

# ANOTHER PIECE OF THE SHORT SEA TRANSPORT PUZZLE

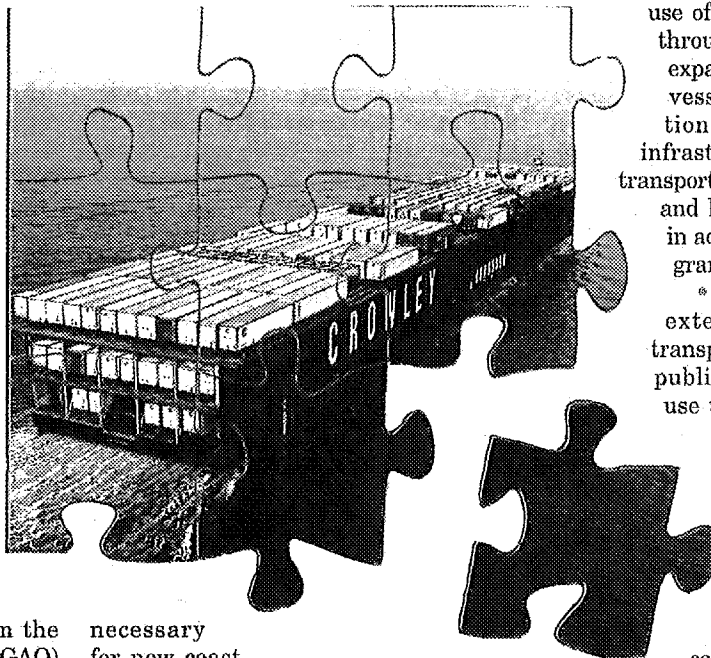
In Europe and the United States the past half dozen years have born increasing witness to highway traffic congestion concerns and to the use of water transport as a possible supplement and alternative. The European Community has moved to embrace water transport for its container and Roll-on/Roll-Off traffic through its "Motorways of the Sea" concept.

In the U.S., multiple "choke points" and miles of bumper-to-bumper traffic characterize travel on major highways that run parallel to ocean coastal waters. Everyone agrees that these coastal waters "could" provide additional transportation capacity. Successive Secretaries at the Department of Transportation (DOT) and reports from the Government Accountability Office (GAO) have addressed the need for a comprehensive federal program that would foster such planning.

With the enactment of the Marine Transportation sections of the Energy Independence and Security Act of 2007, Congress and the Bush Administration have provided the Secretary of Transportation with the authority for such a program—to facilitate DOT and state and local government collaborations, and to attract public and private sector investment for short sea transportation (SST) infrastructure projects to access the potential of our nation's ocean highways.

## PLANNING AND IMPLEMENTING A PROGRAM

Sections 1121, 1122 and 1123 of the act appear as the first and most important of a likely series of Congressional actions to provide a favorable legal regime for public and private sector investments to create the infrastructure



necessary for new coast-wise and other domestic waterborne services. The Congressional sponsors of the act have provided the Secretary authority to develop and implement a comprehensive SST program, with specific Congressionally mandated elements. The objective is the creation of a plan for the creation of an environment that will foster federal, state and local cooperation in the planning and financing of shore-side infrastructure, and attract private sector investment to finance vessel requirements, while at the same time providing strictly limited elements of direct federal assistance. As one reviews the legislation, certain Secretarial actions are mandated as "shall" while others are merely permitted as "may."

Section 1121 of the Act provides that the Secretary "shall establish a short sea transportation program and designate short sea transportation projects to be conducted under the program to mitigate landside congestion, and encourage the

use of short sea transportation through the development and expansion of: (1) documented vessels; (2) shipper utilization; (3) port and landside infrastructure; and (4) marine transportation strategies by State and local governments." And, in administering the SST Program, the Secretary shall:

- \* Designate SST routes as extensions of the surface transportation system to focus public and private efforts to use the waterways to relieve landside congestion along coastal corridors;
- \* Enter into memorandums of understanding with other Federal entities to transport federally owned or generated cargo using program designated SST projects when practical or available;

\* Consult with shippers and other participants in transportation logistics and develop proposals for short-term incentives to encourage the use of SST in consultation with federal entities and State and local governments;

\* Develop strategies to encourage the use of SST of passengers and cargo;

\* Assess the extent to which states and local governments include SST and other marine transportation solutions in their transportation planning, and encourage State departments of transportation to develop strategies, where appropriate, to incorporate SST, ferries, and other marine transportation solutions for regional and interstate transport of freight and passengers in their transportation planning;

\* Encourage groups of states and multi-state transportation entities to determine how SST can address conges-

tion, bottlenecks, and other interstate transportation challenges; and

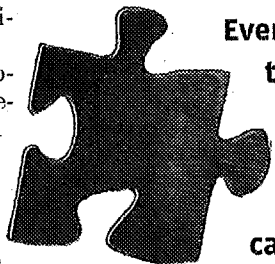
\* Establish a board to identify and seek solutions to impediments hindering effective use of SST, with representatives of the Environmental Protection Agency (EPA) and other federal, state, and local governmental entities and private sector entities; and

\* Issue temporary SST Program regulations for the implementation of the SST Program not later than 90 days after December 19, 2007, and to issue final regulations not later than October 1, 2008.

