

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 11-19 – Notice of Inquiry

**U.S. INLAND CONTAINERIZED CARGO MOVING THROUGH
CANADIAN AND MEXICAN SEAPORTS**

**Joint Comments Submitted By World Shipping Council,
The National Industrial Transportation League, and National Retail Federation**

The World Shipping Council,¹ The National Industrial Transportation League,² and the National Retail Federation³ respectfully and jointly file these comments in response to the Notice of Inquiry published by the Commission on November 8, 2011. (76 Fed. Reg. 69271) This Notice of Inquiry appears to have begun as a result of an August 29, 2011 letter the Chairman received from the two U.S. Senators from Washington State requesting that the Commission “analyze the impact the federal Harbor Maintenance Tax (HMT) may have on the diversion of U.S.-bound cargo from U.S. ports to those in Canada or Mexico”.⁴ The letter characterized the HMT as resulting in an “unfair disparity” and “increased cargo diversion”, stated that “it is imperative that we level the playing field”, and requested the Commission to “conduct an analysis of the impacts and the extent to which the HMT and other factors impact container cargo diversion....”

¹ The World Shipping Council is a non-profit trade association of liner shipping companies with offices in Brussels and Washington, D.C. Its members operate approximately 90 percent of the global liner ship capacity, providing more than 400 regularly scheduled services linking the continents of the world. Collectively, these services transport about 60 percent of the value of global seaborne trade, or more than US\$ 4 trillion worth of goods annually. For more information about the World Shipping Council, visit www.worldshipping.org.

² The League is one of the oldest national associations representing companies that ship goods and purchase transportation from carriers and other service providers in domestic and international commerce. The League has approximately 600 company members that range from some of the largest users of the nation’s transportation system to smaller companies engaged in the shipment and receipt of goods. A substantial number of the League’s members are U.S. importers and exporters that have a direct interest in the subject of this proceeding.

³ As the world’s largest retail trade association and the voice of retail worldwide, NRF represents retailers of all types and sizes, including chain restaurants and industry partners, from the United States and more than 45 countries abroad. Retailers operate more than 3.6 million U.S. establishments that support one in four U.S. jobs – 42 million working Americans. Contributing \$2.5 trillion to annual GDP, retail is a daily barometer for the nation’s economy. NRF’s Retail Means Jobs campaign emphasizes the economic importance of retail and encourages policymakers to support a Jobs, Innovation and Consumer Value Agenda aimed at boosting economic growth and job creation.

⁴ <http://www.fmc.gov/assets/1/Page/TAX-110829-ChairmanRichardLidinskyFMC-HarborMaintenanceTax.pdf>. A similar letter was subsequently sent to the Commission from other members of the Washington State Congressional delegation.

The Commission's Notice of Inquiry poses eight questions that invite comments on differences in laws, processes, procedures, infrastructure, costs or services that could be considered in comparing services involving Mexican, Canadian and U.S. ports, including inland transportation differences. The Commission's broad inquiry into these subjects is apparently intended to assist the agency in responding to the requests from Congressional representatives for recommended legislative and regulatory changes that may address their concerns with the HMT and other factors that may influence the selection of ports in Canada or Mexico over ports in the northwestern U.S.

We appreciate the Commission's inquiry and need to respond to those members of Congress who have raised these issues. However, we note at the outset that the HMT is a subject that falls within the statutory mandates and jurisdiction of other U.S. government agencies. Furthermore, given the political complexities associated with this issue, we respectfully believe that legislative or regulatory recommendations regarding the HMT are matters that would be best addressed by the Congress rather than the Commission.

The Commission's Notice also requested comments on other factors that may affect the selection of ports in the U.S. versus Canada or Mexico, as well as actions that the U.S. Government could take to improve the competitiveness of U.S. ports. Accordingly, these comments explain our views on the Harbor Maintenance Tax issue, which appears to be the instigating cause of this inquiry, and also address a number of other market-driven factors that play a major role in the routing of international shipments involving the U.S. trades.

I. The Harbor Maintenance Tax and Canada

The non-application of the U.S. harbor maintenance tax (HMT) to cargo that transits through Canadian ports is not a "loophole" in U.S. law, nor can one safely assume that U.S. destination cargo that arrives through a Canadian port has been "diverted" to that route by the potential application of the HMT to it if it arrived through a U.S. port.

