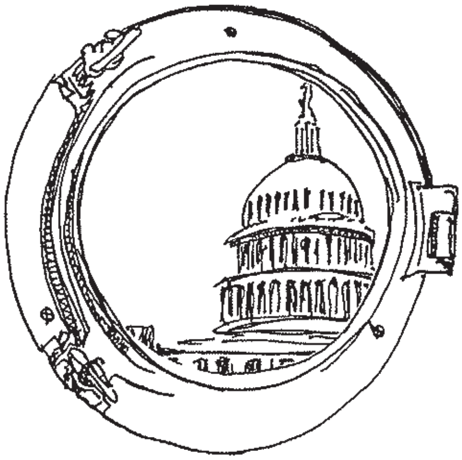
WINDOW ON WASHINGTON



Dredging Up the Harbor Maintenance Tax

By Bryant E. Gardner

Long a backwater of maritime Washington, in the last year the Harbor Maintenance Tax ("HMT"), which funds U.S. port dredging, has come into the cross hairs of the legislative and regulatory agenda. Like most issues in Washington these days, the two main forces at work are (1) the push to reduce unemployment and (2) the lack of budgetary resources to help address joblessness and continue Federal programs at historic levels. Force is building to tap a large surplus in the Harbor Maintenance Trust Fund ("HMTF") to complete long-overdue dredging projects, foster U.S. trade competitiveness, and put Americans to work without increasing taxes. At the same time, proposals have surfaced that would expand the authorized uses of the HMT, opposed by dredging advocates as a "raid" on the HMTF. Additionally, the Federal Maritime Commission ("FMC") has just announced it will launch an inquiry into whether the HMT and other U.S. rules are harming the competitiveness of U.S. ports and causing the diversion of U.S.-bound, trans-pacific cargoes to Canada and Mexico.

HMT Background and Origins

Recognizing the importance of free and open navigation to the integrity of national commerce and communication, Congress has authorized and funded dredging and maintenance of U.S. harbors and waterways since the birth of the Republic. Before 1986, the maintenance of Federal channels was a 100% Federal expense and appropriated from the Treasury. Then, in the 1986 Water Resources Development Act, Congress enacted the HMT to recover a portion of these costs by requiring shippers to pay a fee based on the value of goods imported or exported through U.S harbors and deep-draft channels.[1] The tax funds only maintenance dredging at depths authorized by Congress, not deepening or new construction. In 1990, the law was amended to fund 100% of maintenance dredging expenses from the HMTF, and the HMT was increased from .04% to the current level of 0.125% of the value of cargo moving through coastal and Great Lakes ports.[2]

After the 1990 budget agreement that resulted in the tripling of the HMT, exporters filed suit in the U.S. Court of International Trade, and the Supreme Court

[1] Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1403, 100 Stat. 4082 (1986) (codified as amended at 33 U.S.C. § 2238; 26 U.S.C. §§ 9505 & 4461).

[2] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-640, § 11214, 104 Stat. 1388 (1990).

of the United States ultimately invalidated the tax as applied to exports.[3] Under the Court's reasoning, the HMT was a "tax" on exports, not a "user fee" related to the value of the service provided and, therefore, violated the Export Clause, which states "No Tax or Duty shall be laid on Articles exported from any State."[4] Congress subsequently amended the HMT to exempt exports, consistent with the Court's decision.[5]

Over the last decade, surpluses have been building in the HMTF because expenditures have remained flat while collections have increased on rising import volumes, despite a decrease in collections in 2009. While there was an HMTF surplus of approximately $6.1 billion at the beginning of fiscal year 2012, it is widely acknowledged that U.S. harbors are under-dredged and under-maintained with only two naturally deep, low sediment ports—Long Beach and Los Angeles—dredged to authorized dimensions.[6] The U.S. Army Corps of Engineers estimates that the full capacity of channels at the busiest U.S. ports is available less than 35% of the time, which needlessly increases demurrage costs incurred by vessels waiting for high tide or excludes the largest and most cost-effective vessels altogether.[7] Additionally, vessels are sometimes required to skip port calls where waiting for high tide risks missed appointments at the Panama Canal.[8] These costs and disruptions negatively impact vessel operators, ports, and regional commerce and are ultimately passed on to shippers and to the American consumer. Additionally, East Coast ports widely anticipate increased dredging needs associated with the opening of the widened Panama Canal scheduled for 2014 and the introduction of larger vessels and more all-water service with Asian trading partners.

