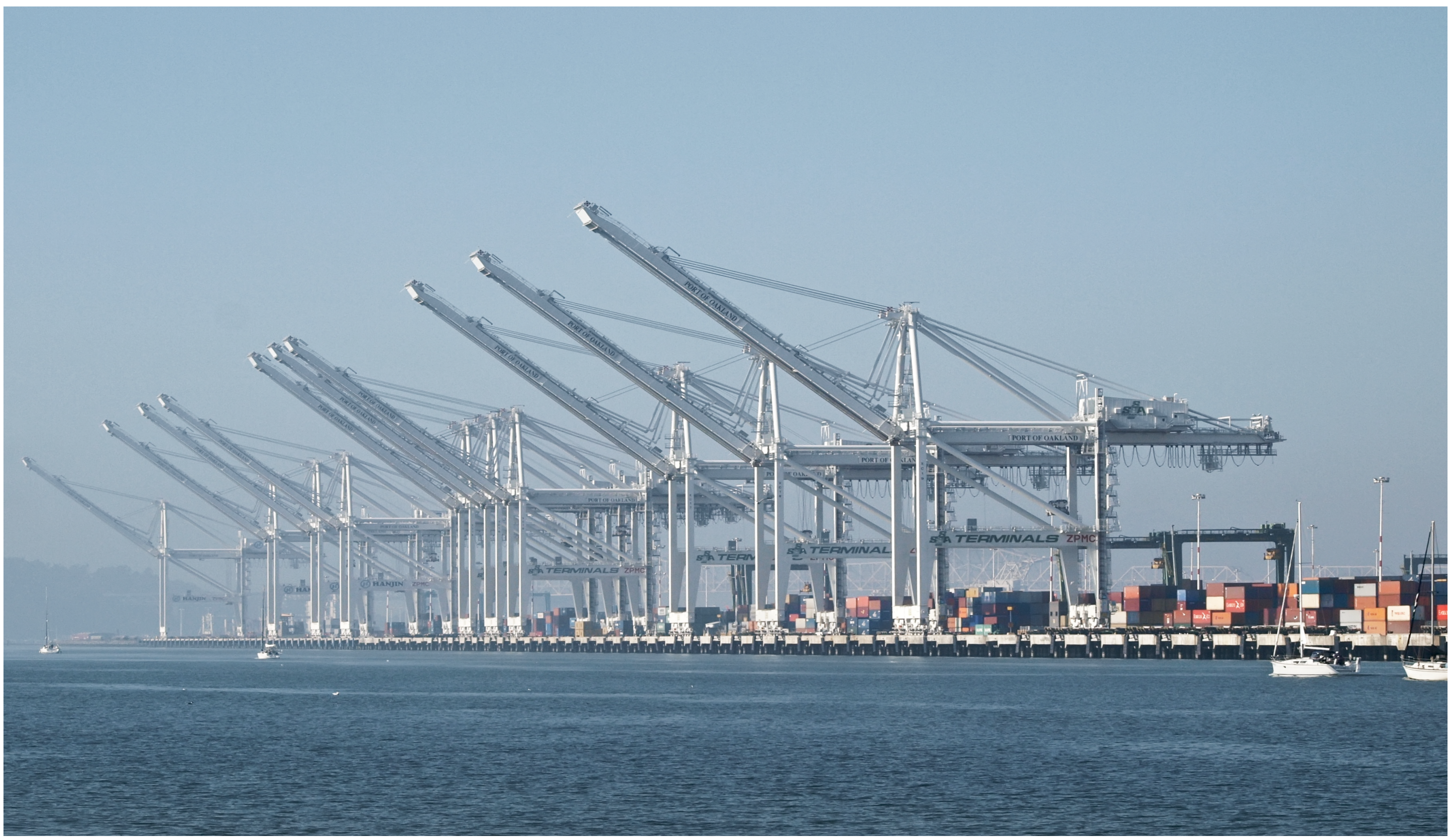
HARBOR MAINTENANCE TRUST FUND: BROKEN OR MISUSED?



May 2016

ALLIANCE FOR INNOVATION AND INFRASTRUCTURE

Harbor Maintenance Trust Fund:
Broken or Misused?

