

SHORT SEA SHIPPING FOR MARITIME LAWYERS: Helping to Build America's Marine Highway

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For decades the decline of the U.S. maritime industry has been a cruel reality for admiralty lawyers, who at times have had to question their choice of careers. But finally there's good news for revitalizing domestic maritime commerce by relieving landside gridlock in a green way. Everyone should win with the growth of short sea shipping ("SSS").

On December 19, 2007 President Bush signed into law H.R. 6, the Energy Independence and Security Act of 2007, which includes a short sea transportation program.¹ The statute lends support to efforts previously underway at the U.S. Department of Transportation ("DOT") Maritime Administration ("MARAD") which is sponsoring "America's Marine Highway Initiative."² These federal government initiatives³ reflect a growing wave of maritime industry plans⁴

To develop and promote the use of short sea shipping as a commercially acceptable, safe, secure and environmentally beneficial means of reducing congestion along an overburdened surface transportation system.⁵

Want to feel optimistic about the future of your maritime law practice? Go to MARAD's home page⁶ and watch "America's Marine Highway" Video [hereafter "MARAD Video"]. In it Maritime Administrator Sean T. Connaughton makes clear that DOT -- the federal agency responsible for rail, truck, and maritime transportation -- seeks to better interconnect all three transportation modes, targeting the excess capacity of U.S. coastal and inland waterways to relieve traffic congestion with increased use of barges, ferries, and roll-on/roll-off vessels.

¹46 U.S.C. §§ 55601-05.

² <http://www.marad.dot.gov/MHI/ops/index.asp>

³The Short Sea Transportation Program is an outgrowth of several bills introduced during the last year. See, e.g., H.R. 1499, "Short Sea Shipping Promotion Act of 2007" (March 13, 2007); H.R. 1701, "Blue Water Highway Act of 2007" (March 26, 2007); H.R. 981 and S. 1683 "Great Lakes Short Sea Shipping Enhancement Act of 2007" (Feb. 12, 2006 and June 22, 2007, respectively); H.R. 2701 (Title IV), "Transportation Energy Security and Climate Change Mitigation Act of 2007" (June 13, 2007); "Consolidated Energy Bill" (Aug. 4, 2007).

⁴E.g., Short Sea Shipping Cooperative Program ("SCOOP"), www.shortsea.us; I-95 Coastal Coalition, <http://66.167.2http://www.marad.dot.gov/MHI/ops/index.asp32.132/pm/ViewProject.asp?pid=247>; 2007 Journal of Commerce Short Sea Shipping Conference, <http://www.joc.com/conferences/sss/>; "Introducing Trucking by Water: California's Maritime I-5 Seaway," The Santa Maria Group, http://www.scag.ca.gov/goodsmove/pdf/2007/workshop/GMCM080207_TruckingbyWater.pdf.

⁵ SCOOP Mission Statement.

⁶ <http://www.marad.dot.gov/>

Vessel Relief of Landside Transportation Congestion

Aging, clogged, and overtaxed highways and bridges combined with global warming, rising fuel prices, noxious truck emissions, and urban chokepoints spurred bipartisan Congressional support for SSS corridors to supplement existing rail and truck routes.

As recently noted by Rep. Elijah Cummings (D. Md.), Chair of the House Subcommittee on Coast Guard and Maritime Transportation:

We urgently need to support the growth of short sea shipping so that cargo can be economically moved between domestic ports and so that we can help get trucks off of our increasingly congested highways.

Rep. Stephen C. LaTourette (R. Oh.) echoed marine highway benefits:

Short sea shipping could potentially transfer thousands of cargo containers off of our interstates and onto U.S.-flag vessels. An increase in the amount of freight traffic that is moved by coastwise trade would benefit the U.S. fleet, our merchant mariners, our ports and our Nation's shipbuilders.

Highlighting the example of SSS efforts in western Europe, Rep. James L. Oberstar (D. Minn.), Chair of the House Committee on Transportation and Infrastructure, recently commented:

Europe is looking at every way it can to reduce costs, and make their transportation system more mobile and more efficient. We can afford to do no less.⁷ ...

Instead of using trucks to move most our goods, we need to start investing in freight rail and water transportation to move goods.⁸

As shown in the MARAD Video, Americans annually lose 3.7 billion hours, wasting 2.3 billion gallons of fuel, at a cost of \$200 billion just sitting in traffic.⁹ Widening roadways to handle ever increasing volumes of ocean containers¹⁰ would

⁷ MARAD Video.

⁸ www.americanshipper.com (12/10/07).

⁹ MARAD Video.

