Dec 11.'73

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20590

STATEMENT OF JOHN W. SNOW, DEPUTY ASSISTANT SECRETARY FOR POLICY, PLANS AND INTERNATIONAL AFFAIRS, BEFORE THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, REGARDING THE BARGE MIXING RULE, H.R. 9772/9897/10380, DECEMBER ~~6~~ 11, 1973

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to discuss with you the Administration's recommendations for dealing with the "Barge Mixing Rule" problem.

The legislative reflection of these recommendations is to be found in H.R. 9772/9897/10380. They are based on the findings and conclusions of the Department of Transportation's two-year study of domestic transportation of dry bulk commodities which was mandated by P.L. 91-590 in December 1970. Today I would like to discuss first and very briefly the conduct of our study, then the background of the "Barge Mixing Rule," then a few of the more pertinent economic aspects of the problem, and finally our recommendations.

The DOT Barge Mixing Rule Study, 1971-73

The legislative history of P.L. 91-590 which initiated this study is probably the most convincing evidence of the complexity of the several issues which have come to be embraced in the term "Barge Mixing Rule" problem. Representative William Springer commented about legislation trying to deal with the problem in 1970 that: "It is the most confusing bill I have seen in my 20 years in the Congress."

The first objective of our study, therefore, was to unravel these policy issues by a careful analysis of the regulatory and operational factors which gave rise to the problem and brought it to the attention of the Congress. The second objective was to display for the first time, as required by the study's enabling legislation, the rates actually charged for dry bulk movements exempted from regulation by the Interstate Commerce Commission. The Congress was also interested in the likely consequences of changing the present regulatory environment, and as a result, a third objective was to analyze the implications of changing the status quo in each of the problem areas and to make appropriate recommendations.

The study effort was based on the analysis of published information and on a specially conducted survey of dry bulk carriage on the Mississippi River, its tributaries, and the Gulf Intracoastal Waterway. The interpretation of these data was validated through staff interviews with shipper and carrier industry associations, government agencies, and academic authorities. The final report of our two-year study was delivered to the Congress on March 30, 1973.

Before I leave this subject, I would like to make special note of the splendid cooperation the Department received from all sectors of the water carrier industry and the shipping public as well as from the Interstate Commerce Commission and the Secretary of the Army. Without the special efforts made by many of the carriers or without their openness

with our staff in providing the study with sensitive information about their operations, the study simply could not have succeeded.

Background of the Barge Mixing Rule Problem

Water carriage was first brought under Federal economic regulation with the enactment in 1940 of Part III of the Interstate Commerce Act. However, several types of water carriage including dry bulk commodities were granted a full or partial exemption from the jurisdiction of the Interstate Commerce Commission. However, the exemption granted dry bulk commodity transportation by the statute was not comprehensive. Rather, two conditions had to be met before it applied: the Custom-of-the-Trade Provision, whereby only those dry commodities being carried in bulk on or before June 1, 1939, were to be exempt from regulation; and the Three-Commodity Restriction, whereby no more than three exempt dry bulk commodities could be carried in one tow. A third condition was added later when the Commission and the courts, interpreting the statute, promulgated and upheld the No-Mixing Rule, which held that exempt dry bulk commodities were not to be mixed with regulated cargo in the same tow.

The "Barge Mixing Rule" problem affects virtually all segments of the domestic barge industry. (The law exempts Great Lakes carriage.) The No-Mixing Rule affects regulated carriers as well as exempted carriers. Eight of the fourteen major regulated carriers carrying dry bulk commodities on

the Mississippi River System and the Gulf Intracoastal Waterway reported in the Mixing Rule Study that dry bulk traffic exceeded 60 percent of all their 1970 tonnage. At the same time, exempt, for-hire and private carriers often move regulated commodities as an incidental towage service on tributary rivers or as fill-in service between the scheduled line-hauls of regulated carriers on major waterways. The Three-Commodity Restriction, of course, applies to all types of for-hire carriers because anyone can move exempt dry bulk commodities. This restriction, however, is more important to those firms operating on the less restricted waterways and especially on the Lower Mississippi River where very large tows capable of carrying greater varieties of commodities are possible. The Custom-of-the-Trade Provision, as far as we can determine, applies only to the carriage of sugar now moved up-river by regulated carriers.

The transportation services performed, the markets reached, and the technology used by the inland industry have all changed dramatically during the thirty years since the Transportation Act of 1940 became law and specified the regulatory regime for water carriers. In 1940 the inland barge industry was still in its infancy with the major share of water movements being conducted in the coastal, intercoastal, and Great Lakes waterways. In 1940 more than 80 percent of the 118 billion total ton-miles of domestic waterborne traffic was carried on the Great Lakes. This is in sharp contrast to 1970 when only 36 percent of the 318 billion total ton-miles of domestic waterborne traffic moved over the Great Lakes.

The types of commodities moved on our inland waterways have shifted over this 30-year period from predominantly general cargoes to mainly bulk commodities, both liquid and dry. This transition has been facilitated by the development of modern materials handling equipment which can transfer bulk cargoes very efficiently, thereby minimizing labor costs. Barge design has become more specialized in optimizing the transport of specific commodities. Towboats, too, have developed into extremely efficient and highly maneuverable power plants through technological advancements in steering and propulsion units as well as in hull design.

Simultaneously, the waterways, themselves, were being further expanded and extended even as the natural and man-made impediments to more efficient water transportation were pushed back and eliminated. These improvements in the waterway system stimulated still further technological improvements in the water craft and terminal facilities. All of these factors have combined to bring industry to its current economic prosperity. These changes were accompanied by extensive changes in the markets served by the inland water carriers. The number of barge-size shipments grew not only because of the opening of new waterways but also because of the waterside proliferation of grain elevators, chemical industries, and power stations.

