

**NOMINATIONS TO THE
FEDERAL MARITIME COMMISSION**

HEARING

BEFORE THE

**COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE**

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

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FEBRUARY 28, 2024
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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

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NOMINATIONS TO THE FEDERAL MARITIME COMMISSION

WEDNESDAY, FEBRUARY 28, 2024

U.S. SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SR-253, Russel Senate Office Building, Hon. Gary Peters, Chairman of the Committee, presiding.

Present: Senators Peters [presiding], Cantwell, Baldwin, Tester, Sinema, Rosen, Warnock, Cruz, Fischer, and Schmitt.

OPENING STATEMENT OF HON. GARY PETERS, U.S. SENATOR FROM MICHIGAN

Chair PETERS. The Committee will come to order. I want to, first off, welcome each of our nominees, and to your friends and families who are joining you here today. Certainly, thank you for your prior public service and your willingness to serve in these important positions.

The Federal Maritime Commission plays an essential role in American shipping and the global economy. It regulates shipping lines to keep them fair and competitive, and protects our country's interests in this industry. This agency does not just help international trade go more smoothly; it also keeps the American economy humming.

It is more important than ever that we confirm qualified people to the FMC. And in this instance retain the leadership and expertise provided by Chairman Daniel Maffei, and Commissioner Rebecca Dye.

The Ocean Shipping Reform Act was signed into law last summer, and provided the FMC with a number of new authorities. If these nominees are confirmed, they will be equipped with new tools to address supply chain challenges and investigate unfair practices.

For instance, the Ocean Shipping Reform Act established new practices for detention and demurrage. This is one of the key duties of this Commission, ensuring that American shippers are not being charged unfair fees, and in turn, lowering costs for consumers across Michigan as well our entire country.

Authorities like these will help FMC Commissioners do their jobs, and meet the demand of record caseload. I look forward to hearing how our nominees plan to continue implementing these new policies, and the other oversight responsibilities of the FMC.

As a Michigander, I am also interested in what our nominees have to say about the Great Lakes. Our ports and shippers are a

pillar of the American shipping industry. Our state is a unique—has a unique regulatory environment for the FMC, and I hope to learn more about how they plan to keep our state’s shipping lines running effectively.

And finally, the duties of this Commission intersect with safety, and international security, conflicts abroad can lead to attacks on commercial American ships, as we have seen recently across the Red Sea and the Gulf of Aden. The FMC has to monitor issues like this, and respond to their effects on the American stakeholders in the shipping industry.

These are just a few examples of the work these nominees will tackle if they are confirmed to this Commission. Today’s hearing gives us a chance to hear from them directly, as well as to dive deeper into their experience, their qualifications, and vision for the Federal Maritime Commission.

Ranking Member Cruz is recognized, as soon as he has a chance to get set up here, for any opening remarks.

**STATEMENT OF HON. TED CRUZ,
U.S. SENATOR FROM TEXAS**

Senator CRUZ. Thank you, Mr. Chairman. We are here today to consider the renominations of two experienced public servants to the Federal Maritime Commission, or FMC. I want to thank FMC Chairman Daniel Maffei, and Commissioner Rebecca Dye, for their willingness to continue their important work.

During the pandemic, supply chains suffered unprecedented shocks; a spike in demand for consumer goods outstripped capacity to transport those goods. As an understandable reaction to the delays, many businesses ordered excess inventory to compensate for the longer transit times, compounding a cycle, and worsening congestion.

Senators Thune and Klobuchar worked on a tailored bipartisan solution to ensure the FMC had the tools it needed to properly oversee ocean transportation practices, resulting in the Ocean Shipping Reform Act of 2022. I look forward to hearing about the FMC’s actions to implement this legislation.

Unfortunately, in recent months, just after ocean shipping prices and transit times began to normalize, international instability threatens to make ocean transportation less affordable and efficient. Iranian-backed terrorists are causing death and costly destruction across the Middle East. In support of Hamas and Gaza, the Houthis have fired dozens of missiles and armed drones at U.S. Naval Forces and cargo ships transiting the Red Sea. This threat has caused many carriers to avoid the Suez Canal in favor of the much longer but safer journey around Africa.

As a result, the spot rate for ocean shipping has increased to a level that is roughly 250 percent of the going rates in early November.

It is understandable why carriers might increase rates to transit around Africa. In turn, the FMC may use its authority to monitor these rate hikes, but we should recognize that neither shippers nor the FMC can address the underlying causes of this most recent disruption.

That responsibility lies squarely with President Biden. His weakness on the international stage has, unfortunately, emboldened our enemies. The inexplicable strategy of appeasing Iran has backfired spectacularly. America must project strength; we must support Israel, and oppose terrorists. The failure to do so has invited violence that threatens international commerce in addition to U.S. security.

As we consider the challenges facing ocean shipping today, it is important to recognize how mistakes on the world stage have serious economic consequences.

Again, Chairman Maffei and Commissioner Dye, I look forward to the discussion of your past and ongoing efforts to protect American businesses and consumers who rely on ocean transportation. Thank you.

Chair PETERS. Thank you, Ranking Member Cruz.

Our first nominee, Dan Maffei, has sat on the FMC since 2016, and is currently the Chairman of the Commission. This is the latest chapter in a long career of public service for Mr. Maffei, including as a Member of the U.S. House of Representatives, sat for two terms, where I was proud to call him one of my colleagues.

I am honored to preside over his nomination hearing, and look forward to learning more about his work with the FMC today.

Chairman Maffei, it is a true pleasure to have you before us here today. And you are now recognized for your opening remarks.

**STATEMENT OF HON. DANIEL B. MAFFEI, NOMINEE TO BE
CHAIRMAN, FEDERAL MARITIME COMMISSION**

Mr. MAFFEI. Thank you, Chairman Peters; also Ranking Member Cruz, and Members of the Committee, I thank you for this opportunity to speak before you today. I know it is a very busy day, so I appreciate the time.

I also want to thank the Full Committee Chair Maria Cantwell; and both the Democratic and Republican staffs for their help and guidance in this process.

The last time I was here, the ocean-linked supply chains that served our Nation were indeed in crisis. Ports were congested, some of them with dozens of hulking container ships waiting at anchor for days to be unloaded. Stores and warehouses were running low on consumer products, and farm exports were sometimes rotting while waiting for an available container or space on a ship.

Now, two years later, I can report COVID-related congestion ended last year. Cargo is now flowing fluidly, shippers can secure their needed equipment, and exports are getting space on outgoing ships. But of course, much of the improvement resulted from shifts in supply and demand occurring as the world emerged from COVID.

However, clearly, a large factor was also the FMC's work in addressing many of the issues that tangled up America's supply chains. An example involves detention and demurrage fees charged by carriers at marine terminals that are supposed to incentivize the efficient movement of cargo. During COVID, the system broke down, resulting in supply chain gridlock, even while American businesses felt they were being unfairly charged.

Thanks to the work of the Commission, starting with Commissioner Dye's 2020 unanimously approved Interpretive Rule, the system has markedly improved. And a new billing rule required under OSRA, and made public in final form last week, will further ensure these fees serve their intended purpose.

During COVID, and ongoing, to promote compliance, the FMC initiated our VOCC Audit Program consisting of regular discussions with all the major carriers about their supply chain challenges and ocean shipping practices. Many carriers have greatly improved in terms of service and responsiveness to U.S. importers and exporters due to this program.

The potential for abuse, however, in any industry is always higher if companies believe they will never get caught. At the start of the pandemic, it had been years since the Federal Maritime Commission brought a major case against an international container line, and virtually no civil fines were collected by the FMC in Fiscal Year 2020 and Fiscal Year 2021 despite much discontent with foreign flag carriers.

With a reorganization of the FMC enforcement personnel and priorities, the Commission turned this around. The FMC collected nearly \$2 million in fines during Fiscal Year 2022, and almost \$2.9 million in Fiscal Year 2023, most of which from containership operators. This does not include the restitution to impacted shippers that carriers in these cases provided, nor does it include settlements to U.S. shippers who brought private cases before the Commission.

Overall, this continues to be the most intense period in our agency's 54-year history. We might have become overwhelmed and had far fewer successes, if not for Congress passing, on a bipartisan basis, the Ocean Shipping Reform Act. That law, authored by Committee Members Klobuchar and Thune, and signed by the President in June 2022, strengthened FMC's authority and provided resources needed to enhance enforcement and consumer services.

As America's importers and exporters realized the FMC was able and willing to help, we got a whole many more cases. In fact, in the first 2 months of 2024, we have almost nearly twice as many enforcement cases already as we had in the entire year of 2020. To handle this growing pace load, we have had to go from one administrative law judge to three, and our Consumer Affairs Division now handles an average of 100 requests per month, many times what they handled pre-COVID.

Thanks to its dedicated commissioners and personnel and additional authority and resources provided by OSRA, FMC has evolved into a stronger regulatory agency, and helped restore confidence in America's ocean shipping supply system.

But not all the news is good. The ocean-linked supply chains responsible for trillions of dollars of U.S. economic activity remain vulnerable, as Senator Cruz pointed out. The Houthis' unprovoked attacks on commercial vessels transiting the Suez Canal suddenly meant a rerouting of roughly 30 percent of global container shipping. This comes at the same time as the Panama's Canal unexpected reduction in capacity.

Add to that a slew of other challenges, including shifting carrier alliances, potential trade disputes, and increasing threats of piracy

and cargo theft, and any major U.S. importer or exporter has plenty to worry about. Given this context of supply chain uncertainty, it is paramount that the FMC do all it can to maintain a competitive and reliable international ocean transportation system and protect the public from unlawful, unfair, and deceptive practices.

Working closely with Commissioner Dye, my fellow Commissioners, Commissioner Vekich, and Commissioner Bentzel, and Commissioner Sola, who is here today, and a small but top-notch professional staff, I have helped put the FMC on course to accomplish this vital mission.

I, respectfully, ask that the Committee support both me and Commissioner Dye in continuing that work.

Thank you. And I look forward to your questions.

[The prepared statement and biographical information of Mr. Maffei follow:]

PREPARED STATEMENT OF HON. DANIEL B. MAFFEI, CHAIRMAN,
FEDERAL MARITIME COMMISSION

Chair Cantwell, Ranking Member Cruz, and Members of the Committee, thank you for this opportunity to appear before you today.

The last time I testified before this committee, the ocean-linked supply chains that serve our Nation were in crisis. Ports were so congested that many of them had dozens of hulking container ships waiting for days to be unloaded. Stores and warehouses were running low on consumer products, factories were short of vital components, and our agricultural exports were losing value because they were rotting while waiting to be loaded in a container or on a ship.

The FMC took a leading role in addressing many of the problems that tangled up America's supply chains. To bolster our efforts, Congress passed the Ocean Shipping Reform Act of 2022 to strengthen some of the FMC's authority and provide resources needed to enhance enforcement and consumer services.

Now, two years later, I can report that the ship congestion that had overwhelmed the supply chain largely subsided last summer. Cargo is flowing fluidly, shippers can secure the equipment they need, and exports are getting space on outgoing ships.

The cost of ocean shipping has dramatically declined to pre-pandemic levels and this drop occurred far more rapidly than forecasted. Much of the reduction in rates and fees is a result of market forces as the world emerged from COVID. Nonetheless, the FMC played a vital role in restoring confidence to the public, importers and exporters in America's ocean supply chains.

For example, during COVID, the system of detention and demurrage fees—the charges levelled by carriers and marine terminals that are supposed to incentivize the efficient movement of cargo—became so ubiquitous and disruptive to the supply chain whether or not shippers moved their cargo or returned their equipment on time. Thanks to the work of the Commission—starting with the detention and demurrage interpretive rule efforts by Commissioner Dye—the final OSRA-mandated billing rule made public last week will ensure these fees are assessed transparently and serve their intended purpose.

To encourage compliance, in 2021 we initiated regular discussions with all the major carriers about supply chain challenges and ocean shipping practices through our Vessel-Operating Common Carrier Audit Program. We also collect valuable quarterly data from the carriers that gives the FMC better visibility into supply chain trends. As a result of this program, carriers have greatly improved in terms of service and responsiveness to U.S. importers and exporters.

That said, when necessary, we will hold the ocean carriers accountable through enforcement. At the start of the pandemic, it had been years since the FMC brought a major case against a container line and virtually no civil fines were collected in 2020 and 2021 despite much discontent with foreign-flagged carriers. When I became Chairman, I worked with Commissioner Dye, as well as Commissioners Bentzel, Sola, and Vekich, and senior staff to reorganize FMC enforcement and reset its priorities. As a result, the FMC collected nearly two-million-dollars in fines during 2022 and almost 2.9-million-dollars in 2023—most of which was directly related to cases prosecuted against container ship operators. This does not include the res-

titution to impacted shippers that carriers in these cases provided nor does it include settlements to U.S. shippers who brought private cases before the commission.

Overall, this continues to be the most intense period of activity in our agency's 54-year history. As America's importers and exporters realized the FMC was willing and able to help restore fairness, we saw a huge influx of cases being filed with the Commission. So far this year, we have already received in less than two-months nearly twice as many new cases as we received in the entire year of 2020. To accommodate our growing caseload, we have increased our Office of Administrative Law Judges from one judge to three. Our Office of Consumer Affairs and Dispute Resolution Services also handles an average of more than 100 requests for help every month.

The FMC has evolved into a stronger regulatory agency than it was before the pandemic. And we will continue this hard work for the public and our industry stakeholders that we were created to serve.

But make no mistake the ocean-linked supply chains responsible for trillions of dollars in U.S. economic activity remain vulnerable. The Houthi's unprovoked and unanticipated attacks on commercial vessels transiting the Suez Canal suddenly meant the re-routing of roughly 30 percent of global container shipping. This comes at the same time as the Panama Canal's unexpected reduction in capacity. Add to that a slew of other challenges including shifting carrier alliances, potential trade disputes, and a historically high threat of cargo theft inland—and any major shipper will tell you they are concerned about unpredictable future disruptions.

Given this context of supply-chain uncertainty, it is paramount that the FMC do all it can to maintain a competitive and reliable international ocean transportation system and protect the public from unlawful, unfair, and deceptive ocean transportation practices. Working closely with Commissioner Dye, my other fellow commissioners, and a small but top-notch professional staff, I have helped put the FMC on course to accomplish this vital mission. I respectfully ask the Committee to support both me and Commissioner Dye in continuing that work.

Thank you, and I look forward to answering any of your questions today.

A. BIOGRAPHICAL INFORMATION

1. Name (Include any former names or nicknames used): Daniel Benjamin Maffei.
2. Position to which nominated: Commissioner, Federal Maritime Commission (FMC).

3. Date of Nomination: January 3, 2023.

4. Address (List current place of residence and office addresses):

Residence: Information not released to the public.

Office: 800 North Capitol Street, NW, Washington, D.C. 20573

5. Date and Place of Birth: July 4, 1968; Syracuse, NY.

6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

Spouse: Abby Lynne Davidson, Managing Director, Engie Insight Services Inc., DBA as Engie Impact, Spokane, WA

7. List all college and graduate schools attended, whether or not you were granted a degree by the institution. Provide the name of the institution, the dates attended, the degree received, and the date of the degree.

Brown University (1986–1990)

B.A., History and American Civilization, 1990

Columbia University, Graduate School of Journalism (1990–1991)

M.S., Journalism, 1991

Harvard University, John F. Kennedy School of Government

Master of Public Policy, 1995

8. List all post-undergraduate employment, including the job title, name of employer, and inclusive dates of employment, and highlight all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

March 2021 to present

Chairman

Federal Maritime Commission

July 2019 to present
 Commissioner
 Federal Maritime Commission
 August 2018–January 2019
 Professor of Practice, The Graduate School of Political Management
 The George Washington University, Washington, D.C.
 January 2015–April 2016 & July 2018–August 2018
 Self-Employed Public Affairs Consultant
 (See answers to Question 11 for clients)
 July 2016–June 2018
 Commissioner
 Federal Maritime Commission
 April 2016–July 2016
 Senior Advisor, International Trade Administration
 U.S. Department of Commerce, Washington, D.C.
 January 2015–July 2016
 Senior Fellow
 Center for the Study of the Presidency and Congress, Washington, D.C.
 (Focus on improving government procurement and acquisitions)
 January 2013–January 2015
 Member of Congress (NY–24)
 United States House of Representatives, Washington, D.C.
 (Service on Committee on Armed Services, Committee on Science, Space and
 Technology, Ranking Democrat on Oversight Subcommittee; Managed Wash-
 ington, D.C. and three district offices, represented the Port of Oswego and East
 Syracuse Rail Yard)
 June 2011–December 2012
 Policy Advisor
 Manatt, Phelps, Phillips, LLP, Washington, D.C.
 August 2011–May 2012
 Visiting Professor of Environmental Studies
 SUNY College of Environmental Science and Forestry, Syracuse, NY
 January 2011–May 2011
 Senior Fellow
 Third Way, Washington, D.C.
 January 2009–January 2011
 Member of Congress (NY–25)
 United States House of Representatives, Washington, D.C.
 (Service on Committee on Financial Services and Committee on the Judiciary,
 Managed Washington and three district offices, represented the East Syracuse
 Rail Yard)
 2006–2008
 Senior Vice President, Corporate Development
 Pinnacle Capital Management, LLC, Syracuse, NY
 2005
 Campaign Coordinator
 Matt Driscoll for Mayor, Syracuse, NY
 2005
 Summer Teaching Fellow
 Syracuse University Maxwell School of Public Affairs, Syracuse, NY
 1998–2005
 Senior Policy Advisor, Communications Director, Press Secretary
 Committee on Ways and Means
 U.S. House of Representatives, Washington, D.C.
 1997–1998
 Press Secretary
 U.S. Senator Daniel Patrick Moynihan, Washington, D.C.
 1995–1996
 Press Secretary
 U.S. Senator Bill Bradley, Washington, D.C.
 1995
 Summer Researcher
 Aspen Institute, Washington, D.C.

1992–1993
Reporter/Producer, News Administrative Assistant
ABC Affiliate WIXT-TV (now WSYR-TV), Syracuse, NY

1991–1992
Weekend and Part-time Reporter
CBS Affiliate WWNY-TV, Watertown, NY

1991
Part-time Anchor and Reporter
CBS Affiliate WTNY-AM, Watertown, NY 1990

Summer Anchor and Reporter
WBRU-FM, Providence, RI

9. Attach a copy of your résumé.
See Attachment.

10. List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments, other than those listed above after 18 years of age. None.

11. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational, or other institution.

July 2016–July 2019
Board Member
U.S. Association of Former Members of Congress, Washington, D.C.
January 2015–April 2016
Senior Fellow
Center for the Study of the Presidency and Congress, Washington, D.C.
April 2015–July 2016
Member, Board of Advisors
National Committee to Preserve Social Security & Medicare, Washington, D.C.
January 2011–July 2016
Global Panel America
(Subsidiary to Global Panel Worldwide, Prague, Czech Republic)
April 2015–July 2016, July 2018–August 2018
Consultant
Dezenhall Resources Ltd., Washington, D.C.
March 2015–August 2015
Consultant
Synoptos Inc., Washington, D.C.
January 2011–May 2011
Senior Fellow
Third Way, Washington, D.C.
2005–2013
Proprietor
Maffei and Associates LLC, Syracuse, NY

12. Please list each membership you have had after 18 years of age or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religiously affiliated organization, private club, or other membership organization. (For this question, you do not have to list your religious affiliation or membership in a religious house of worship or institution.). Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age, or disability.

None of the following organizations listed restricts membership on the basis of sex, race, color, religion, national origin, age, or disability.

April 2018–January 2019
Member
Commission on Political Civility and Effective Governance
Center for the Study of the Presidency and Congress, Washington, D.C.
April 2018 to present
ReFormers Caucus
Issue One, Washington, D.C.
January 2015 to present
Member
U.S. Association of Former Members of Congress, Washington, D.C.

(Board Member, July 2016–January 2019)
 April 2015–July 2016
 Member, Board of Advisors
 National Committee to Preserve Social Security and Medicare, Washington, D.C.
 October 2014–December 2015
 Member
 New York Farm Bureau, Albany, NY
 January 2011–July 2016
 Member, Board of Advisors
 Global Panel America
 (Subsidiary to Global Panel Worldwide, Prague, Czech Republic)
 January 2007–August 2015
 Active Member
 Rotary Club of DeWitt, Syracuse, NY
 January 2007–December 2014
 Member
 Italian American Athletic Club, Syracuse, NY
 January 2009–December 2014
 Member
 National Democratic Club, Washington, D.C.
 August 2011–August 2012
 Member
 United University Professions at SUNY-School of Environmental Science & Forestry, Syracuse, NY
 December 2007–December 2008
 Board Member
 The Newland Center for Adult Learning and Literacy, Syracuse, NY
 January 2007–December 2008
 Board Member
 The Spanish Action League of Onondaga County, Syracuse, NY
 January 2007–December 2008
 Board Member
 New York Donors Choose.Org, New York, NY
 January 2007–December 2007
 Advisory Board Member
 Kids Win! of Catholic Charities of Onondaga County, Syracuse, NY
 2005–2008
 Member from DeWitt
 Onondaga County Democratic Committee, Syracuse, NY
 2007–2012
 Member
 Sierra Club (Iroquois Chapter), Syracuse, NY
 2000 to present
 Member
 Various Regional Chapters, AAA, Washington, D.C.

13. Have you ever been a candidate for and/or held a public office (elected, non-elected, or appointed)? If so, indicate whether any campaign has any outstanding debt, the amount, and whether you are personally liable for that debt.

Yes, I have been a candidate for, and have held, public office. My campaign has no outstanding debt and all campaign accounts have been closed.

14. List all memberships and offices held with and services rendered to, whether compensated or not, any political party or election committee within the past ten years. If you have held a paid position or served in a formal or official advisory position (whether compensated or not) in a political campaign within the past ten years, identify the particulars of the campaign, including the candidate, year of the campaign, and your title and responsibilities.

