

The Harbor Maintenance Trust Fund

Collecting funds necessary to maintain our waterways.

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The Harbor Maintenance Tax

The Harbor Maintenance Tax (HMT) was established by the Water Resources Development Act of 1986, and is applied on an *ad valorem* (or “according to value”) basis on the worth of commercial cargo involved in any port use of federally maintained harbor projects.

The phrase “port use” means loading or unloading of commercial cargo to or from a commercial vessel at a port. In this case, “port” refers to any U.S. harbor or channel (or component thereof) that is not a fuel-taxed inland waterway, and is open to public navigation. U.S. Customs and Border Protection maintains the list of applicable ports, which primarily include deep-draft port and harbor complexes.

One final definition: The “commercial cargo” that is subject to the fee is:

- any cargo transported on a commercial vessel,
- passengers transported for compensation or hire.

But not including:

- bunker fuel,
- ship’s stores,
- sea stores,
- the equipment necessary for the operation of a vessel,
- any fish or other aquatic animal life caught and not previously landed on shore.

How Much?

In 1986, 0.04 percent of the value of the cargo was subject to the tax. The Omnibus Budget Reconciliation Act of 1990 increased the tax from 0.04 to 0.125 percent, where it remains today.

This money is deposited into the Harbor Maintenance Trust Fund, or HMTF. As the name implies, these funds are spent to maintain our waterways.¹

The tax is generally imposed against most imports, foreign trade zone cargo, passengers not aboard ferries, and about 38 percent of domestic shipments.

However, the Water Resources Development Act also set forth several exclusions. For the purposes of the act:

- Ferries are not considered commercial vessels.
- No tax is imposed on cargo moving to and from Alaska, Hawaii, and other U.S. possessions (except for Alaskan crude oil).
- The tax is not imposed on any cargo associated with vessel movements to, from, or on the fuel-taxed inland waterways system.

Eligible Expenditures

Funds collected by U.S. Customs and Border Protection pursuant to the act are transferred to the trust for recovery of eligible expenditures in accordance with congressional appropriations and actual expenditures. Funds are transferred from the trust to the general treasury for current year expenditures based on monthly estimates.

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Harbor Maintenance Trust Fund appropriations are authorized for 100 percent of the eligible operations and maintenance costs of those portions of the St. Lawrence Seaway operated and maintained by the St. Lawrence Seaway Development Corporation (SLSDC), and not more than 40 percent of the eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States.

Additionally, funds can be used to recover the federal share of construction costs for dredged material disposal facilities associated with the operation and maintenance of federal commercial navigation projects, including beneficial uses, the dredging and disposal of contaminated sediments that are in or affect the maintenance of federal channels, mitigation of operation and maintenance impact from federal navigation, and dredged material disposal facilities.

U.S. Army Corps of Engineers

The U.S. Army Corps of Engineers (USACE) interprets the term “commercial navigation” to mean any project authorized by Congress with commercial navigation as an authorized purpose. Most federal deep- and shallow-draft harbor projects are “single-purpose” commercial navigation projects. All operation and maintenance and the federal share of dredged material disposal area construction costs for such “single-purpose” navigation projects are subject to recovery from the trust fund.

There are also some projects with a commercial navigation purpose that have other authorized purposes as well, including flood control, hydropower, recreation, water supply, environment, and other allied water resources uses. For “multi-purpose” projects, only expenditures on behalf of commercial navigation and joint-use costs allocated to commercial navigation are subject to recovery from the trust fund. Expenditures for other specific and joint-use purposes, such as hydropower, are not eligible for HMTF monies. In addition, USACE incurs expenditures to administer the HMT.

St. Lawrence Seaway Development Corporation

As mentioned, the Water Resources Development Act of 1986 authorized funding 100 percent of the operation and maintenance expenditures for the St. Lawrence Seaway Development Corporation from the Harbor Maintenance Trust Fund. Prior to FY 2003, funds were transferred to the Department of Transportation as payments for SLSDC rents. These rent payments are now

included in the total SLSDC transfers and amounted to \$16,223,160 in FY 2007 and \$17,392,000 in FY 2008.

Prior to FY 1995, the tolls collected on that portion of the St. Lawrence Seaway under U.S. jurisdiction were deposited into the HMTF, but then fully rebated back to the vessel operating companies paying the tolls in accordance with Section 805 of WRDA 1986. However, with the passage of the Department of Transportation and Related Agencies Appropriations Act for FY 1995, the collection of tolls on the U.S. portion of the seaway was eliminated, effective October 1, 1994. Approximately \$9.55 million in seaway tolls were rebated back to the vessel operating companies during FY 1994, the last full year of toll collections on the U.S. portion. Toll rebates from the trust fund averaged about \$9.5 million per year from FY 1988-1994.