However, as inland waterborne commerce grew, the carriers felt their operation increasingly constrained by various aspects of the "Barge Mixing Rule" problem.

The No-Mixing Rule

The No-Mixing Rule became a major issue during the last twenty years as the regulated water carriers increasingly came to believe that, if enforced, it could significantly inhibit their growth. The No-Mixing Rule was first laid down by the Interstate Commerce Commission in March 1941. However, mixing of barges with exempt dry bulk commodities in the same tow with barges of regulated commodities was permitted during World War II years on the grounds of conserving fuel. In March 1944 the Commission advised that the incidental towage provisions of Section 303(f)(2) could be used to mix regulated and unregulated cargoes. As a result, interline arrangements were made between certificated and non-certificated carriers to carry each other's trade. In other cases, unregulated subsidiary or associated firms were established to facilitate long-haul, through movements which mixed regulated and exempt commodities. Therefore, notwithstanding the continued existence of the No-Mixing Rule as a technical matter, the carriers were permitted to realize the benefits of improved towboat and barge technology.

Before investing in these new vessels, however, the carriers tried to test how restrictively the Commission would eventually interpret and apply the No-Mixing Rule. In a series of complex cases, which are explained in depth in our study, the Commission's prohibition of mixing was sustained in the lower courts, and was affirmed by the Supreme Court in 1967.

Concurrently, the carriers brought their concern to the Congress, and from 1958 to 1970, the No-Mixing Rule was extensively debated before both your Committee and the Senate Commerce Committee. During this period, the Commission refrained from enforcing the No-Mixing Rule. When Public Law 91-590 was enacted in December 1970, it specified that the No-Mixing Rule would not be applied for a three-year period, that is, until the DOT study could be completed and the Congress could evaluate the matter in light of the study's findings.

Thus, the No-Mixing Rule has never been implemented. Mixing has always been, and is now, a permitted practice on the waterways. The no-mixing prohibition is scheduled, however, to become effective on December 28, 1973, unless the Congress takes some further action.

The Three-Commodity Restriction

The Three-Commodity Restriction provides that the carriage of dry bulk commodities by water is exempt from ICC regulation if only one, two, or three exempt dry bulk commodities are carried in one tow. Our study found that there is much confusion about this restriction and that it is often misunderstood, violated or ignored. Furthermore, our investigations indicated that it has not been intensively enforced by the ICC. Some water carrier operators, in the past, have worked more or less within the rule when convenient, but at other times have disregarded

it. There appears to be industry-wide tacit toleration or ignorance of violations of the Three-Commodity Restriction. Part of this, perhaps, can be traced to the highly complex language and the varying interpretations of Section 303(b). For example, there is a misunderstanding among numerous water carrier personnel that the Three-Commodity Restriction and the No-Mixing Rule are indistinguishable in the sense that the legal non-enforcement of the No-Mixing Rule also applies to the Three-Commodity Restriction.

During the early years of water carrier regulation, the Three-Commodity Restriction was irrelevant to waterway operating practices because towboats did not have the power for large multiple commodity tows. Since the mid-fifties, however, more powerful and maneuverable towboats have become widely available which are capable of towing as many as 40 jumbo barges. Today, maximum flotilla sizes are determined primarily by lock dimensions on any particular waterway. Under present conditions, compliance with the Three-Commodity Restriction would necessitate significant and costly adjustments on the part of the water carriers in putting together their tows and in scheduling their operations. These adjustments would produce a drop in overall industry efficiency.

The Consequences of Enforcement

Based on their usual and preferred operating patterns, many barge carriers would clearly be faced with substantial increases in operating

costs if they were to have to comply with the No-Mixing Rule and the Three-Commodity Restriction. Of particular importance at this time is the potential loss of efficiency in fuel use at a time when we are striving by every means possible to conserve and stretch our scarce energy supplies. In addition to higher towage costs, higher management and administrative costs could result from having to schedule and control many more tows.

Higher rates or less operational flexibility for shippers would, of course, ultimately impact on the general consuming public. Higher transportation costs for particular commodities must mean, all other things being equal, higher prices for these commodities in the market place. Finally, increased fuel consumption would have a deleterious effect on our national effort to conserve energy.

The Custom-of-the-Trade Provision

The Custom-of-the-Trade Provision has been enforced since its enactment. However, dry bulk commodity carriers and shippers have, at least to date, experienced little practical difficulty living with it because sugar is the only commodity presently affected. Moreover, there are no other commodities, existing or expected from new technology, which we currently see being affected by this provision in the future. Sugar is a controlled commodity and our study concluded that any attempt to change only the inland water transportation condition out of the many

controlled conditions affecting its production, distribution, and marketing would be likely to result in minimal impact on either the transportation efficiency or the consumer price of sugar.

Corrective Legislation

The legislation before you which has been proposed by the Administration would repeal both the No-Mixing Rule and the Three-Commodity Restriction. The Rule has never been imposed and the Restriction has never received universal compliance or been the subject of formal ICC enforcement action. The practical effect of this proposal will be to formalize the existing efficient, flexible and energy-conserving methods of operation which have been developed over the last 30 years on the inland waterways.

Unless the Congress acts quickly, the No-Mixing Rule will become law on December 28th of this year. The Senate passed an identical bill, S. 2267, on November 16th. We urge your prompt consideration of this problem.

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Mr. Chairman, this completes my prepared statement. My colleagues and I would be happy to answer any questions the Committee might want to ask.