None since 2009.

15. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$200 or more for the past ten years.

Sam Roberts for Congress, \$500.00, 2022

Francis Conole for Congress, \$500.00, 2022

Terry McAuliffe for Governor, \$500.00, 2012

16. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognition for outstanding service or achievements. None.

17. List each book, article, column, letter to the editor, Internet blog posting, or other publication you have authored, individually or with others. Include a link to each publication when possible. If a link is not available, provide a digital copy of the publication when available.

“Injecting more containers won’t solve supply chain woes” by Daniel B. Maffei and Louis F. Sola in *Supply Chain Dive*, March 2, 2021.

“How junk food information starves democracy” by Dan Maffei in *The Dominion Post* (Wellington, New Zealand), November 5, 2018.

“Why democrats would be wise to compromise on CAFÉ standards” by Dan Maffei in *The Hill* (on-line), August 28, 2018.

“The New Health Care Rationing” in *U.S. News & World Report*, May 5, 2016.

“Democrats Would be Wise Not to Denigrate Innovation” by Dan Maffei in *The Hill* (on-line) December 1, 2015.

“Time for patients to benefit from lifesaving drugs” by Dan Maffei in *The Hill* (on-line), October 23, 2015.

“Consequences of Regulation by Clickbait” by Dan Maffei in *Medium* (on-line), September 28, 2015.

“Free Affordable Care Act From Unpopular Taxes” by Dan Maffei in *Roll Call* (on-line), August 27, 2015.

“A Frightening Thought: Congress’ Flip-Flop on War and Diplomacy” by Dan Mahaffee and Dan Maffei in *The National Interest* (on-line), August 20, 2015.

“Science Denial: It’s Not Just A Republican Problem” by Dan Maffei in *Roll Call*, June 4, 2015.

“Equal Pay for Women Helps the Economy” by Dan Maffei in *The (Syracuse) Post-Standard*, September 16, 2014.

“Rep. Dan Maffei: Rebuilding Infrastructure is the Key to Revitalizing Central New York” by Dan Maffei in *The (Syracuse) Post-Standard*, June 22, 2014.

“Rep. Dan Maffei: I didn’t vote to ‘defund’ the Affordable Care Act” by Dan Maffei in *The (Syracuse) Post-Standard*, October 3, 2013.

“Rep. Dan Maffei on Interstate 81’s Future: Two Options Aren’t Enough” by Dan Maffei in *The (Syracuse) Post-Standard*, May 30, 2013.

“Rep. Dan Maffei: It’s clear to me that our middle class families are still being squeezed” by Dan Maffei in *The (Syracuse) Post Standard*, February 8, 2013.

“Commentary: Dan Maffei shares his vision for getting Central New York and the Nation back on track” by Dan Maffei in *The (Syracuse) Post-Standard*, August 19, 2012.

“The Case for Corporate Tax Reform” by Dan Maffei and Ryan McConaghy in *Third Way Report*, August 30, 2011.

“Doing nothing on health care not an option” by Dan Maffei in *The (Syracuse) Post-Standard*, March 19, 2010.

“Building a road map in the first 100 days” by Dan Maffei in *The (Syracuse) Post-Standard*, April 30, 2009.

“Campaign as Classroom: Dan Maffei MPP 1995 on lessons learned” by Dan Maffei in *Kennedy School Bulletin*, Summer 2008.

“Part of ‘thinking big’ is working for U.S. energy independence” by Dan Maffei in *The (Syracuse) Post-Standard*, May 22, 2008.

18. List all speeches, panel discussions, and presentations (*e.g.*, PowerPoint) that you have given on topics relevant to the position for which you have been nominated. Include a link to each publication when possible. If a link is not available, provide a digital copy of the speech or presentation when available.

Note: I often only use notes or an outline when speaking publicly and do not always have text of prepared remarks. In addition to the below listed events, I have spoken to or with many smaller audiences of companies and/or their trade associations interested learning about the Commission’s work. In these instances, I again was speaking from brief notes or an outline as opposed to using prepared remarks.

NCBFAA Government Affairs Conference, November 19, 2022

JOC Inland Distribution Conference, September 27, 2022

National Industrial Transportation League, May 27, 2022
 National Association of Waterfront Employees, May 19, 2022
 American Home Furnishing Association Fly-In, May 11, 2022
 American Association of Port Authorities, March 30, 2022
 TPM Conference, February 28, 2022
 NCBFAA Annual Conference, May 5, 2021
 Marine Transportation System Innovation Science and Technology Conference
 Keynote, March 18, 2021
 Transportation Club of Tacoma Luncheon Meeting, January 12, 2021
 AgTC Major Midyear Meeting, December 9, 2020
 Global Liner Shipping Conference, November 3, 2020
 NY/NJFF&BA Annual Dinner, February 18, 2020
 Maritime Risk Symposium, November 13–15, 2019
 NY/NJFF&BA Learn & Lunch, October 16, 2019
 Global Liner Shipping Conference, May 16, 2018
 NITL Summit, January 30, 2018
 Second Annual Customs Brokers & Freight Forwarders Conference of the Americas,
 December 4–5, 2017
 Global Liner Shipping Conference, May 16–16, 2017
 Maritime Administrative Bar Association, November 29, 2016
 First Annual Customs Brokers & Freight Forwarders Conference of the Americas,
 November 14, 2016

19. List all public statements you have made during the past ten years, including statements in news articles and radio and television appearances, which are on topics relevant to the position for which you have been nominated, including dates. Include a link to each statement when possible. If a link is not available, provide a digital copy of the statement when available.

“Market Fallout From OSRA–22 to Become Clearer in 2023” Journal of Commerce, January 18, 2023.
“FMC Nixes Claim That Proposed Per Diem Rule Adds to Port Congestion, Pollution” Journal of Commerce, January 6, 2023.
“Statement of Chairman Daniel B. Maffei on the Denial of the PMSA/WSC Petition for Review” Federal Maritime Commission, January 6, 2023.
“Fireside Chat with Daniel Maffei, Chairman, Federal Maritime Commission” Cargomatic, December 2022.
“FMC Checking Carrier Compliance With OSRA–22 Anti-Retaliation Clause” Journal of Commerce, December 15, 2022.
“FMC Probing Shipping Lines’ Anti-Retaliation Compliance” Federal Maritime Commission, December 15, 2022.
“Free Time Comes Under Scrutiny Following Pandemic Port Congestion” Journal of Commerce, December 6, 2022.
“Chairman Maffei Participates in US-UK Bilateral Maritime Consultation” Federal Maritime Commission, December 2, 2022.
“Pandemic Offers Opportunity to Improve U.S. Port Flow” Journal of Commerce, November 30, 2022.
“Traffic Jam Podcast 21—Daniel B. Maffei, Chairman, Federal Maritime Commission” Traffic Club of Chicago, November 29, 2022.
“Statement of Chairman Daniel B. Maffei in Memory of the Honorable Richard A. Lidinsky” Federal Maritime Commission, November 22, 2022.
“The 10 People Transforming Supply Chain—Including Leaders From Best Buy, Goodr, and Altana” Insider, November 19, 2022.
“Maffei Visits Bay Area for Congressional & Industry Meetings” Federal Maritime Commission, November 15, 2022.
“What One Importer’s Legal Fight Says About the Power of Cargo Giants” The New York Times, November 14, 2022.
“Chris Hughey Named FMC General Counsel” Federal Maritime Commission, November 7, 2022.

"FMC's Maffei Warns of Increased Congressional Scrutiny on IEPs, Rails", Journal of Commerce, September 28, 2022.

"Linda S. Harris Crovella Named Administrative Law Judge" Federal Maritime Commission, September 26, 2022.

"FMC Chairman Urges Ocean Carriers to Improve Their Public Relations", Lloyd's List, September 24, 2021.

"It Costs How Much to Ship That? How One Commission is Tackling Inflation at the Ports" Marketplace, September 20, 2022.

"U.S. Shipping Backups Shift to East Coast and Gulf Coast Ports" The Wall Street Journal, August 17, 2022.

"FMC Establishes OSRA 2022 Implementation Webpage" Federal Maritime Commission, August 12, 2022.

"Can Global Shipping be Fixed? One Regulator Will Try." The New York Times, August 8, 2022.

"Carriers Need to Sweep Up NY–NJ Empties: FMC's Maffei" Journal of Commerce, August 4, 2022.

"Chairman Daniel B. Maffei Visits Port of New York and New Jersey to Meet with Stakeholders" Federal Maritime Commission, August 4, 2022.

"New FMC Enforcement Structure" Federal Maritime Commission, July 29, 2022.

"FMC Moving Quickly Implementing OSRA 2022" Federal Maritime Commission, July 28, 2022.

"Statement of Chairman Maffei on E.O. 14036 & Competition" Federal Maritime Commission, July 15, 2022.

"Chairman Maffei Addresses AgTC Annual Meeting" Federal Maritime Commission, June 24, 2022.

"Lloyd's List Podcast: Why Does President Biden Want to Punch Shipping CEOs?" Lloyd's List, June 17, 2022.

"FMC Ready to Hit the Ground Running on OSRA: Maffei" Journal of Commerce, June 17, 2022.

"How President Biden's Ocean Reform Act Could Impact Shipping and Inflation" CNBC, June 16, 2022.

"Will the Shipping Reform Act Help Rebalance Scales? The FMC Chairman Thinks So." Freightwaves, June 15, 2022.

"Statement of Daniel B. Maffei on Passage of the Ocean Shipping Reform Act of 2022" Federal Maritime Commission, June 14, 2022.

"Biden Blasts Ocean Carriers as Congress Readies Tougher Shipping Regulations" The Wall Street Journal, June 10, 2022.

"FMC Approves \$2 Million Settle Agreement with Hapag-Lloyd" Federal Maritime Commission, June 8, 2022.

"FMC Announces Three New Initiatives to Assist Shippers and Improve Supply Chain Performance" Federal Maritime Commission, June 8, 2022.

"Commissioner Dye Releases Final Report for Fact Finding No. 29" Federal Maritime Commission, May 31, 2022.

"With Inflation Surging, Biden Targets Ocean Shipping" The New York Times, March 21, 2022.

"FMC Initiative Examining How Ocean Carriers Serve Export Shippers" Federal Maritime Commission, April 22, 2022.

"Remarks of Daniel B. Maffei Chairman, Federal Maritime Commission, to the American Association of Port Authorities" Federal Maritime Commission, March 30, 2022.

"Export Service is New Added Focus of FMC Ocean Carrier Audit Program" Federal Maritime Commission, March 21, 2022.

"FMC Rule Change Will Provide More Rights to Refunds for Cancelled or Delayed Cruises" Federal Maritime Commission, March 16, 2022.

"FMC Meets to Discuss Ocean Carrier Enforcement Efforts & New Rule Protecting Cruise Passengers" Federal Maritime Commission, March 16, 2022.

"TPM22: FMC's Maffei Sees No Collusion as Biden Targets Container Lines" Journal of Commerce, March 1, 2022.

“Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry” Federal Maritime Commission, February 28, 2022.

“Max Vekich Sworn-In as FMC Commissioner” Federal Maritime Commission, February 15, 2022.

“LA-LB Terminals Scrap Daytime Truck Fee Extension After Maffei Salvo” Journal of Commerce, February 11, 2022.

“Statement of Daniel B. Maffei on Proposed PierPass Change” Federal Maritime Commission, February 11, 2022.

“Lawmakers, Regulators, Seek to Rein In Fees Carriers Charge at Ports” The Wall Street Journal February 6, 2022.

“FMC Hires New Secretary” Federal Maritime Commission, November 29, 2021.

“New Supply Chain Initiatives Announced at FMC Meeting” Federal Maritime Commission, November 17, 2021.

“FMC Effort Will Examine How Data Can Improve Ocean Cargo Velocity” Federal Maritime Commission, November 15, 2021.

“U.S. Regulator Expects to Find Abuses in Shipping Amid Supply Chain Woes” Reuters, November 2, 2021.

“Letter of Commissioners Daniel Maffei and Louis Sola to President Joe Biden” Federal Maritime Commission, October 25, 2021.

“White House Scrambles to Address Looming Christmas Crisis” Politico, October 13, 2021.

“Chairman Daniel B. Maffei Visits West Coast Ports” Federal Maritime Commission, September 30, 2021.

“Chairman Maffei Addresses NCBFAA Conference” Federal Maritime Commission, September 30, 2021.

“Lloyd’s List Podcast: The Regulators View of Container Chaos” Lloyd’s List, September 24, 2021.

“FMC Announces National Shipper Advisory Committee Membership” Federal Maritime Commission, September 9, 2021.

“International Shipping Competition Agencies Meet” Federal Maritime Commission, September 8, 2021.

“FMC’s Scope in Shipping Crisis Limited: Maffei” Journal of Commerce, October 18, 2021.

“Commission Questions Shipping Lines About Surcharges” Federal Maritime Commission, August 4, 2021.

“FMC’s Maffei Says Capacity Demand Won’t Recede ‘Until Late 2022’” Freightwaves, August 3, 2021.

“FMC Establishes Ocean Carriers Audit Program” Federal Maritime Commission, July 20, 2021.

“New FMC and DoJ MOU Supports Interagency Collaboration on Antitrust Issues” Federal Maritime Commission, July 12, 2021.

“Chairman Daniel B. Maffei Attends White House Signing Ceremony for Executive Order on Competition” Federal Maritime Commission, July 9, 2021.

“FMC Onboard for Biden’s Ocean Carrier ‘Crackdown’” Freightwaves, July 8, 2021.

“Chairman Maffei and Commissioner Bentzel Tour the Port of New York and New Jersey, Meet with Stakeholders on Cargo Operations and FMC Enforcement Priorities” Federal Maritime Commission, June 15, 2021.

“Exclusive: Proposals Submitted to Address Ocean Shipping Crisis” Freightwaves, June 10, 2021.

“Remarks as Provided by Chairman Daniel B. Maffei: Celebrating Maritime Day 2021” Federal Maritime Commission, May 20, 2021.

“Commission Meeting Addresses Fact Finding 29 and Alliance Monitoring” Federal Maritime Commission, April 7, 2021.

“First Interview With New Federal Maritime Commission Chairman” Freightwaves, April 1, 2021.

“Daniel B. Maffei Designated as the Chairman of the Federal Maritime Commission” Federal Maritime Commission, March 30, 2021.

“Chairman Maffei Discusses Port & Supply Chain Issues During Port of LA Briefing” Federal Maritime Commission, May 17, 2021.

- “Top U.S. Maritime Regulator Wants to Strengthen Enforcement” Journal of Commerce, May 12, 2021.*
- “Letter of Commissioners Maffei and Bentzel to Great Lakes Governors” Federal Maritime Commission, March 8, 2021.*
- “Statement of Commissioners Maffei and Bentzel: Urging Governors to Prioritize Maritime Worker Vaccinations” Federal Maritime Commission, March 3, 2021.*
- “Commissioner Maffei Visits Port Newark Container Terminal” Federal Maritime Commission, February 26, 2021.*
- “Commissioners Maffei and Bentzel Urge Biden Administration to Prioritize Vaccinations for the Maritime Industry” Federal Maritime Commission, January 29, 2021.*
- “Commissioners Bentzel and Maffei Urge Ocean Carriers to Carry U.S. Exports” Federal Maritime Commission, December 17, 2020.*
- “Commissioners Bentzel and Maffei Urge MARAD and CDC to Prioritize Maritime Workforce” Federal Maritime Commission, December 4, 2020.*
- “Commissioner Daniel B. Maffei Statement on Expanded Supply Chain Investigation” Federal Maritime Commission, November 20, 2020.*
- “Commissioner Daniel B. Maffei Statement on World Shipping Council Agreement” Federal Maritime Commission, November 16, 2020.*
- “Commissioner Maffei Visits Port of New York and New Jersey” Federal Maritime Commission, October 2, 2020.*
- “Commissioner Daniel B. Maffei Statement on Detention and Demurrage Interpretive Rule” Federal Maritime Commission, April 29, 2020.*
- “Commissioner Daniel B. Maffei Statement on Coronavirus and the Shipping Industry” Federal Maritime Commission, March 26, 2020.*
- “Commissioner Daniel B. Maffei Statement in Memoriam Rep. Richard L. Hanna” Federal Maritime Commission, March 24, 2020.*
- “FMC Monitors Coronavirus’ Impacts on Container Industry’s Competitive Health” Freightwaves, March 13, 2020.*
- “Commissioner Daniel B. Maffei Statement on Coronavirus and the Shipping Industry” Federal Maritime Commission, March 12, 2020.*
- “Commissioners Bentzel & Maffei Travel to Houston, Texas” Federal Maritime Commission, February 18, 2020.*
- “Commissioner Daniel B. Maffei participates in Maritime Risk Symposium” Federal Maritime Commission, November 27, 2019.*
- “Commissioner Daniel B. Maffei visits Singapore for Global Maritime Forum” Federal Maritime Commission, November 25, 2019.*
- “Statement from Commissioner Maffei on Docket Nos. 16–01, 16–07, 16–10, and 16–11” Federal Maritime Commission, October 21, 2019.*
- “Commissioner Daniel Maffei Visits NYSHEX HQ in New York” Federal Maritime Commission, October 11, 2019.*
- “Commissioners Maffei & Sola Travel to Gulf of Mexico Ports” Federal Maritime Commission, October 2, 2019.*
- “Statement from Commissioner Maffei on Puerto Rico Nuevo Terminals LLC Cooperative Working Agreement” Federal Maritime Commission, August 29, 2019.*
- “Commissioner Maffei votes in favor of amendments to rules governing NRAs and NSAs” Federal Maritime Commission, June 29, 2019.*
- “Statement from Commissioner Maffei regarding Amendment to the West Coast Marine Terminal Operator Agreement” Federal Maritime Commission, May 24, 2018.*
- “Statement from Commissioner Maffei on Formal Investigation into Detention and Demurrage” Federal Maritime Commission, March 7, 2018.*
- “Statement of Commissioner Daniel Maffei re Hearings on the Petition of the Coalition for Fair Port Practices” Federal Maritime Commission, January 16, 2018.*
- “Mission Failure—Exploring the Problems of Policy Schools Can Ignite New Ways to Realize the Mission of Educating Public Servants in the 21st Century” Stanford Social Innovation Review, September 20, 2018.*
- “Statement of Commissioner Maffei on the NYSHEX Agreements” Federal Maritime Commission, December 4, 2017.*

“Statement from Commissioner Maffei commending the Commission’s vote to hold public hearings on Petition P4–16” Federal Maritime Commission, September 20, 2017.

“Statement from Commissioner Maffei on Bankruptcy Amendment to The Alliance” Federal Maritime Commission, September 14, 2017.

“Dan Maffei, the Cerebral Democrat and Perennial Candidate” WRVO, October 30, 2014.

20. List all digital platforms (including social media and other digital content sites) on which you currently or have formerly operated an account, regardless of whether or not the account was held in your name or an alias. Include the full name of an “alias” or “handle”, including the complete URL and username with hyperlinks, you have used on each of the named platforms. Indicate whether the account is active, deleted, or dormant. Include a link to each account if possible.

LinkedIn: /Daniel-maffei-38905430/ (Active)

Twitter: @danielbmaffei (Dormant)

Facebook: /danmaffeiNY (Dormant)

Note: I believe my Congressional office had a Facebook account, but I cannot locate anything about it. My Congressional campaigns utilized the above Facebook link, but it is possible my campaigns had other social media accounts for which I have no access or identifying information. My campaigns had a website (maffeiforcongress.com). My Congressional office had a website that I believe the U.S. House of Representatives keeps archived. I also currently have a *webpage* on the Federal Maritime Commission website.

21. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or non-governmental capacity and specify the date and subject matter of each testimony.

As a Member of Congress, I testified before committees, of which I was not a member, which had jurisdiction over legislation that I sponsored. In 2009, I testified before the U.S. House of Representatives Committee on Energy and Commerce advocating passage of the Automobile Dealer Economic Rights Restoration Act (ADERRA). In 2011, I testified before the U.S. House of Representatives Committee on Natural Resources advocating passage of the Harriet Tubman National Historic Parks Act.

Roundtable Discussion on Agricultural Exports and Supply Chain Disruption hosted by Representatives Costa, Garamendi, Lee and Thompson, Port of Oakland, November 1, 2022.

“Executive Session and Ocean Shipping Reform Act”, Senate Committee on Commerce, Science, and Transportation, March 3, 2022.

“Review of Fiscal Year 2023 Budget Request for the Coast Guard and Maritime Transportation Programs”, Subcommittee on Coast Guard and Maritime Transportation, House Committee on Transportation and Infrastructure, April 27, 2022.

“Review of Fiscal Year 2022 Budget for the Coast Guard and Maritime Transportation Programs”, Subcommittee on Coast Guard and Maritime Transportation, House Committee on Transportation and Infrastructure, July 21, 2021.

“Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain”, Subcommittee on Coast Guard and Maritime Transportation, House Committee on Transportation and Infrastructure, June 15, 2021.

22. Given the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated, what in your background or employment experience do you believe affirmatively qualifies you for appointment to the position for which you have been nominated, and why do you wish to serve in that position?

I have more than six years’ experience as a Commissioner on the FMC. Since March of 2021, I have served as the Chairman. For the entirety of that time, I have worked closely and well with my fellow Commissioners, the senior management, and staff of the FMC.

I continue to apply the law and regulations, understand the intricacies of the industry, and receive varying perspectives from stakeholders. While at the Commission, I have remained focused on understanding and advocating action where appropriate on challenges faced by U.S. shippers, especially exporters. Having the invaluable

able experience I have gained at the FMC is certainly an important qualification that I have for this maritime industry oversight moving forward.