National Oceanic and Atmospheric Administration

The original legislative proposal for the Water Resources Development Act of 1990 included several amendments to the Harbor Maintenance Trust Fund. These included increasing the *ad valorem* fee from 0.04 percent to 0.125 percent, increasing the recovery level for USACE from 40 percent to 100 percent, providing funds for the National Oceanic and Atmospheric Administration’s (NOAA) marine navigation services, and providing for reimbursement of administrative costs. However, Congress did not pass all of the proposed amendments. Section 316 of the Water Resources Development Act of 1990 authorized the increase in the recovery level for USACE to 100 percent while the Omnibus Budget Reconciliation Act of 1990 increased the *ad valorem* fee to 0.125 percent, beginning January 1991. However, NOAA never received authorization to recover costs from the Harbor Maintenance Trust Fund.

Department of Homeland Security

During the 103rd Congress, legislation was enacted that allows the CBP, USACE, and U.S. Department of Commerce to share a maximum total of \$5 million per year for expenses incurred in the administration of the Harbor Maintenance Tax. Under the North American Free Trade Agreement Implementation Act, funds were to be made available as of the beginning of FY 1995; however, enactment was too late to include monies in the FY 1995 appropriations.

Since FY 1996, \$3 million has been transferred annually to the CBP for administration of the tax. In addition, USACE received funds to collect domestic shipper information required for auditing HMT collections, to track operation and maintenance expenditures, to pre-



pare the annual HMTF report to Congress, to coordinate with the CBP on data collection and enforcement issues, and for addressing and evaluating possible alternatives to the tax.

Court Challenges

On October 25, 1995, the U.S. Court of International Trade (CIT) issued a summary judgment in the case *United States Shoe Corp. v. The United States*, 907 F. Supp. 408, finding the HMT unconstitutional under the export clause of the Constitution. Article I, Section 9, Clause 5 provides that “No Tax or Duty shall be laid on Articles exported from any State.” The CIT also enjoined the Customs Service from collecting the fee. However, in response to a motion filed by the U.S. Department of Justice, the CIT agreed to let the Customs Service continue to collect the fee until the conclusion of any appellate proceedings.

On June 3, 1997, the U.S. Court of Appeals for the Federal Circuit affirmed the CIT’s ruling in a 4-to-1 decision² and on March 31, 1998, that decision was affirmed by the U.S. Supreme Court.³ In its unanimous decision, the Supreme Court confirmed that levying a tax on the value of commercial cargo loaded for export violated the export clause of the Constitution.

The *U.S. Shoe* decision affects only exports, which represented approximately 30 percent of HMTF revenues during fiscal years 1996 and 1997. The export clause does not, however, prohibit a user fee, provided the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services.

As a result of the Supreme Court ruling, the Customs Service published a notice in the Federal Register advising exporters that they should stop paying the Harbor Maintenance Tax effective April 25, 1998, and the tax is no longer being collected on exported goods. Under existing law, the CBP continues to collect the HMT on imports, domestic shipments, foreign trade zone cargo, and passengers.

Harbor Maintenance Tax collections for exports received during the judgment period totaled \$1.08 billion according to the CBP Accounting Services Division. HMT refunds from Department of the Treasury Fund “Refund of Monies Erroneously Received and Covered (Indefinite)” are available to claimants. They must follow CIT procedures requiring the filing of a claim by the claimant and review and approval by the court.

There have been other court challenges to the law, including passenger vessel passenger eligibility, validity of taxation on interstate shipments, and exemptions for imports of foreign military articles.

World Trade Organization Consultations on the HMT

In 1992, the European Community (now European Union) members of the General Agreement on Tariffs and Trade requested a “consultation” on the HMTF surplus through the Office of the U.S. Trade Representative. At that time the trust fund’s surplus was about \$70 million. After those consultations occurred the EC did not pursue the matter, and no further formal action was taken.

On February 6, 1998, prior to the U.S. Supreme Court’s *U.S. Shoe* decision, the EU requested World Trade Organization (WTO) consultations with the United States on the impact of the tax on EU imports into the United States. The EU claims that the HMT violates Articles I, II, III, VIII, and X of the General Agreement on Tariffs and Trade (1994) and estimates that the HMT costs European exporters \$86 million annually.

On March 25, 1998, a first round of consultations took place with the EU in Geneva, Switzerland, with Canada, Japan, and Norway also participating. During these consultations the United States responded to questions posed by its trading partners regarding the Harbor Maintenance Tax and how it is assessed and used, but declined to engage in a discussion of the international legal merits of the case or to speculate on how a U.S. Supreme Court decision might affect WTO obligations.

On April 8, 1998, after the U.S. Supreme Court decision in *U.S. Shoe*, the EU requested a second round of consultations. These consultations, which again included Japan, Canada, and Norway, were held on June 10, 1998. In these and other discussions with U.S. trading partners, the U.S. Trade Representative made it clear that any changes made to the HMT as a result of *U.S. Shoe* would be done to comply with the ruling of the U.S. Supreme Court and to maintain consistency with World Trade Organization obligations. Under WTO dispute settlement rules, the European Union could move to request establishing a dispute settlement panel to examine its legal claims. The EU indicated that if satisfactory legislation was not passed by January 1, 2000, it would ask for a panel. However, no panel had been requested to date.