¹⁰ "By 2020, every major U.S. container port is expected to double the volume of cargo it must process, with East Coast ports tripling in volume and some West Coast ports quadrupling in volume. The United States is expected to import 30 million containers in 2010 and 40 million in 2020. The domestic tonnage of freight carried by all U.S. systems will increase by 67%, while international trade is expected to at least double. Presently, this domestic freight is carried almost exclusively by road or rail – coastal shipping handles only 2% of our domestic freight, even though coastal counties hold more than half of the Nation's

require astronomical construction expenditures.¹¹ This can be avoided by innovative “back to the future” use of our coastal and inland waterways to relieve traffic congestion the same way they were integral to the U.S. economy before railroads and interstate highways.¹²

As anyone driving I-95 from Connecticut through New Jersey or interstates connecting with I-5 through Southern California knows, truck traffic often slows everyone to a crawl. A straight-forward solution to this economic gridlock would be to move containers off the roads and onto an adjacent marine highway. For example:

Columbia Coastal Transport currently moves 1,800 containers by barge daily from Norfolk to Baltimore, the equivalent of 3 lanes of traffic 8 miles long – at 1/8 the fuel consumption of trucks.¹³

Horizon Lines announced plans to start two short sea shipping services among East or Gulf Coast ports during 2008, moving containers up and down the coast after import on Maersk, Evergreen, or Hanjin Shipping container ships.¹⁴

Marine highway proponents posit that a truck could be driven from an inland point in New England onto a ro-ro vessel in an underused south-facing port; the driver could stay aboard and the cargo would remain in transit in contrast to required highway rest periods; such that when the truck drove off the vessel in northern Florida the trip would be faster than by interstate alone.¹⁵

Improved Cost-Effectiveness -- Plus Environmental Friendliness

Fuel consumption savings on the marine highway has obvious public appeal: 1 gallon of fuel is burned to move 1 ton of cargo 70 miles by truck vs. 420 miles by rail vs. 575 miles by barge. Similar improvements in air quality can be achieved on the marine highway, particularly with technologies that are reducing marine engine SO₂, CO₂, and particle emissions.¹⁶

population.” Statement of Maritime Administrator Sean T. Connaughton before the Sub-Committee on Coast Guard and Maritime Transportation of the Committee on Transportation and Infrastructure, U.S. House of Representatives, on the Development of Short Sea Shipping (Feb. 15, 2007) [hereafter Connaughton Statement] at 2.

¹¹ Major highway construction costs \$30 million per mile. See “Short Sea Savior,” Journal of Commerce, (Sept. 27, 2007).

¹² MARAD Video; see generally Alex Roland, W. Jeffrey Bolster & Alexander Keyssar, The Way of the Ship (John Wiley & Sons ed., 2008)(reenvisions U.S. history of waterborne commerce).

¹³ MARAD Video.

¹⁴ “Short Sea Savior,” supra n.11.

¹⁵ Hearing, House Transportation and Infrastructure Committee, Subcommittee on Coast Guard and Maritime Transportation (Feb. 15, 2007).

¹⁶ MARAD Video.

These environmental benefits translate into cost savings for shippers, which is of course critical if they are to shift domestic transportation onto vessels and away from truck and rail. But this is more than theory because already there are marine highway success stories:

The European Union moves 40% of all its freight on the water;

The Mississippi River barge system transports 312 million tons of cargo annually, taking the place of 12.4 million semi-trucks or 3.12 million rail cars.¹⁷ While Mississippi barges traditionally handle bulk commodities, Osprey Lines of New Orleans has built recent success by barging containers;

Cross Sound Ferry in Long Island Sound¹⁸ and Washington State Ferries have long provided time saving alternatives for truckers and passengers;

Sause Bros. and others in the tug and barge industry annually move thousands of tons of lumber and forest products along the West Coast; and

TOTE's Tacoma to Anchorage ro/ro operation serves a route that has no viable landside alternatives¹⁹ while new containers-on-barge options are just beginning to emerge in the Oakland to Sacramento-Stockton corridor long served only by truck and rail.²⁰

Will truckers and railroads oppose America's Marine Highway/SSS initiatives? Not as it becomes obvious that constantly being stuck in traffic hurts their profit margins which will improve with waterborne congestion relief. The geography of the East and West Coasts and the Mississippi river system can readily take the pressure off north-south cargo movements; however, east-west cargo movements will always require truck and rail transportation since there are no transcontinental waterborne alternatives with the exception of partial routes on the Great Lakes/St. Lawrence Seaway and the Columbia/Snake Rivers to the north and the Gulf of Mexico to the south.

Other marine highway benefits MARAD touts include (1) high volume petroleum product and HAZMAT transportation by barge has a better safety record than by

¹⁷ Connaughton Statement at 3.