In 2016 and 2018, I mentioned that my time as a former Member of Congress would be valuable for several reasons that still hold true today. First, the nature of the district I represented with agricultural areas, a Great Lakes international port, and supply chains that involve intermodal traffic from the Port of New York/New Jersey makes me intimately aware of the challenges faced by stakeholders (consumers, shippers, and intermediaries) in many areas throughout the United States—especially the Midwest.

Second, I remain committed to the relationship regarding communication between the FMC and Congress. As a Commissioner and currently Chairman during an active time of ocean shipping reform, I redoubled my commitment to communicate with Congress to ensure that the FMC properly interprets the Shipping Act and, where updates to the law may be needed. I strive to be a valuable resource to the House and Senate staffers of both Democratic and Republican members and believe I have been helpful to them in finding bipartisan solutions to the ocean shipping challenges. This experience in Congress and working with Congress is especially pertinent in the current efforts to implement the Ocean Shipping Reform Act of 2022 and the several FMC rulemakings it mandates.

I have been an effective communicator and team builder in a wide variety of context including the media, private sector, and the legislative branch. I have substantial experience working with disparate interests in my district and state, as well as with Congress, to bring groups together to develop and implement specific solutions. All this experience indeed helped me to be effective in the years I already served on the FMC and remain important now.

23. What do you believe are your responsibilities, if confirmed, to ensure that the department/agency has proper management and accounting controls, and what experience do you have in managing a large organization?

As I stated in 2016 and 2018, the responsibility of the Commissioners of the FMC to ensure proper management and accounting is crucial to the FMC's success. As a small agency, the FMC has continued to operate on a lean budget to execute a large mandate to oversee international trade (130 people for approximately \$1.3 trillion of commerce). During a critical time in this industry, demand for Commission services has not been higher in recent years. Our Office of Consumer Affairs and Dispute Resolution Services continues to receive voluminous requests from the public for assistance. Aggrieved shippers continue to share information with us about unsatisfactory service—all of which is reviewed for potential legal violations. The FMC continues to meet its statutory obligations to facilitate a positive impact on the economic recovery of U.S. importers and exporters, which depend on a maritime industry providing stable, reliable ocean transportation.

In addition, prior to my Commission experience, I have managed a Congressional office that included a Washington, D.C. office and three district offices within an economically challenged and diverse region of the country. In addition, I have managed teams in the private sector in completing specific deliverables. Given that this specific appointment is to a Commission in which five people of diverse backgrounds work together to manage the organization, my experience as a senior staff person on a Congressional committee and then as a Member of Congress is particularly relevant. For example, as Ranking Member of the Subcommittee on the Oversight of the House Committee on Science, Space, and Technology, I worked very closely in collaboration with the Chairman and other subcommittee members to plan most of the hearings in a bipartisan way. Similarly, I have worked closely with my Republican and Democrat colleagues at the Commission, and while we have some disagreements, I have contributed to us all rowing in the same direction to serve the American shipper.

24. What do you believe to be the top three challenges facing the department/agency, and why?

- Exports & Consumer Assistance
- Enforcement
- OSRA Implementation

Exports & Consumer Assistance

Addressing the challenges American businesses face in using ocean transportation to reach overseas markets is both a top priority I have as Chairman as well as a challenge for the Federal Maritime Commission to address.

Ocean carriers have created services that meet the service requirements of the majority of their customers. The overwhelming majority of international trade that moves by ocean is import cargo. In some respects, export shippers have benefited

from riding on the “back haul” of a service string. The chief benefit being they have typically been charged a low rate. There has always been a substantial spread in the cost to import a container into the United States versus exporting from the United States to other nations. Even at the height of the pandemic where the cost to ship a container hit historic highs, it was substantially less expensive to export a container than to import one. The reason for this is that ocean carriers are more interested in generating sufficient revenue to pay for a ship’s return voyage overseas as opposed to charging a rate that generates a profit. In “normal” years, there has been ample space to accommodate the requirements of export shippers.

That is not to say that even in the pre-pandemic era shippers were not frustrated by challenges with securing intermodal equipment, meeting deadlines for getting containers aboard a vessel or having their shipments “rolled”.

Nonetheless, the pandemic brought into stark relief the issues export shippers must overcome in securing service and underscored the reality that the “headhaul”, the overseas-to-U.S. leg of a voyage, is what is the business priority for ocean carriers.

This must be addressed, and I used my authority as Chairman to direct Commission resources be prioritized toward identifying ways to assist exporters. I challenged Commission staff to think creatively on how we could use our existing authorities to aid exporters, as well as what approaches we could take beyond our authorities. In response, we:

- Focused our resources in our Office of Consumer Affairs and Dispute Resolution Services on assisting exporters who request assistance;
- Hired an Export Expert to work exclusively on exporter issues;
- Prioritized handling any cases involving exports for potential enforcement violations;
- Issued policy statements and instructional information on how to bring complaints at the Commission;
- Used our Vessel-Operating Common Carrier Audit Team to engage ocean carriers about how they serve U.S. export shippers and what opportunities exist for shipping lines to improve the service they offer American exporters; and,
- Continue our work to identify potential rulemakings that might make exporting less burdensome on U.S. companies.

Foundationally, these are complicated, interconnected, and global problems that can only be addressed by many parties and organizations demonstrating leadership and taking responsibility for matters where they can make a difference. There is no one government agency, nor one company capable of unilaterally addressing the myriad causes that have so totally disrupted the international ocean freight delivery system. The Commission recognizes the importance of U.S. exporters, and we will work with any and all companies, associations, or other U.S. Government agencies to improve the ability for U.S. export shippers to gain access to more reliable ocean transportation services.

Enforcement

The Commission remains vigilant and protects the public from unlawful, unfair, and deceptive practices. We will continue to respond as comprehensively, aggressively, and creatively as possible within the bounds of our present authorities.

Since I became Chairman, I redirected the FMC resources to be focused on issues discussed above as priorities. The Commission is focused on deterrence through enforcement by increasing its investigatory and enforcement activity.

We have increased investigative and enforcement activity, paying particular attention to ocean carriers. Initiating a new focus on addressing fees and surcharges with the goal of bringing greater transparency to rates was also put in place. In addition, we have increased the monitoring requirements of ocean carrier alliances and continue to assess if further changes are needed. On the oversight of markets, we have invested in our Bureau of Trade Analysis and their ability to review markets and alliances by adding staff with backgrounds in data science and analysis. Moreover, we have provided guidance to shippers on bringing complaints at the Federal Maritime Commission and we are seeing an increase in both formal and especially informal docketed proceedings being filed.

With international counterparts, we have consulted with competition authorities from the European Union and the People’s Republic of China, regarding our respective efforts to ensure a competitive marketplace for ocean transportation services, as well as observations and conclusions from each regime’s monitoring work. I directed, following conversations with Commissioner Dye, that the FMC create the Vessel-Operating Common Carrier Audit Program to help ensure with compliance

on the Commission's interpretive rule on detention and demurrage and other important regulations.

Accordingly, the FMC, through the Bureau of Enforcement, Investigations, and Compliance, will continue to investigate for any illegal conduct in the marketplace and stand ready to prosecute potential violations by any entity under our jurisdiction.

Overarchingly, I am committed to making the Commission's enforcement program more capable and prepared than it has been in many years. Reorganizing our former Bureau of Enforcement and expanding the number of investigators, analysts, and attorneys devoted to seeking out non-compliant behavior is being done, not just in response to what happened during the pandemic, but to be best prepared for the next shock to the supply chain. Our goal is to mature our enforcement program to be more than sufficiently nimble to quickly pivot to address the consequences of the inevitable next disruption and to have the instincts to look for ways to use existing statutory authority to directly address relevant issues and disputes. We are on the right path.

Implementing OSRA 2022

I am committed to full implementation of the Ocean Shipping Reform Act of 2022 and in meeting not only the black letter requirements of the law, but in satisfying the intent of the Congress.

The Commission has moved forward expeditiously and decisively in implementing OSRA 2022. We have already made substantive progress in meeting many of the law's requirements and we are working diligently to fulfill the remaining requirements. We are being transparent in our work, establishing a dedicated page on our website where all Commission activity is being posted and we are providing a public update on implementation at each of our Commission meetings.

This has been essentially an "all hands" endeavor. The Commission is a small organization, consisting of approximately 130 employees, not all of whom are involved in monitoring, enforcement, licensing, consumer assistance and other related core functions. That noted, there is not a bureau or office at the Commission not engaged in the work necessary to implement all provisions of OSRA 2022 that are our responsibility. This is in addition to simultaneously continuing our work in the traditional mission areas of the FMC. No one has complained about the added work, but the pace and scope of implementation-related taskings has resulted in a considerable number of added assignments for everyone. Additional authorized and appropriated funds provided by Congress are being used to add needed staff to assist with OSRA implementation and to expand the capabilities and responsiveness of the Commission.

We will take full advantage of this support. The additional staff and resources we are hiring and procuring are needed to realize the full potential of OSRA 2022.

We have already seen a positive public response to new authorities provided to the Commission, particularly in the area of Charge Complaints. Since enactment, more than 200 Charge Complaints have been filed at the Commission and more than 70 of those met the standard for being investigated. Commission staff estimate that more than \$700,000 in contested fees have been waived or refunded by ocean carriers.

While we are proud of how quickly we created a way to accept, review, investigate, and dispose of Charge Complaints, if past is precedent, we will need to commit more resources to this activity. Again, the support we received from Congress will help us in making certain we have adequate resources devoted to this activity.

Similarly, our Office of the Administrative Law Judges has seen a significant increase in filings of all classes of complaints. We have added a second Administrative Law Judge and are in the process of hiring a third. These are not simple cases. They are matters involving international commerce with often complicated matters of law in question. Cases frequently involve considerable procedural motions, and they are not routine cases. We must continue to invest in our Office of Administrative Law Judges to ensure the public benefits from the most rapid, full hearing of cases deserved. In addition to adding staff to this function, we are reviewing the procurement of additional information technology to assist in court management.

OSRA 2022 provides the Commission with many new and welcomed authorities that once fully implemented will benefit American companies.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers. Please include information related to retirement accounts, such as a 401(k) or pension plan.

I have both FERS and TSP accounts from my service as a Congressional staff person and Member of Congress.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation, or practice with any business, association, or other organization during your appointment? If so, please explain. No.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest. None.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last ten years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest. None.

5. Identify any other potential conflicts of interest, and explain how you will resolve each potential conflict of interest. None.

6. Describe any activity during the past ten years, including the names of clients represented, in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy.

In my two terms as a Member of Congress, as well as during my campaigns, I advocated publicly legislative positions on hundreds of topics. I am happy to provide specific examples as needed.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics, professional misconduct, or retaliation by, or been the subject of a complaint to, any court, administrative agency, the Office of Special Counsel, an Inspector General, professional association, disciplinary committee, or other professional group? If yes:

- a. Provide the name of court, agency, association, committee, or group;
- b. Provide the date the citation, disciplinary action, complaint, or personnel action was issued or initiated;
- c. Describe the citation, disciplinary action, complaint, or personnel action;
- d. Provide the results of the citation, disciplinary action, complaint, or personnel action.

No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? If so, please explain.

No, except for background investigations preceding potential Presidential appointments.

3. Have you or any business or nonprofit of which you are or were an officer ever been involved as a party in an administrative agency proceeding, criminal proceeding, or civil litigation? If so, please explain.

In my capacity as a candidate for Congress, I was a party to civil litigation in the following instances:

I was a plaintiff in lawsuits filed in November 2012 and October 2014, respectively, to request securing of ballots to protect against the possibility of vote counting irregularities in the respective year's general election. Because of each suit, the ballots were impounded after the 2012 and 2014 elections.

I was a Respondent in a lawsuit filed in May 2014 by the Onondaga County Republican Committee (OCRC), which claimed that my campaign manager should not have been issued voter registration in New York because the OCRC alleged that he was only a temporary resident; accordingly, the OCRC contended the individual should not have been permitted to circulate candidate petitions for the Working Families Party. The court ruled in my favor, concluding my campaign manager was properly registered in New York and had conducted himself properly.

In November 2010, I was involved in a very close election and filed a court case to attempt to have all ballots counted. The judge eventually ruled that we had counted all of the votes. The lawsuit was resolved when I conceded the election.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain. No.

5. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion, or any other basis? If so, please explain. No.

6. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination.

I know of no applicable additional information.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees, and that your department/agency endeavors to timely comply with requests for information from individual Members of Congress, including requests from members in the minority? Yes.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistleblowers from reprisal for their testimony and disclosures? Yes.

3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee? Yes.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes.

ATTACHMENT

The Honorable Daniel B. Maffei

FEDERAL GOVERNMENT SERVICE

FEDERAL MARITIME COMMISSION

Washington, DC

Commissioner

2016 – present

- Appointed by President Obama and reappointed by President Trump, and President Biden to Senate-confirmed position
- Serve as one of up to five members of the bipartisan, independent commission that regulates the U.S. international ocean transportation system and adjudicates cases under the Shipping Act of 1984
- Designated as Chairman by President Biden in 2021
 - Responsible for the administration of the Commission and allocating resources to accomplish mission and priorities
 - Key initiatives include reinvigorating enforcement, emphasizing consumer assistance, and prioritizing ways to assist U.S. exporters reach overseas markets
 - Responsible for implementing the Ocean Shipping Reform Act of 2022
- Participated in bilateral and multilateral consultations with other competition and maritime authorities around the world including the European Commission, Denmark, Japan, Republic of Korea, People's Republic of China, and United Kingdom
- Delivered presentations on maritime transportation issues at domestic and international conferences
- Advised congressional committee staff and members on important revisions to maritime legislation
- Wrote concurring opinions in legal cases that had been appealed to the Commission

DEPARTMENT OF COMMERCE

Washington, DC

Senior Advisor

2016

- Appointed to International Trade Administration and seconded to Office of the Secretary
- Advised department leadership on legislative and public strategy for finishing Obama trade agenda
- Communicated informally with current Congress members and staff on TPP and other trade issues
- Coached officials on dealing with congressional meetings including prep for oversight hearings

THE HOUSE OF REPRESENTATIVES

Washington, DC

Member of 113th Congress representing New York's 24th District

2013 – 2015

- Member of Committee on Armed Services and Committee on Science, Space, and Technology
- Ranking Member on Science and Technology Oversight Subcommittee
- Authored several provisions to identify and support new and better military technologies in the *National Defense Authorization Act of 2013* and *National Defense Authorization Act of 2014*
- Fought successfully the efforts to decrease federal support for social science research and advocated for increased support for basic scientific research and streamlining of the grant application process
- Resolved military concerns and cleared bureaucratic obstacles so that one of six FAA-approved remotely piloted vehicle test sites would be established in Central New York
- Led successful bipartisan effort creating the first national park to honor Harriet Tubman
- Developed program to enhance 24th district local governmental and institutional capacity to obtain federal grants, resulting in approximately twenty-eight million dollars in grants over a two-year period

UNITED STATES HOUSE OF REPRESENTATIVES (CONTINUED) Washington, DC

Member of 111th Congress representing New York's 25th District **2009 – 2011**

- Member of Financial Services Committee and Committee on the Judiciary
- Affected significant provisions of *Affordable Care Act of 2010* as key swing vote; led coalition of members that reduced the proposed tax on medical device manufacturers by 50 percent
- Co-authored *Credit Card Holder Bill of Rights of 2009*; and was sole sponsor of separate 2010 law to save retailers millions of dollars by grandfathering previously printed gift cards
- Won passage of 24 appropriations projects totaling \$14.4 million in funds for the 25th District
- Led movement in Congress to prevent unfair closures of GM and Chrysler auto dealerships; negotiated inclusion of dealers' rights provision in appropriations law
- Founded the bipartisan House Adult Literacy Caucus

Communications Director/Senior Policy Advisor **1998 – 2005**
Committee on Ways and Means Democratic Staff

- Crafted and implemented media and political strategies involving economic policy, taxes, Social Security, Medicare, health, welfare, and international trade
- Explained and analyzed legislative issues for journalists, members, and the public
- Worked with Democratic leadership and other House committee staffs to coordinate message points
- Appeared periodically on C-SPAN's *Washington Journal*

UNITED STATES SENATE Washington, DC

Press Secretary to Senator Daniel Patrick Moynihan of New York **1997 – 1998**

- Managed all of the Senator's media relations including monthly press briefings and op-ed placements
- Promoted the Senator's agenda involving issues before him as Finance Committee Ranking Member

Press Secretary to Senator Bill Bradley of New Jersey **1995 – 1996**

- Developed issue-based media strategies for Senator's agenda on health, tax and environmental issues
- Advanced the Senator's national profile in anticipation of presidential campaign

PRIVATE SECTOR EXPERIENCE

SELF-EMPLOYED PUBLIC AFFAIRS CONSULTANT **2015 – 2016**

- Assisted clients in developing message and marketing materials for various targeted audiences
- Wrote memos and position papers for clients on health, science and tax issues
- Coached and prepared clients for appearances before congressional committees

MANATT, PHELPS, PHILLIPS, LLP **Washington, DC**
Senior Policy Advisor **2011 – 2012**

- Advised clients on *Affordable Care Act* and *Wall Street Reform and Consumer Protection Act* implementation
- Assisted clients in applying for federal contracts

PINNACLE CAPITAL MANAGEMENT, LLC **Syracuse, NY**
Senior Vice President, Corporate Development **2006 – 2008**

- Enhanced profile of newly formed Central New York-based capital management firm
- Identified and cultivated prospective clients through individual meetings and outreach events

ABC AFFILIATE WIXT-TV (NOW WSYR-TV) **Syracuse, NY**
On-Air News Reporter/Producer **1992 – 1993**

CBS AFFILIATE WWNY-TV AND WTNY-AM
On-Air News Reporter/Anchor

Watertown, DC
1991 – 1992

UNIVERSITY TEACHING EXPERIENCE

THE GEORGE WASHINGTON UNIVERSITY

Washington, DC
2018 – 2019

Professor of Practice, Graduate School of Political Management

- Taught courses *Running For Office* (PMGT 6434) and *Legislative Politics* (LGAF 6202)
- Represented GWU at academic roundtable *Open Information vs. Fake News* in Wellington, N.Z.
- Assisted planning, recruited speakers, and moderated a panel for *Reinventing Disruption* conference
- Provided Capitol tour and assisted in hosting British Members of Parliament visiting the school
- Formulated and facilitated week-long program for visiting Southern Methodist University students

SUNY COLLEGE OF ENVIRONMENTAL SCIENCE AND FORESTRY
Visiting Professor, Environmental Studies Department

Syracuse, NY
2011 – 2012

- Designed and taught Graduate Seminar: *The Politics of Environmental Science and Technology Policy*
- Taught Survey Course: *Government and the Environment* (with then Assistant Professor Paul Hirsch)

SYRACUSE UNIVERSITY MAXWELL SCHOOL OF CITIZENSHIP AND PUBLIC AFFAIRS

Syracuse, NY

- Special Summer Course Assistant 2005
- Assisted in facilitating Washington simulation for *Public Administration and Democracy* course

GUEST TEACHING AND LECTURES

Syracuse University Maxwell School of Citizenship and Public Affairs

2016, 2018

Speaker/Mentor at National Security Studies Program Minnowbrook Conference

Brown University, A. Alfred Taubman Center for American Politics and Policy

2017

Lecture Series Speaker

Millikin University

2015

Thomas W. Ewing Lecture (with former Representative Peter Tonkildsen)

Guest Lectures at Colleges and Universities:

Syracuse University Washington Program	2016, 2017, 2018
Indiana State University	2017
Texas Tech University Washington Congressional Internship Program	2017
Syracuse University Maxwell School of Citizenship and Public Affairs	2010, 2012, 2013, 2014
Cornell University Government Department	2015
Syracuse University Newhouse School of Public Communications	2004, 2005, 2010, 2014
LeMoyne College	2010, 2014
Syracuse University Law School	2011, 2013
SUNY Oswego	2012
Cornell University School of Hotel Administration	2011
Ivy Tech College (Bloomington, Indiana) O'Bannon Institute for Community Service	2011
Hobart and William Smith Colleges	2008, 2009
University of Richmond Jepson School of Leadership Studies	2007
Harvard University John F. Kennedy School of Government	2004
Rutgers University Bloustein School of Planning and Public Policy	2004
American University Washington Semester Program	2003

FELLOWSHIPS

- CENTER FOR THE STUDY OF THE PRESIDENCY AND CONGRESS** Washington, DC
Senior Fellow 2015 – 2016
- Co-coordinated and advised major research project on government procurement
 - Participated in Middle East Study Group examining United States policy in Iraq, Syria and Jordan
 - Authored (with Dan Mahaffee) *A Frightening Thought: Congress' Flip Flop on War and Diplomacy*
- THIRD WAY** Washington, DC
Senior Fellow 2011
- Authored (with Ryan McConaghy) Third Way policy paper *The Case for Corporate Tax Reform*
 - Moderated public panels and private meetings on corporate tax issues

SELECTED MEMBERSHIPS

- U.S. ASSOCIATION OF FORMER MEMBERS OF CONGRESS** Washington, DC
Board Member 2016 – present
- ISSUE ONE "ReFormers Caucus"** Washington, DC
Member 2018 – present
- GLOBAL PANEL FOUNDATION** Prague, Czech Republic
Board of Advisors (America) 2010 – 2016
- NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE** Washington, DC
Board of Advisors 2015 – 2016

EDUCATION

- HARVARD UNIVERSITY JOHN F. KENNEDY SCHOOL OF GOVERNMENT** Cambridge, MA
Master of Public Policy 1993 – 1995
- Thesis: *An Analysis of Media Coverage of the Watchdog Group the Center for Public Integrity*
- COLUMBIA UNIVERSITY GRADUATE SCHOOL OF JOURNALISM** New York, NY
Master of Science in Journalism 1990 – 1991
- Project: *A Radio Documentary on the Rise of Political Talk Radio*
- BROWN UNIVERSITY** Providence, RI
Bachelor of Arts in History and American Civilization 1986 – 1990

SELECTED PUBLICATIONS

- “How Junk Food Information Starves Democracy” in *The Dominion Post* (Wellington, New Zealand), November 5, 2018
- “The New Health Care Rationing” in *U.S. News & World Report*, May 5, 2016
- “Democrats Would Be Wise Not to Denigrate Innovation” in *The Hill*, December 1, 2015
- “Time for Patients to Benefit From Lifesaving Drugs” in *The Hill*, October 23, 2015
- “Consequences of Regulation by Clickbait” in *Medium.com*, September 28, 2015
- “Free Affordable Care Act From Unpopular Taxes” in *Roll Call*, August 27, 2015
- “A Frightening Thought: Congress’ Flip-Flop on War and Diplomacy” (co-authored by Dan Mahaffee) in *The National Interest*, August 20, 2015
- “Science Denial: It’s Not Just A Republican Problem” in *Roll Call*, June 4, 2015
- “Equal Pay for Women Helps the Economy” in *The (Syracuse) Post-Standard*, September 16, 2014
- “Rep. Dan Maffei: Rebuilding Infrastructure is the Key to Revitalizing Central New York” in *The (Syracuse) Post-Standard*, June 22, 2014
- “Rep. Dan Maffei on Interstate 81’s Future: Two Options Aren’t Enough” in *The (Syracuse) Post-Standard*, May 30, 2013
- “The Case for Corporate Tax Reform” (co-authored by Ryan McConaghy) in *Third Way Report*, August 30, 2011
- “Campaign as Classroom: Dan Maffei MPP 1995 on lessons learned” in *John F. Kennedy School of Government Bulletin*, Summer 2008
- “Part of ‘Thinking Big’ is Working for U.S. Energy Independence” in *The (Syracuse) Post-Standard*, May 22, 2008

Daniel B. Maffei
Senate Commerce Committee Nominee Questionnaire, 118th Congress
Supplemental Information

The following information amends a Nominee Questionnaire submitted to the Committee on February 17, 2023.

15. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$200 or more for the past ten years.

Biden Action Fund, \$1,000.00, 2020
Biden for President, \$1,000.00, 2020
Solutions PAC, \$504.65, 2016

18. List all speeches, panel discussions, and presentations (e.g. PowerPoint) that you have given on topics relevant to the position for which you have been nominated. Include a link to each publication when possible. If a link is not available, provide a digital copy of the speech or presentation when available.

National Maritime Day Ceremony, May 22, 2023
• [Full Event Video](#) (Note: My remarks being at ~38:40 mark)

Baltimore Port Alliance, May 19, 2023

Women's International Shipping and Trading Association ISTA 2023 Conference May 12, 2023

[Meeting of the Federal Maritime Commission](#), May 3, 2023

DC Propeller Club March 15, 2023

TPM23, "Delivering on OSRA 2022's Promises: A Townhall Discussion With FMC Chairman Daniel Maffei", February 27, 2023

[Meeting of the Federal Maritime Commission](#), January 25, 2023

Association of Bi-State Motor Carriers, January 10, 2023

[Meeting of the Federal Maritime Commission](#), July 27, 2022

[Plenary Session for the Maritime Transportation Data Initiative](#), June 1, 2022

Continued

Daniel B. Maffei
Nominee Questionnaire, 118th Congress
Supplemental Information
June 15, 2023

Meeting of the Federal Maritime Commission, November 16, 2021

Meeting of the Federal Maritime Commission, October 13, 2021

National Shipper Advisory Committee Inaugural Meeting, October 27, 2021

21. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or non-governmental capacity and specify the date and subject matter of each testimony.

Hearing of Subcommittee on Coast Guard and Maritime Transportation (House Committee on Transportation and Infrastructure) on "Review of Fiscal Year 2024 Budget Request for the Federal Maritime Transportation Programs, and Implementation of the Ocean Shipping Reform Act of 2022", March 23, 2023.

- [Testimony submitted for the Record](#)
- [Full Hearing Video](#)

Chair PETERS. Well, thank you, Chairman Maffei.

Our second nominee, Rebecca Dye, has been a Commissioner of the FMC since 2002. She has been reappointed and confirmed three times, first by President Bush, and subsequently by President Obama. Prior to joining the Commission, Ms. Dye served as Counsel in various offices of the U.S. Coast Guard, U.S. Maritime Administration, and the U.S. House of Representatives.

Commissioner Dye, it is a pleasure to have you before us here today. And you are now recognized for your opening comments.

**STATEMENT OF HON. REBECCA F. DYE, NOMINEE TO BE A
COMMISSIONER, FEDERAL MARITIME COMMISSION**

Ms. DYE. Thank you very much, Mr. Chairman. I appreciate that introduction. I want to say, first of all, that I appreciate my colleague, Louis Sola, who is here today to support us, and I really appreciate the opportunity to testify here today before you.

It is an honor to appear, as renominated by President Biden to serve as a Commissioner of the Federal Maritime Commission. I welcome the opportunity, if confirmed, to continue the important work of the Commission at this critical time for the Nation's freight delivery system.

I have been fortunate to serve with excellent colleagues at the Commission during my tenure. Our current Chairman, Dan Maffei, is the best partner I could ask for as we carry out the responsibilities of the Commission. During the past 5 years of the Commission, I have been honored that my colleagues place their trust in me to serve as Fact Finding Officer in two investigations to address major concerns of U.S. exporters and importers.

The first, Fact Finding 28, stemmed from a petition filed at the Commission by the Coalition for Fair Port Practices, a broad coalition of shippers and others concerned with detention and demurrage fees charged by ocean carriers, seaports, and marine terminal operators.

I recommended, and the Commission approved, an approach to address detention and demurrage practices based upon a principle, "incentive principle."

If cargo owners cannot be further incentivized to pick up cargo or return equipment, no charge may be assessed. The "incentive principle" was embodied in a Commission Rule, though characterized as an interpretive rule, it is enforceable, and the Commission has moved forward with investigations and cases to enforce it.

I am pleased to say that this effort is bearing fruit in changing behavior in the marketplace. I am gratified that OSRA 2022 recognized and ratified the interpretive rule and gives the Commission the opportunity to further clarify specific practices that would be unreasonable under the general incentive principle.

The second investigation, Fact Finding 29, "International Ocean Transportation Supply Chain Engagement," was ordered to address problems in the U.S. supply chain caused by the COVID-19 pandemic. As a result of my investigation, I recommended statutory and administrative changes to Congress and the Commission. I appreciate your support of the implementation of my statutory recommendations.

The Commission is moving forward with the final Fact Finding 29 recommendations to address supply chain problems that occurred during the pandemic. Most important among these recommendations is a new Commission “International Ocean Shipping Supply Chain Program” with dedicated personnel.

Second, is the new FMC “Ocean Carrier Compliance Program”, including a new requirement for ocean common carriers, seaports, and marine terminals to employ an FMC Compliance Officer. And I am pleased that our carriers, very quickly, did nominate compliance officers, and it has been a great aid to us in transmitting our intent for obeying the law. Both recommendations have been implemented by the Commission.

If confirmed, I look forward to working with Chairman Maffei and my colleagues to maintain the professionalism of our flagship competition program among ocean carriers, seaports, and marine terminals, to increase stakeholder outreach, and work with FMC supply chain innovation teams to craft clear and predictable commercial solutions to address supply chain bottlenecks.

I pledge to work closely with the Members of this Committee to make our Nation’s supply chain more dependable and responsive to the needs of American importers and exporters. Thank you.

[The prepared statement and biographical information of Ms. Dye follow:]

PREPARED STATEMENT OF HON. REBECCA F. DYE, COMMISSIONER,
FEDERAL MARITIME COMMISSION

Chair Cantwell, Ranking Member Cruz, Members of the Committee, thank you for the opportunity to testify here today. It is an honor to appear before you as nominated by President Biden to serve as a Commissioner at the Federal Maritime Commission. I welcome the opportunity, if confirmed, to continue the important work of the Commission at this critical time for the Nation’s freight delivery supply chain.

I have been fortunate to serve with excellent colleagues at the Commission during my tenure. Our current Chairman, Dan Maffei, is the best partner I could ask for as we carry out the responsibilities of the Federal Maritime Commission.

During the past five years at the Commission, I have been honored that my colleagues placed their trust in me to serve as Fact Finding Officer in two investigations to address major concerns of U.S. exporters and importers.

The first, Fact Finding 28, stemmed from a petition filed at the Commission by the Coalition for Fair Port Practices, a broad coalition of shippers and others concerned with detention and demurrage fees charged by ocean carriers, seaports, and marine terminal operators. I recommended, and the Commission approved, an approach to address detention and demurrage practices based upon a principle, the “incentive principle.” If cargo owners cannot be further incentivized to pick up cargo or return equipment, no charge may be assessed. This “incentive principle” was embodied in a Commission rule. Though characterized as an interpretive rule, it is enforceable, and the Commission has moved forward with investigations and cases to enforce it. I am pleased to say that this effort is bearing fruit and changing behavior in the marketplace. I am gratified that OSRA 2022 recognized and ratified the interpretive rule and gives the Commission the opportunity to further clarify specific practices that would be unreasonable under the general incentive principle.

The second investigation, Fact Finding 29, “International Ocean Transportation Supply Chain Engagement”, was ordered to address problems in the U.S. supply chain caused by the COVID-19 pandemic. As a result of my investigation, I recommended statutory and administrative changes to Congress and the Commission. I appreciate your support of the implementation of my statutory recommendations. The Commission is moving forward with the final Fact Finding 29 recommendations to address supply chain problems that occurred during the pandemic.

Most important among these recommendations is a new Commission “International Ocean Shipping Supply Chain Program” with dedicated personnel. Second, is the new FMC “Ocean Carrier Compliance Program”, including a new requirement

for ocean common carriers, seaports, and marine terminals to employ an FMC Compliance Officer. Both recommendations have been implemented by the Commission.

If confirmed, I look forward to working with Chairman Maffei and my colleagues to maintain the professionalism of our flagship competition program among ocean carriers, seaports, and marine terminals; increase stakeholder outreach; and work with FMC Supply Chain Innovation Teams to craft clear and predictable commercial solutions to address supply chain bottlenecks.

I also pledge to work closely with the Members of this Committee to make our Nation's supply chain more dependable and responsive to the needs of American importers and exporters.

Thank you.

A. BIOGRAPHICAL INFORMATION

1. Name (Include any former names or nicknames used):

Rebecca Feemster Dye
Maiden Name: Rebecca Lynn Feemster
Nickname: "Becky"

2. Position to which nominated: Commissioner, Federal Maritime Commission.

3. Date of Nomination: January 3, 2023.

4. Address (List current place of residence and office addresses):

Residence: Information not released to the public.
Office: 800 North Capitol Street, N.W., Washington, D.C. 20573

5. Date and Place of Birth: May 8, 1952; Charlotte, North Carolina.

6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

I am divorced. My daughter is Caroline Lytton Jones, age 33.

7. List all college and graduate schools attended, whether or not you were granted a degree by the institution. Provide the name of the institution, the dates attended, the degree received, and the date of the degree.

University of North Carolina at Greensboro
Attended 1970–1972

University of North Carolina at Chapel Hill
Bachelor of Arts awarded May 1974

University of North Carolina School of Law
Juris Doctorate awarded May 1977

8. List all post-undergraduate employment, including the job title, name of employer, and inclusive dates of employment, and highlight all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

December 2002 to present
Commissioner
Federal Maritime Commission
January 1995–December 2002
Counsel and Subcommittee Staff Director
Committee on Transportation and Infrastructure
U.S. House of Representatives
February 1987–January 1995
Minority Counsel
Committee on Merchant Marine and Fisheries
U.S. House of Representatives
June 1985–February 1987
Legislative Attorney
Legislation Division, Office of the Chief Counsel
Maritime Administration of the U.S. Department of Transportation
August 1983–June 1985
Law Instructor
United States Coast Guard Academy
June–August 1983
Legislative Attorney
Office of the Assistant Counsel for Legislation

United States Department of Transportation
 1980–1983
 Legislative Attorney
 Legislation Division, Office of the Chief Counsel
 United States Coast Guard Headquarters
 1979–1980
 Assistant Division Chief
 Legal Administration Division, Office of the Chief Counsel
 United States Coast Guard Headquarters
 1978–1979
 Attorney Project Coordinator
 Legal Services of North Carolina
 1977–1978
 Special Counsel
 Broughton Psychiatric Hospital
 1977 (Part-time)
 Instructor
 Reading Research Foundation
 1976–1977 (Part-time)
 Sales Clerk
 Belk-Leggett Co.
 1975–1976 (Part-time)
 UNC School of Law library
 1975 (Part-time)
 Instructor
 Reading Research Foundation

9. Attach a copy of your résumé.
 See attached.

10. List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments, other than those listed above after 18 years of age. None.

11. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational, or other institution.

Executive Women in Government (Nonprofit):
 Vice President, 2012–2013

12. Please list each membership you have had after 18 years of age or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religiously affiliated organization, private club, or other membership organization. (For this question, you do not have to list your religious affiliation or membership in a religious house of worship or institution.). Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age, or disability.

- Kappa Kappa Gamma, 1973 to 1974;
- North Carolina State Bar, 1977 to present;
- White House Military Aides Association, 1983 to present;
- Executive Women in Government, 2012 to present (Vice President 2012–2013);
- International Women's Forum, Washington, D.C., 2014 to present;
- Women's International Shipping and Trading Association (WISTA), 2008 to present;
- Loudoun County Republican Women's Club, December 2012 to 2013;
- Federalist Society, 2012 to present;
- The Falls Church Anglican, 2010 to present;
- American Bar Association, 2021 to present; and
- European Maritime Law Organization, 2016 to present.

It is my understanding that the groups above do not restrict membership on the basis of sex, race, color, religion, national origin, age, or disability. It is also my understanding that Kappa Kappa Gamma does not discriminate on the basis of national origin, religion, disability, age, gender identity or sexual orientation.

13. Have you ever been a candidate for and/or held a public office (elected, non-elected, or appointed)? If so, indicate whether any campaign has any outstanding debt, the amount, and whether you are personally liable for that debt. No.

14. List all memberships and offices held with and services rendered to, whether compensated or not, any political party or election committee within the past ten years. If you have held a paid position or served in a formal or official advisory position (whether compensated or not) in a political campaign within the past ten years, identify the particulars of the campaign, including the candidate, year of the campaign, and your title and responsibilities. None.

15. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$200 or more for the past ten years.

- Romney for President (Paul D. Ryan)—\$1000;
- Romney Victory, Inc.—\$2,500;
- Romney Victory, Inc.—\$1,000;
- Romney Victory, Inc.—\$500;
- Romney for President—\$1,000;
- Romney for President—\$1,500;
- Romney for President—\$1,000;
- Romney for President—\$500;
- McConnell for Senate Committee—\$1,000;
- McConnell for Senate Committee—\$1,000;
- Ed Gillespie for Senate—\$500;
- Cruz for President—\$1,000;
- Cruz for President—\$1,000;
- Cruz for President—\$700;
- National Republican Senatorial Committee—\$700;
- Ted Cruz for Senate—\$500.00;
- Donald J. Trump for President (WinRed)—\$800;
- Donald J. Trump for President (WinRed)—\$1,000;
- Donald J. Trump for President (WinRed)—\$1,800;
- Donald J. Trump for President (WinRed)—\$1,350;
- Republican National Committee—\$500.00;
- Donald J. Trump for President (WINRED)—\$500;
- Youngkin for Governor—\$500; and
- Youngkin for Governor—\$500.

16. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognition for outstanding service or achievements.

- Coast Guard Commendation Medal;
- Coast Guard Achievement Medal;
- Coast Guard Meritorious Public Service Award;
- 2016 Outstanding Woman of the Year in International Trade from Women in International Trade, Los Angeles; (October 6, 2016)
- 2016 Agricultural Transportation Coalition Award for Exemplary Leadership;
- 2018 Women’s Leadership in Supply Chain Award, USC Marshall School of Business, Global Supply Chain Management;
- 2018 Supply Chain Dive Regulator of the Year;
- 2019 Bi-State Motor Carriers Malcolm McLean Memorial Award;
- 2020 Agricultural Transportation Coalition “Person of the Year” Award;
- 2021 Lloyd’s List One Hundred People, The Most Influential People in Shipping;
- 2021 Lloyd’s List Top Ten in Regulation; and
- 2023 Harbor Trucking Association Champions Award.

17. List each book, article, column, letter to the editor, Internet blog posting, or other publication you have authored, individually or with others. Include a link to

each publication when possible. If a link is not available, provide a digital copy of the publication when available.

- “Slick Work: An Analysis of the Oil Pollution Act of 1990”; Published in 1992 by the Journal of Energy, Natural Resources and Environmental Law; Coauthored with Cynthia M. Wilkinson and Lisa Pittman. (See attached document.)
- Fact Finding 26—Vessel Capacity and Equipment Availability in the United States Export and Import Liner Trades
 - Order of Investigation, March 17, 2010. <https://www.fmc.gov/wp-content/uploads/2018/09/FactfindingOrder26.pdf>
 - Vessel Capacity and Equipment Availability Report Recommends Collaborative Approaches to Develop Supply Chain Reliability Solutions, December 8, 2010. <https://www.fmc.gov/vessel-capacity-and-equipment-availability-report-recommends-collaborative-approaches-to-develop-supply-chain-reliability-solutions/>
- International Ocean Transportation Supply Chain Engagement
 - Order of Investigation on International Ocean Transportation Supply Chain Engagement, February 1, 2016. <https://www.fmc.gov/wp-content/uploads/2018/10/OrderSupplyChainEngagement.pdf>
 - Remarks of Commissioner Dye to the Commission on Innovation Teams Initiative Update, November 8, 2017. <https://www.fmc.gov/remarks-of-commissioner-dye-to-the-commission-fmc-innovation-teams-initiative-update/>
 - “Dear Colleague Letter” on Fact Finding Investigation and Final Report on Commission’s Supply Chain Innovation Teams Initiative, December 5, 2017. <https://www.fmc.gov/wp-content/uploads/2018/08/SCITFinalReport-reduced.pdf>
- Fact Finding 28—Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce
 - Order of Investigation. Fact Finding Investigation No. 28, March 5, 2018. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf
 - White Paper: The Memphis Supply Chain Innovation Team—A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity. May 22, 2019. <https://www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf>
 - “Dear Colleague Letter” on Fact Finding Investigation No. 28, August 27, 2019. <https://www.fmc.gov/wp-content/uploads/2019/09/FF28FinalReportLetter.pdf>
 - Fact Finding Investigation No. 28 Interim Report, Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce, September 4, 2018. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.p.9.f.
 - Fact Finding Investigation No. 28 Final Report, Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce December 3, 2018. https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf
- Fact Finding 29:
 - Fact Finding No. 29—Order of Investigation, March 31, 2020. https://www2.fmc.gov/readingroom/docs/FFno29/FF29_Order.pdf
 - Fact Finding No. 29—Supplemental Order November 19, 2020. [https://www2.fmc.gov/readingroom/docs/FFno29/FF2941102\(c\)%20SupplementalOrder.pdf](https://www2.fmc.gov/readingroom/docs/FFno29/FF2941102(c)%20SupplementalOrder.pdf)
 - Executive Summary of Fact Finding 29, Presented as part of the Record submitted by Commissioner Dye to the Subcommittee on Coast Guard and Maritime Transportation, June 15, 2021. <https://www.fmc.gov/wp-content/uploads/2021/06/061021DyeTestimonyExecutiveSummary.pdf>
 - Fact Finding Investigation No. 29 Interim Recommendations, July 28, 2021. <https://www2.fmc.gov/ReadingRoom/docs/FFno29/FF29%20Interim%20Recommendations.pdf>
 - Fact Finding Investigation Final Report—Effects of Covid-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. 41102(c), May 31, 2022. <https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf>

18. List all speeches, panel discussions, and presentations (e.g., PowerPoint) that you have given on topics relevant to the position for which you have been nominated. Include a link to each publication when possible. If a link is not available, provide a digital copy of the speech or presentation when available.