When taken together with the discretionary subject matters in the Secretarial "may" authorizations, these "shall" grants provide the basis for an effective federal program to foster the development of SST initiatives to access the transportation potential of our coastal ocean waters—accompanied by statutory deadlines to provide an incentive for timely Secretarial action in SST Program implementation, and a basis for ongoing Congressional oversight.

#### FINANCING THE PROGRAM: CCF, TITLE XI AND HMT

In numerous SST discussions over the past half dozen years it has been generally agreed that two of the most important impediments to the initiation of



Everyone agrees that these coastal waters "could" provide additional transportation capacity. ■■■■

coastwise blue water services have been the Harbor Maintenance Tax (HMT) and the absence of the two federal support programs that have proven essential to the financing of the nation's existing blue water container and RO/RO fleets.

Many if not most of the initial SST projects can be expected to require the financing of landside facilities and vessel deployments on the basis of market surveys and business expectations—with

the result that government financing assistance will be required. Landside facilities can probably be financed with State and local assistance. Financing the multiple vessel commitments to meet the service frequencies that will be needed to attract cargoes from interstate highways to coastal waterways will probably require federal assistance.

The Congressional sponsors of the act were mindful of these needs. The original versions of the Act, as reported by the House Committee on Transportation and Infrastructure, and later passed by the House, included access to two existing Maritime Administration (MarAd) financing assistance programs, MarAd's Title XI loan guarantee and CCF tax deferral programs, authorizing \$2 billion of new Title XI financing guarantees, and the extension of the CCF tax deferrals for SST project use. These MarAd programs, which enable vessel owners to obtain long-term commercial financing and to purchase vessels with tax-deferred dollars over periods of up to 25 years, have been used in combination in the financing of virtually all of the container and RO/RO vessels in current U.S.

## COASTAL SHIPPING

domestic services. The final version of the act does not provide additional Title XI authorization, but does extend CCF program availability.

The CCF program's extension to coastwise services has been a long-time maritime objective. This extension was included in Congressional initiatives in the 1990's, in the SEA 21 congestion mitigation proposals in 2002, and in Congressionally sponsored legislation in 2003. Because the MarAd CCF program is one of individual taxpayer tax deferral on the basis of MarAd contracts, the Act's extension has already become effective for existing MarAd contract holders, and should be available upon application and MarAd approval for others.

The importance of the CCF program's availability for the accumulation of vessel equity can hardly be overstated. However, the Title XI program 25-year term debt is of equal transaction importance. The two programs are complementary and designed for joint use. Title XI or similar debt financing support will be necessary for meaningful SST Program developments. Title XI program opponents have called it a "corporate subsidy."

But, in fact, it is simply "mortgage insurance" that is being purchased by the vessel owner and included as a transaction cost.

Finally, and of critical importance, although not an infrastructure financing problem, the HMT, a tax in the amount of 1.25% based on the value of the contents of every container or RO/RO trailer that is discharged from a vessel at a U.S. location, must be repealed. In present circumstances, this tax will prevent even the most efficient coastwise operation from being cost competitive with landside highway and rail container and trailer movements.

So these will be topics for 2008 discussion and Congressional attention.

#### REPORTING ON PROGRESS

Acting with the Administrator of the EPA, and not later than Dec. 17, 2008, the Secretary must provide a mission status report to House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation on the SST Program, which must include a description of the activities conducted under the

program, and any recommendations for further legislation or administrative action that the Secretary considers appropriate.

#### CONCLUDING THOUGHTS

The act provides the Secretary with the authority and direction to begin to craft a plan and program for the solution to the SST "puzzle." Implementation work is already underway at MarAd. How well will the Secretary succeed? We have every reason to be optimistic. **ML**

H. Clayton Cook, Jr., is a Counsel in the Seward & Kissel LLP's Corporate Finance Group. Mr.

Cook has been engaged in private law practice or U.S. government service since 1960. He served as General Counsel of the Maritime Administration from 1970 through 1973.

