapproval of Regulatory Action for the California Air Resource Board's (CARB) final Commercial Harbor Craft (CHC) rule. Government Code section 11349(c) requires a regulation to be "easily understood by those persons directly affected by them." OAL determined that the proposed regulatory changes failed to comply with this clarity standard.

AWO and its members have appreciated CARB staff's willingness to discuss the CHC rule over the last three years and welcome the opportunity to provide additional recommendations to increase rule clarity.

Comments on OAL's Decision

1.1 Proposed Subsection (k)(1)(C) of Section 93118.5

Subsection (k)(1)(C) requires training for individuals conducting opacity tests. OAL rejected this subsection, stating that the proposed regulation implies that training courses and certifications for opacity test procedures are available, but the Initial Statement of Reason (ISOR) indicates they are not. AWO agrees with OAL's determination and underscores the need for flexibility in this process. Therefore, we recommend changing the ISOR language to the following¹:

“If, during implementation of the Amended Commercial Harbor Craft Regulation, there are challenges associated with the consistent application of the proposed CHC opacity testing methodology, then an operator may submit an alternative strategy for testing that achieves equivalent results as those required within this subsection or submit an alternate proof of compliance as required by a federal enforcement agency².”

While standardized testing because of uniform training is important, certain vessels' operational profiles do not fit into the proposed testing procedures. This change will allow operators to determine the best way to report opacity for their vessel. However, AWO recognizes the need for consistent reporting and therefore suggests that any alternative compliance method be approved by the Executive Officer.

1.3 Proposed Subsection (e)(11)(A) of Section 93118.5/1.3.2 “Maximum Additional Compliance Time”

Subsection (e)(11)(A) relates to early adoption of Zero Emissions and Advance Technology (ZEAT). OAL found this section to be unclear because the proposed regulation suggests that the reward for early adoption of ZEAT will result in a maximum additional compliance time between three and seven years, while the ISOR says that it would result in standard three- or seven-year increments. AWO suggests that this rule should align with the ISOR definition of “Maximum Additional Compliance Time.”

AWO also recommends that CARB define the term “early adoption.” There is no definition or additional clarification for this term in the regulatory text, giving this term more than one meaning³. Therefore, it does not meet OAL's clarity standard. AWO proposes defining “early adoption” as “any technical improvement made by an owner/operator to a vessel beyond any local, state, or federal legal requirement since 2009”⁴.

1.12 Proposed Subsection (e)(12)(E)3.b.vi. of Section 93118.5

¹ Additions to the proposed language are *italicized* and deletions are ~~crossed out~~.

² An example of an alternate proof of compliance is International Air Pollution Prevention certificates. These certificates are issued by the U.S. Coast Guard or class societies and the program is regulated jointly by the USCG and U.S. Environmental Protection Agency. The certification's standard is set by the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI and the Act to Prevent Pollution From Ships (APPS).

³ Cal. Code Regs., tit. 1, sec.16, subs. (a)(1) and (a)(3).

⁴ AWO recommends 2009 because that is when the last CHC rule went into effect.

Proposed Subsection (e)(12)(E)3.b outlines the application requirements for the E(3) Extension application. Among other things, the regulation currently requires:

“vi. A list of actions that the applicant has taken to comply or in anticipation to comply with the regulation at the earliest compliance date and supporting documentation to demonstrate that these actions have been taken.”

AWO is extremely concerned about this reporting requirement. The language puts an undue and unworkable burden on companies to prove that compliance will harm their business. It is impossible for companies to determine whether various business models will prevent this loss. The application package already requires three years of profit and loss statements, three years of federal and state income tax documents, and technical reports to prove eligibility. Proposed Subsection (e)(12)(E)3.b.vi is onerous and unnecessary and AWO asks CARB to strike it from the proposed CHC rule.

1.13 Proposed Subsection (e)(12)(E)5.b.i of section 93118.5

The scheduling extension outlined in subsection (e)(12)(E)5 allows operators to postpone compliance for one year if they can demonstrate that a project was delayed due to external issues. Subsection (e)(12)(E)5.b.i allows an operator to receive an extension if “new engine or equipment has not been received or installed since it was ordered due to manufacturing delays or excessive difficulties encountered by the engine or equipment installer.”

OAL finds the term “excessive difficulties” to be ambiguous and therefore opposes this subsection. AWO disagrees with this determination. There are many steps that must be taken to repower or rebuild a vessel and delays can occur at each of these stages. By using this general term, CARB is building additional flexibility into this extension.

However, AWO does recommend amending the subsection to read:

“The new engine or equipment has not been received or installed since it was ordered due to manufacturing delays or excessive difficulties encountered by the engine or equipment installer, *including all inspection delays.*”

Other Comments

OAL’s Decision will help clarify many of the ambiguous terms and confusing language in the CHC rule. AWO’s additional proposals that will further this goal and make it easier for regulated entities to comply:

- 1) **Extend the E(5) Scheduling Extension.** The goal of the scheduling extension is to allow owners and operators who are working in good faith to not be penalized for noncompliance if there are project delays outside of their control. The extension as written is for one year and cannot be renewed. While this extension may work in a few cases, supply chain issues, lack of available drydocks, and other factors are likely to cause a project to be delayed longer than a year. AWO recommends amending the E(5) Scheduling Extension to allow it to be renewed.

- 2) **Allow Stakeholders to Comment on the Alternative Control Emissions Calculation Methodology.** The Alternative Control Emissions (ACE) program gives operators an alternative pathway for meeting CARB's emissions reduction goals. However, it is incumbent on the applicant to demonstrate that their plan will complete this pathway. AWO supports CARB's desire to standardize the method for calculating emissions but requests that they publish an initial draft and hold a comment period to allow for feedback before finalizing the process. There are many different vessels regulated under the CHC Rule, and it is vital that the ACE emissions calculation does not exclude a vessel class.

Conclusion

Thank you again for the opportunity to submit additional recommendations on the Commercial Harbor Craft Rule. We would be pleased to answer any questions or provide further information as CARB sees fit.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Schrapfen". The signature is written in a cursive, flowing style.

Peter Schrapfen
Vice President – Pacific Region