In the past, I have been asked to give remarks concerning current issues related to my position. I speak from notes for the appearances, and do not keep copies of my notes or the dates of appearances. Following are the speeches for which I have retained prepared remarks:

- September 2007: Comments Before the National Custom Brokers and Forwarders Association of America; <https://www.fmc.gov/comments-of-commissioner-rebecca-dye-at-ncbfaa-government-affairs-conference/>
- April 2008: Comments Before the National Industrial Transportation League; <https://www.fmc.gov/comments-of-commissioner-rebecca-dye-at-nitl-spring-policy-forum/>
- April 2009: Remarks at the Global Liner Shipping Conference; <https://www.fmc.gov/dye-global-liner-2009/>
- April 2009: Comments before the National Custom Brokers and Forwarders Association of America, Inc.; <https://www.fmc.gov/comments-of-u-s-federal-maritime-commissioner-rebecca-dye-at-ncbfaa-annual-conference-2/>
- October 2009: Comments Before the National Association of Waterfront Employers; <https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-dye-national-association-of-waterfront-employers/>
- April 2010: Comments before the National Custom Brokers and Forwarders Association of America, Inc.; <https://www.fmc.gov/comments-of-fmc-commissioner-rebecca-f-dye-at-the-2010-ncbfaa-annual-conference/>
- October 2010: Comments before the Midwest Specialty Grains Conference and Trade Show; <https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-2010-midwest-specialty-grains-conference-and-trade-show/>
- October 2010: Comments before the American Metal Market Scrap and Scrap Substitutes Conference; <https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-american-metal-market-scrap-and-scrap-substitutes-conference/>
- November 2010: Comments at the Western Cargo Conference (WESCCON); <https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-western-cargo-conference-wescon/>
- November 2010: Comments at the Northeast Cargo Symposium; <https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-northeast-cargo-symposium-in-boston/>
- December 2011: Comments at the American Metal Market Moving Metals Conference; <https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-american-metal-market-moving-metals-conference/>
- June 2012: Comments before the Canadian American Business Council; <https://www.fmc.gov/comments-of-fmc-commissioner-rebecca-f-dye-at-the-canadian-american-business-council-the-dragon-in-the-room-chinas-impact-on-canada-u-s-issues/>
- September 2013: Comments before the National Customs Brokers and Freight Forwarders Association of America, Inc. (NCBFAA); <https://www.fmc.gov/commissioner-rebecca-dyes-comments-delivered-at-the-ncbfaa-government-affairs-conference/>
- May 2014: Remarks at the European Maritime Law Organisation; <https://www.fmc.gov/commissioner-dyes-prepared-remarks-to-the-european-maritime-law-organization-spring-seminar-in-valletta-malta/>
- June 2014: Remarks to the Propeller Club of the United States; <https://www.fmc.gov/commissioner-dyes-prepared-remarks-to-the-propeller-club-of-the-united-states-port-of-washington-d-c/>
- January 2015: Statement to the FMC's Gulf Coast Port Forum; <https://www.fmc.gov/commissioner-dyes-statement-to-the-port-forum-in-new-orleans/>
- December 2015: Remarks to the Navy League Northern Virginia Council; <https://www.fmc.gov/remarks-by-commissioner-rebecca-dye-navy-league-northern-virginia-council/>
- July 2016: Remarks to the National Maritime Interagency Advisory Group Meeting; <https://www.fmc.gov/commissioner-dyes-prepared-remarks-to-national-maritime-interagency-advisory-group-meeting/>

- October 2016: Remarks to the General Stevedoring Council; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-general-stevedoring-council-luncheon/>
- December 2016: Remarks at the Journal of Commerce's Port Performance North American Conference; <https://www.fmc.gov/information-infrastructure-is-key-to-american-economic-competitiveness/>
- January 2017: Remarks at the National Industrial Transportation League (NITL) Transportation Summit; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-national-industrial-transportation-league-transportation-summit/>
- May 2017: Remarks at the Washington Council on International Trade; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-washington-council-on-international-trade/>
- June 2017: Address at the Agricultural Transportation Coalition Annual Meeting; <https://www.fmc.gov/commissioner-dye-addresses-agricultural-transportation-coalition-annual-meeting/>
- September 2017: Address to the Global Liner Shipping Asia Forum; <https://www.fmc.gov/commissioner-dye-addresses-global-liner-shipping-asia-forum-in-singapore-on-supply-chain-visibility-and-us-regulatory-reform/>
- September 2017: Remarks at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Government Affairs Conference; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-ncbfaa-government-affairs-conference/>
- October 2017: Remarks at the American Association of Port Authorities (AAPA) Annual Convention; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-aapa-annual-convention/>
- October 2017: Panel Remarks at the American Association of Port Authorities (AAPA) Annual Convention; <https://www.fmc.gov/commissioner-dye-participates-on-panel-at-aapa-annual-convention-in-long-beach/>
- October 2017: Address at the Pacific Northwest Waterways Association (PNWA) Annual Meeting; <https://www.fmc.gov/commissioner-dye-addresses-pnwa-annual-meeting/>
- January 2018: Statement on Hearings on the Petition for Fair Port Practices; <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-hearings-on-the-petition-of-the-coalition-for-fair-port-practices/>
- March 2018: Remarks at the 18th TPM Annual Conference; <https://www.fmc.gov/remarks-of-commissioner-dye-to-the-18th-tpm-annual-conference/>
- April 2018: Comments at the Global Liner Shipping Conference; <https://www.fmc.gov/comments-of-u-s-federal-maritime-commissioner-rebecca-dye-at-global-liner-shipping-conference/>
- April 2018: Comments at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Annual Conference; <https://www.fmc.gov/comments-of-u-s-federal-maritime-commissioner-rebecca-dye-at-ncbfaa-annual-conference/>
- April 2018: Remarks at U.S.-China Bilateral Maritime Consultations; <https://www.fmc.gov/commissioner-dye-represents-fmc-at-us-china-bilateral-maritime-consultations/>
- May 2018: Address at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Annual Conference; <https://www.fmc.gov/commissioner-dye-addresses-ncbfaa-annual-conference/>
- May 2018: Keynote Address to the Global Shippers Forum Annual Conference; <https://www.fmc.gov/commissioner-dyes-keynote-address-to-the-global-shippers-forum-annual-conference/>
- June 2018: Address at the Transportation Research Board's (TRB) Maritime Research & Development Conference; <https://www.fmc.gov/commissioner-dye-addressed-the-trbs-maritime-research-development-conference/>
- July 2018: Remarks at the Maritime Administrative Bar Association (MABA) luncheon; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-at-the-maba-luncheon/>
- September 2018: Remarks to the National Retail Federation's (NRF) Strategic Supply Chain Council & Trade Advisory Committee; <https://www.fmc.gov/commissioner-dye-meets-with-nrfs-strategic-supply-chain-council-trade-advisory-committee/>

- September 2018: Remarks at the Port of New York and New Jersey's 18th Annual Port Industry Day; <https://www.fmc.gov/commissioner-dyes-remarks-at-the-port-of-new-york-new-jerseys-18th-annual-port-industry-day/>
 - September 2018: Remarks at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Conference; <https://www.fmc.gov/commissioner-dye-discusses-carrier-service-contract-filing-exemption-fact-finding-28-at-ncbfaa-conference/>
 - October 2018: Remarks at Vessel Ceremony at the Port of Baltimore; <https://www.fmc.gov/commissioner-dye-christens-ship-operating-in-the-us-europe-trade/>
 - October 2018: Remarks at the International Bar Association, Annual Conference; <https://www.fmc.gov/remarks-of-commissioner-dye-international-bar-association-annual-conference-2018/>
 - October 2018, Remarks to the European Maritime Law Organisation, 24th Annual Conference; <https://www.fmc.gov/remarks-of-commissioner-dye-european-maritime-law-organization-24th-annual-conference/>
 - October 2018: Remarks at the Association of Transportation Law Professionals (ATLP); <https://www.fmc.gov/remarks-of-commissioner-dye-association-of-transportation-law-professionals-transportation-forum-xv/>
 - December 2018: Remarks at Journal of Commerce Port Performance North America; <https://www.fmc.gov/remarks-of-commissioner-dye-joc-port-performance-north-america/>
 - March 2019, Remarks to Women's Traffic and Tourism Club Dinner; <https://www.fmc.gov/remarks-of-fmc-commissioner-rebecca-dye-womens-traffic-and-tourism-club-dinner-baltimore-maryland/>
 - March 2019, Remarks of Commissioner Rebecca Dye American Association of Port Authorities; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-american-association-of-port-authorities/>
 - April 2019, Remarks to National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Annual Conference; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-ncbffa-annual-conference-san-antonio-texas/>
 - May 2019, Remarks to American Trucking Association Conference; <https://www.fmc.gov/dye-american-trucking-association/>
 - May 2019, Remarks to Dye American Cotton Shippers Association; <https://www.fmc.gov/dye-american-cotton-shippers-association/>
 - May 2019, Statement Before the U.S. Surface Transportation Board Oversight Hearing on Demurrage and Accessorial Charges; <https://www.fmc.gov/statement-of-dye-stb-demurrage/>
 - June 2019, Remarks at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Conference; <https://www.fmc.gov/fmc-commissioner-rebecca-dye-remarks-at-the-ncbfaa-conference/>
 - September 2019, Remarks to Retail Industry Leaders Association's (RILA) Transportation Executives; <https://www.fmc.gov/dye-addresses-rila-transportation-executives/>
 - September 2019, Malcom McLean Award Acceptance Remarks; <https://www.fmc.gov/dye-malcolm-mclean-award-acceptance-remarks/>
 - September 2020: Remarks at National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Panel: A Conversation with FMC; <https://www.fmc.gov/three-commissioners-participate-in-ncbfaa-panel-a-conversation-with-fmc/>
 - October 2021, Remarks to the 2021 South Carolina International Trade Conference; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-2021-south-carolina-international-trade-conference/> and
 - October 2022, Remarks at Western Cargo Conference (WESCCON); <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-at-wescon-in-san-diego/>.
19. List all public statements you have made during the past ten years, including statements in news articles and radio and television appearances, which are on topics relevant to the position for which you have been nominated, including dates. Include a link to each statement when possible. If a link is not available, provide a digital copy of the statement when available.
- Commissioner Dye Releases Final Report for Fact Finding No. 29, May 31, 2022; <https://www.fmc.gov/commissioner-dye-releases-final-report-for-fact-finding-no-29/>

- FMC Receives Fact Finding No. 29 Final Recommendations & Intermodal Equipment Report, May 19, 2022; <https://www.fmc.gov/fmc-receives-fact-finding-29-final-recommendations-intermodal-equipment-report/>
- FMC Launches Instructional Video on How to File Complaints, April 25, 2022; <https://www.fmc.gov/fmc-launches-instructional-video-on-how-to-file-complaints/>
- Testimony of Commissioner Dye before Congress: “Executive Session and Ocean Shipping Reform Act Hearing,” March 3, 2022; <https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-executive-session-and-ocean-shipping-reform-act-hearing/>
- Commissioner Dye Explains Options for Filing Complaints at FMC, February 15, 2022; <https://www.fmc.gov/commissioner-dye-explains-options-for-filing-complaints-at-fmc/>
- Commission Invites Comments on Benefits of New Demurrage & Detention Rule, February 4, 2022; <https://www.fmc.gov/commission-invites-comments-on-benefits-of-new-demurrage-detention-rule/>
- New Supply Chain Initiatives Announced at FMC Meeting, November 17, 2021; <https://www.fmc.gov/new-supply-chain-initiatives-announced-at-fmc-meeting/>
- Remarks of Commissioner Rebecca Dye on Fact Finding No. 29 Interim Recommendations, July 28, 2021; <https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-on-fact-finding-29-interim-recommendations/>
- FMC Hears Proposals Addressing Supply Chain and Cruise Issues, July 28, 2021; <https://www.fmc.gov/fmc-hears-proposals-addressing-supply-chain-and-cruise-issues/>
- Testimony of Commissioner Dye before Congress: “Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain” with Executive Summary of Fact Finding No. 29, June 15, 2021; <https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-impacts-of-shipping-container-shortages-delays-and-increased-demand-on-the-north-american-supply-chain/>
- Statement of Commissioner Rebecca F. Dye Applauding the Creation of the FMC National Shipper Advisory Committee, May 19, 2021; <https://www.fmc.gov/statement-of-commissioner-rebecca-f-dye-applauding-the-creation-of-the-fmc-national-shipper-advisory-committee/>
- Information Demand on Detention & Demurrage Practices to be Issued, February 17, 2021; <https://www.fmc.gov/information-demand-on-detention-demurrage-practices-to-be-issued/>
- Fact Finding No. 29: Advice to the Trade, December 17, 2020; <https://www.fmc.gov/fact-finding-29-advice-to-the-trade/>
- FMC Receives Briefings at December Meeting, December 10, 2020; <https://www.fmc.gov/fmc-receives-briefings-at-december-meeting/>
- Commission Approves Supplemental Order Expanding Fact Finding 29 Authority, November 20, 2020; <https://www.fmc.gov/commission-approves-supplemental-order-expanding-fact-finding-29-authority/>
- Commission Extends Temporary Exemption of Certain Service Contract Filing Requirements, October 1, 2020; <https://www.fmc.gov/commission-extends-temporary-exemption-of-certain-service-contract-filing-requirements/>
- Three Commissioners Participate in NCBFAA Panel: A Conversation with the FMC, September 29, 2020; <https://www.fmc.gov/three-commissioners-participate-in-ncbfaa-panel-a-conversation-with-fmc/>
- Commissioner Dye Completes Work in NY & NJ, Turns Attention to New Orleans, August 4, 2020; <https://www.fmc.gov/commissioner-dye-completes-work-in-ny-nj-turns-attention-to-new-orleans/>
- Dye Covid-19 Supply Chain Investigation Shifts Focus to NY/NJ in Phase Two, July 16, 2020; <https://www.fmc.gov/dye-covid-19-supply-chain-investigation-shifts-focus-to-ny-nj-in-phase-two/>
- Commissioner Dye Announces Findings of San Pedro Bay Discussions, June 17, 2020; <https://www.fmc.gov/commissioner-dye-announces-findings-of-san-pedro-bay-discussions/>
- Shipper Group Recognizes Commissioner Dye for Her Leadership on Supply Chain Issues, May 29, 2020; <https://www.fmc.gov/shipper-group-recognizes-commissioner-dye-for-her-leadership-on-supply-chain-issues/>

- act Finding No. 29 Innovation Teams Identify Information Helpful to Mitigating Covid-19 Impacts on Supply Chain, May 14, 2020; <https://www.fmc.gov/fact-finding-29-teams-covid-19-impacts-supply-chain/>
- Commission Issues New Guidance on Detention & Demurrage, April 28, 2020; <https://www.fmc.gov/new-guidance-detention-demurrage/>
- Commission Provides Temporary Relief from Certain Service Contract Filing Requirements, April 27, 2020; <https://www.fmc.gov/commission-provides-temporary-relief-service-contract-filing/>
- Fact Finding No. 29 Supply Chain Innovation Teams to Begin Work, April 6, 2020; <https://www.fmc.gov/fact-finding-29-teams-to-begin-work/>
- Commissioner Dye Leading FMC Initiative to Address Urgent COVID-19 Supply Chain Impacts, March 31, 2020; <https://www.fmc.gov/dye-leading-fmc-initiative-address-urgent-covid-19-supply-chain-impacts/>
- Malcom McLean Award Presented to Commissioner Dye, September 13, 2019; <https://www.fmc.gov/malcom-mclean-award-presented-to-commissioner-dye/>
- Commissioner Rebecca Dye's Malcom McLean Award Acceptance Remarks, September 9, 2019; <https://www.fmc.gov/dye-malcolm-mclean-award-acceptance-remarks/>
- Proposed Interpretive Rule on Demurrage and Detention Issued, September 13, 2019; <https://www.fmc.gov/proposed-interpretive-rule-on-demurrage-and-detention-issued/>
- Commission Approves Dye's Final Recommendations on Detention and Demurrage, September 6, 2019; <https://www.fmc.gov/commission-approves-dyes-final-recommendations-on-detention-and-demurrage/>
- Commissioner Dye Addresses RILA Transportation Executives, September 5, 2019; <https://www.fmc.gov/dye-addresses-rila-transportation-executives/>
- Commissioner Dye Represents the Federal Maritime Commission at the U.S.-Japan Maritime Bilateral Meeting in Washington, DC, September 5, 2019; <https://www.fmc.gov/dye-maritime-bilateral-dc/>
- Dye to Begin Last Phase of Detention & Demurrage Investigation, March 1, 2019; <https://www.fmc.gov/dye-to-begin-last-phase-of-detention-demurrage-investigation/>
- Acting Chairman Khouri & Commissioner Dye Address Transportation Legal Professionals, November 5, 2018; <https://www.fmc.gov/acting-chairman-khouri-commissioner-dye-address-transportation-legal-professionals/>
- Commissioner Dye Christens Ship Operating in the U.S.-Europe Trade, October 3, 2018; <https://www.fmc.gov/commissioner-dye-christens-ship-operating-in-the-us-europe-trade/>
- Port of New York & New Jersey Added to Detention & Demurrage Field Interview Itinerary, October 3, 2018; <https://www.fmc.gov/port-of-new-york-new-jersey-added-to-detention-demurrage-field-interview-itinerary/>
- Detention & Demurrage Filed Interview Locations Announced, September 28, 2018; <https://www.fmc.gov/detention-demurrage-field-interview-locations-announced/>
- Commissioner Dye Discusses Carrier Service Contract Filing Exemption and Fact Finding 28 at NCBFAA Conference, September 28, 2018; <https://www.fmc.gov/commissioner-dye-discusses-carrier-service-contract-filing-exemption-fact-finding-28-at-ncbfaa-conference/>
- Commissioner Dye's Remarks at the Port of New York & New Jersey's 18th Annual Port Industry Day, September 24, 2018; <https://www.fmc.gov/commissioner-dyes-remarks-at-the-port-of-new-york-new-jerseys-18th-annual-port-industry-day/>
- Commission Reviews Work on Fact Finding 28 & Regulatory Reform Initiative, September 19, 2018; <https://www.fmc.gov/commission-reviews-work-on-fact-finding-28-regulatory-reform-initiative/>
- Commissioner Dye Meets with NRF's Strategic Supply Chain Council & Trade Advisory Committee, September 5, 2018; <https://www.fmc.gov/commissioner-dye-meets-with-nrfs-strategic-supply-chain-council-trade-advisory-committee/>
- Commissioner Dye Represents FMC at U.S.-China Bilateral Maritime Consultations, April 25, 2018; <https://www.fmc.gov/commissioner-dye-represents-fmc-at-us-china-bilateral-maritime-consultations/>

- FMC Issues Information Demands in Detention & Demurrage Investigation, April 2, 2018; <https://www.fmc.gov/fmc-issues-information-demands-in-detention-demurrage-investigation/>
- Commission Orders Formal Investigation in Detention & Demurrage Case, March 5, 2018; <https://www.fmc.gov/commission-orders-formal-investigation-in-detention-demurrage-case/>
- Statement of Commissioner Rebecca Dye at Hearings on the Petition of the Coalition for Fair Port Practices, January 16, 2018; <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-hearings-on-the-petition-of-the-coalition-for-fair-port-practices/>
- Supply Chain Innovation Teams Report Published, December 7, 2017; <https://www.fmc.gov/supply-chain-innovation-teams-report-published/>
- Commissioner Dye Addresses Pacific Northwest Waterways Association's (PNWA) Annual Meeting, October 18, 2017; <https://www.fmc.gov/commissioner-dye-addresses-pnwa-annual-meeting/>
- Commissioner Dye Participates on Panel at AAPA Annual Convention, October 3, 2017; <https://www.fmc.gov/commissioner-dye-participates-on-panel-at-aapa-annual-convention-in-long-beach/>
- Commissioner Dye Addresses Global Liner Shipping Asia Forum in Singapore on Supply Chain Visibility and U.S. Regulatory Reform, September 5, 2017; <https://www.fmc.gov/commissioner-dye-addresses-global-liner-shipping-asia-forum-in-singapore-on-supply-chain-visibility-and-us-regulatory-reform/>
- FMC Launches Export Phase of Supply Chain System Information Initiative, July 11, 2017; <https://www.fmc.gov/fmc-launches-export-phase-of-supply-chain-system-information-initiative/>
- Commissioner Dye Addresses Agricultural Transportation Coalition Annual Meeting, June 8, 2017; <https://www.fmc.gov/commissioner-dye-addresses-agricultural-transportation-coalition-annual-meeting/>
- U.S. Senate Subcommittee Hearing on Maritime Transportation, May 9, 2017; <https://www.fmc.gov/senate-subcommittee-hearing-on-maritime-transportation/>
- Commissioner Dye Testifies to Congress Regarding Maritime Transportation: Opportunities and Challenges for the Maritime Administration and Federal Maritime Commission, May 9, 2017; <https://www.fmc.gov/commissioner-rebecca-dye-testifies-to-congress-regarding-maritime-transportation-opportunities-and-challenges-for-the-maritime-administration-and-federal-maritime-commission/>
- Information Infrastructure is Key to American Economic Competitiveness, December 6, 2016; <https://www.fmc.gov/information-infrastructure-is-key-to-american-economic-competitiveness/>
- Statements on Passing of Former FMC Chairman Helen Bentley, August 8, 2016; <https://www.fmc.gov/statements-on-passing-of-former-fmc-chairman-helen-bentley/>
- FMC Votes on Rulemakings, Provides Briefings on Global Shipping Issues, July 21, 2016; <https://www.fmc.gov/fmc-votes-on-rulemakings-provides-briefings-on-global-shipping-issues/>
- Senate Confirms Three to Serve on Federal Maritime Commission, June 30, 2016; <https://www.fmc.gov/senate-confirms-three-to-serve-on-federal-maritime-commission/>
- FMC's Supply Chain Innovation Teams Launched Today, May 3, 2016. <https://www.fmc.gov/fmcs-supply-chain-innovation-teams-launched-today/>
- FMC Briefed on Supply Chain Innovation Team Launch and Seeks Comment on Two Rulemakings, April 20, 2016; <https://www.fmc.gov/fmc-briefed-on-supply-chain-innovation-team-launch-and-seeks-comment-on-two-rulemakings/>
- Commissioner Dye Updates FMC on Supply Chain Initiative, April 20, 2016; <https://www.fmc.gov/commissioner-dye-updates-fmc-on-supply-chain-innovation-initiative/>
- Supply Chain Innovation Team Launch Scheduled, March 24, 2016; <https://www.fmc.gov/supply-chain-innovation-team-launch-scheduled/>
- Chairman Cordero Announces Commissioner Dye to Lead Supply Chain Innovation Project, February 1, 2016. <https://www.fmc.gov/chairman-cordero-announces-commissioner-dye-to-lead-supply-chain-innovation-project/>

- Commissioner Dye Votes Against Final Rule Concerning OTIs, October 22, 2015; <https://www.fmc.gov/commissioner-dye-votes-against-final-rules-concerning-otis/>
- Public Forum-Gulf Coast Ports, October 27, 2014; <https://www.fmc.gov/public-forum-gulf-coast-ports/>
- Statement of Commissioner Rebecca Dye on Docket 13-05 Regulations Governing Ocean Transportation Intermediaries, September 26, 2014; <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-on-docket-13-05-regulations-governing-ocean-transportation-intermediary-licensing/>
- Statement of Commissioner Rebecca Dye on Revised Timetable for Retrospective review of Existing Rules to Include Service Contract Rules, February 13, 2013; <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-revised-timetable-for-retrospective-review-of-existing-rules-to-include-service-contract-rules/>
- Statement of Commissioner Rebecca Dye: Passenger Vessel Financial Responsibility Requirements, February 13, 2013; <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-passenger-vessel-financial-responsibility-requirements/>
- Statement of Commissioner Rebecca Dye: Ocean Transportation Intermediary Advanced Notice of Proposed Rulemaking, December 19, 2012. <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-ocean-transportation-intermediary-advanced-notice-of-proposed-rulemaking-2/>
- Statement of Commissioner Rebecca Dye on Study of U.S. Inland Containerized Cargo Moving Through Canadian and Mexican Seaports, July 27, 2012; <https://www.fmc.gov/statement-of-fmc-commissioner-dye-on-study-of-u-s-inland-containerized-cargo-moving-through-canadian-and-mexican-seaports/>
- Comments of FMC Commissioner Rebecca F. Dye at the Canadian American Business Council, The Dragon in the Room: China's Impact on Canada/U.S. Issues, June 7, 2012; <https://www.fmc.gov/comments-of-fmc-commissioner-rebecca-f-dye-at-the-canadian-american-business-council-the-dragon-in-the-room-chinas-impact-on-canada-u-s-issues/>
- Statement of Commissioner Rebecca Dye on Review of NVOCC Negotiated Rate Arrangements April 18, 2012, April 24, 2012; <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-on-review-of-nvocc-negotiated-rate-arrangements-april-18-2012/>
- Comments of Federal Maritime Commissioner Rebecca F. Dye at the American Metal Market Moving Metals Conference, December 9, 2011; <https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-american-metal-market-moving-metals-conference/>
- Statement of Commissioner Rebecca Dye regarding Revisions to the Commission's Passenger Vessel Regulations on September 8, 2011, September 14, 2011; <https://www.fmc.gov/statement-of-commissioner-rebecca-dye-regarding-revisions-to-the-commissions-passenger-vessel-regulations-on-september-8-2011/>
- Senate Confirms Rebecca F. Dye and Mario Cordero as FMC Commissioners, April 15, 2011; <https://www.fmc.gov/senate-confirms-rebecca-f-dye-and-mario-cordero-as-fmc-commissioners/>

Prior to 2011, the Commission's Press Releases were limited in scope and Commissioner Statements and Remarks were not posted with the same regularity or frequency as in recent years.