In a 2008 report, the Government Accountability Office ("GAO") presciently concluded that "[t]here is no link between the amount of annual HMF collections and expenditures" and noted that "[s]ince 2003, HM[T]F collections have significantly exceeded funds appropriated for harbor maintenance, resulting in a large and growing surplus in the fund. This may be inconsistent with users' expectations of the fee's purpose laid out in statute and the principles of effective user fee design."[9] That inconsistency with expectations appears to be coming to a head with fresh advocacy and new proposals to put the HMTF funding to work restoring our harbors and waterways.

Recent HMT Proposals

The President's FY 2012 Budget

The President's budget proposed to use only $800 million of the $1.5 billion estimated receipts for fiscal year 2012.[10] Additionally, the Administration proposed to permit the transfer of funds from the HMTF to the construction account for other water resources and navigation-related projects although few details of that proposal have been made public. This proposal was made clear in a hearing before the Senate Appropriations Committee in April of this year when Jo-Ellen Darcy, Assistant Secretary, Department of the Army, testified:

> The Budget provides for use of $758 million from the Harbor Maintenance Trust Fund to maintain coastal channels and harbors. Despite an overall Civil Works reduction of 15 percent below the enacted FY 2010 level, the amount recommended in the FY 2012 Budget for harbor maintenance and related work is essentially unchanged from the two prior years. The Administration also plans to develop legislation to expand the authorized uses of the Trust Fund, so that its receipts are available to finance the Federal share of other efforts in support of commercial navigation through the Nation's ports. No decisions have been made yet on what additional costs

[3] *U.S. Shoe Corp. v. U.S.*, 19 C.I.T. 1284, 907 F. Supp. 408 (1995), *aff'd*, 114 F.3d 1564, 1997 A.M.C. 2551 (Fed. Cir. 1997), *aff'd*, 522 U.S. 944, 1998 A.M.C. 2997 (1998).

[4] 522 U.S. at 363 ("We hold, in accord with the Federal Circuit, that the tax, which is imposed on an *ad valorem* basis, is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee.").

[5] U.S. Const., art. I, § 9, cl. 5.

[6] Letter from AAPA to House Comm. on Transp. & Infrastructure (Mar. 9, 2011) (on file with author).

[7] John Fritelli, Congressional Research Service, Harbor Maintenance Trust Fund Expenditures, Nos. 7-7599 & R41042 (Jan. 10, 2011) (hereinafter, "CRS Report"); Government Accountability Office, Federal User Fees: Substantive Reviews Needed to Alight Port-Related Fees with the Programs They Support, No. GAO-08-321 at 29 (Feb. 2008) (hereinafter, "GAO Report") (2006 data). For example, GAO received testimony that a 1-hour delay can cost a carrier $15,000 in longshoreman labor costs. *Id.* at 36.

[8] GAO Report at 30.

[9] *Id.* at 25.

[10] U.S. Gov't Printing Office, Budget of the United States Government, Fiscal Year 2012, Appx. at 1074.

> would be proposed to be paid from receipts into the Harbor Maintenance Trust Fund. Development of proposed legislation will proceed in the coming months.[11]

Predictably, the House reacted negatively to the President's proposal, stating:

> The proposed reduction in funding for maintenance of deep-draft navigation is particularly perplexing since the Harbor Maintenance Trust Fund (HMTF), which is intended to fund 100 percent of the maintenance dredging requirements of coastal and Great Lakes ports, will have an estimated balance of more than $6.1 billion at the beginning of fiscal year 2012. The budget request does not propose drawing down the balance to address unmet dredging needs and, in fact, proposes to use less than one-half the estimated receipts for fiscal year 2012 for maintenance dredging. Also included in the budget is a proposal to expand activities eligible for reimbursements from the HMTF, although no specific details have been provided to date. The Committee strongly opposes any attempt to divert revenue from the purposes for which it was collected, namely maintenance dredging. Also, in general, for the top 59 ports, the Corps is only able to maintain authorized depths, only within the middle half of the channel, 33 percent of the time. The fiscal year 2012 budget request is unlikely to improve that statistic. It is clear, therefore, that this proposal to expand HMTF uses is not based on a lack of need for funds for existing eligible dredging activities.[12]

