Dead in the Water?

By H. Clayton Cook, Jr.

For more than a decade, Europe and the U.S. have witnessed increasing highway traffic congestion and considered the possible use of water transport as a highway supplement and alternative. The European Community has moved to embrace water transport for its container and ro/ro traffic using programs like the Marco Polo and Motorways of the Sea initiatives. In the U.S., there has been general agreement that our ocean coastal waters could provide additional transportation capacity and that a comprehensive federal program would be required to achieve it. But no such program has been initiated, and the multiple "choke points" and miles of bumper-to-bumper traffic that have characterized travel on major highways, such as I-95, I-10 and I-5, have simply grown more pronounced year by year. These issues remain unaddressed today.

With the December 2007 enactment of the Marine Transportation sections of the Energy Independence and Security Act of 2007 (Act), Congress and the Bush Administration provided the Secretary of Transportation (Secretary) with the authority for a European-style Motorways of the Sea program to facilitate federal and local government collaborations and attract public and private sector investment for short sea transportation infrastructure projects to access the potential of our nation's ocean highways.

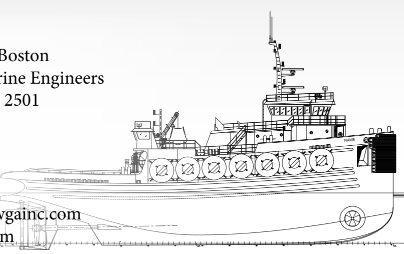
America's Marine Highway program is in danger of expiring for lack of government support – and money. What happened?

The Short Sea Transportation Program

The Act directed the Secretary to establish a short sea transportation program (SST) to mitigate landside congestion and provide a favorable legal regime for public and private sector investment to create the infrastructure necessary for new coastwise and other domestic waterborne services. The program was intended to expand the use of the Great Lakes/Saint Lawrence Seaway System as well as inland, intracoastal and coastal waterways for the transportation of freight loaded in containers and trailers to mitigate landside congestion.

Section 1121 mandated actions to create an environment that would foster federal, state and local cooperation in the planning and financing of shore-side infrastructure and attract private sector investment to finance vessel fleet requirements. The House version of Section 1122 addressed the need for U.S. government-assisted financing for the vessels that would be involved by extending the Maritime Administration's (MARAD) Capital Construction Fund's (CCF) tax-deferral program to container and ro/ro services nationwide and authorizing $2 billion for MARAD's Title XI loan guarantee program. Section 1123 mandated a report to be made not later than one year after the December 19, 2007 enactment to detail progress in the implementation of SST and provide recommendations for further administrative or legislative action as appropriate.

Certain actions in the Act are mandated as "shall" while others are merely permitted as "may." 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." In administering the 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 the heads of 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 for 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 congestion, bottlenecks, and other interstate transportation challenges;
» Establish a board to identify and seek solutions to impediments hindering effective use of SST, with representatives of the Environmental Protection Agency 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.

MARAD was assigned responsibility for implementation of SST, which it renamed America's Marine Highway Program.

Report to Congress

The report to Congress on the implementation of SST and any recommendations for further legislative or administrative action, which was due not later than December 19, 2008, was issued on April 5 of this year. It addresses the "shall" tasking assigned under Section 1121 point by point and confirms – without noting DOT's failure to meet the mandated deadlines for the publication of regulations or the deadline for filing the report – that the congressionally assigned tasks have been completed or are otherwise well underway. The report's organization and content are explained in an Executive Summary which commences: "The first section of this report provides the justification for expanding the utilization of Marine Highway services. It describes the interests of the federal government in encouraging greater use of Marine Highways and, through the example of Europe, shows that government policy can be successful in achieving this result. An important point of this section is that the full range of public benefits of Marine Highways services will not be realized based solely on market-driven transportation choices."

The report confirms the Secretary's compliance with the Act's directions. In the Conclusion it acknowledges that: "The private sector will ultimately be the key to the success of America's Marine Highway through innovation, outreach and investment," and goes on to state: "Without strong leadership from the federal government, however, the nation's rivers and coastal waterways will continue to be underutilized for domestic container and trailer freight transportation. It is difficult for private operators to support the scale of investment needed to initiate large-scale operations. Private operators are particularly disadvantaged by the fact that many of the important public benefits of water transportation . . . cannot be captured in the form of higher revenues or lower costs . . . . Government action is required to help overcome these challenges and assist the expansion of Marine Highway services in a significant manner."

Government Actions and Assistance

In discussions too numerous to count over the past dozen years, it is clear that two of the most important impediments to the initiation of coastwise blue water services have been (1) 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 in prior decades, and (2) the imposition of the Harbor Maintenance Tax.

Financing the multiple vessel commitments to meet the service frequencies that will be needed to attract cargoes from interstate highways to coastal waterways will almost certainly require federal assistance. The congressional sponsors of the Act were mindful of this need, which is why the original versions of the Act, as reported by the House Committee on Transportation and Infrastructure and later passed by the House, provided access to two important MARAD financing assistance programs: the Title XI loan guarantee program, authorizing $2 billion of new financing, and the CCF tax deferral program, extending these deferrals to SST project use.

These programs, which enable vessel owners to obtain long-term commercial financing and 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. domestic service. The final version of the Act does not provide additional Title XI authorization but does extend CCF program availability.

The CCF extension to coastwise services has been a long-time maritime community objective. The extension was included in congressional initiatives in the 1990s, in the SEA 21 congestion mitigation proposals in 2002, and in congressionally sponsored legislation in 2003. The CCF program is made up of individual tax deferrals based on MARAD contracts; its extension has already become effective for existing MARAD contract holders and should be available upon application and approval for others.

The availability of Title XI 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 developments. Title XI program opponents have called it a "corporate subsidy." But, in fact, it is simply "mortgage insurance," as it was termed in its 1938 enactment, 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 Harbor Maintenance Tax, a tax in the amount of 1.25 percent 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 highway and rail container and trailer movements.

End of the Highway?

Section 1123 mandated a report with "recommendations [to the Congress] for further legislative or administrative action that the Secretary of Transportation considers appropriate." Instead, the report provides only: "suggestions from the transportation community. . . which are under consideration by the Administration and thus not necessarily endorsed by MARAD, US DOT, or the Administration, that stakeholders say could induce increased waterborne freight traffic on America's Marine Highways." We are assured that MARAD will work to "incorporate America's Marine Highway more completely into the national transportation system . . . fund research and study the commercial market . . . [and] evaluate the outcomes of Marine Highway projects already underway . . . ."

Where are the outlines of any MARAD process to address and prioritize the "suggestions from the transportation community," or of Administration support for the modification of the Harbor Maintenance Tax, or of support for a well-funded, multiyear MARAD Title XI program for the financing necessary for the creation of the container and ro/ro fleets of $150-to-$200 million vessels that will required to achieve SST's objectives?

Perhaps a review the MARAD Administrator's FY 2012 budget testimony on March 1 and the March 10 testimony of the Secretary suggests that there will be no America's Marine Highway Program. Instead of a request for some portion or all of the Act's authorization of $2 billion for Title XI vessel financing, the MARAD Administrator requested the cancellation of $54.1 million of the $76.6 million of its existing Title XI authority "because the maritime industry must share in the national sacrifice during these challenging economic times." And while the Secretary spoke of multibillion-dollar investments for six-year authorizations in high-speed rail, road and bridge improvements, and rehabilitation of existing transit systems, the entire MARAD operating budget request was only $357.8 million.

So, perhaps we have a December 2008 report, delivered in April 2011, and not a great deal more.

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