

EXHIBIT D

August 21, 2020

California Air Resources Board
Attention: Clerk's Office
1001 I Street
Sacramento, CA 95814

**Re: Control Measure for Ocean-Going Vessels At Berth (“At-Berth Rule”)
Draft Environmental Analysis CEQA Violations**

California Air Resources Board:

Crowley Maritime Corporation (“Crowley”) submits this additional comment, in advance of the Public Hearing on August 27, 2020, addressed to the CEQA¹ violations of the Draft Environmental Analysis, Appendix D to the Staff Report: Initial Statement of Reasons released on October 15, 2019. We ask that it be taken into proper consideration.

I. Introduction

While CARB’s certified regulatory programs are exempt from certain procedural aspects of CEQA, CARB’s actions remain subject to all other CEQA provisions. Moreover, it is the express policy of CARB to prepare staff reports in a manner consistent with the environmental protection purposes of the Board’s regulatory program and with the goals and policies of CEQA².

CEQA generally requires state and local government agencies to inform decision makers and the public about the potential environmental impacts of proposed projects, and to reduce those environmental impacts to the extent feasible. CEQA thus requires that the Environmental Analysis that provides the basis for the Board’s decision provide full disclosure, a comprehensive analysis of significant environmental impacts, and an assessment of feasible mitigation measures. As explained in the CEQA Guidelines, “public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance.” 14 Cal. Code Regs., § 15004(b)(2).

¹ Public Resources Code §21000, *et seq.*

² 17 Cal. Code Regs., § 60005(b).

II. Summary

The Draft Environmental Analysis commits a number of *per se* CEQA violations in connection with its omission to address the environmental impact of the exclusion of articulated tug barges (ATBs) from the At-Berth Rule. As an environmental document, the Draft Environmental Analysis violates CEQA by failing to accurately and comprehensively describe the “project”, failing to analyze the environmental impact of the regulatory policy of excluding ATBs from the At-Berth Rule, and failing to assess the feasibility of mitigation measures. The CEQA violations of the Draft Environmental Analysis are highly significant. Final agency approval of the proposed regulation must be postponed pending lawful completion of the required CEQA procedures.

III. Comment

Underlying the ATB exclusion is an evident policy to retain the regulation of ATBs under the Commercial Harbor Craft (CHC) regulation, despite the opportunity that the At-Berth Rule now affords for ATBs to be properly regulated alongside, and as, ocean-going tank vessels. This policy is misinformed.

During the past 18 months of this rulemaking process, Crowley, the largest U.S. operator of ATBs in California, has repeatedly, consistently and specifically explained the compelling need for ATBs to be regulated, like other ocean-going tank vessels, under the At-Berth Rule. Crowley takes this position, in part, because it makes no sense to exclude ATBs from the proposed regulation, and, in part, because there is no feasible alternative.

As discussed below, Crowley’s fleet of ATBs cannot operate economically if they are required to be retrofitted as required by the proposed revised CHC. So, if ATBs are not regulated under the At-Berth Rule, Crowley’s ATB fleet will inevitably be withdrawn from California, and the clean petroleum products (CPP) currently transported by ATBs would be carried by increased numbers of Medium Range (MR) tankers.

Under the circumstances, it makes no sense for CARB to hold onto this policy of excluding ATBs from the At-Berth Rule, which, as addressed below, is wrong-headed and unsupportable. Crowley continues to urge CARB to delete the ATB exclusion. This simple amendment would improve air quality and benefit the communities living in the vicinity of California’s marine terminals.

If the Board is asked to approve the proposed At-Berth rule without removing the ATB exclusion, it cannot do so unless and until the Draft Environmental Analysis complies with CEQA procedures.

IV. CEQA Violations

If the proposed regulation is to continue to include the ATB exclusion, the proposed At Berth Rule cannot be approved by the Board based on the Draft Environmental Analysis, because it fails to follow CEQA's procedures.

A. Failure to Analyze the Impact of the Regulatory Policy to Exclude ATBs

(i) Failure to Follow CEQA Procedures for Describing the "Project"

The Draft Environmental Analysis fails to analyze the environmental impact and feasibility of mitigation measures arising from the express policy of the proposed regulation to exclude ATBs. This glaring omission stems from the failure of the Draft Environmental Analysis to describe and analyze the proposed regulation adequately. Whether this is a deliberate refusal to draw attention to this policy aspect of the proposed regulation or merely an inadvertent oversight, it is clearly a *per se* CEQA violation.