The House-passed measure, H.R. 2354, also included a stop-gap measure to prohibit the use of any funds on expanded uses for the HMTF.[13] The version of the bill reported in the Senate on September 7, 2011, does not include the prohibition. In report language, the Senate noted, however, that "[n]o legislative proposal to provide for this expansion has been forthcoming from the administration," and that "current law limits funds in the HMTF to be used only for maintenance of waterways and harbors."[14]

Recent Legislative Proposals

The U.S. maritime industry has in recent years pushed aggressively to require the expenditure of HMTF funding, making this one of the top legislative priorities highlighted during its annual "Sail-In" held each spring on Capitol Hill. Numerous legislative proposals were introduced in the 111th Congress regarding the HMT with varying objectives. Each of H.R. 3447 and H.R. 4844/S. 3213 would have required the expenditure of the HMTF surplus, either by giving the U.S. Army Corps freedom to use funds without involving Congress in the annual appropriations process or by imposing a "spending guarantee" modeled after the Airport and Airway Trust Fund. H.R. 2355 would have increased the tax rate to 0.4375%, and expanded the HMTF for landside and port infrastructure improvements, such as highway and railroad connections to seaports, potentially diverting funding away from traditional dredging projects. H.R. 3486, H.R. 638, S. 551, and S. 1509 would have altered the application of the HMT on the Great Lakes to promote "marine highways" or "short sea shipping" initiatives to move cargo onto the waterways and reduce highway cargo congestion, which has been supported by the U.S. maritime unions.[15]

---

[11] *The Army Civil Works Program Fiscal Year 2012: Hearing before the H. Comm. on Transportation and Infrastructure, Subcomm. on Water Resources*, 112th Cong. 5-6 (2011) (Statement of Jo-Ellen Darcy, Assistant Secretary, Department of the Army).

[12] H.R. Rep. No. 112-118 at 13 (2011).

[13] H.R. 2354, 112th Cong. § 619 (2011).

[14] S. Rep. No. 112-75 (2011). *See also* 33 U.S.C. § 2238 (authorizing use of funds for "up to 100 percent of the eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States"); 26 U.S.C. § 9505 ("Amounts in the Harbor Maintenance Trust Fund shall be available, as provided in the appropriation Acts, for making expenditures . . . to carry out section 210 of the Water Resources Development Act of 1986," which are "Corps of Engineers costs for dredging and maintaining harbors at U.S. ports." H.R. Rep. 103-361(I), 103rd Cong., 1st Sess. at 151, 1993 U.S.C.C.A.N. 2552, 2719 at (Nov. 15, 1993)").

[15] *The State of the United States Merchant Fleet in Foreign Commerce: Before the H. Comm. on Transportation and Infrastructure, Subcomm. on Coast Guard and Marine Transportation*, 111th Cong. 11 (2010) (Statement of American Maritime Officers, International Organization of Masters, Mates, & Pilots, Marine Engineers' Beneficial Association, and Seafarers International Union) ("As applied today, the HMT is imposed on cargo entering the United States from an overseas market. If this cargo is then reloaded onto another vessel for transportation along our coasts to another U.S. port, it is taxed again upon its arrival at this second U.S. destination. This double taxation of waterborne cargo under the HMT discourages shippers from using vessels to supplement their rail and truck traffic, thereby increasing congestion on the roads and rails.").

Current proposals in the 112th Congress follow some of the same themes raised in the 111th Congress, but with the change in control of the House of Representatives and in the leadership of the relevant congressional committees, a new approach should be expected:

- H.R. 104, the "Realize America's Maritime Promise" or "RAMP" Act, would require that HMTF expenditures equal funds received each year plus interest on the HMTF. The act, introduced by Rep. Boustany (R-LA), has 128 total cosponsors, including 56 Democrats and 72 Republicans.

- S. 412, the "Harbor Maintenance Act of 2011," acts as a companion to HR 104 and would also require that HMTF expenditures be no less than HMT receipts plus HMTF interest for any fiscal year. The act would also impose a spending guarantee, which prohibits the reduction of HMTF resources, unless the annual expenditure requirement has already been met. The act, introduced by Sen. Levin (D-MI), has 26 cosponsors, including 14 Democrats, 11 Republicans, and 1 independent.