20. List all digital platforms (including social media and other digital content sites) on which you currently or have formerly operated an account, regardless of whether or not the account was held in your name or an alias. Include the full name of an "alias" or "handle", including the complete URL and username with hyperlinks, you have used on each of the named platforms. Indicate whether the account is active, deleted, or dormant. Include a link to each account if possible.

None.

21. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or non-governmental capacity and specify the date and subject matter of each testimony.

- Committee on Commerce, Science, and Transportation, U.S. Senate, four appearances:
 - July 31, 2002, Nomination Hearing;
 - November 30, 2010, Nomination Hearing; <https://www.fmc.gov/statement-of-commissioner-rebecca-f-dye-before-the-senate-committee-on-commerce-science-and-transportation/>

- May 9, 2017, Opportunities and Challenges for the Maritime for Administration and the Federal Maritime Commission <https://www.fmc.gov/commissioner-rebecca-dye-testifies-to-congress-regarding-maritime-transportation-opportunities-and-challenges-for-the-maritime-administration-and-federal-maritime-commission/>; and
- March 3, 2022, Ocean Shipping Reform Act. <https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-executive-session-and-ocean-shipping-reform-act-hearing/>
- Subcommittee on Coast Guard and Maritime Transportation, Committee on Transportation and Infrastructure, U.S. House of Representatives, six appearances:
 - April 15, 2008, Fiscal Year 2009 Federal Maritime Commission Budget Request;
 - June 19, 2008, Management of the Federal Maritime Commission;
 - May 13, 2009, Fiscal Year 2010 Federal Maritime Commission Budget Request;
 - March 17, 2010, Capacity of Vessels to Meet U.S. Import and Export Requirements; <https://www.fmc.gov/chairman-lidinsky-testifies-to-congress-regarding-vessel-capacity-issues-and-fmc-fact-finding-investigation/>
 - June 30, 2010, Update on Federal Maritime Commission's Examination of Vessel Capacity; <https://www.fmc.gov/commissioner-dye-testifies-to-congress-regarding-ocean-vessel-capacity-shipping-container-availability-and-fact-finding-investigation-number-26/>; and
 - June 15, 2021, Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain. <https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-impacts-of-shipping-container-shortages-delays-and-increased-demand-on-the-north-american-supply-chain/>

22. Given the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated, what in your background or employment experience do you believe affirmatively qualifies you for appointment to the position for which you have been nominated, and why do you wish to serve in that position?

I believe my over 40 years of knowledge in matters concerning maritime law and policy, including my experience as a Federal Maritime Commissioner, qualifies me for this position. If confirmed, I believe that my in-depth expertise and other qualifications will allow me to successfully discharge the responsibilities of the position for which I have been nominated. I believe it is an honor to serve the people of the United States in the position for which I have been nominated.

23. What do you believe are your responsibilities, if confirmed, to ensure that the department/agency has proper management and accounting controls, and what experience do you have in managing a large organization?

If confirmed, I will continue to cooperate with the Chairman of the Federal Maritime Commission to ensure that the Commission has proper management and accounting controls. In the absence of a Federal Maritime Commission Chairman from November 2006 to June 2009, I performed the management duties of Chairman for the agency in cooperation with my fellow commissioners and am familiar with all management and accounting requirements of the agency.

24. What do you believe to be the top three challenges facing the department/agency, and why?

As a small agency, the Federal Maritime Commission is challenged to enforce the law strategically in order to use limited resources wisely. As an independent agency, the Federal Maritime Commission is challenged to enforce the law independently after considering all relevant viewpoints and other legal mandates of the Commission. Finally, the Commission is challenged today to enforce the law and other requirements of the agency, including working to improve the U.S. international ocean shipping freight delivery system, in accordance with the purposes of our organic statute, the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, and the Ocean Shipping Reform Act of 2022.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers. Please include information related to retirement accounts, such as a 401(k) or pension plan. None.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation, or practice with any business, association, or other organization during your appointment? If so, please explain. None.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest. None.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last ten years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest. None.

5. Identify any other potential conflicts of interest, and explain how you will resolve each potential conflict of interest.

I am unaware of any potential conflicts of interest at this time. If any potential conflicts arise, I will recuse myself from consideration of the matters involved.

6. Describe any activity during the past ten years, including the names of clients represented, in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy. None.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics, professional misconduct, or retaliation by, or been the subject of a complaint to, any court, administrative agency, the Office of Special Counsel, an Inspector General, professional association, disciplinary committee, or other professional group?

If yes:

- a. Provide the name of court, agency, association, committee, or group;
- b. Provide the date the citation, disciplinary action, complaint, or personnel action was issued or initiated;
- c. Describe the citation, disciplinary action, complaint, or personnel action;
- d. Provide the results of the citation, disciplinary action, complaint, or personnel action.

No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? If so, please explain. No.

3. Have you or any business or nonprofit of which you are or were an officer ever been involved as a party in an administrative agency proceeding, criminal proceeding, or civil litigation? If so, please explain.

I was the Plaintiff in a civil divorce proceeding for which a Final Divorce Decree was issued on August 27, 2008.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain. No.

5. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion, or any other basis? If so, please explain. No.

6. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination. None.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees, and that your department/agency endeavors to timely comply with requests for information from individual Members of Congress, including requests from members in the minority? Yes.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistleblowers from reprisal for their testimony and disclosures? Yes.

3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee? Yes.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes.

RÉSUMÉ OF REBECCA F. DYE

PROFESSIONAL BACKGROUND

Federal Maritime Commission, Washington, DC

Commissioner

December 2002–Present

Nominated by President George W. Bush and renominated and confirmed by the United States Senate for successive terms to the Federal Maritime Commission.

Oversee international system of ocean transportation of over \$4 trillion annually in containerized import and export cargo.

Enforce the Shipping Act competition regime among container vessel operators, U.S. seaports, and marine terminals.

Developed and execute successful commercial supply chain innovation initiative to increase U.S. international freight delivery system performance; involve ocean carriers, U.S. importers and exporters, seaports and marine terminal operators, truckers, shipping intermediaries, and railroads.

- Prioritize regulatory deregulation to benefit the U.S. economy.
- Champion free market solutions for transportation inefficiency.
- Conduct groundbreaking investigations with shipping reforms for American exporters, importers, truckers, and shipping intermediaries.

Transportation and Infrastructure Committee, U.S. House of Representatives

Subcommittee Counsel and Staff Director

January 1995–December 2002

Supervised development and execution of over \$7 billion in annual Federal budget authority for maritime transportation programs.

Supervised Subcommittee staff performance in all matters related to Subcommittee Jurisdiction.

Advanced the policies of members of Congress on all matters related to maritime transportation. Exercised oversight over ocean transportation, marine environmental pollution, maritime and waterways safety, law enforcement, International Maritime Organization agreements, and other matters related to maritime transportation of passengers, goods, and commodities.

Developed and negotiated enactment of major maritime legislation, including the Ocean Shipping Reform Act of 1998, which successfully deregulated international ocean shipping, and the Maritime Transportation Security Act of 2002, which established a port and vessel security regime following the attacks of September 11, 2001.

Merchant Marine and Fisheries Committee, U.S. House of Representatives

Minority Counsel

February 1987–January 1995

Supervised development and execution of over \$5 billion in annual Federal budget authority for maritime transportation programs. Advanced the policies of members of Congress on all matters related to maritime transportation. Exercised leadership role in enactment of Oil Pollution Act of 1990, following the Exxon Valdez oil spill in Prince William Sound, Alaska.

Office of the Chief Counsel, Maritime Administration, Washington, DC

Legislative Attorney

June 1985–February 1987

Developed and coordinated clearance of Maritime Administration legislation, policy positions, and Congressional testimony. Provided legal and policy advice, including on matters related to Federal ship financing and cargo preference.

United States Coast Guard Academy, New London, CT

Commissioned Officer, Law Instructor

August 1983–June 1985

Instructed Coast Guard cadets on a variety of legal topics, including the legislative process, military law and procedure, tort liability, and selected administrative, law enforcement, and international law topics.

Office of the General Counsel, United States Department of Transportation, Washington, DC

Commissioned Officer, Legislative Attorney

June–August 1983

Developed and coordinated clearance of Department of Transportation maritime legislation, policy positions, and Congressional testimony. Provided legal and policy advice concerning Carriage of Goods at Sea and other transportation matters.

*Office of the Chief Counsel, United States Coast Guard Headquarters,
Washington, DC
Commissioned Officer, Legislative Attorney
August 1979–June 1983*

Developed and coordinated clearance of Coast Guard legislation, policy positions, and Congressional testimony. Provided legal and policy advice concerning Coast Guard authority over vessel and waterways safety and Federal user fee financing. Certified as Trial and Defense Counsel in General and Special Courts-Martial. Served as Chief Coast Guard White House Military Social Aide.

EDUCATION

University of North Carolina at Chapel Hill, Bachelor of Arts Degree
University of North Carolina School of Law, Juris Doctorate Degree

BAR MEMBERSHIP

Admitted to North Carolina State Bar

SLICK WORK:
AN ANALYSIS OF THE OIL POLLUTION ACT OF 1990

CYNTHIA M. WILKINSON*

L. PITTMAN**

REBECCA F. DYE***

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*Majority Counsel, Merchant Marine and Fisheries Committee, U.S. House of Representatives, Washington, D.C. The views expressed by the authors do not necessarily reflect those of the members of the Merchant Marine and Fisheries Committee or the United States House of Representatives.

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I. INTRODUCTION

Long before there was an Exxon Valdez spewing over ten million gallons of crude oil into cold Alaskan waters on March 24, 1989,¹ there was a law establishing a comprehensive compensation and liability scheme for oil discharges into United States waters.² For fifteen years, Congress had debated the need to improve that scheme to no avail.³ Then came the Exxon Valdez oil spill, an incident that highlighted the inadequacies of the existing legal regime as never before, raising the level of national concern and the severity of the congressional response—perhaps too far in light of the actual environmental harm caused by the vast majority of spills each year. More than anything else, that incident provided the driving force for a revamped oil spill law. The Oil Pollution Act of 1990⁴ (OPA), signed by President Bush on August 18, 1990, reflected a new sensitivity to those harmed by oil spills, as well as a pro-environmental stance, triggered in part by a uniform anger at “Big Oil.” The resulting legislation forcefully addresses the shortcomings of the pre-OPA law: inadequate measures for preventing spills; unrealistic and confused clean up plans; weak liability provisions; and a lack of Federal monies for cleanup.

This Article begins by providing an overview of the state of the law before passage of the OPA. The OPA is then discussed in-depth, contrasting and comparing it to the pre-existing law and offering insight into the Act’s key controversies and their resolutions in Congress. Discussion of the OPA begins by looking at provisions of the Act dealing with oil spill prevention and preparedness by addressing Federal removal authority, oil spill contingency plan requirements, and double hull requirements for tank vessels. Next follows a discussion of the OPA’s liability regime, exploring a number of significant provisions: compensation for removal costs and damage incurred, defenses to liability, oil spill trust fund monies, extent of cleanup requirements, claims procedure against responsible parties, limitations on liability, financial responsibility requirements, penalties, natural resource damage compensation, jurisdiction and venue requirements, and preemption. The Article concludes with a discussion of the 1984 Oil Spill Protocols, which attempt to address the problem of oil spills at the international level, and the failure of the United States to ratify the Protocols.

II. THE LAW BEFORE THE OIL POLLUTION ACT OF 1990

Prior to the OPA, section 311 of the Clean Water Act⁵ constituted the chief strategy for cleaning up and recompensing those who had been damaged by a release of oil.⁶ Discharges of oil into or upon the navigable waters of the United States,⁷ the contiguous zone of the United States,⁸ or shorelines adjoining these areas were

¹See generally *Topics Concerning the Exxon Valdez Oil Spill into the Prince William Sound, Alaska, Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 20 (1989) (hereinafter *Exxon Valdez Hearing*).

²Federal Water Pollution Control (Clean Water) Act § 311, 33 U.S.C. § 1321 (1988) (originally enacted as Act of October 18, 1972, Pub. L. No. 92-500, § 2, 86 Stat. 862).

³Jones, *Oil Spill Compensation and Liability Legislation*, 19 ENVTL. L. REP. 10,333, 10,333 (1989).

⁴Pub. L. No. 101-380. 104 Stat. 484 (1990)(codified as amended in scattered sections of the U.S.C.).

⁵33 U.S.C. § 1321 (1988). Citations to section 311 of the Clean Water Act (CWA) may be found at 33 U.S.C. § 1321 (1988); subsections of the CWA correspond identically to those found in the United States Code. The official statutory name of the Act is the Federal Water Pollution Control Act.

⁶Section 311 also covers discharges of hazardous substances, but the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9676 (1988), generally establishes liability and response actions for those incidents. This paper is restricted to a discussion of oil discharges only, although several provisions of the Oil Pollution Act, most notably contingency planning and increased penalties, have ramifications for activities under CERCLA.

⁷Navigable waters are defined as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7) (1988). In turn, “waters of the United States” are broadly defined by regulation to include all waters susceptible now or in the past for use in interstate or foreign commerce, all interstate waters, all other waters affecting interstate or foreign commerce, impoundments of waters otherwise meeting the definition, tributaries to any of the waters, the territorial sea, and wetlands which abut any of these waters. 33 C.F.R. § 328.3(a) (1990). “Territorial seas” is defined in the Clean Water Act as extending from the ordinary low water mark seaward three miles. 33 U.S.C. § 1362(8) (1988). President Reagan extended the territorial sea, for purposes of international law only, to 12 miles in late 1988. Proclamation No. 6928, 54 Fed. Reg. 777 (1988), reprinted in 43 U.S.C. § 1331 note (1988) (Authorization of Appropriations).

⁸The contiguous zone may extend 12 miles seaward from the baseline from which the territorial sea is measured. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958,

Continued

prohibited under this section, as were discharges potentially affecting natural resources claimed by the United States.⁹ As the United States has claimed jurisdiction over fishery resources located within the 200-mile United States Exclusive Economic Zone¹⁰ and continental shelf, as well as migrating anadromous species even beyond these ocean areas,¹¹ this latter reference to natural resources was an important seaward extension of liability for oil discharges.

If a discharge of oil had occurred under the pre-OPA regime, the owners and operators of a vessel or facility from which oil was discharged were required to report the spill¹² to the United States Coast Guard.¹³ Failure to report a spill subjected a discharger to a fine of up to \$10,000 or imprisonment of up to one year.¹⁴ For the discharge itself, civil penalties of up to \$5,000 could be assessed by the Coast Guard.¹⁵ In lieu of a Coast Guard administrative penalty, the Administrator of the Environmental Protection Agency (EPA) was empowered to pursue more stringent action in court if the discharge was the result of willful negligence or willful misconduct within the privity or knowledge of the owner or operator. In that case, penalties could rise to \$250,000 per incident.¹⁶ Section 311(f)(6) authorized the President to designate Federal trustees on behalf of the public for any natural resource which was damaged by the oil spill and allowed suits by these trustees to recover the costs of restoring or replacing harmed natural resources.

Once a covered discharge occurred, or if there was a substantial threat of a discharge, the Clean Water Act authorized various Federal responses. The most basic authority was found under section 311(c)(1), where the President was authorized to “remove or arrange for the removal” of the discharge. While logic dictates that removal cannot occur if only a threat of a discharge exists, “remove” was (and is) defined to include actions necessary to minimize or mitigate damage to the public health or welfare.¹⁷ This could include assembling cleanup equipment at the site, protecting vulnerable coastal areas with containment boom, or relocating birds or animals away from a potential spill area. The President was given this authority rather than a specific Federal agency head to allow delegation to the appropriate entity, recognizing the respective jurisdictions of the United States Coast Guard and the EPA.¹⁸ In addition, other Federal agencies have been employed to assist in cleanup activities, most notably the Department of Defense.¹⁹ If the President acted under the foregoing authority, funding for removal actions came from a Federal fund established under section 311(k) of the Clean Water Act.

The President was not required to act if he determined that the owner or operator was capable of properly cleaning up the discharge. This latter course of action is the norm, as the vast majority of oil spills are small and more easily contained and removed by the operator of the vessel or facility who is almost always physically closest to the discharge.²⁰ Additionally, the Federal government may be slow to “federalize” a spill if a financially solvent spiller is available to foot the bill for cleanup, as Federal dollars for this purpose have been extremely limited.²¹

art. 24, 15 U.S.T. 1606, 1612. *See also* 40 C.F.R. § 300.6 (1990). *See supra* note 7 for the meaning of territorial seas.

⁹ 83 U.S.C. § 1321(b)(1) (1988).

¹⁰ Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983), *reprinted in* 16 U.S.C.A. § 1453, note (West 1985).

¹¹ 16 U.S.C.A. § 1811 (West Supp. 1991).

¹² The Clean Water Act requires that only discharges of “harmful” quantities of oil must be reported. 33 U.S.C. § 1321(b)(3), (5) (1988). This has been defined by regulation to mean any amount of oil which violates a water quality standard or causes a sheen on the water. 40 C.F.R. § 110.4 (1990).

¹³ Exec. Order No. 11,785, 38 Fed. Reg. 21,243 (1973), *amended by* Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983).

¹⁴ 83 U.S.C. § 1321(b)(5) (1988).

¹⁵ *Id.* § 1321(b)(6)(A).

¹⁶ *Id.* § 1321(b)(6)(B).

¹⁷ *Id.* § 1321(a)(8).

¹⁸ Exec. Order No. 11,735, *supra* note 13. Division of authority is determined by the source of the spill. If a vessel or transportation-related facility discharges oil, the Commandant of the Coast Guard is in charge. Other spills are handled by the EPA Administrator.

¹⁹ *The Ability of the Federal, State, and Local Governments to Respond to Oil Spills, Methods of Cleanup, Oil Spill Prevention, and Contingency Planning Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 46 (1989) [hereinafter *Ability Hearing*].

²⁰ *Id.* at 45. *See also* H.R. 1465—*To Establish Limitations on Liability for Damages Resulting from Oil Pollution, to Establish a Fund for the Payment of Compensation for Such Damages, and for Other Purposes Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 40 (1989) [hereinafter H.R. 1465 Hearing].

²¹ *See* discussion regarding Clean Water Act § 311(k), *infra* notes 35–40 and accompanying text.

Under the pre-OPA scheme, discharges from vessels in certain circumstances appeared to be covered by separate but similar authority. Section 311(d) of the Clean Water Act provided that, the Federal government may “coordinate and direct” efforts to clean up or minimize the threat of a discharge caused by a marine disaster. In addition, authority was provided to remove and destroy the vessel, notwithstanding limitations posed by employment and appropriations laws. Additional special authority to handle “imminent and substantial threats” of discharges from facilities could be found in section 311(e). Under this subsection, the President was authorized to secure any necessary relief in Federal court, such as an injunction, through the appropriate United States attorney. Finally, Section 311(b)(6)(c) specifically authorizes the EPA Administrator to mitigate the damage caused by an oil spill to the public health or welfare.