Under CEQA, the Environmental Analysis must contain a precise description of the project, including "a general description of the project's technical, economic and environmental characteristics."³ The proper and accurate description of the project is the *sine qua non* of an informative and legally-sufficient environmental document.

The Draft Environmental Analysis does not comply with this CEQA requirement. It begins⁴ with CARB's determination that the proposed regulation is a "project" as defined by CEQA, and recites the definition of project set forth in the CEQA Guidelines⁵.

But then the Draft Environmental Analysis continues by never properly describing the regulation. In particular, the Draft Environmental Analysis fails to appreciate that the express exclusion of the ATBs from the At Berth Rule is itself a policy of the proposed regulation, as to which the environmental impact needs to be analyzed and, if possible, minimized or mitigated.

³ 14 Cal. Code of Regs., §15124(c).

⁴ Draft Environmental Analysis, p.3.

⁵ "[T]he whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is an activity directly undertaken by any public agency. 14 Cal. Code Regs. §15378(a).

Ignoring the ATB exclusion policy leads the Draft Environmental Analysis to the following incorrect conclusion: “the policy aspects of the Proposed Regulation do not directly change the physical environment”.⁶ Based on this misconception, the Draft Environmental Analysis proceeds to confine its analysis to “indirect physical changes to the environment [that] could result from reasonably foreseeable compliance responses taken in response to implementation actions identified in the Proposed Regulation.”

The failure of the Draft Environmental Analysis to follow CEQA’s mandate to describe the regulation accurately is a *per se* CEQA violation. That failure is significant, because, by overlooking what the proposed regulation is intended to achieve, the Draft Environmental Analysis is led to omit entirely any analysis of the environmental impact of the ATB exclusion or whether that impact can be feasibly mitigated. ATBs are not even mentioned in the Draft Environmental Analysis.

(ii) The ATB Exclusion is Manifestly a Policy of the Regulation

The policy of the proposed regulation to exclude ATBs is expressed through specifically inserting an exception into the definition of ocean-going vessels.⁷ This policy has no operational basis or rationale.

In the Initial Statement of Reasons, CARB staff state, as the sole reason offered for excluding ATBs from the At-Berth Rule, the following:

“When an articulated tug barge is fully connected, it may meet the definition of an ocean-going vessel, as defined in this chapter (Section 93130.2(b)). However, despite being defined as a subcategory of tankers, articulated tug barges are considered a barge and a tug separately.” [p. IV-6.]

This statement makes no sense whatsoever and is incorrect⁸.

⁶ Draft Environmental Analysis, p.3.

⁷ The exclusion is contained in two subsections of the definition section of the proposed regulation, section 93130(b)(7) and (b)(50).

⁸ Crowley’s 120,000 bbls. ATBs are modern tank vessel which carry cargo in a double-hulled tank barge equipped with sumped cargo tanks, remote gauging, an inert gas system, and other systems, and is propelled and maneuvered by a high-horsepower tug that is physically a part of the whole vessel, positioned in a notch in the stern of the barge, and attached by rigid, articulating pins, and is itself considered an “ocean going vessel”, under applicable federal law. For the purpose of improved safety and environmental protection, ATBs function as a single unit in a system that allows for better maneuverability and sea-

Under the circumstances, the stated basis for the ATB exclusion is arbitrary and capricious.

The proposed regulation incorporates a definition of tanker vessels⁹ and provides¹⁰ a description of an “ocean-going vessel”¹¹ that exactly describe Crowley’s 550 and 650 Class ATBs. ATBs are unquestionably ocean-going vessels. ATBs operate as a single vessel. As Crowley, the largest operator of tankers and ATBs in the United States, has explained to CARB and its staff during this rulemaking process, ATBs of more than 120,000 bbl. capacity (or at least 20,000 DWT) are the functional equivalent of ocean-going tankers that are the subject of the At-Berth Rule.

Under the circumstances, the exclusion of ATBs from the At-Berth Rule must be recognized for what it is: a deliberate policy determination regarding how ATBs should be regulated. CARB staff have determined, despite consistent and clear information to the contrary from Crowley, that ATBs should not be regulated like other ocean-going tankers, but rather as if they were operating in the same manner as California-based harbor tugs¹².