- S. 573, the "Corps of Engineers Reform Act of 2011," would convert the HMTF to a block-grant program administered by the states and would expand eligible projects to include shore-side infrastructure improvements and other "construction projects at harbors," potentially diverting funding away from dredging projects. The act would also tie state allotments to HMT collections within that state. This change would likely have the effect of shifting funding priorities away from Gulf and East Coast dredging projects toward West Coast infrastructure development. The act, introduced by Sen. DeMint (R-SC), has only one co-sponsor, Sen. Graham (R-SC).

- H.R. 1553, the "Short Sea Shipping Act of 2011," would repeal the HMT for certain Great Lakes movements to facilitate coastwise U.S. domestic cargo movements and promote "marine highways." The act, introduced by Rep. Johnson (R-IL), has 2 cosponsors, 1 Democrat and 1 Republican.

Among these proposals, the RAMP Act, H.R. 104, appears to have the greatest chance of becoming law in the near term. Chairman Mica (R-FL), of the House Transportation and Infrastructure Committee, has indicated an intention to include the first-ever maritime title in the multi-year surface and air transportation bill and to attach the RAMP Act to it, but it appears that legislation will be delayed until at least April 2012, when the current extension runs out.[16] While inclusion in the surface transportation bill remains an attractive option for eventual passage, Rep. Boustany has indicated he will continue pushing the bill as a stand-alone proposal, which might be feasible considering that it already has 128 cosponsors and bipartisan support with 56 Democrats and 72 Republicans. A key characteristic of the bill is that it "scores" neutrally, meaning that it will not be viewed as increasing the deficit or raising taxes because it would only require the expenditure of revenues taken-in by the HMT and, therefore, can obtain the support of Republicans opposed to spending increases and Democrats looking to stimulate jobs through infrastructure spending.

FMC Investigation into the HMT's Effect on Cargo Diversion

With cargo volumes dropping in the sagging economy and port business scarce, pressure has been building since the earlier part of 2011 to address the perceived competitive disadvantage that the HMT imposes upon U.S. ports located near competing Mexican or Canadian ports, which do not impose the tax on shippers. Some West Coast ports, which have experienced declining volumes while volumes have increased across the border in Canada, have advocated closing what they term the "land border loophole" by imposing a levy on containers entering the United States from Canada and Mexico equal to the HMT.[17]

Testifying before the House Transportation and Infrastructure Committee, Subcommittee on Coast Guard and Maritime Transportation in February 2010, FMC Chairman Richard A. Lidinsky announced that "[t]he Commission is . . . carefully monitoring diversion of U.S.-bound container cargo to Canadian ports and away from U.S. ports . . . ."[18] Then, in August 2011, Senators Murray (D-WA) and Cantwell (D-WA) wrote

[16] Surface and Air Transportation Programs Extension Act of 2011, Pub. L. No. 112-30, 125 Stat. 342 (2011).

[17] *See, e.g.*, Port of Tacoma, Harbor Maintenance Tax, http://www.portoftacoma.com (2011).

[18] *Fiscal 2011 Budget Coast Guard and Maritime Transportation: Hearing Before the H. Comm. on Transportation and Infrastructure, Subcomm. on Coast Guard and Maritime Transportation*, 112th Cong. (2011) (Statement of Richard A. Lidinsky, Chairman, Federal Maritime Commission).

to the FMC requesting "the Commission to conduct an analysis of the impacts and extent to which the HMT and other factors impact container cargo diversion from U.S. west coast ports to west coast Canadian and Mexican ports, as well as offer legislative and regulatory recommendations to address those concerns."[19] Shortly thereafter, the FMC received additional letters from Washington and California Members of Congress requesting an FMC inquiry into the matter.[20] Picking up on the story, numerous news outlets forecast the possibility of "a major new levy" on cargo shipped into the United States from British Columbia ports, sparking concern among Canadian stakeholders and criticism from Canadian trade officials.[21]

At an open meeting held in Washington, D.C., on October 5, 2011, the FMC determined, by unanimous vote, to launch a "Notice of Inquiry" into "disparities that drive U.S.-bound cargo to Canadian and Mexican ports," including the HMT.[22] Announcing the inquiry, Chairman Lidinsky took note of the rapid growth plans that the Canadian government has to make the Port of Prince Rupert "the" North American gateway to Asia and stated that "Canadian and Mexican ports are free to compete with U.S. ports for U.S. cargo. But they should do so on a playing field that is not tilted by governments' policies. So the primary questions is: Are we handicapping our own ports in international competition?"[23] In addition to the HMT, the inquiry will look at the effects of container inspection and other security-related obstacles to cargo movement, rail costs and subsidies, and infrastructure disparities that may make U.S. ports less attractive. In announcing the inquiry, the Chairman was careful to note that the Commission is only embarking on a study and that no conclusions have been made and no consideration has been given to imposing fees or tariffs on U.S.-bound, cross-border cargo. The FMC inquiry will be undertaken with input from concerned stakeholders and will likely include a hearing by the Commission.