¹⁸ MARAD Video.

¹⁹ *Id.*

²⁰ Roger Bohnert, MARAD Deputy Associate Administrator, Intermodal System Development; but cf. The Tioga Group, "California Inter-Regional Intermodal System" at 179-83 (June 11, 2006)(skepticism overcome by need).

highway through populous areas and (2) water transportation is a National Security asset, remaining viable after natural disasters, bridge collapses, etc.²¹

Short Sea Transportation Program, 46 U.S.C. §§ 55601-05

Stowed deep inside the Energy Independence and Security Act of 2007 (“Act”), the short sea shipping program, 46 U.S.C. §§ 55601-05, can’t be heralded as a “New Deal” for American shipping. But it reflects Congressional and MARAD recognition that SSS, if effectively implemented, can relieve transportation snafus:

The Secretary of Transportation shall establish a short sea transportation program and designate short sea transportation projects to be conducted under the program to mitigate landside congestion.

Id., § 55601(a).

The Act directs the Secretary of Transportation to issue final regulations by October 1, 2008²² to implement short sea *container or trailer*²³ transportation, id., § 55605, thus enabling MARAD to further the work it has already started with its America’s Marine Highway Initiative.

Along with interagency and industry consultation to develop incentives encouraging SSS growth, id., §§ 55602-03, DOT in consultation with EPA may research

- (1) the environmental and transportation benefits to be derived from short sea transportation alternatives...;
- (2) technology, vessel design, and other improvements that would reduce emissions, increase fuel economy, and lower costs of short sea transportation and increase the efficiency of intermodal transfers; and
- (3) solutions to impediments to short sea transportation projects...

id., § 55604.

The Act importantly incorporates a key vessel construction incentive by making owners who want “replacement vessels, additional vessels, or reconstructed vessels”

²¹ MARAD Video.

²² 48 U.S.C. § 55601 (note).

²³ Dry and liquid bulk cargoes are excluded; rather, the program as defined includes “intermodal cargo containers... loaded by crane” or “by means of wheeled technology.” 46 U.S.C. § 55605(1)(a) and (b). Despite that limited definition, short sea transportation of passengers would also seem included. See id., § 55601(d)(2).

for short sea trade eligible for the Capital Construction Fund (“CCF”) tax incentives administered by MARAD. *Id.*, § 53501(7) and § 53503.²⁴

Overcoming Impediments such as the Harbor Maintenance Tax (“HMT”)

MARAD’s implementation of the short sea transportation program, 46 U.S.C. §§ 55601-05, by expanding America’s Marine Highways promises to ease landside congestion, cost-effectively improve transportation in a green way, and grow the economy. But before the statute and implementing regulations can accomplish that, there are cost hurdles which must be overcome before reluctant shippers will commit to moving their cargo off the roads and onto the water.

First, the perennial debate over the increased cost of coastwise trade vessel construction by U.S. shipyards as required by the Jones Act is sure to get more discussion as vessel operators look to decrease their costs and pass savings onto shippers.²⁵

Opening the CCF to SSS was one very positive step in the Act. However, Congressional proposals to revive up to \$2 billion in MARAD Title XI loan-guarantee programs to attract private financing for short sea vessel construction and refurbishing was dropped from the final version of H.R. 6.²⁶

While dumb barges can capably serve the marine highway, technological advances such as high speed, long haul, ro/ro, passenger and freight pentamarans -- “ROPAX” -- are under design for SeaBridge, Inc. of Virginia²⁷ but will be expensive. Where will start-up money come from for similar worthy projects?

Second, stevedore and labor costs (i.e., longshore gang wages) for handling containers multiple times (at discharge from overseas, then when loading onto a domestic barge, and again at discharge at the end of the marine highway) need to be

²⁴ “The CCF program was created to assist owners and operators of U.S.-flag vessels in accumulating capital necessary for the modernization and expansion of the U.S. merchant marine. The program encourages construction, reconstruction or acquisition of vessels through the deferment of federal income taxes on certain deposits of money or other property placed into a CCF. In the past, CCF funds had to be spent on vessels built in the United States and documented under the laws of the United States for fishing boats or for operation in foreign, Great Lakes, or noncontiguous domestic trade such as ships or barges used between the U.S. mainland and Alaska or Hawaii. But the new law amends that requirement to allow vessels in contiguous trades, among the lower 48 states for example” to take advantage of the CCF program. www.americanshipper.com (12/10/07); 46 U.S.C. § 53501-03.

