



U.S. Government Kick Starts New Marine Highway Program

Congress mandated that the U.S. Department of Transportation (DOT) establish a short sea transportation program in the Energy Independence and Security Act of 2007, which President Bush signed into law on Dec. 19, 2007. On Sept. 30, 2008, the U.S. Maritime Administration (MarAd) issued a final rule implementing the maritime tax-incentive portion of the 2007 Energy Act, which was the subject of an earlier Winston & Strawn maritime briefing. On Oct. 9, 2008, MarAd took the next steps as it kick-started “America’s Marine Highway Program” with the issuance of an Interim Final Rule in the *Federal Register* setting forth the framework for the program.

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The Interim Rule describes how MarAd will solicit proposals for the designation of marine corridors and marine projects that would be eligible for financial and other federal, state and local government support. The Interim Rule will be effective on Nov. 10, 2008, although comments are not due until Feb. 6, 2009. MarAd also intends to submit a report to Congress, in consultation with the Environmental Protection Agency, by Dec. 19, 2008 reporting on the status of America’s Marine Highway Program.

2007 Energy Act

It has been predicted for many years that the volume of cargo and passenger traffic in the United States would outstrip highway and rail capacity. Anyone taking a trip on Interstate 95, for example, which runs from Maine to Florida, knows that I-95’s capacity is already strained. Yet, particularly in the urbanized northeastern United States, any increase in capacity is very expensive and politically difficult. As a result, a movement has arisen to promote use of vessels to help relieve the congestion on relatively short sea routes, known as “short sea shipping” or, in MarAd’s vernacular, as “marine highways.”

The 2007 Energy Act took several significant steps in promoting short sea shipping, including requiring MarAd to designate “short sea transportation routes as extensions of the surface transportation system” for the purpose of focusing “public and private efforts to use the waterways to relieve landside congestion along coastal corridors.” “Short sea transportation” was defined in the 2007 Energy Act as the carriage by vessel of cargo in containers and loaded by crane on a vessel and wheeled cargoes. In other words, the Act encompasses container vessels and roll-on/roll-off vessels but not vessels that transport commodities or other cargoes in bulk, such as grain, coal or petroleum products.

The 2007 Energy Act also mandated that attention be focused on particular short sea transportation projects that would be eligible for financial and other support from the federal government. The 2007 Energy Act requires DOT to return to Congress this December with the report, mentioned in the Interim Rule, on the status of the short sea transportation program together with DOT’s recommendations for further legislative and administrative action, which could include designation for funding.

The Interim Rule

As mandated by the 2007 Energy Act, the Interim Rule divides U.S. Government promotion of short sea shipping into “Marine Highway Corridors” and “Marine Highway Projects.” Marine Highway Corridors are intended to serve as extensions of the surface transportation system. Marine Highway Projects will be designated that provide the greatest benefit to the public in terms of congestion relief, improved air quality, long-term economic viability and other factors.

Both corridors and projects must be proposed by public entities, although the Interim Rule encourages project partnerships with private entities, including vessel owners and operators, third-party logistics providers, trucking companies, ports, terminals and other entities.

Marine Highway Corridors. Since Marine Highway Projects supporting a designated Marine Highway Corridor will receive more favorable consideration by DOT, the first step is the designation of such corridors. Although the Interim Rule says so obliquely (in the Paperwork Reduction Act notice), it appears that MarAd will accept recommendations for the designation of Marine Highway Corridors in the form of comments to the Interim Rule. Waterways designated as Marine Highway Corridors will be announced in the *Federal Register*.

Navigable waterways that parallel “Corridors of the Future,” already designed under DOT’s National Strategy to Reduce Congestion, “will be fast tracked for designation as Marine Highway Corridors.” The I-5 and I-95 corridors on the East and West coasts have, for example, been designated Corridors of the Future.

Each application for the designation of a Marine Highway Corridor must describe, among other things, the proposed corridor, including connections to existing or planned transportation infrastructure and intermodal facilities and navigational factors (such channel depths or bridge clearances) that impact the corridor. The Interim Rule indicates that MarAd will evaluate Marine Highway Corridor applications based on these factors.

Marine Highway Projects. The Interim Rule indicates that a separate notice in the *Federal Register* will solicit applications for Marine Highway Projects, which probably

will not occur until after the Interim Rule becomes effective after Nov. 10.

Each application for the designation of a Marine Highway Project will have to contain, among other things, a description of the overall operation, the identity of any shippers who have indicated an interest in a proposed service, the extent to which the project will relieve congestion, projected project revenues and expenses, any known project obstacles and a proposed project timeline.

Each project application will be graded by MarAd as either “strong, medium or weak” based on scope, impact, public benefit, offsetting costs, feasibility and cost effectiveness from a U.S. government perspective. Once projects enter the operational phase, they will be evaluated regularly to determine if the project’s objectives are being achieved.

Incentives. The Interim Rule indicates that the U.S. government may provide a wide variety of support for corridors and projects including designation of related transportation infrastructure on the Secretary of Transportation’s list of high priority transportation infrastructure projects. The Interim Rule also indicates that: “The Department of Transportation will develop proposed short-term incentives that would encourage the use, initiation, or expansion of Marine Highway services.”

Title XI Funding

In a related development, Congress included \$48 million in funding for the U.S. Government’s Title XI ship-financing guarantee program in the omnibus appropriations bill signed by President Bush on Sept. 30. That amount is a significant increase and will help many ship construction projects in this lean credit period.

Conclusion

The Interim Rule is an important step forward in the invigoration of a vibrant U.S. short sea capability. Although the nation’s priorities for the next four years remain in limbo until after the inauguration of the new president, the responses MarAd receives to the Interim Rule will give MarAd the ability to set the stage for significant progress on the short sea shipping front in the coming years.

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