Introduction

Waterborne commerce generated an estimated $4.6 trillion of economic activity in 2014, accounting for 26 percent of U.S. gross domestic product (GDP) in that year.[1] Additionally, seaport activities accounted for $41 billion in federal, state, and local tax revenue in the same year.[2] These statistics are not surprising considering "more than 95 percent (by volume) of overseas trade produced or consumed by the U.S. moves through our ports."[3]

Numerous U.S. industries rely on ports to find markets, both domestically and internationally, including: [4]

- Food and Agriculture Producers – farmers, ranchers, and etc.
- Hard Product Manufacturers and Miners – steel and iron mills, sand, gravel, rock, and stone mines
- Auto Manufacturers
- Consumer Goods Manufacturers – clothing, electronics, and toys
- Energy industry – crude oil and natural gas producers

These economic and trade benefits are fully dependent on seagoing vessels having reliable access to U.S. ports, which means deep, well-dredged, and well-maintained harbors. This is especially true in light of the Panama Canal expansion project scheduled for completion later this year. This nine-year, $5.2 billion infrastructure project will allow vessels up to 14,000 TEUs to pass through the canal – nearly triple the current 5,000 TEU maximum.[5] Larger vessels increase trade opportunities, but they also require deeper harbors.

The U.S. may not be ready for this new opportunity. Many ports in the U.S. do not meet the 45-foot depth marker needed to accommodate these larger ships.[6] Fortunately, the West Coast is equipped with naturally occurring deep harbors, but as of 2005, only five Atlantic ports and one Gulf port could accommodate moderately large vessels.[7] This was one of the primary factors leading the American Society of Civil Engineers (ASCE) to assess U.S. ports with a "C" grade.[8]

In recent years, the U.S. Army Corps of Engineers has not requested or received the funding needed to dredge and maintain the necessary depth of navigation channels, despite collecting an excise tax directed to the Harbor Maintenance Trust Fund. This particular tax imposed on shippers is earmarked specifically for the purpose of maintaining U.S. harbors and ports. As ASCE pointed out, "While port authorities and their private sector partners have planned over $46 billion in capital improvements from now until 2016, federal funding has declined."[9]

---

1 Martin Associates, "The 2014 National Economic Impact of the U.S. Coastal Port System," March 2015.
2 Ibid.
3 American Society of Civil Engineers, "Infrastructure Report Card," 2013 Edition.
4 American Association of Port Authorities, "U.S. Public Port Facts," accessed on February 11, 2016.
5 Canal De Panama, Official Website of the Panama Canal, "Panama Canal Expansion," accessed February 11, 2016.
6 Infrastructure Report Card
7 Ibid.
8 Ibid.
9 Ibid.

The Harbor Maintenance Trust Fund

The Water Resources Act of 1986 created an excise tax, effective April 11, 1987, levied upon shippers for port use associated with imports, exports, and movement of cargo and passengers between U.S. ports.[10] The tax did not undergo significant modification until 1998, when the Supreme Court held the tax, as it applied to exported products, in violation of the Constitution's Export Clause in United States Shoe Corporation v. United States.[11]

Currently, the Harbor Maintenance Tax (HMT) is assessed at identified ports on the value of commercial cargo shipped (excluding exported product), or cruise tickets sold, at a rate of .125 percent.[12] The taxes collected under this provision are deposited into the Harbor Maintenance Trust Fund (HMTF), from where Congress may then appropriate the monies for qualified activities, i.e. "dredging channels, maintaining jetties and breakwaters, and operating locks along the coasts and in the Great Lakes."[13]

While leaving the tax in place, the program was slightly modified in the Water Resources Reform and Development Act of 2014 (WRRDA 2014),[14] to address critical needs by focusing work on priority projects in the near term, increasing spending on underserved and emerging ports, and incentivizing – but not requiring – Congress to appropriate increased funding for port and harbor projects.[15] Specifically, of the nearly $1.8 billion collected under the Harbor Maintenance Fee annually,[16] the bill requested that Congress appropriate no less than 100 percent to qualified projects by 2025, with incremental increases annually along the way.[17]

"Why did the Corps ignore a backlog of needed harbor projects and request far less funding than it needs?"