Canadian stakeholders have been quick to stand up against the specter of protectionism, rejecting charges that Canadian ports are thriving because of unfair subsidies and noting that the U.S. decision about how it funds the dredging and infrastructure of its own ports is a purely domestic U.S. issue that cannot be blamed upon their Canadian competitors.[24] Moreover, these Canadian interests assert that the Canadian port of Prince Rupert, which appears a focus of the inquiry, is popular with shippers due to advantages beyond the HMT, including a closer location to Asia on the Great Circle shipping route, good rail connections, new infrastructure, and comparatively little congestion, which provide a three to four day advantage over Los Angeles-Long-Beach in getting goods from Asia to U.S.-interior cities, such as Chicago.[25] Ironically, it was the U.S. West Coast ports that benefitted from their own proximity to Asia at the expense of New York as trade shifted from Europe to Asia in recent decades.

Canadian International Trade Minister Ed Fast reacted to news of the FMC inquiry, stating that "Canada's ports and railways are competing fairly. We will defend Canada's competitive advantage routes wherever they are threatened."[26] Canadian interests also counter

---

[19] Letter from Sen. P. Murray & Sen. M. Cantwell to Chairman R. Lidinsky (Aug. 29, 2011) (on file with author) ("HMT may be a key factor causing U.S. ports to lose a growing share of imported cargo from Asia. . . . It is imperative that we level the playing field between international ports and domestic ports so that the U.S. can compete for cargo.").

[20] Letter from Rep. Larsen (D-WA) et al. Chairman R. Lidinsky (Sept. 30, 2011) (on file with author); Letter from Rep. Richardson (D-CA) to Chairman R. Lidinsky (Sept. 28, 2011) (on file with author).

[21] *See, e.g.*, *U.S. Mulls Levy on Cargo from BC Ports*, CARGONEWS ASIA, Oct. 4, 2011.

[22] Federal Maritime Commission, *Two Actions Approved: Inquiries into Disparities that Drive U.S.-Bound Cargo to Canadian and Mexican Ports and Proposed Rule for Service Contracts that Link Rates to Freight Indices*, Oct. 5, 2011 (on file with author).

[23] *Id.*

[24] Canadian Government representatives attended the FMC hearing on October 5, 2011, and, immediately after the hearing, the Canadian Chamber of Commerce released a statement that: "This is a domestic U.S. issue, and should remain one. Canadian ports and users are required to pay the full cost of the infrastructure that they use. The Canadian Chamber will oppose any protectionist measures that will penalize Canadian ports, railways and all cargo carriers and make North America's freight system more costly." Canadian Chamber of Commerce, *Statement by the Canadian Chamber of Commerce on the Federal Maritime Commission Decision to Proceed with an Investigation of Canadian Ports*, CANADA NEWSWIRE, Oct. 5, 2011.

[25] Peter Tirschwell, *Taxing Whose Containers?*, J. COMM., Sept. 30, 2011; Lee-Anne Goodman, *Canada-U.S. Trade Tensions Loom Over West Coast Ports*, GLOBE AND MAIL, Oct. 6, 2011 (quoting Don Krusel, President and CEO of the Prince Rupert Port Authority).