These diverse authorities appear on their face to be overlapping at best, and possibly conflicting. However, the National Contingency Plan (NCP) attempted to untangle the various roles by assigning duties to Federal actors. Section 311(c)(2) of the Clean Water Act required the President to promulgate the NCP.²² It served as the game plan for the Federal government to minimize the damage from an oil spill. Beyond providing a delineation of Federal responsibilities, the Clean Water Act required the NCP to address key components of an oil spill response strategy: specification of removal techniques;²³ creation of oil spill strike teams to respond to oil spills;²⁴ establishment of a national coordination center for oil spill response;²⁵ procedures governing the use of dispersants;²⁶ and delegation of authority to the states to react to oil spills.²⁷ The President was also directed under subsection 311(G) of the Clean Water Act to supplement the NCP with regulations establishing: procedures for removing spilled oil; criteria for regional and local oil spill removal contingency plans; oil spill prevention requirements; and vessel inspection requirements for oil-carrying tankers. Violations of these regulations subjected the owner or operator of a facility to a civil penalty of up to \$5,000.

Under section 311(f) of the Clean Water Act the owner or operator of the vessel or facility (both onshore and offshore) was liable for the removal costs incurred by any of the authorized Federal parties, as well as costs incurred by the United States or a state to restore or replace damaged natural resources.²⁸ Liability costs were limited to, in the case of a facility, \$50 million; for inland barges the greater of \$125 per gross ton or \$125,000; for tankers which carry oil as cargo, the greater of \$150 per gross ton or \$250,000; and for all other vessels, \$150 per gross ton.²⁹ Additionally, the President was authorized at his discretion to lower limits of liability for classes of facilities to \$8 million.³⁰

These limits of liability could be breached if the discharge was caused by willful negligence or by willful misconduct within the privity and knowledge of the owner or operator.³¹ On the other hand, owners and operators could completely absolve themselves of responsibility if they could prove that the discharge was caused solely by an act of God, an act of war, or negligence on the part of the Federal government. The owner or operator could also escape liability if she could prove that a third party was the sole cause of the discharge, in which case liability attached to the third party.³² If the owner or operator of a discharging vessel or facility incurred removal costs, and could prove that he or she was entitled to a defense to liability, the owner or operator could recover removal expenses from the United States under subsection 311(i).

The pre-OPA scheme required owners and operators of all vessels over 300 tons which used any United States port to provide evidence of sufficient finances to cover the applicable liability limits.³³ Vessels which did not provide evidence of financial

²²The NCP prior to the Oil Pollution Act is found at 40 C.F.R. § 300 (1989).

²³*Id.* §§ 300.51–58 (1989).

²⁴*Id.* § 300.34 (1989).

²⁵*Id.* § 300.36 (1989). The National Response Center is located at the U.S. Coast Guard headquarters in Washington, D.C.

²⁶*Id.* §§ 300.81–86 (1989).

²⁷40 C.F.R. § 300.24 (1989).

²⁸Only this limited cause of action running to government entities is provided by the Clean Water Act. Private claims can be pursued under state or common law.

²⁹33 U.S.C. § 1321 (1988).

³⁰*Id.* § 1321(q).

³¹*Id.* § 1321(g).

³²*Id.* However, the owner or operator must pay first and then bring suit against the third party to recover those costs.

³³*Id.* § 1321(p)(1). Barges that are not self-propelled and that do not carry oil or fuel as cargo are excepted.

responsibility could be denied entry to, or be detained in, United States ports. The owners or operators of such vessels could be subject to a \$10,000 fine.³⁴

Federal activities under section 311 were paid from a revolving fund established under subsection 311(k).³⁵ Appropriations of \$35 million were authorized for the fund,³⁶ a sum which would be wholly inadequate to fund Federal actions for all of the thousands of spills reported each year.³⁷ In addition, actual appropriations never even reached that paltry amount.³⁸ At the time of the Exxon Valdez disaster, the section 311(k) fund had been depleted to less than \$4 million at a time when Exxon was spending \$1 million a day.³⁹ Such shortages can easily lead to a less than enthusiastic Federal response effort.⁴⁰

Other oil spill liability schemes and accompanying funds were provided for in the Deepwater Port Act of 1974⁴¹ for deepwater ports,⁴² title III of the Outer Continental Shelf Lands Act Amendments of 1978⁴³ for outer continental shelf oil and gas facilities,⁴⁴ and the Trans-Alaska Pipeline Authorization Act⁴⁵ for oil carried through the trans-Alaska pipeline.⁴⁶ In addition to these Federal laws, states were not prohibited from establishing their own liability regimes and funds. Many states have liability laws for oil spills and several have established dedicated funds for oil spill removal and compensation.⁴⁷ This patchwork of Federal and state laws set the stage for the development of an improved comprehensive oil pollution regime.

III. THE OIL POLLUTION ACT OF 1990

The nine titles of the Oil Pollution Act (OPA)⁴⁸ expand on the existing Clean Water Act liability scheme while adding substantial new provisions on oil spill prevention, increasing penalties for spills, and strengthening oil spill response capabilities.⁴⁹ For the first time, the OPA consolidates Federal oil spill laws under a single program, with uniform Federal liability and compensation schemes. Although beyond the scope of this paper, the Act also establishes new oil spill research programs,⁵⁰ and provides special protections for selected geographic areas,⁵¹ including Prince William Sound, Alaska,⁵² the site of the Exxon Valdez disaster.

A. Preparedness and Prevention of Oil Spills

For the first 14 years that oilspill liability legislation was considered by the Congress, the focus was solely on liability for oil spills and compensation ensuing after a spill occurred.⁵³ However, the magnitude of possible spills was highlighted by the Exxon Valdez situation, which indicated more than any other recent event that prevention of a spill should be the primary goal of oil spill legislation. Absent this, better preparedness for containment and cleaning up an oil spill is the key to minimizing the impacts from an oil spill. Accordingly, the liability and compensation re-

³⁴ 33 U.S.C. § 1321(p)(4) (1988).

³⁵ Another Federal fund for oil spill costs existed prior to enactment of the Oil Pollution Act. 26 U.S.C. § 9509 (1988). However, the availability of this fund was contingent upon the enactment of a comprehensive oil spill act such as the Oil Pollution Act of 1990.

³⁶ 33 U.S.C. § 1321(k)(1) (1988), *repealed by* Oil Pollution Act of 1990, Pub. L. No. 101-380, § 2002(b)(2), 104 Stat. 507. As a revolving fund, sums paid out of the fund are to be recovered from the responsible spillers, but this has not proved out in practice. *H.R. 1465 Hearing, supra* note 20, at 202.

³⁷ This number has been variably given as 5,700, 8,500, or 8,800. *H.R. 1465 Hearing, supra* note 20 at 40; *Ability Hearing, supra* note 19, at 23 & 45.

³⁸ *H.R. 1465 Hearing, supra* note 20, at 202.

³⁹ *Exxon Valdez Hearing, supra* note 1, at 22-23; *see also H.R. 1465 Hearing, supra* note 20, at 202.

⁴⁰ *Exxon Valdez Hearing, supra* note 1, at 23.

⁴¹ 33 U.S.C. §§ 1601-1524 (1988).

⁴² *Id.* § 1507, *repealed by* OPA § 2003(a)(2).

⁴³ 43 U.S.C.A. §§ 1811-1824 (West 1988).

⁴⁴ *Id.* §§ 1811-1824, *repealed by* OPA § 2004.

⁴⁵ U.S.C.A. §§ 1651-1655 (West 1988 & Supp. 1992).

⁴⁶ *Id.* § 1653.

⁴⁷ *See Costello & Gurevitz, Liability Provisions in State Oil Spill Laws: A Brief Summary, Congressional Research Service Report to Congress* (Oct. 1, 1990). Twenty-four states have specific oil spill laws. *Id.*

⁴⁸ Pub. L. No. 101-380, 104 Stat. 484(1990) (codified as amended in scattered sections of the U.S.C.).

⁴⁹ In many cases, the Oil Pollution Act amended existing Clean Water Act section 311 provisions. In other case, new free-standing law was created.

⁵⁰ OPA § 7001, 83 U.S.C.A. § 2761 (West Supp. 1991).

⁵¹ OPA §§ 8001-8302, 43 U.S.C.A. §§ 1651-1655 (West Supp. 1991).

⁵² OPA §§ 5001-1507, 33 U.S.C.A. § 2731-2737 (West Supp. 1991).

⁵³ *See Jones, supra* note 3, at 10,337.

gime found in previous oil spill bills was expanded to include substantial prevention and improved planning provisions.

1. Federal Removal Authority and Contingency Plans

From the beginning, the goal in developing comprehensive oil spill legislation was to ensure an integrated federal, state, local, and private industry system of response and removal. To achieve this end, the drafters of the OPA first had to establish clear lines of responsibility. A common concern voiced by environmentalists, the oil industry, Federal officials, and others was that under the old system, no one was really in charge. As discussed above, under previous law, the President had two choices in dealing with an oil spill: monitor a spiller's cleanup effort or "federalize" the cleanup effort.⁵⁴ However, the legislative mandate triggering federalization was far from clear.

The OPA now requires the President, in accordance with the NCP, to ensure the "effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge . . . of oil."⁵⁵ Under the umbrella of this general mandate, a third option is available to the President. The President, in addition to monitoring the cleanup efforts of the spiller or federalizing the spill, may actually direct the activities of the responsible parties and others.⁵⁶ However, when the spill poses a substantial threat to the public health or welfare of the United States,⁵⁷ the President is limited to federalizing the spill or directing the spiller's removal efforts.⁵⁸

The OPA also establishes limited immunity under Federal law for persons involved in an oil spill cleanup, including those persons retained or directed by the Coast Guard, and those rendering care, assistance, or advice consistent with the NCP.⁵⁹ The authors did not want the Federal government to bear the burden of cleaning up all spills. Thus, it was necessary to ensure that private contractors would be available to assist owners and operators of vessels and facilities when a spill occurs. This immunity provision was deemed to be indispensable to cleanup contractors and essential to ensuring a nationwide network of cleanup contractors.⁶⁰ Without it, legislators were told, it would be nearly impossible to assure an adequate number of cleanup contractors. When questioned about why there would be a problem when contractors had always been available in the past, one answer was always forthcoming—the Exxon Valdez had changed everything.

The contractor immunity provided for in the OPA, however, is limited: immunity does not extend to a responsible party, to a response action taken under the Comprehensive Environmental Response, Compensation and Liability Act, when there is personal injury or wrongful death, or if the contractor is grossly negligent or engages in willful misconduct.⁶¹

In addition to broadening the authority of the Federal government to respond to an oil spill, the OPA also expands and strengthens the role of the NCP.⁶² As stated above, the NCP already existed under the Clean Water Act,⁶³ but the Exxon Valdez

⁵⁴ 88 U.S.C. § 1821(c)(1) (1988). See also *supra* notes 17–21 and accompanying text.

⁵⁵ OPA § 4201(a), 33 U.S.C.A. § 1321(c)(1) (West Supp. 1991).

⁵⁶ OPA § 4201(a), 33 U.S.C.A. § 1321(c)(D)(B) (West Supp. 1991).

⁵⁷ The Exxon Valdez incident is, as would be expected, an example of the type of spill that would constitute a substantial threat to the public health or welfare. H.R. REP. NO. 653, 101st Cong., 2d Sess. 145–46 (1990).

⁵⁸ OPA § 4201(a), 33 U.S.C.A. § 1321(c)(2) (West Supp. 1991).

⁵⁹ OPA § 4201(a)(4)(A), 33 U.S.C.A. § 1321(c)(4)(A) (West Supp. 1991).

⁶⁰ In August 1990, about 20 oil companies created the Marine Spill Response Corporation (MSRC). MSRC is headquartered in Washington, D.C., and has established five regional response centers in the New York-New Jersey area; Port Everglades, Florida; Lake Charles, Louisiana; Port Hueneme, California; and Seattle, Washington. Each region will have four to six prestaging areas where equipment, and sometimes vessels and personnel, will be located. This will complement existing oil spill cooperatives and independent response contractors.

⁶¹ 33 U.S.C.A. § 1321(c)(4)(B) (West Supp. 1991).

⁶² OPA § 4.201(b), 33 U.S.C.A. § 1321(d) (West Supp. 1991). The NCP also applies to discharges of hazardous substances, and any changes made to it also will affect actions taken under the Comprehensive Environmental Response, Compensation, and Liability Act.

⁶³ 33 U.S.C. § 1821(c)(2) (1988). The existing Federal regulatory structure designed to respond to spills of oil under the Clean Water Act is basically untouched by the Oil Pollution Act. The NCP establishes the National Response Team (NRT), which is a national planning, policy, and coordinating body. The NRT does not respond to spills, but provides guidance and assistance to others before and after a spill. It includes members from 14 federal agencies having environmental responsibilities. The NRT is chaired by the EPA and vice-chaired by the Coast Guard. The NCP also establishes 13 Regional Response Teams (RRTs). There are also planning and policy organizations which do not respond to spills. Each RRT is cochaired by the Coast Guard and

spill highlighted the need to update the plan and provide for a better coordinated system of federal, state, local, and private response and preparedness.

The OPA requires the President to prepare and publish an NCP for addressing the removal of a worst case discharge⁶⁴ of oil and for mitigating or preventing a substantial threat of such a discharge.⁶⁵ Among other requirements are assignment of duties and responsibilities among Federal agencies in coordination with state and local agencies and port authorities; identification, procurement, maintenance, and storage of equipment and supplies; identification of procedures and techniques to be used in removing oil; preparation of a schedule, in cooperation with the states, to deal with the use of dispersants; establishment of procedures to coordinate activities by the Coast Guard strike teams, Federal On-Scene Coordinators,⁶⁶ Coast Guard District Response Groups, and Area Committees; and development of a fish and wildlife response plan.⁶⁷ The President is required to revise and publish the updated NCP not later than one year after the date of enactment.⁶⁸

Within this framework, the Act further establishes a multilayered planning and response mechanism, the "National Planning and Response System." This System provides for a National Response Unit, Coast Guard District Response Groups, Area Committees, Area Contingency Plans, and Tank Vessel and Facility Response Plans.⁶⁹ A description of each follows.

(1) The *National Response Unit*⁷⁰ (renamed the National Strike Force Coordination Center) is a Coast Guard operation that was established in August 1991, at Elizabeth City, North Carolina. It will coordinate private and public responses to a spill. It will serve the important functions of compiling a list of oil spill removal resources, personnel, and equipment worldwide; administering the Coast Guard strike teams; training response personnel around the country; and reviewing contingency and response plans.

(2) A *Coast Guard District Response Group*⁷¹ is established in each of the 10 Coast Guard Districts around the country. Each Group will be comprised of personnel and equipment on call 24 hours a day to respond to oil spills in every port within the district.

(3) *Area Committees*⁷² will be comprised of individuals from federal, state, and local agencies whose function will be to prepare Area Contingency Plans. The President is required to delineate by February 1991 geographic areas for which Area Committees are to be established. All navigable waters, adjoining shorelines, and waters of the Exclusive Economic Zone are to be covered by an Area Contingency Plan.

(4) The *Area Contingency Plans*⁷³ are to ensure the removal of a worst case spill from a vessel or facility operating in or near the area covered by the Plan. One of the chief responsibilities of the National Response Unit and the Area Committees in preparing and reviewing the Plans is ensuring that each Plan fits neatly into the overall response capabilities when implemented in conjunction with the other plans mandated under the OPA. Each Area Committee has 18 months after enactment to submit a Plan to the President, and the President has six months thereafter to review and approve the Plan.⁷⁴

(5) *Tank Vessel and Facility Response Plans*⁷⁵ are to be designed to allow an owner or operator to respond, to the maximum extent practicable, to a worst case discharge of oil or the substantial threat of such a discharge. The lesser standard, meeting a worse case discharge to the maximum extent practicable, was adopted in recognition of the more limited response and planning capabilities of an individual

EPA. See 33 U.S.C.A. § 1321(j) (West Supp. 1991). See also 40 C.F.R. § 300 (1990) (responsibility and organization for response under NCP).

⁶⁴ OPA § 4201(b), 33 U.S.C.A. § 1321(a)(24) (West Supp. 1991), defines a worst case discharge to mean "(A) in the case of a vessel, a discharge in adverse weather conditions or its entire cargo; and (B) in the case of an offshore facility or onshore facility, the largest foreseeable discharge in adverse weather conditions."

⁶⁵ OPA § 4201(b), 33 U.S.C.A. § 1321(d)(2)(J) (West Supp. 1991).

⁶⁶ 40 C.F.R. § 300.33 (1990) directs the Coast Guard and EPA to predesignate On-Scene Coordinators.

⁶⁷ OPA § 4201(b), 33 U.S.C.A. § 1321(d)(2) (West Supp. 1991).

⁶⁸ OPA § 4201(c), 33 U.S.C.A. § 1321(d)(1) (West Supp. 1991).

⁶⁹ OPA § 4202, 33 U.S.C.A. § 1321(j) (West Supp. 1991).

⁷⁰ OPA § 4202(a), 33 U.S.C.A. § 1321(j)(2) (West Supp. 1991).

⁷¹ OPA § 4202(a), 33 U.S.C.A. § 1321(j)(3) (West Supp. 1991).

⁷² OPA § 4202(a), 33 U.S.C.A. § 1321(j)(4) (West Supp. 1991).

⁷³ *Id.*

⁷⁴ *Id.* § 4.202(b), 33 U.S.C.A. § 1321 note (West Supp. 1991) (Implementation of National Planning and Response System).

⁷⁵ OPA § 4202(a), 33 U.S.C.A. § 1321(j)(5) (West Supp. 1991).

owner or operator as opposed to a port *area*. All United States flag tank vessels,⁷⁶ other than public vessels,⁷⁷ are required to develop a plan. All other tank vessels operating on the navigable waters of the United States or transforming oil in a port or place subject to the jurisdiction of the United States must also meet the Response Plan requirements.⁷⁸ Finally, offshore and onshore facilities must have Plans.⁷⁹ For onshore facilities, the requirement is limited to those that, because of their location, could reasonably be expected to cause substantial harm to the environment by discharging into the navigable waters, adjoining shorelines, or the Exclusive Economic Zone.⁸⁰

The requirement that Tank Vessel and Facility Plans be developed consistently with the NCP and Area Contingency Plans and higher burden of response should ensure that even in the most disastrous circumstances there will be adequate response capabilities available, if not in the local area, then from Federal strike teams, or other private resources around the country.

The Presidential regulations for these Tank Vessel and Facility Response Plans are due two years after enactment. The Response Plans themselves are required to be submitted for approval to the President not later than 30 to 36 months after enactment.⁸¹ By then, the NCP will have been updated and the Area Contingency Plans will have been developed, allowing owners and operators to key into those contingency plans in preparing their individual Response Plans. The Coast Guard or the EPA will review each Response Plan, require amendments as necessary, and approve any plan that meets the approval criteria.⁸² In addition, in keeping with the concept of ongoing preparedness, the Response Plans have to be reviewed periodically thereafter.

Covered vessels and facilities are prohibited from operating without a submitted Response Plan beginning two-and-a-half years after enactment, and from operating without an approved Plan three years after enactment.⁸³ Both the Coast Guard and EPA were especially concerned about having to review and approve the large number of Response Plans expected to be submitted to them. The Coast Guard estimates that it alone will have 3,500 facilities and 4,600 tank vessels covered under this section.⁸⁴ This number may prevent review and approval before the deadlines. The drafters of the OPA believed that responsible owners and operators who submitted their Plans in a timely manner should not be punished by this possible government backlog. Therefore, the President is given the authority to allow a vessel or facility to operate up to two years after its Plan has been submitted, provided that the owner or operator certifies that private personnel and equipment have been secured by contract.⁸⁵

In addition to the volume of Response Plans that have to be approved, the agencies were concerned about their potential liability. Specifically, they were apprehensive about putting their imprimatur on a plan only to have an operator who caused an accident point a finger at the Federal government in an attempt to absolve herself from liability. For that reason, a provision was included that sets out clearly that the United States is not liable for any damages resulting from approval of a contingency plan.⁸⁶

The authors of the OPA wanted to ensure that Tank Vessel and Facility Response Plans were comprehensive, effective, and workable. Rather than having a thick, detailed, complicated document on board each vessel and at each facility, the drafters opted for a simple approach. A person who has authority to implement the plan must be designated. That person is responsible for contacting the appropriate Fed-

⁷⁶Tank vessels are defined as vessels that are constructed or adapted to carry, or that carry, oil as cargo or cargo residue. 46 U.S.C. § 2101(3g) (1988).

⁷⁷A public vessel is defined as a vessel owned or bareboat chartered by the United States, a state, or a foreign country for noncommercial purposes. OPA § 1001(29), 33 U.S.C.A. § 2701(29) (West Supp. 1991).

⁷⁸OPA § 4202, 33 U.S.C.A. § 1321(j)(5)(B)(i) (West Supp. 1991).

⁷⁹OPA § 4202, 33 U.S.C.A. § 1321(j)(5)(B)(ii) and (iii) (West Supp. 1991).

⁸⁰OPA § 4202, 33 U.S.C.A. § 1321(j)(5)(B)(iii) (West Supp. 1991).

⁸¹OPA § 4102(b)(4), 33 U.S.C.A. § 1321 note (West Supp. 1991) (Implementation of National Planning and Response System).

⁸²The requirement for Presidential approval and review of Area Contingency Plans is found in section 4202(a) of the OPA, 33 U.S.C.A. § 1321(j)(4)(D) (West Supp. 1991). The requirement for Presidential review and approval for Tank Vessel and Facility Response Plans is found in section 4202(a) of the OPA, 33 U.S.C.A. § 1321(j)(5)(D) (West Supp. 1991).

⁸³OPA § 4202(b)(4)(B), 33 U.S.C.A. § 1321 note (West Supp. 1991) (Implementation of National Planning and Response System).

⁸⁴Telephone interview with Capt. W. F. "Biff" Holt, Division Chief, Marine Environmental Protection, U.S. Coast Guard (Dec. 7, 1990).

⁸⁵OPA § 4202(a), 33 U.S.C.A. § 1321(j)(5)(F) (West Supp. 1991).