Port and Harbor Maintenance is Underfunded

In 2013, ASCE asserted that harbor dredging was on pace to receive $28 billion less than needed by 2040 under current funding patterns – that is equivalent to a shortfall of just more than $1 billion per year of the 27 year window. Insufficient funding is a constant issue for large-scale infrastructure projects, but the shortfall in harbor funding is particularly problematic since waterborne cargo vessels pay an excise tax (the HMT) specifically aimed at solving this problem, only to see the funds lie dormant in government coffers or be reallocated for unrelated programs.

As of January 31, 2016, the HMTF had a balance of $9.2 billion.[18] The Army Corp of Engineers (Corp), the entity responsible for carrying out the federal government's harbor activities, estimates that after all funds have been expended for fiscal year 2016, the fund will have a $9.1 billion balance heading into 2017.[19] The Corp expects the HMT to generate an additional $1.7 billion in revenue, and expects the fund to earn another $128 million in

---

10 U.S. Customs and Border Protection, "Harbor Maintenance Fees (HMF)," accessed February 22, 2016.
11 See United States Shoe Corporation v. United States, 523 U.S. 360 (1998).
12 19 CFR §24.24 Harbor Maintenance Fee (2011).
13 Congressional Research Service, "Harbor Maintenance Finance and Funding," September 12, 2013.
14 See Public Law 113-121.
15 United States House of Representatives Committee on Transportation and Infrastructure, "The Water Resources Reform & Development Act," accessed February 22, 2016.
16 Ibid.
17 Public Law 113-121, §2101(b)(1)(A-K).
18 Treasury Direct Savings Bond Reports, "Harbor Maintenance Reports," accessed on February 23, 2016.
19 FY 2017 Budget of the United States Government, The Appendix, "Corps of Engineers – Civil Works."

interests, meaning the fund will increase in value by more than $1.8 billion – to $10.9 billion – in 2017 prior to considering expenditures for that year. [20]

Despite the urgent need to maintain certain harbors and deepen others, the Corp only asked Congress to allocate $986 million for harbor maintenance activities, i.e. those eligible for HMTF dollars for 2017 (the next fiscal year for Congressional appropriations bills). [21] That rounds out to slightly more than half of the total revenue the fund is expected to bring in over the same period, creating an irresponsible backlog, while also increasing the balance to $9.9 billion.[22]

This begs the question: Why did the Corps ignore a backlog of needed harbor projects and request far less funding than it needs, all the while sitting on a fund of nearly $10 billion intended for precisely that purpose? There are numerous roadblocks in the way of sufficient funding, the most likely of which are statutory federal spending rules, the budget caps agreed to by Congress and the administration, and political budget gimmickry.

Federal Spending Rules

There are two types of federal government spending: mandatory spending (sometimes referred to as direct spending) and discretionary spending. Mandatory spending is permanently authorized spending based upon parameters set in law. For example, under current law, a retiree is entitled to collect Social Security in an amount determined under a formula set in statute. Congress does not review, approve, or disapprove Social Security on an annual basis, yet the Social Security Administration still has the authority to issue checks.

Discretionary spending, on the other hand, is spending authorized by Congress annually through the appropriations process. Unless Congress explicitly makes these funds available for a particular account, no money can be spent from said account in that year. The Corps Civil Works activities, including harbor dredging, are funded through discretionary appropriations. Unlike Social Security, if Congress does not appropriate a specific amount of money to the Corp in a given year for activities eligible for HMTF dollars, no activities can be performed. Further, the Corps cannot engage in activities that cost in excess of the amount provided by Congress for that year, regardless of the need.

Budget Caps

Dredging and other HMTF eligible activities are funded with discretionary dollars, meaning they are subject to the budget caps agreed to by Congress and the administration. For the upcoming fiscal year, the overall discretionary spending cap is $1.07 trillion - $551 billion for defense related activities and $519 for non-defense activities (including HMTF eligible activities).[23]

These caps create an incentive to reduce spending from certain accounts to create room to spend more from other accounts and remain compliant with the caps. When determining whether or not the total amount of appropriated funding is at or beneath the caps, revenues generated through the excise tax (the HMT) are not considered – they are deemed unrelated revenues on the federal ledger.