The exclusion of ATBs from the proposed At-Berth Rule can only be characterized as an affirmative regulatory policy of CARB’s that ATBs should not be regulated like other ocean-going tank vessels. Under CEQA, the Draft Environmental Analysis is required to

keeping over separate, conventional tug and wire towed tank barges. By definition, an articulated tug barge is an ocean-going vessel that functions “as one vessel.”

⁹ The Initial Statement of Reasons defines tanker vessels as those vessels “designed to carry liquid or gaseous products, including crude oil or other hydrocarbon products, such as Liquid Liquefied Petroleum Gas (LPG), Liquid Natural Gas (LNG); chemicals, such as ammonia, chlorine, and styrene monomer, asphalt, and even fresh water. [ES-2]

¹⁰ See 17 Cal. Code Regs. §93130.2(b).

¹¹ A vessel “generally greater than 400 feet, weigh more than 10,000 gross tons, and have per-cylinder engine displacement of greater than 30 liter/cylinder”.

¹² There is no rational basis for regulating ATBs as commercial harbor craft. The only initial reason for including ATBs in the CHC regulation was that, before the proposed extension of the At-Berth Rule to cover ocean-going vessels, there was no alternative. But there was never any other operational rationale for regulating ATBs as if they were harbor tugs. Unlike the commercial harbor craft regulated by the CHC regulation, Crowley’s ATB Fleet is not based in California and does not operate predominately in California ports performing operations of harbor tugs. Like other ocean-going tank vessels, Crowley’s ATBs transport cargo, including to and from California marine terminals, and their operations in California waters consist of transit to and from sea and in interstate commerce, maneuvering and conducting cargo operations at berth. They are not harbor tugs.

analyze whether that policy has a significant environmental impact. The Draft Environmental Analysis fails to do so.

(iii) The Draft Environmental Analysis Fails to Identify and Analyze the Environmental Impact of the ATB Exclusion Policy

The environmental impact of the policy of excluding ATBs is the emissions reductions achieved by the proposed At-Berth Rule do not take into account the ATB emissions. The impact of the policy is to deliberately lessen the emissions reductions resulting from the At-Berth rule. The Draft Environmental Analysis ignores this environmental impact and fails to analyze it.

Crowley, however, has done its own analysis, which we offer here by way of an example of the environmental impact assessment that the Draft Environmental Analysis fails to include. Crowley analyzed the emissions profile of one of its 650 Class ATBs, the *Vision/650-10*¹³, based on actual operational conditions¹⁴:

- (a) from or to 3 nm from the harbor entrance before or after maneuvering (Port Zone or “PZ”);
- (b) during maneuvering near berth during arrival or departure; and
- (c) at berth.

Crowley’s analysis showed the following baseline¹⁵ for ATB emissions for one of its 650 Class ATBs, *Vision/650-10*, assuming compliance with current commercial harbor craft regulations:

¹³ The actual engine specifications of the *Vision/650-10* were used.

¹⁴ For the tug (*Vision*) engines, the assumptions were 50% main engine load in PZ Zone, 20% main engine load in maneuvering zone, and 50% auxiliary engines for all zones. For the barge (650-10) engines, the assumptions were 60% load at berth, using one large (800 BHP) and one small (1202 BHP) engines. All engines use ultra-low sulfur fuel.

¹⁵ The baseline emissions of *Vision/650-10* were calculated using Tier 2 emission factors consistent with California Air Resources Board and the Port of Los Angeles and the Port of Long Beach latest emissions inventories.

	Mode	PM tons per trip	PM2.5 tons per trip	DPM tons per trip	NOx tons per trip	SOx tons per trip	CO2 e MT per trip
<i>Vision</i>	PZ	0.003	0.003	0.003	0.08	0.0001	6.0
<i>650-10</i>	PZ	0.000	0.000	0.000	0.00	0.0000	0.0
<i>Vision</i>	Maneuvering	0.001	0.001	0.001	0.04	0.0000	2.9
<i>650-10</i>	Maneuvering	0.000	0.000	0.000	0.00	0.0000	0.0
<i>Vision</i>	Berth	0.003	0.003	0.003	0.07	0.0001	5.3
<i>650-10</i>	Berth	0.013	0.012	0.013	0.34	0.0003	26.2
Power Plant							0.0
Total		0.020	0.019	0.020	0.53	0.0005	40.4

Crowley further analyzed the emissions that would result if the ATB were regulated under the At-Berth Rule and used the shore power option:

	Mode	PM tons per trip	PM2.5 tons per trip	DPM tons per trip	NOx tons per trip	SOx tons per trip	CO2 e MT per trip
<i>Vision</i>	PZ	0.003	0.003	0.003	0.08	0.0001	6.0
<i>650-10</i>	PZ	0.000	0.000	0.000	0.00	0.0000	0.0
<i>Vision</i>	Maneuvering	0.001	0.001	0.001	0.04	0.0000	2.9
<i>650-10</i>	Maneuvering	0.000	0.000	0.000	0.00	0.0000	0.0
<i>Vision</i>	Berth	0.000	0.000	0.000	0.01	0.0000	0.7
<i>650-10</i>	Berth	0.000	0.000	0.000	0.00	0.0000	0.0
Power Plant							11.3
Total		0.004	0.004	0.004	0.13	0.0001	20.9

Crowley also analyzed the emissions that would result if the ATB were regulated under the At-Berth Rule and employed the option of using Alternative Control Technology:

	Mode	PM tons per trip	PM2.5 tons per trip	DPM tons per trip	NOx tons per trip	SOx tons per trip	CO2 e MT per trip
<i>Vision</i>	PZ	0.003	0.003	0.003	0.08	0.0001	6.0
<i>650-10</i>	PZ	0.000	0.000	0.000	0.00	0.0000	0.0
<i>Vision</i>	Maneuvering	0.001	0.001	0.001	0.04	0.0000	2.9
<i>650-10</i>	Maneuvering	0.000	0.000	0.000	0.00	0.0000	0.0
<i>Vision</i>	Berth	0.000	0.000	0.000	0.01	0.0000	0.7
<i>650-10</i>	Berth	0.003	0.002	0.003	0.07	0.0003	26.2
Power Plant							0.0
Total		0.007	0.006	0.007	0.20	0.0004	35.8

This analysis, which measures the emissions from only one ATB on one trip to a California port, should leave no doubt that CARB’s policy decision to exclude ATBs from the At-Berth Rule has an environmental impact:

Criteria pollutant emissions due to at-berth operations are clearly higher if the ATB exclusion policy is implemented than if CARB were to regulate ATB’s, like other ocean-going tank vessels, under the At-Berth Rule.

CEQA requires that the Draft Environmental Analysis perform an evaluation of the significance of this environmental impact. The Draft Environmental Analysis fails to follow this procedural step and is a *per se* violation of CEQA.

B. Failure to Analyze Feasible Alternatives to Minimize Adverse Effects

CEQA requires that written documentation prepared under a certified regulatory program, such as the Draft Environmental Analysis, must include a description of “mitigation measures to minimize any significant adverse effect on the environment of the activity.” CEQA, § 21080.5(d)(3)(A). This obligation to describe mitigation measures

is one of the procedural requirements of CEQA “intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects.” (§ 21002.)

The Draft Environmental Analysis fails to proceed in the manner required by CEQA. Under CEQA, the Draft Environmental Analysis is required to analyze the feasibility of the alternative to the proposed regulation which will mitigate or minimize the environmental impact of excluding ATBs from the At-Berth Rule. It fails to do so. As has been stated, the Draft Environmental Analysis fails even to discuss ATBs.

This failure of the Draft Environmental Analysis to undertake the analysis of feasible alternatives is another *per se* violation of CEQA that undermines the entire environmental analysis of the regulation.

The implication is clear, as stated in the Initial Statement of Reasons, that CARB has made the determination that it would prefer to regulate ATBs, as if they were harbor craft, under the CHC regulation. Therefore, in this context, the mitigation analysis must necessarily involve an evaluation of the feasibility of the regulation of ATBs under the revised CHC rules.

CARB’s policy to regulate ATBs under the CHC regulations evidently assumes the adoption of the revised CHC regulations¹⁶, as to which a rulemaking process is underway. Under CEQA, before the Board approves those revisions to the CHC regulations, a proper, CEQA-compliant environmental review of those revisions must be conducted. That has not occurred. Therefore, CARB is not entitled to take a regulatory action in connection with the At Berth rule based on the assumption that the as-yet unadopted revised CHC regulation might provide an alternative. This is not merely CARB putting the cart before the horse, it is illegal under CEQA.