We do not question the fact that the application or non-application of the HMT may be one of many factors in the total cost calculation of moving goods from origin to destination, but it is only one of many factors in the decision about how cargo may be routed. For example, the recent growth of Trans-Pacific services through Prince Rupert is also certainly due in substantial part to the transportation advantages of that service, especially the shorter ocean transit time from Asia, and the excellent rail connection and service from the railroad(s) providing service from that port into the U.S. Midwest.

Canada and the United States are very close politically, economically, and socially. But it would not be a realistic objective to expect or try to create tax equality between the specifics of these two sovereign governments' tax systems or to require identical approaches to how they finance port dredging. The systems are different.

Canadian ports do not have the advantage of tax exempt financing that is available to U.S. port authorities; tax exempt financing lowers the borrowing costs of U.S. ports, but this should not be a basis for Canada taking offense. A number of ports in Washington State can and do impose taxes on the citizens living in their community to support port operations; this is not an option available to Canadian ports, but this should not be a basis for Canada taking offense. U.S. ports have been given \$2.5 billion in port security grants by the federal government to assist them in complying with the International Ship and Port Security Code and improve their security, whereas Canadian ports have not received the same financial support from the Canadian government. Such differences are a natural result of different governments' approaches to the issues and do not warrant recrimination or countervailing government responses.

Canadian ports are generally self-financing, meaning that they pay for their own harbor dredging from revenues derived from operations, including tenant leases, harbor dues, wharfage, etc. Canada thus finances its harbor dredging with a different system than the U.S., but that does not make it inappropriate or unfair. Commerce transiting through Canadian ports pays for the harbor dredging of those Canadian ports through revenues the ports derive from their tenants. It would be illogical to argue, as the above referenced August 29 letter to the Chairman appears to do, that commerce transiting through Canadian ports should also financially contribute to the cost of U.S. harbor dredging, or that its failure to do so somehow "adversely affects ... the United States' capacity to handle international trade growth".

The principle of the current HMT is that U.S. import cargo arriving through any U.S. port should pay a *national* ad valorem tax to fund a *national* harbor maintenance trust fund from which U.S. Army Corps of Engineers receives revenue for maintenance dredging of *all* U.S. ports.⁵ While this rationale has been the foundation of the law for many years, Puget Sound ports in Washington State have complained about the application of the HMT for decades.

The Port of Seattle's and Tacoma's real issue is not that Canada does not apply a comparable HMT, but that the U.S. does apply the HMT to U.S. import cargo transiting all U.S. ports. Seattle and Tacoma are natural, deep water ports (similar to ports in British Columbia). They do not need significant maintenance dredging, yet cargo arriving through the ports must pay the HMT in order to fund the national Army Corps of Engineers harbor maintenance dredging program. The ports of Seattle and Tacoma presumably would prefer to have the Canadian system apply to them, whereby each port pays for its own dredging needs, rather than to have cargo arriving in Puget Sound help pay for dredging in other parts of the United States, such as New Orleans, Anchorage, Savannah and Oregon Inlet, for example. If this were the case, Seattle and Tacoma could pay for only their dredging costs just as Vancouver and Prince Rupert pay for only their dredging costs. Of course, if the U.S. were to adopt a system where each port must pay for its own maintenance dredging, a lot of U.S. ports would face substantial

⁵ Because of the U.S. Supreme Court decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), the HMT does not apply to U.S. export cargo.

economic challenges at best, and possible closure at worst. If certain deep water U.S. ports wish to argue that they do not operate on a “level playing field” because of the way the nations’ ports’ dredging is financed, it is because of the U.S. national harbor maintenance funding system, not the Canadian ports or Canadian policy.⁶

In considering this issue, however, one should clearly understand that ports do not pay a single cent into the Harbor Maintenance Trust Fund. This is not a situation where deep water West Coast ports pay more into a program than they get out of the program, because they don’t pay at all. Importers who use vessel services that call in U.S. ports are the parties who pay into the Trust Fund. These importers pay one rate regardless of the port used. This does create a level playing field in the U.S. for U.S. ports. It also provides U.S. importers with the flexibility they need to shift cargo without penalty from one U.S. port to another.

While the “equities” of the HMT Trust Fund and disbursements may arguably vary by port, it is a national tax established by Congress, funding a national system, which has had sufficient national political support to remain unchanged for decades.