Budget Gimmickry

When assessing the federal budget's impact on the debt as a whole, mandatory spending, discretionary spending, and tax revenue are considered collectively. This means that collecting excise taxes, like the HMT, and refusing to spend them creates a deficit reduction facade, allowing the budget to appear more fiscally responsible.

[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Congressional Research Service, "Bipartisan Budget Act of 2015: Adjustments to the Budget Control Act of 2011," November 6, 2015. (All numbers rounded to the nearest billion.)

If the federal government collects $2 billion in HMT revenue and spends only $1 billion, it equates to a $1 billion surplus on the budget ledger, which allows an additional $1 billion of spending on unrelated programs without increasing the deficit, or claiming $1 billion in deficit reduction. This is true despite the fact that shippers pay the tax solely for harbor maintenance and improvement purposes.

Options to Consider

The best and most effective way to ensure harbor projects get the funding they need is to eliminate the temptation and ability of Congress and the administration to withhold HMTF funds to allow increased spending on unrelated programs or allow them to accrue indefinitely.

Three ways to do this are:

1) Make the spending mandatory and have it function like the Highway Trust Fund

2) Privatize the fee and transform the program to function more like a Checkoff program

3) Eliminate the fee altogether and allow shippers to self-finance all of their harbor dredging and maintenance needs

Make the Spending Mandatory

If the HMTF was permanently authorized to release any monies brought in through the HMT to the Corps for qualifying projects (i.e. making the spending mandatory or direct spending), shippers could be certain that the excise tax would be spent as intended. Further, government-wide discretionary spending caps that are entirely unrelated to the HMTF would not restrain harbor maintenance activities.

This approach carries risks as well. Congress appropriates funding for each account prior to the fiscal year, but the HMT is collected throughout the fiscal year. If Congress relied on the Corps revenue estimate when appropriating funds, and those estimates proved to be high, the HMTF could run a deficit in any given year. While a small deficit may seem inconsequential now, with a nearly $10 billion surplus in the fund, it may have the effect of increasing the debt if the funds balance is diminished over time.

Create a Checkoff Program

Checkoff programs are specific to agricultural commodities, but the structure of the program could be applied to other industries as well. In a Checkoff program, all participants in a particular industry are assessed a fee on a per unit basis of the marketed commodity.[24] The funds are then spent by the industry-run program to improve market opportunities for the commodity being assessed.

If the HMTF was transformed into a Checkoff-like program, the HMT could still be assessed at the current rate – generating the same amount of revenue – but the shipping industry could exercise control over when those dollars are spent based on industry need. This would remove Congress from the process entirely (with the exception of authorizing the program) and remove HMTF spending from applying pressure on budget caps.

Eliminate the HMT

Congress could choose to eliminate the HMT and suspend all Corps activities currently eligible for HMTF reimbursement. This approach would free

[24] The National Agricultural Law Center, "Checkoff Programs – An Overview," accessed on February 25, 2016.

up nearly $1.8 billion of shipping industry money and allow the industry to decide if, how, where, and when to expend it. If the market is efficient, the most relied upon ports will receive the funding needed to maintain clear, deep shipping channels.

Conclusion

Waterborne commerce is a boon to the U.S. economy, and is a critical component of the United States' role in international trade. Congress created the HMT and the HMTF to ensure funds are accessible to maintain and improve critical harbor infrastructure. It is worth noting that if the entire amount collected under the HMT was expended, the $27 billion funding shortfall estimated by ASCE to occur between now and 2040 would be eliminated.

There are a number of reasons U.S. ports are not receiving the attention they need, and an equivalent number of potential solutions, including those discussed in this paper. It is unclear whether the HMTF is broken or misused, but until harbors in the U.S. receive the funding they need, one or both must be true.

About Aii

The Alliance for Innovation and Infrastructure (Aii) consists of two non-profit organizations, The National Infrastructure Safety Foundation (NISF) a 501(c)(4), and the Public Institute for Facility Safety (PIFS) a 501(c)(3). The Foundation and the Institute focus on non-partisan policy issues and are governed by separate volunteer boards working in conjunction with the Alliance's own volunteer Advisory Council.