If a World Trade Organization member nation is found to be in violation of WTO rules, it may be granted a “reasonable period of time” to correct the violation. Generally a member nation has a maximum of 15 months within which it must correct the violation or face trade retaliation. If the violating party fails to take such corrective action by the end of this 15-month period, any party having invoked the dispute settlement procedure may request authorization to suspend the application of concessions or other obligations under the WTO agreements with respect to the violating party.

Total Waterborne Commerce

Total waterborne commerce for the U.S. in calendar year 2008 decreased 87 million tons (3.4 percent) to 2.477 billion short tons. The decrease in waterborne commerce tonnage between 2007 and 2008 was due to a decrease of 21 million tons in foreign waterborne commerce to 1.521 billion tons and a decrease of 66 million tons in domestic waterborne commerce to 956 million tons. Foreign waterborne commerce in 2008 was valued at a record \$1.613 trillion, equivalent to approximately 11 percent of U.S. Gross Domestic Product.

States and Territories

Forty-five states and territories recorded waterborne commerce in 2008, of which nine states handled more than 100 million tons. Louisiana led all states with 480.7 million tons of waterborne commerce, followed by Texas with 473.3 million tons, and California with 221.3 million tons. Eight states and territories handled 50 to 99 million tons and 12 others handled 25 to 49 million tons. Cargo tonnage assigned to each state is the summation of shipping (domestic and foreign), receiving (domestic and foreign), and intrastate traffic.

Recent Trends

Total HMT collections exceeded \$1 billion for the fourth consecutive year as they reached a record \$1.467 billion. That was a 16.2 percent increase (\$205 million) over \$1.262 billion in FY 2007. Collections from all four sources increased year over year between FY 2007 and 2008. Imports tend to consist of higher-value commodities (such as electronics, automobiles, etc.), while U.S. exports and domestic cargoes have generally tended to be lower-value bulk cargoes (grain, coal, chemicals, and petroleum products).

Expenditures for USACE Operation and Maintenance

Total USACE expenditures eligible for recovery from the Harbor Maintenance Trust Fund totaled \$757.6 million in FY 2007 and \$788 million in FY 2008.

Legislative language in the annual Energy and Water Development Appropriations conference reports establishes guidance under which funds are permitted to be withdrawn from the HMTF.

The FY 2005 conference report language permitted funds to be used for coastal—but not inland—harbors. The FY 2006 conference report language permitted funds to be used for both coastal and inland harbors. Neither conference report cited use of funds for Great Lakes harbors and channels. The HMTF Report for FY 2005 and 2006 construed the conference report language as including Great Lakes harbors with coastal harbors for funding from the Harbor Maintenance Trust Fund.

Maintenance Dredging

About four-fifths of the total harbor and channel operation and maintenance costs are attributed to maintenance dredging. Private industry moves about 82 percent of the quantity dredged for about 88 percent of the costs for the maintenance dredging. USACE conducted the remaining 18 percent of the maintenance dredging for 12 percent of the expenditures.

Projections

It is projected that the balance in the Harbor Maintenance Trust Fund will grow from approximately \$4.65 billion at the end of FY 2008 to \$7.48 billion at the end of FY 2013. Revenues substantially exceeded transfers in FY 2007 and FY 2008, as they have for a number of years. Amounts transferred from the trust fund depend upon the amounts appropriated by Congress for authorized activities, irrespective of the level of funds in the trust fund.

About the author:

Ms. Patricia Mutschler has worked for the U.S. Army Corps of Engineers for 22 years, serving in the Philadelphia District, the Baltimore District as chief economist, the Institute for Water Resources, and at headquarters. She is the USACE liaison to the U.S. Coast Guard and sits on the CMTS Executive Secretariat.

Bibliography:

Report to Congress on the annual status of the Harbor Maintenance Trust Fund for fiscal 2005, 2006, 2007, and 2008 draft, May 2010, revised August 2010. Prepared by the USACE Institute for Water Resources.

Endnotes:

¹ The revenue generated from this 0.04 percent tax rate was intended to be sufficient to recover not more than 40 percent of eligible U.S. Army Corps of Engineers operation and maintenance (O&M) costs assigned to commercial navigation, and 100 percent of the St. Lawrence Seaway Development Corporation's eligible O&M costs for the St. Lawrence Seaway. However, Section 11214 of the Omnibus Budget Reconciliation Act of 1990 subsequently increased the HMT from 0.04 to 0.125 percent, effective January 1, 1991, in conjunction with an authorized increase in the recovery level of USACE O&M expenditures on behalf of commercial navigation up to 100 percent in accordance with Section 316 of WRDA 1990 (P.L. 101-640).

² 114 F. 3d 1564.

³ U.S. v. U.S. Shoe Corp., 523 U.S. 360.