This complaint is reminiscent of the Port of Seattle’s efforts in years past to seek Congressional change to U.S. cabotage laws as they apply to the carriage of passengers, because the Port felt that the cabotage laws put the Port of Seattle at a competitive disadvantage with respect to the Port of Vancouver, British Columbia in the competition for the cruise line business to Alaska. The issue in that case again was not Canadian law, but the competitive consequence of the application of U.S. law that the Port of Seattle felt was disadvantageous.

In the present case of the HMT, many U.S. ports and many elected representatives from those communities could be expected to strongly resist initiatives that undermine or threaten the current HMT or how U.S. harbor maintenance dredging is funded. For example, we could expect that ports like Anchorage, Baltimore, Philadelphia, Savannah, Stockton, Wilmington, and ports along the Mississippi or Columbia Rivers may have a different perspective on the issue from those deep water West Coast ports that do not need maintenance dredging. The views of the cargo interests who actually pay the HMT, and the ocean carriers who carry their cargo, should be of paramount interest and concern to the Commission, as well as to the ports which are attempting to retain and attract their business. Shippers, both importers and exporters represented by the organizations signatory to this letter, and ocean carriers, are concerned about any initiative which questions, as this investigation appears to do, the utility of continuing the currently available funding mechanism for maintaining our nation’s many and diverse seaports.

⁶ While a coalition called the U.S. West Coast Collaboration, comprised of the ports of Los Angeles, Long Beach, Oakland, Portland, Tacoma and Seattle, has at times indicated some level of support for reexamining the HMT, we also note that the Executive Director of the Port of Los Angeles has clearly stated that Canada has not engaged in any unfair or inappropriate practices (see American Shipper, October 26, 2011, “*Knatz: U.S. at fault for Canada diversion*”). We also note that there are many west coast ports that have not sought FMC inquiry into the HMT. Those ports would not remain commercially viable without regular maintenance dredging and substantial funding assistance, whether through the HMT or some other, as yet undefined mechanism.

One could reasonably conclude that Congress' exempting U.S. import cargo transiting through the deepwater U.S. West Coast ports from the HMT is politically unlikely. This does not make it appropriate to try to make Canada a culprit in this debate for not imposing an HMT of the same nature as the U.S. Congress has imposed on cargo arriving at U.S. ports.

Critiques of the HMT are long-standing and well known. Some complaints have merit. For example, the fact that Congress imposes the tax, places it in a "trust fund" for harbor maintenance dredging, and then either fails to spend monies for dredging or spends much of the "trust fund" revenues on other purposes is well known and arguably unfair.⁷ Nevertheless, the HMT continues as a statutory structure that has had sufficient political support over the years that the Congress has not found sufficient support for alternative formulations. The many issues and political complexities of this funding regime and the trade-offs within it cannot be dismissed or minimized if one wants to consider an alternative HMT regime.

For example, some have suggested that, as a way to "equalize" the effect of the HMT application to U.S. import cargo that transits through a Canadian port, the Congress should impose a tax comparable to the HMT on U.S. import cargo that has transited a Canadian port when it enters the U.S. Such a measure could not be justified on the basis of paying for U.S. harbor dredging because such cargo has not transited a U.S. harbor. Such a tax would violate the GATT and at least the spirit of NAFTA and provoke an unjustifiable trade dispute with the United States' largest trading partner. Such a tax would invite retaliation from the Canadian government on goods moving from the United States to Canada, including Canadian import and export cargo that transits through U.S. ports. For all of these reasons, our organizations would be strongly opposed to such a proposal.

Moreover, notwithstanding the invitation in the Senators' August 29 letter for the FMC to "make legislative and regulatory recommendations to address" the HMT issue, we very respectfully submit that this issue and the nation's harbor dredging and funding policy are not subjects for the Federal Maritime Commission. Congress has given the agency no regulatory or subject matter jurisdiction over this set of issues and the agency has no real experience with the HMT's application or enforcement. It is a subject that cannot be analyzed by a simple comparison of how certain U.S. and Canadian ports pay for harbor maintenance dredging, but also how all U.S. ports' maintenance dredging needs are paid for. How the U.S. Army Corps of Engineers and the U.S. Congress address taxing and spending trade-offs between the Outer Banks of North Carolina and Puget Sound, or Los Angeles and New Orleans, or Savannah and Portland are matters for the Army Corps and the Congressional authorizing and appropriating committees, not the FMC. How transportation infrastructure is paid for or how highway projects connect seaports and intermodal facilities to the national highway system are issues for the Department of Transportation, the Congress, and the various states to address. How U.S.

