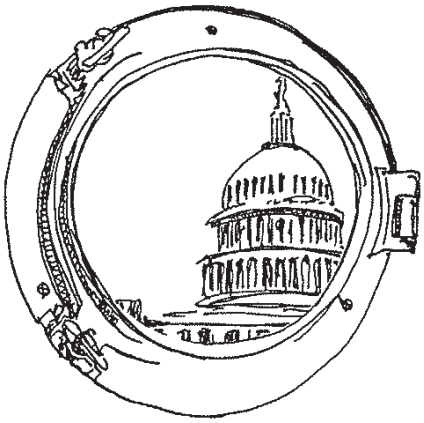
WINDOW ON WASHINGTON



AND WRRDA DONE

By Bryant E. Gardner

Contrary to popular belief, the 113th Congress has actually passed legislation, some of it meaningful. On June 10, 2014, the Congress at long last passed the Water Resources Reform and Development Act of 2014[1] ("WRRDA"). At 182 pages of lean legislative sausage, the law includes hard-fought compromises on a wide variety of issues, many of which may impact the maritime industry. The First Quarter 2013 *Window on Washington*, "WRDA Up!" reviewed the Senate proposal[2] and highlighted many of these items, but the deal ultimately struck necessarily reflects the House negotiations and compromises along the way. The law's passage is particularly remarkable because it is the first water resources development legislation since Congress's 2010 voluntary ban on earmarks came into effect. While the abstention from earmarks has generally retarded the Congress's ability to produce legislation, it has been remarkably disruptive with respect to water resources legislation, which relied upon local interests and compromises, and had come to represent, in the eyes of some, a showpiece of pork-barrel politics.

For years, the Harbor Maintenance Tax ("HMT"), which imposes a tax on imports to fund harbor improvements, has built up a large surplus in the Harbor Maintenance Trust Fund even though there is widespread acknowledgement that dredging and other eligible harbor improvements are badly needed. However, as discussed in the Fourth Quarter 2011 *Window on Washington*, "Dredging Up the Harbor Maintenance Tax", maritime interests have been unable to tap that surplus because it has been siphoned off to meet other priorities. Attempts to mandate use of HMT collections for harbor maintenance were met with budget offset obstacles, as well as jurisdictional objections from appropriators unwilling to take direction from their authorizing committee brethren regarding the allocation of discretionary spending. The final compromise sets target expenditures to increase each year so that, by fiscal year 2025, and each year thereafter, one hundred percent of the funds collected actually go to harbor maintenance. However, there is a catch: The allocation increase only applies if the level of appropriations for the Civil Works program of the U.S. Army Corps of Engineers in that fiscal year has been increased by the appropriators, so that the other programs that have been feeding off of the Harbor Maintenance Trust Fund are not caught in a PAYGO situation and left without funding. And, in a twist of beltway irony, the very same day that the President signed WRRDA into law, the House passed its FY15

[1] Pub. L. No. 113-121, 128 Stat. 1193 (2014) ("WRRDA").

[2] S. 601, 113th Cong. (2013).

Energy and Water Appropriations spending bill, which failed to increase Corps appropriations enough to trigger the increase allocation of HMT funds to harbor maintenance.[3]

WRRDA establishes a new framework for the annual allocation of harbor maintenance and operation expenditures. It requires that the Corps expend HMT funds "based on an equitable allocation of funds" among harbors, which requires that it consider the "national and regional significance of harbor operations," "national security and military readiness needs," and the uses of the harbors.[4] Over the past several years, the Corps has made funding allocations primarily on the basis of tonnage moved through the harbors, and therefore the legislation specifically directs that it "shall not allocate funds . . . based solely on the tonnage transiting through the harbor."[5]

The legislation also sets up a series of allocation targets keyed off of the operation and maintenance funds baseline for FY 2012, which was $898 million.[6] First, the Corps is directed to allocate not less than 10% of the 2012 baseline amount to smaller or "emerging" harbors, with the remaining 90% to medium and high volume ports based upon the "equitable allocation" standard. Second, for funds appropriated in excess of the 2012 baseline (called "priority funds"), the Corps is to allocate 10% to emerging harbors, and 90% to medium and high volume ports. Third, not less than 5% of such priority funds above the 2012 baseline must be allocated to "underserved harbors," which are those that have not received funding to their constructed depth or width and which have received state and local infrastructure funding; and not less than 10% of such priority funds must be allocated to Great Lakes ports.