[26] Peter O'Neill, *BC Ports Under U.S. Scrutiny; Study of Possible Subsidies Raises Fears of Protectionism*, EDMONTON J., Oct. 6, 2011.

that it was a U.S. government of just a few decades ago that sought and achieved the North American Free Trade Agreement ("NAFTA") and that, while a growing but small percentage of U.S.-bound containers come through Canadian ports, 15% of all Canadian-bound containers discharge at U.S. ports.[27] The Canadian Chamber of Commerce has also reacted strongly to the proposal, stating that "this is a matter of concern not only because of the potential impact on Canadian businesses and their customers, but also because this protectionist effort will be launched at the very moment our two governments are undertaking a joint effort to increase their economic and security cooperation," referring to the "Beyond the Borders" agreement announced by the U.S. and Canadian governments in February 2011.[28]

The question of cargo diversion and the HMT's competitive impact has been around as long as the HMT itself. During initial debate over the HMT, members of Congress expressed concern that the HMT would hinder the ability of American ports to compete with their Canadian neighbors for cargo ultimately *bound for Canada*.[29] Therefore, the original legislation authorizing the HMT provided for the Secretary of the Treasury, in consultation with U.S. ports, the Army, Department of Transportation, and the House of Representatives, to "conduct a study to determine the impact of the port use tax imposed under section 4461(a) . . . on potential diversions of cargo from particular United States ports to any port in a country contiguous to the United States."[30]

In 1992, Representatives from the Massachusetts delegation rose in support of legislation to roll back the HMT "in order to save jobs and keep our ports competitive," arguing that "[i]n New England, and in Massachusetts particularly, the tripling of the tax has had a profound negative impact on our economy, increasing the cost of shipping out of New England and causing cargo to be diverted to cheaper Canadian ports."[31] Similarly, numerous ports witnesses from both coasts testified before the House Merchant Marine Committee in 1993, claiming competitive disadvantage caused by the HMT to "northern tier" ports competing with ports in Canada.[32]

As Boston port business declined in the mid-1990s, the FMC subpoenaed shippers' records of their HMT payments dating back three years to assess the influence of the tax on decisions to divert cargo to Montreal from New England ports, particularly the Port of Boston.[33] Ultimately, the Massachusetts legislature enacted the Harbor Maintenance Tax Credit, through which the state provided a dollar-for-dollar credit to off-set the allegedly diversionary effects of the Federal HMT.[34]

Attempts have also been made over the years to repeal the HMT and return the funding obligation to the Treasury, thereby eliminating both the competitive advantage issue and the burden on maritime commerce. In 1995, Rep. Jim McDermott (D-WA) introduced a bill which would have rolled back the HMT to a lower level, arguing that "[t]he HMT is especially burdensome to U.S. ports in the Pacific northwest, Great Lakes region and the Northeast which compete directly with nearby Canadian ports."[35] Similarly, the Support for Harbor Investment Program, introduced in 2001, would have replaced the HMT because, according to supporters, "[t]he existing Harbor Maintenance Tax puts our maritime industry at a competitive disadvantage. The tax increases the price of goods sold in the U.S. and

[27] Peter Tirschwell, *Taxing Whose Containers?*, J. Comm., Sept. 30, 2011; Lee-Anne Goodman, *Canada-U.S. Trade Tensions Loom Over West Coast Ports*, Globe and Mail, Oct. 6, 2011 (statement of Fred Green, CEO, Canadian Pacific Railway).

[28] Peter O'Neil, *Minister Keeping an Eye on "Protectionist" U.S. Port Proposal*, Postmedia News, Oct. 3, 2011.

[29] 132 Cong. Rec. S3319-02 (1986) (Statement of Sen. Bradley).

[30] Water Resources Development Act of 1986 § 1407.

[31] 138 Cong. Reg. E2519-01 (1992) (Statement of Rep. Studds).

[32] *General Accounting Office's Study on the Impact of Federally Mandated User Fees on the Maritime Industry: Hearing Before the H. Merchant Marine and Fisheries Comm., Coast Guard & Navigation Subcomm. and Merchant Marine Subcomm.*, 103rd Cong. (1993) (Statements of the American Association of Port Authorities by Anne Aylward, Maritime Director, Massachusetts Port Authority, Statement of Tom Carroll, Co-Director, New England Shippers Advisory Council, & Statement of John Terpstra, Executive Director of the Port of Tacoma).

[33] Michael S. Lelyveld, *Skipped Calls Top Agenda in FMC Inquiry of TAA*, J. of Comm., Aug. 24, 1994.

[34] Mass. Gen. Laws, ch. 63, § 38P; Massachusetts Department of Revenue, Technical Information Release 97-4; Brendan J. Dugan, *Tax Credit Gives Boost to Boston*, Inbound Logistics, Oct. 1998.