⁷ This repeated Congressional diversion of HMT revenues to non-harbor dredging uses also creates strong reasons to doubt whether any Congressional change to the current HMT regime would produce a more equitable or desirable outcome for ports or port users.

Customs and Border Protection and Canadian Customs coordinate and cooperate with respect to Customs and import cargo security matters is an issue for those agencies and the Executive Branch to address.⁸

II. Other Factors That Affect Port Selections For U.S. Destined Cargo

In addition to the HMT, the Commission has inquired as to other factors that may influence the routing of cargo destined to inland points in the United States and, in particular, the selection of U.S. west coast ports versus ports in Canada or Mexico. We note that the primary considerations affecting the ports used for cargo imported to the U.S. are market-driven; rather than specific government policies in the U.S., Canada or Mexico. The business requirements of U.S. importers for timely, efficient and cost-effective service that will satisfy their delivery requirements are paramount considerations, as is the carrier's desire to meet the needs of its customers. Thus, transit times, sailing frequencies, intermodal connections, and port congestion, among other commercial factors play an important role in the routing of U.S. in-bound cargo.

Further, as previously noted, the geographic advantage of Prince Rupert which allows for shorter transit times for cargo imported to the United States from Asia, as well as its excellent intermodal connections with rail carriers, are significant factors which may result in the selection of that Canadian port for shipments bound to U.S. interior points.

Experience also shows that port congestion and capacity constraints have caused cargo to shift from the U.S. west coast ports to alternatives in Canada or on the U.S. eastern seaboard. For example, the severe port congestion on the west coast that occurred in 2004-2005 caused importers to shift their cargo to Canada or move their goods through the Panama Canal to the east coast ports, in order to preserve transit times and meet their delivery requirements. The fundamental causes of the congestion problems were infrastructure constraints and poor planning during an economic boom when imports were soaring.⁹ Thus, it was the market conditions and state of our nation's infrastructure that caused U.S. importers to find more efficient and lower cost alternatives to the west coast ports; rather than the HMT or other government policies. Although the west coast ports are not currently facing severe congestion, their operating costs, efficiencies in cargo handling, intermodal connections with railroads, and infrastructure remain important factors in routing decisions. Based on the substantial influence of market considerations on the routing of U.S. imports from Asia, it is unnecessary for the Commission to make legislative or regulatory recommendations to address these issues.

The Commission has also asked in this Notice of Inquiry how the U.S. government could improve the competitiveness of U.S. ports. There are many answers to this. The Congress could

⁸ For example, we note the February 4, 2011 joint Declaration by President Obama and Prime Minister Harper of Canada, entitled, "Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness."

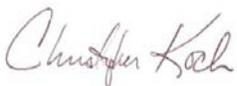
⁹ *Facing up to Congestion factors on the US West Coast*, Transport International Online, <http://www.itfglobal.org/transport-international/til9congestionfactors.cfm>

stop diverting HMT Trust Fund dollars to non-harbor dredging purposes. The Congress could enact a long term surface transportation bill that better recognizes and better funds intermodal freight connectivity from seaports to the national highway system. The U.S. government could fund the channel deepening projects proposed by the ports of Charleston, Savannah, Jacksonville and others. The U.S. government could assist the Port of New York/New Jersey with raising the Bayonne Bridge. The government could speed up the seaport dredging and expansion permitting approval processes. The U.S. government could modernize and upgrade its aging inland waterway lock and dam system. We are confident that the port authorities around the country could provide many details on what they would like from the federal government to improve their capabilities and competitiveness.

III. Conclusion

The subject of funding harbor dredging involves a complex mixture of demands and equities and financing options, but this is purely a political issue within the sole and exclusive legislative jurisdiction and competence of the Congress of the United States. Furthermore, there are a number of commercial and market considerations which influence the routing of U.S. imports. Accordingly, while we appreciate the Commission's good intentions in issuing this Notice of Inquiry, we respectfully submit that it should not offer specific legislative or regulatory recommendations since these are matters that are best addressed by the Congress or should be left to the workings of the marketplace.

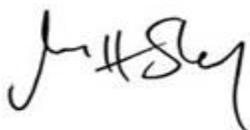
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