The Act also sets up a new discretionary program whereby "donor ports," defined as those that receive less than 25% of the HMT collected there and located in a state with more than two million containers loaded or unloaded annually, and high-volume energy shipment ports, are eligible to receive additional amounts for maintenance dredging, environmental remediation related thereto, or "payments to shippers."[7] Notably, where a donor port elects the "payments to shippers" provision, it receives the amounts "that is equal to those payments to Customs and Border Protection." This provision appears to be an HMT refund for shippers, and is therefore likely an outgrowth of complaints by West Coast ports, especially in the Pacific North West, alleging that the HMT puts them at a competitive disadvantage vis-à-vis ports in Mexico or Canada.

WRRDA also tackles some of the festering issues regarding the Inland Waterways Trust Fund ("IWTF"), which funds inland waterways infrastructure needs with a tax on marine fuel imposed upon waterways users. The IWTF faces a shortfall, and waterways interests have been advocating for a tax or fee increase to finance needed infrastructure improvements. Although requested by the users who pay the tax, the increase has been a tough sell in the Republican House, which has shown little appetite for fresh tax increases of any kind. WRRDA therefore takes the interim step of requiring various studies and user groups to analyze the best path forward to tank-up the IWTF.[8] The funding study is due by June 10, 2015, and will likely spur the next big push to fund the IWTF. A big drain in IWTF funding was the Olmsted lock and dam project on the Ohio River in Illinois. Although originally budgeted for $775 million in 1988 with inland waterways users responsible for half the cost, the project has overrun budgeted amounts and ballooned to over $3 billion. Waterways users scored a major win by limiting the IWTF's share of Olmsted to 15% of cost.[9] And although the WRRDA authorizers are limited in their ability to direct the appropriators, the legislation includes a "sense of Congress" that Olmsted appropriations should be at least $150 million per year. In an attempt to avoid a repeat of the Olmsted situation, the law requires that any projects estimated to cost over a half billion dollars be reported to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.[10]

WRRDA also includes a handful of "streamlining" provisions favored by waterways stakeholders but opposed by the environmental lobby. The provisions generally received bipartisan support, and even President Obama

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[3] H.R. 4745, 113th Cong. (2014).

[4] WRRDA § 2102.

[5] *Id.*

[6] *Id.*

[7] WRRDA § 2106.

[8] *Id.* §§ 2004–2005.

[9] *Id.* § 2006.

[10] *Id.* § 2007.

recognized the problem in March 2012 when he directed implementing agencies to speed up projects as much as possible.[11] The bill limits feasibility studies to three years and $3 million in federal costs, consolidates studies, eliminates duplicative analyses, and requires expedited approvals by federal and non-federal interests.[12] Moreover, priority is required for projects addressing an imminent threat to life or property, such as hurricane or levee protections. Lastly, the Corps has a backlog of roughly 1,000 projects, and WRRDA establishes a process to eliminate the backlog, thereby purportedly offsetting the value of the projects affirmatively authorized in WRRDA by more than $6 billion. The provision targets projects authorized prior to the Water Resources Development Act of 2007 which have not begun construction, or which have begun construction but have not received funding in the last six years.[13] To prevent the build-up of back-logs in the future, projects which do not begin construction within seven years of authorization will be de-authorized.

Although WRRDA is not a total victory for all sides, it represents important advances for the waterways and harbor user communities, and should help reform what has become a cumbersome and inefficient waterways infrastructure development process that was built to satisfy congressional earmarks, but which has been denied that lubricant in recent years due to changes in congressional policy.

P3 Alliance Cleared, Rejected

One of the most hotly anticipated shipping line alliances met its fate this past quarter when the "P3 Network" tie-up of Maersk Line, Mediterranean Shipping Company ("MSC"), and CMA-CGM was first approved, then rejected by regulators. The alliance was pitched as purely operational in so far as it would have allowed the lines to share facilities and vessels in order to cut costs and create efficiencies, but not to fix prices.