In this case, however, the impropriety of implementing a policy based on a regulation that has not undergone the proper rulemaking process, and the failure of the Draft Environmental Analysis to determine the feasibility of such a potential future regulation as an alternative, is overshadowed by one simple fact: for Crowley’s ATBs, the revised CHC regulations are not be a feasible option. Compliance with the revised CHC regulations, as currently proposed, is commercially prohibitive.

To understand why, the Board needs to understand the commercial context, a matter of feasibility that the Draft Environmental Analysis ignores.

¹⁶ See, Initial Statement of Reasons, page IV-6.

As U.S.-flagged Jones Act tank vessels, Crowley's large, militarily-useful, greater than 120,000 barrel ATBs are employed in California under charter to oil majors with rates that reflect the speed, efficiency and flexibility of ATBs and allow Crowley's ATBs to compete with MR tankers. Generally-speaking, it is reasonable to propose that Crowley's customers choose to transport clean petroleum products (CPP) in ATBs because Crowley's ATBs compete favorably with MR tankers on cost of transportation. In addition to safety and reliability, economically, refinery customers care mainly about "dollars per barrel delivered" by the vessel from the refinery tank terminal to the distribution tank terminal.

If Crowley ATBs were required to comply with the revised CHC regulation, even assuming the availability of the technology that those revisions contemplate, Crowley estimates that the potential compliance cost for its entire fleet would be prohibitive. As Crowley has commented, including in its letter to CARB of April 29, 2020, the potential cost of retrofitting Crowley's ATB fleet to meet the equipment standards of the CHC revisions would be almost \$126 million. From a commercial perspective, this cost cannot be absorbed by Crowley or through increases in charter rates.

If Crowley were to make such an expenditure to comply with the revised CHC regulations, while, at the same time, MR Tankers enjoy the competitive advantage of operating under the At Berth Rule, it can reasonably be expected that a point will be reached at which the cost of barrels delivered by Crowley's ATBs in California will be significantly more than the cost per barrel delivered by an MR tanker. When this point is reached, ATBs will no longer be employed in the California market. When ATBs are no longer available to the oil majors currently chartering ATBs, the cost of CPP transportation will be greater, and there may be an increase in the cost of CPP paid by California refineries, which will be passed to the California consumer.

Therefore, the impact of imposing the revised CHC upon ATBs, and excluding ATBs from the At-Berth Rule, is likely to be that Crowley's ATBs will no longer operate in California. Given that MR tankers would be regulated under the At-Berth Rule, there would be no way for Crowley's ATBs to compete with MR tankers. This would mean that California's CPP would be transported by MR tankers, and the commercial, safety and environmental benefits of using ATBs would no longer be available.

The proposed revised CHC regulations thus offer no feasible alternative to the At Berth rule, if the ATB exclusion is retained. For Crowley, excluding ATBs from the At Berth rule would have the practical effect of banning its ATBs from California operations.

The Draft Environmental Analysis fails to comply with CEQA procedures to analyze alternatives to minimize the adverse environmental effect of the ATB exclusion. Final agency approval of the proposed regulation must be postponed pending lawful completion of the required CEQA procedures.

C. Failure to Disclose the Basis for Data

CEQA requires full disclosure. The Draft Environmental Analysis is also deficient under CEQA in its failure to disclose whether the data used to calculate the baseline analysis and measure the effect of the At-Berth regulation includes or excludes ATBs. It thus fails to provide the public with any proper basis to determine the claimed impact of the proposed regulation.

This is crucially important. When drawing up the baseline analysis or analyzing the effect of the At-Berth regulation on air quality, failing to take into account ATBs, which account for over half of the Jones Act West Coast CPP vessel fleet, would distort and obscure the true situation. The failure to disclose the nature of the data used undermines the statistical analysis of the Draft Environmental Analysis.

Conclusion

Crowley fully supports the overall aims of the At-Berth regulation to reduce harmful emissions and improve air quality for communities living in the vicinity of California's ports and marine terminals. It is evident and remarkable that the proposed regulation's policy of excluding ATBs is inconsistent with this goal. An environmental analysis that complies with CEQA would make that clear and properly inform the Board to delete the ATB exclusion from the At-Berth Rule. The Draft Environmental Analysis, which violates CEQA, should be amended, or the ATB exclusion removed. Final agency approval of the proposed At-Berth cannot be given until the lawful completion of the required CEQA procedures.

Yours respectfully,
CROWLEY MARITIME CORPORATION

Electronically signed
21-AUG-20 1250 EST
by Art Mead

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Vice President & Chief Counsel
Government and Regulatory