²⁵ Compare J.C. Perry et al, “The Deep Blue Highway,” *The New York Times* (Jan. 2, 2007)(advocates exempting marine highway vessels from Jones Act) with MARAD Policy Paper, “Shipbuilding and Repair” at <http://www.marad.dot.gov/Policy%20Papers/Shipbuilding.pdf> (MARAD “recognizes that construction of vessels for the Nation’s marine highway system could also result in significant new construction and repair opportunities for U.S. shipyards.”).

²⁶ See R.G. Edmonson, “Special Report: Short Sea Shipping,” *The Journal of Commerce* at 21 (April 16, 2007); H.R. 2701 (Title IV); www.americanshipper.com (12/10/07).

²⁷ “Climate Change for Short Sea Shipping?” *Marine Log* at 21-22 (Aug. 2007); see also “Maritime Advisors Newsletter – SSS/Marine Highways recent developments” (Oct. 9, 2007) (lists SSS vessel design concepts); “Ulstein’s X-Box Ship,” *Marine Log* at 27 (July 2007)(possible SSS RO/RO application).

addressed. To make marine highway costs competitive with rail and trucking costs it would seem that maritime union handling charges could decrease in anticipation of more and steadier work.

Third, the Harbor Maintenance Tax (“HMT”)²⁸ is another cost faced multiple times by marine highway users – but not railroads or trucks. The HMT levy is 0.125% of the cargo’s value assessed upon import into a U.S. port. Compounding the competitive disadvantage *vis-a-vis* rail and truck transportation, HMT is assessed again if the cargo is carried to another U.S. port aboard a marine highway vessel. Complicating matters, the tax is paid by the shipper, which discourages consolidated loads.

The HMT thus presents a market entry barrier for full development of the marine highway. Furthermore, in the context of marine highway carriage, it makes no sense. HMT revenues are earmarked for harbor dredging by the U.S. Army Corps of Engineers – but most marine highway vessels will be shallow draft which do not require additional dredging.²⁹ In short, there are solid policy reasons to exempt marine highway shippers from the HMT because it has a disproportionate impact on them with no benefits from revenues raised.

To avoid the HMT, foreign shipments of high value containers are often diverted to nearby ports in Canada and Mexico and then trucked across the U.S. border. Bargaining those cargos into the U.S. presents another competitive disadvantage for the marine highway – but not other transport modes – because cargo manifests inbound from foreign ports need to be sent electronically to U.S. Customs and Border Patrol 24 hours before *loading*. In contrast, foreign air, rail, and truck manifests need be sent to Customs only 4 hours, 2 hours, and 1 hour, respectively, before *arrival* in the U.S.³⁰ That translates into a 24+ hour delay for marine highway shipments in the name of homeland security that air, rail, and truck carriers inconsistently do not face. The result is landside congestion and delays at our borders that with thought could be streamlined.

Fourth, in addition to these hurdles, infrastructure at major and minor ports must be modified to accommodate marine highway needs. As one example, ro-ro ramps would need to be built in smaller ports hoping to serve the marine highway (at bargain costs in comparison to highway construction). Overall, creative solutions and cooperation will be required of all stakeholders in an integrated marine highway system: vessel operators, truckers, and railroads; shippers and unions; federal, state, and local governments; port authorities and the public. Maritime lawyers should look forward to the opportunity of providing counsel and assistance to a variety of these interests.

²⁸ 24 U.S.C. § 4461; 19 C.F.R. § 24.24; see an excellent analysis “Short-Sea Vessel Service and Harbor Maintenance Tax,” National Ports and Waterways Institute, University of New Orleans (Oct. 2005) available at www.shortsea.org

²⁹ E.g., Letter from Secretary of Transportation Mary E. Peters to Senator Max Baucus, Chairman, Committee on Finance (July 31, 2007)(supports S. 1683 Great Lakes HMT exemption for containerized cargo).

³⁰ See 68 Fed. Reg. 68140 (Dec. 5, 2003) implementing Trade Act of 2002 and summary table at http://www.cbp.gov/linkhandler/cgov/import/communications_to_trade/advance_info/transport_matrix.ctt/transport_matrix.xls

The MLA Looks Ahead

This paper has been presented in conjunction with the first meeting of the Ad-Hoc Committee on Short Sea Shipping appointed by MLA President Lizabeth L. Burrell.

Our goal is to familiarize MLA Members around the United States with marine highway solutions so we can serve our varying clientele and otherwise assist the maritime industry and government interests in implementing policies which make good sense for transportation, the environment, and the economy.

In sum, rejuvenating coastal shipping by providing a green solution to highway traffic congestion would be good for our country – and for our law practices.

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I-710 Under Normal Conditions and
During Shut Down of West Coast Ports
Lockout disrupted \$6.28 billion in trade at
POLA/POLB



SUPPLEMENTAL BIBLIOGRAPHY

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