The U.S. Federal Maritime Commission was the first to clear the proposed alliance, which would have deployed approximately 250 ships in 29 loops in the Asia-Europe, transpacific, and transatlantic trades. On March 20, 2014, the Commission announced that it had completed its review of P3, "based on a determination that the agreement is not likely at this time, by a reduction in competition, to produce an unreasonable increase in transportation cost or an unreasonable reduction in transportation service."[14] In the lone dissent, Commissioner Lidinsky expressed his concern that the agreement would permit one carrier the ability, when coupled with existing discussion agreements, to deploy its assets along with those of the other two carriers in a manner so as to "dominate vessel competition and narrow shipper options at U.S. ports."[15] On June 4, 2014, the European Commission indicated that it did not intend to open any proceedings in relation to P3, but that it would follow market developments and remain vigilant as regards any competition risks.[16]

Then, in a surprise decision, China's Ministry of Commerce ("MofCom") stated on June 17, 2014, that it had determined to forbid the alliance, reported to be the first time it had ever moved to reject a transaction that did not involve a Chinese company. Maersk Line and MSC officers indicated that the decision was both a "surprise" and a "disappointment" to them, indicating that the "partners have worked hard to address all the regulators' concerns."[17]

Why did the U.S., European, and Chinese regulators take divergent views of P3? Like most decisions of this magnitude, the answer appears to hinge upon factors that range from the technical to the political. Officially, MofCom indicated it rejected the alliance because it would have held 47% in the Asia-Europe "with remarkable increase of market concentration" which "may have the impact of competition elimination and restriction."[18] The FMC issued a statement defending its decision following China's rejection, stating that their decision remains in effect notwithstanding China's rejection, and that P3 agreement

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[11] Exec. Order No. 13604, 77 Fed. Reg. 18,887 (Mar. 28, 2012).

[12] WRRDA Title I.

[13] *Id.* § 6001.

[14] Federal Maritime Commission News Release, *P3 Agreement Clears FMC Regulatory Review* (Mar. 20, 2014).

[15] Federal Maritime Commission News Release, *Comments of Commissioner Richard A. Lidinsky, Jr. on Proposed Vessel Sharing Agreement* (Mar. 24, 2014).

[16] Maersk Line News Release, *Maersk Line and P3 Partners Receive European Commission Affirmation* (June 4, 2014).

[17] *Asia: China's Ministry of Commerce Kills P3*, LLOYD'S LIST (June 18, 2014).

[18] Ministry of Commerce News Release, *People's Republic of China, Official of Anti-Monopoly Bureau of Ministry of Commerce Interprets Investigation in Concentration of Undertakings of Three Shipping Businesses* (June 20, 2014).

parties would have been subject to "specifically tailored monitoring" to ensure compliance with the U.S. Shipping Act.[19] Similarly, Federal Maritime Commissioner Doyle issued a statement the following day explaining that his agency's review did not have jurisdiction over the Asia-Europe trade, and that the Asia/North America and Europe/North America trade shares with P3 would have been only 23%, in contrast to the 47% Asia/Europe share which apparently breached China's 30% market share threshold.[20]

The rejection by MofCom also serves as a powerful reminder that the Chinese will not hesitate to block deals deemed detrimental to Chinese interests. In the months leading up to the P3 rejection, the China Shippers' Association aggressively lobbied the authorities to block the consortium, indicating their belief that the P3 operators would seek price fixing once the operation went on line.[21] The Hong Kong Shippers' Association also lobbied against the deal, and the China Shipowners' Association indicated in January 2014 that "Based on all the available information gathered so far, there are not enough grounds to conclude that P3 is illegal [under Chinese laws]. But we have always been worried about the formation of P3."[22] Indeed, China's COSCO holdings has been struggling in recent years, and many predicted that the rise of the powerful new alliance would only lead to more red ink at the state-owned Chinese line.

The Chinese rejection also serves as yet another milestone in China's assertiveness with respect to the regulation of international commerce. Whether it is international trade, pollution, or safety measures, operators can no longer afford to focus their attentions only on the U.S. and Europe, leaving China as an afterthought. Chinese authorities must be considered and engaged early on, keeping an eye toward Chinese interests and pressures which may be brought to bear on any regulated decision.

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[19] Federal Maritime Commission News Release, *Commission Statement on the P3 Agreement* (June 18, 2014).

[20] Federal Maritime Commission News Release, *Commissioner Doyle on P3 Final Decision* (June 19, 2014).

[21] Jing Yang, *Beijing Starts Antitrust Review of P3*, Lloyd's List (Jan. 29, 2014).

[22] *Id.*; Tom Mitchell, *Domestic Factors Key in China's Shipping Rejection*, Financial Times (June 18, 2014).