[35] 141 Cong. Rec. E519-01 (1995) (statement of Rep. McDermott).

diverts cargo to Canada, which does not have a similar tax. At a time we should be working to attract new commerce to our U.S. ports, and take advantage of our waterways to relieve congestion, we are hindering their ability to remain competitive, attract business and aid in relieving congestion."[36]

Longstanding West Coast discontent with the HMT structure finds its roots in U.S. regional disparities in the application of the tax and its benefits. Because the largest volume and highest value of imports come through naturally deep ports on the West Coast, those ports bear the brunt of the tax, but the funds generated flow disproportionately to ports on the East Coast and even more so to the Gulf Coast ports, which require more maintenance dredging. For example, California ports contribute approximately 29% of HMT revenues but receive only 7% of dredging expenditures, while Louisiana ports receive 20% of HMTF expenditures and contribute approximately 5% of funds received into the HMTF.[37] West Coast ports are likely to be even less inclined to subsidize their competitors in the Gulf and on the East Coast after 2014 when the expanded Panama Canal opens and "Vessel calls on the East and Gulf Coasts are . . . expected to increase significantly as cargo shifts away from the congested West Coast."[38]

Conclusion and Future Action on the HMT

Because the HMTF is not a separate or "off-budget" account, the "surplus" has in effect already been spent, and, therefore, a draw-down of the HMTF surplus would increase the deficit, a point that the Senate acknowledged in expressing its concern about the President's proposal to expand the uses of the HMTF.[39] Consequently, any proposals to increase HMTF expenditures or draw down the surplus, either through increased maintenance dredging or through the expansion of authorized projects, would likely require legislative changes, which will be challenging in the current budget environment. One alternative suggested by Senate appropriators is to remove the HMTF from the appropriations process so that funds generated by the HMTF flow directly to the Army Corps.[40] Alternatively, these appropriators suggested that a higher request by the Administration might lead to an increase in the allocation cap for the relevant appropriators, which would allow them to dedicate more resources to dredging if not offset by decreases elsewhere in their bill.[41] The likelihood of either solution appears, at this stage, distant, and therefore proponents of leveraging the HMT to achieve increased dredging are likely to find their best hope in the RAMP Act, which would not increase the deficit or taxes because of its neutral scoring. Even that proposal will likely meet resistance from within the Budget Committee, however, given the application of HMT funding elsewhere in the budget.

With regard to the FMC inquiry, there is an open question as to the FMC's jurisdiction over the HMT and the non-U.S. ports at issue, and any meaningful change will likely require legislation. Given the number of times that the cargo diversion issue has surfaced in the past and the legislative inertia within the current Congress, the near-term success of any such legislation seems unlikely. If the FMC conducts a thorough investigation and does, in fact, put forward legislative proposals as requested, however, its analysis will likely serve as the launching point for any legislative initiatives. Jurisdictional issues notwithstanding, the FMC is free to conduct an informal inquiry and, at all events, will likely be well-served by its responsiveness towards the pointed request from Senator Murray, who chairs the Transportation Subcommittee of the Senate Appropriations Committee, and Senator Cantwell, who sits on the Surface Transportation and Merchant Marine Infrastructure Subcommittee of the Senate Commerce Committee, and who therefore have jurisdiction over the FMC and its budget.

*****

Bryant E. Gardner is a Partner at Winston & Strawn, LLP, Washington, D.C. B.A., summa cum laude 1996, Tulane University of Louisiana; J.D. cum laude 2000 Tulane Law School.

---

36 147 Cong. Rec. E1556-02 at E1557 (2001) (statement of Rep. Borski).

37 CRS Report at 7 & 10.

38 U.S. Army Corps of Engineers, IWR White Paper: The Implications of Panama Canal Expansion to U.S. Ports and Coastal Navigation Economic Analysis 1 (Dec. 2008) (2005 data).

39 CRS Report at 5-6; S. Rep. 112-75 ("The funds deposited into the HMTF are available through appropriations provided by this Committee. As such, these appropriations are subject to the same budgetary authority cap that all other appropriated funds in this bill are subject to. To appropriate more funds for maintenance of these projects would require the Committee to cut funding elsewhere within the bill in order to stay within the budget authority cap. With all of the competing demands on funding from this Committee, it is impossible to find sufficient funds to fully expend revenues that are generated by the HMT.").

40 S. Rep. 112-75.

41 *Id.*