⁸⁶OPA § 4202(a), 33 U.S.C.A. § 1321(j)(8) (West Supp. 1991).

eral official and contractors enlisted to provide equipment and personnel. The authors also considered it important to have adequate response capability on call, under contract, and capable of responding to a large spill. Therefore, all owners or operators are required to have private organizations under contract before a Response Plan can be approved.⁸⁷

The Tank Vessel Response Plans must describe the training, equipment testing, and response actions to be carried out by personnel on the vessel to ensure the safety of the vessel. Personnel on board a vessel should first see to the safety of the vessel rather than devoting time and attention to responding to a spill. However, it is important that personnel know the rudiments of responding and do what they can to mitigate the threat of a spill consistent with the safety of the crew and the vessel. For this reason, the requirement for on-board oil spill response equipment was included in the OPA. The equipment must be compatible with the safe operation of the vessel.⁸⁸

The Coast Guard is required to conduct drills, without prior notice, to test the workability of the layers of Contingency and Response Plans. Again, in keeping with the theme of an integrated response capability, federal, state, and local organization will participate as well as private industry. Afterwards, the relevant plans will be assessed and, if necessary, amended.⁸⁹

2. Double Hulls

The requirement for double hulls on tank vessels resolved a contentious prevention issue that had undergone years of debate and discussion. Double hulls on vessels can provide an additional layer of protection for the oil cargo if the vessel should run aground or is otherwise punctured. However, opponents of double hulls claim that once the outer hull of a vessel is breached, water can enter into the space between the hulls, causing severe stability problems. This could impede salvage attempts or cause the vessel to capsize, losing the entire oil shipment.

The legislative history behind this measure is particularly instructive of the anti-Big Oil/pro-environment color of the OPA. In the 101st Congress, the Senate acted first in passing an oil spill bill, Senate Bill 686.⁹⁰ It required the Secretary of Transportation to determine whether double hulls or double bottoms would enhance oil tanker safety and environmental protection. The bill also required the Secretary to investigate alternative technologies.⁹¹ Similarly, the House predecessor bill to the OPA, H.R. 1465,⁹² directed the Secretary of Transportation to evaluate the efficacy of double hulls and double bottoms. The study was to emphasize their environmental safety record, and the associated costs and benefits. The Secretary was directed to consider alternative technologies as well.⁹³

On November 9, 1989, the House of Representatives adopted two amendments to its bill that were purported to be complementary.⁹⁴ The first amendment required all new tank vessels to be equipped with a double hull. Existing vessels would have an additional 15 years after the bill's enactment to meet the double hull requirement.⁹⁵ The second amendment required new self-propelled tank vessels of at least 20,000 gross tons to be equipped with a double bottom. Existing self-propelled tank vessels were to retrofit with double bottoms within seven years.⁹⁶ Confusion over the effect of these amendments is apparent, given that double hulls include double bottoms, the weight class restrictions in the second amendment, and that self-propelled tank vessels are a subset of tank vessels.

A third double hull amendment was offered as a substitute for the previous two amendments which was identical to the Senate's double hull provision. Its author cited its strong support by the environmental community after adoption by the Senate months before.⁹⁷ However, the "greener than thou" fever that seemed to grip Members of the House of Representatives between Senate passage and House con-

⁸⁷ HR. REP. NO. 653, *supra* note 67, at 150. *See also supra* note 60 regarding creation of the Marine Spill Response Corporation.

⁸⁸ OPA § 4202(B), 33 U.S.C.A. § 1321(j)(6) (West Supp. 1991).

⁸⁹ OPA § 4202, 33 U.S.C.A. § 1321(j)(7) (West Supp. 1991).

⁹⁰ S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S10,070-90 (daily ed. Aug. 4, 1989).

⁹¹ S. 686, 101st Cong., 1st Sess., § 308(a), 135 CONG. REC. S10,406, S10,416 (daily ed. Aug. 16, 1989).

⁹² H.R. 1466, 101st Cong., 1st Sess. (1989) (introduced by Congressman Walter B. Jones and others).

⁹³ H.R. 1465, 101st Cong., 1st Sess. § 420(8)(0) (1989).

⁹⁴ 135 CONG. REC. H8262 (daily ed. Nov. 9, 1989).

⁹⁵ *Id.* This amendment originally included a weight class restriction, but this provision was deleted by another amendment. *Id.* at H8272.

⁹⁶ *Id.* at H8263.

⁹⁷ *Id.* Rec. H8272.

sideration of oil spill legislation was particularly evident during the November days when H.R. 1465 was before the House. After spirited debate, the third amendment was rejected by a voice vote, and the conflicting double hull amendments were passed as part of H.R. 1466.⁹⁸

During the House-Senate Conference on this provision, the Senate made an offer on double hulls to the House that was even stronger than the House-passed bill. After wide circulation, the proposal was met with strong opposition,⁹⁹ and consequently, it was quickly withdrawn. A complicated compromise was arrived at by the House and Senate conferees based on an elaborate formula, taking into account vessel size, type, and age. However, there is no explicit legislative history on how this formula was arrived at.

The final version of the double hull provision is found in section 4115 of the OPA. It adds a new section 3703a to title 46, United States Code.¹⁰⁰ The new section provides that almost all newly-built tank vessels must be built with double hulls. This applies to all vessels carrying oil, regardless of their flag, when they are operating on waters subject to the jurisdiction of the United States, including the 200-mile Exclusive Economic Zone.¹⁰¹

Certain vessels are exempt from the double hull requirement.¹⁰² Vessels used only to respond to an oil spill are not required to have double hulls because their capacity would be so reduced as to make them less effective. Vessels under 5,000 gross tons are also exempt from the double hull requirement, but must have a double containment system determined by the Secretary of Transportation to be as effective as a double hull for oil spill prevention.¹⁰³ This exemption will primarily affect inland tank barges. The justification for this exemption is that these vessels move more slowly in calmer waters and have a smaller carrying capacity, thus reducing the potential for a large spill.

A third category of exempt vessels are those that unload at deepwater ports.¹⁰⁴ However, these vessels are required to have double hulls after January 1, 2016.¹⁰⁵ This temporary exemption was allowed because deepwater ports move tanker traffic far offshore, thus reducing the risk of spills harming United States ports and shore lines.¹⁰⁶ This temporary exemption also applies to delivering vessels offloading oil more than sixty miles from shore. These activities will have to be conducted in lightering zones.¹⁰⁷ Again, the reason for the temporary exemption is the distance from shore and lower potential for collisions and groundings.

In the case of lightering vessels,¹⁰⁸ the authors of the OPA recognized that often there was not a direct nexus between the delivering vessel and the United States; this is not true for a receiving vessel which usually enters a United States port to offload the received oil. Because of international law implications and constraints, the OPA imposes various requirements on the delivering vessel through the receiving vessel. This is accomplished through amending section 3715(a) of title 46, United States Code. This amended section requires both delivering and receiving vessels engaged in lightering transfers that result in the delivery of oil to the United States to be in compliance with the double hull requirements of the OPA. This is accomplished by mandating that a receiving vessel may only receive oil from a delivering vessel that complies with section 3703a as well as other requirements of section 3715(a).¹⁰⁹

⁹⁸ *Id.*

⁹⁹ *Tanker Bill May Not Cut Alaska Risk*, Anchorage Daily News, Mar. 29, 1990, at 2.

¹⁰⁰ Chapter 37 of title 46, United States Code, deals with the carriage of liquid bulk dangerous cargoes.

¹⁰¹ OPA § 4115(a), 46 U.S.C.A. § 3703a(a) (West Supp. 1991).

¹⁰² OPA § 4115(a), 46 U.S.C.A. § 3703a(b) (West Supp. 1991).

¹⁰³ In making this determination, the Secretary may consider vessel size and the environment in which the vessel operates. The Secretary may find that flexible bladders, double aides, or other combinations of technology are equally as effective as double hulls. H.R. REP. NO. 653, *supra* note 57, at 139.

¹⁰⁴ The only port currently licensed under the Deepwater Port Act is located off the coast of New Orleans, Louisiana. It is known as the Louisiana Offshore Oil Port (LOOP).

¹⁰⁵ OPA § 4115(e), 46 U.S.C.A. § 3703a(b)(3) (West Supp. 1991).

¹⁰⁶ The safety record and potential for collisions or groundings are significantly lower at deepwater ports. H.R. REP. NO. 653, *supra* note 57, at 139.

¹⁰⁷ OPA § 4115(a), 46 U.S.C.A. § 3703a(b)(3)(B) (West Supp. 1991).

¹⁰⁸ Lightering involves the transfer of cargo from a large vessel (the delivery vessel) to smaller ones (the receiving vessels). It often involves the use of huge supertankers which are incapable of maneuvering into shallow-draft United States ports for offloading.

¹⁰⁹ OPA § 4115(d)(3), 46 U.S.C.A. § 3715(a)(5) (West Supp. 1991). The other requirements are that the delivering and receiving vessels have evidence of financial responsibility under section

The OPA provides for the phaseout of existing vessels beginning in 1995, based on age and size.¹¹⁰ The age of an existing vessel is determined from the later of the date on which the vessel is delivered after original construction or is delivered after completion of a major conversion.¹¹¹ The phaseout schedule was developed with the idea of getting vessels without double hulls out of the trade as quickly as possible without undue adverse impact on the transportation of oil, and to assure worldwide shipyard capacity to accommodate the new construction.

Vessels of at least 5,000 gross tons but less than 15,000 gross tons begin to be phased out in January 1995. Vessels in service after that date that are forty years old or older and have a single hull, or are forty-five years old or older and have a double bottom or double sides must be decommissioned. The phaseout is completed in 2006 when vessels twenty-five years of age or older with a single hull, or thirty years old or older with double bottoms or double sides, must have a double hull to transport oil in the United States.

The same five-year differentiation between single hulls and double bottoms and double sides applies to vessels of greater than or equal to 15,000 gross tons but less than 30,000 gross tons. This phaseout begins in 1995 with forty-year old vessels and ends in 2005 with twenty-five year old vessels. For vessels of 30,000 gross tons and over, the phaseout begins in 1995 for vessels at least twenty-eight years old, and ends on January 1, 2000, with vessels twenty-three years old. In any case, after January 1, 2010, a vessel with a single hull, and after January 1, 2015, a vessel with a double bottom or double sides, may not operate in United States waters regardless of age or size.

B. Liability Regime

1. In General

Despite the best laid plans of oil transporters, some spills are inevitable. As stated above, the sheer magnitude of the Exxon Valdez spill provoked a severe congressional backlash against oil companies and their associated marine transporters. The Exxon Valdez spill also created great sympathy for those harmed by the spill, and a desire for retribution for the damage done to the once pristine Prince William Sound. Given these emotions, Congress basically threw out the liability regime in section 311 of the Clean Water Act as it related to oil spills,¹¹² and authored a new, freestanding regime. This housecleaning also created an opportunity to unify the various Federal oil spill laws.

Title I of the OPA establishes liability for discharges of oil,¹¹³ as well as threats of discharges, from any source, including United States and foreign flag vessels, onshore and offshore facilities,¹¹⁴ pipelines, and deepwater ports.¹¹⁵ The geographic scope of liability for a discharge is also extended to the full extent of United States maritime jurisdiction—the 200-mile Exclusive Economic Zone.¹¹⁶ This means that discharges beyond the twelve-mile contiguous zone no longer must affect United States natural resources before liability attaches;¹¹⁷ the mere fact of the discharge triggers the application of the statute. Of course, liability for harm to natural resources of the United States continues unchanged under the Act as to geographic scope.¹¹⁸

1016 of the OPA, and comply with the response plan requirements of section 311(j) of the Clean Water Act.

¹¹⁰ OPA § 4115(0), 46 U.S.C.A. § 3703(c) (West Supp. 1991).

¹¹¹ OPA § 4115(11), 46 U.S.C.A. § 8703a(c)(1) (West Supp. 1991). One exception to this rule is for a vessel that has been rebuilt under the Wrecked Vessel Act. 46 U.S.C. app. § 14 (1988). Its age is determined from the date on which the vessel had its appraised value determined by the Coast Guard and is qualified for documentation.

¹¹² Clean Water Act section 311 continues to apply to discharges of hazardous substances.

¹¹³ “Oil” is now defined to exclude constituent portions of oil specifically listed as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act. OPA § 1001(23), 33 U.S.C.A. § 2701(23) (West Supp. 1991).

¹¹⁴ “Facility” is defined in the OPA to include any structure used to explore, drill, produce, store, handle, transfer, process, or transport oil. OPA § 1001(9), 33 U.S.C.A. § 2701(9) (West Supp. 1991). Therefore, an oil delivery truck which topples off an elevated highway into a U.S. waterway and discharges oil would be captured by the OPA.

¹¹⁵ OPA § 1001(32), 33 U.S.C.A. § 2701(32) (West Supp. 1991).

¹¹⁶ This area is defined in the Oil Pollution Act to include the “eastern special areas” negotiated between the U.S. and the U.S.S.R. in June of 1990. OPA § 1001(8), 33 U.S.C.A. § 2701(8) (West Supp. 1991).

¹¹⁷ See *supra* notes 5-11 and accompanying text.

¹¹⁸ The OPA liability provisions do not apply to discharges covered by a government-issued permit, from a public vessel, or from an onshore facility subject to the Trans-Alaska Pipeline Au-

Although the standard of liability is not explicitly defined by the OPA, the Act instructs that the terms “liable” or “liability” are to be construed to be “the standard of liability which obtains under section 311 of the Clean Water Act.”¹¹⁹ Some might wonder why the authors of the legislation retreated from a position taken by the House of Representative’s predecessor bill to the OPA, where liability was clearly delineated as “joint, strict, and several.”¹²⁰ On its face, the standard of liability in the OPA appears to be a lesser one. However, the Conference Report which accompanies the Act states that the Clean Water Act liability standard has been determined repeatedly to be strict, joint, and several.¹²¹ Reluctance to clearly state this critical element is curious, given the opportunity to clarify this point and the strong anti-Big Oil, pro-environment stance evident throughout the OPA.

Liability runs to the “responsible party” for a vessel or facility, a term defined generally to mean owner or operator,¹²² with minor exceptions for governmental entities which own facilities but which lease them to others. Because “responsible party” is defined to include corporations, liability potentially could extend to shareholders or corporate officers. Such liability has been found in several incidents involving hazardous waste under CERCLA.¹²³ On the other hand, Federal employees are specifically shielded from liability for acts or omissions occurring while the employee is acting in an official capacity.¹²⁴

The OPA does not prohibit agreements to insure or hold harmless any person for liability under the Act. However, these agreements do not affect the attachment of liability under the OPA to a responsible party.¹²⁵ For example, a contract purporting to transfer responsibility for the safe transport of oil from an otherwise responsible party under the OPA to a third party will not relieve the responsible party from liability for removal costs and damages under the OPA. However, the agreement or contract may affect subrogation or other rights between the contracting parties.

The OPA did not alter existing law regarding parallel liability schemes for oil discharges under state law. Over twenty-four states have oil-specific liability schemes which authorize a cause of action for oil discharges in state waters.¹²⁶ This double layer of liability is an area of potential confusion which remains unresolved.¹²⁷

2. Removal Costs and Damages Compensable Under the OPA

The responsible party must pay removal costs and damages specified in section 1002(b) of the OPA to claimants.¹²⁸ Two types of removal costs are compensable under the Act: (1) removal costs incurred by a governmental entity¹²⁹ under subsections 311(c), (d), (e), or (l) of the Clean Water Act, as amended by the OPA, under

thorization Act. OPA § 1002(c), 33 U.S.C.A. § 2702(c) (West Supp. 1991). However, once oil from the Trans-Alaska pipeline is transferred to a vessel, Oil Pollution Act coverage is engaged.

¹¹⁹ OPA § 1001(17), 33 U.S.C.A. § 2701(17) (West Supp. 1991). This standard is reinforced by taking definitions of key terms under the Oil Pollution Act, such as “owner or operator,” “liable,” “onshore facility,” “offshore facility,” “public vessel,” and “vessel” verbatim from the Clean Water Act. H.R. REP. NO. 653, *supra* note 57, at 101-02.

¹²⁰ H. R. 1165, 101st Cong., 1st Sess. § 102, 135 CONG. REC. HB124 (daily ed. Nov. 8, 1989).

¹²¹ H.R. REP. NO. 653, *supra* note 57, at 102.

¹²² OPA § 1001(32), 33 U.S.C.A. § 2701(32) (West Supp. 1991). The House of Representatives predecessor bill to the OPA included a provision apportioning liability between the owner and operator of a spilling vessel, and the owner of the oil carried as cargo aboard the vessel. H.R. 1466, 101st Cong., 1st Sess. § 1004(b), 135 CONG. REC. H8124 (daily ed. Nov. 8, 1989). The intent behind this provision was to ensure that oil companies would select the most prudent carriers to transport their oil if the threat of shared liability in the event of a spill were present. This provision was dropped despite predictions that the greater liability risk inherent in the Oil Pollution Act would cause a proliferation of shell oil transportation corporations, whose only asset is a single tanker.

¹²³ *United States v. Northeastern Pharmaceutical and Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1985); *New York v. Shore Realty Corp.*, 759 F.2d 1082 (2d Cir. 1985).

¹²⁴ OPA § 1018(d), 33 U.S.C.A. § 2718(d) (West Supp. 1991). This provision could also protect a Federal employee, such as a Federal On-Scene Coordinator or a U.S. Coast Guard Vessel Traffic Service System operator, from a third-party defense claim.

¹²⁵ OPA § 1010, 88 U.S.C.A. § 2710 (West Supp. 1991).

¹²⁶ Costello and Gurevitz, *supra* note 47, at 49.

¹²⁷ See discussion on preemption of state laws, *infra* notes 243-52 and accompanying text.

¹²⁸ 33 U.S.C.A. § 2702(a) (West Supp. 1991). Additionally, the responsible party is liable for interest for any claims paid under the OPA, as calculated under section 1005 of the OPA, 83 U.S.C.A. § 2705 (West Supp. 1991). Claimants may include foreign governments and other foreign claimants under certain conditions. OPA § 1007, 33 U.S.C.A. § 2707 (West Supp. 1991).

¹²⁹ This includes a state government or an Indian tribe.

the Intervention on the High Seas Act,¹³⁰ or under state law;¹³¹ and (2) removal costs incurred by any other person consistent with the NCP.¹³² These categories of costs which may be recovered under the OPA are greatly expanded from those originally provided in Clean Water Act section 311. For the first time, removal costs are not restricted to those incurred by the Federal government. Private parties are afforded protection under the OPA for their cleanup costs, as long as their actions are consistent with the NCP. Moreover, United States, state, or Indian tribe removal costs which are consistent with both the NCP and state law must be paid by a responsible party under the OPA. Under the previous Clean Water Act regime, liability to nonfederal parties could be based only on a showing of fault.

In addition to removal costs, monetary damages can be collected from a responsible party under the OPA. These are:

- (1) damages to natural resources (including assessment costs) recoverable by a government trustee;
- (2) damages for injury to real or personal property (including economic losses resulting from the injury) recoverable by the owner or lessee of the property;
- (3) damages for loss of subsistence use of natural resources (ownership of resource not required);
- (4) damages equal to the loss of revenues caused by the destruction of property or natural resources recoverable by a government entity;
- (5) damages equal to lost profits or earning capacity because of injury to property or natural resources (ownership of property or resource not required); and
- (6) damages for net costs of providing increased public services during or after removal activities recoverable by a state or local government.¹³³

The expanded realm of allowable monetary damages is obvious and is likely to be most troubling to the oil industry, given the possibility, however small, of another spill as disastrous as the Exxon Valdez. The most apparent change is that the OPA deletes a limitation which had previously existed under case law requiring that the claimant show physical damage to a proprietary interest before economic damage could be awarded.¹³⁴ This is readily seen in the authorization of damages for loss of profits or earning capacity, which may be had by anyone, not just the owners of the damaged property. The allowance for costs of increased public services can also be seen as a direct result of the experience with the Exxon Valdez. The small and isolated City of Valdez, Alaska, was overwhelmed with cleanup workers and the press, and city services such as fire department protection, water, and sewage, were severely strained.¹³⁵ Of course this provision, having no retroactive effect, cannot now benefit Valdez.

In addition, an innocuous "notwithstanding any other provision or rule of law" clause at the beginning of OPA section 1002¹³⁶ means that financial limits for harm posed by the 189 year-old Limited Liability Act,¹³⁷ which restricts claims against vessel owners to the value of the vessel and cargo involved, does not apply to actions brought under the OPA.¹³⁸ The OPA also abrogates the application of this law to states.¹³⁹ This will have a significant impact on oil tanker owners and their insurance providers, especially in waters where the state has no limits of liability for oil spills¹⁴⁰ or allows recovery of a broader range of removal costs or damages.¹⁴¹

3. Defenses to Liability

Despite the broadened scope of liability created by the OPA, the oil industry has not been left without a defense. Congress provided a complete defense to liability

¹³⁰ 33 U.S.C. §§ 1471–1487 (1988).

¹³¹ OPA § 1002(b)(1)(A), 33 U.S.C.A. § 2702(b)(1)(A) (West Supp. 1991).

¹³² OPA § 1002(b)(1)(B), 33 U.S.C.A. § 2702(b)(1)(B) (West Supp. 1991).

¹³³ OPA § 1002(b)(2), 33 U.S.C.A. § 2702(b)(2) (West Supp. 1991).

¹³⁴ H.R. REP. NO. 653, *supra* note 57, at 108. *See also Louisiana ex. rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985).

¹³⁵ *Ability Hearing*, *supra* note 19, at 33.

¹³⁶ 33 U.S.C.A. § 2702(a) (West Supp. 1991).

¹³⁷ 46 U.S.C. app. §§ 181–189 (1988).

¹³⁸ Section 1004 of the OPA, 33 U.S.C.A. § 2704 (West Supp. 1991), does limit a vessel's liability.

¹³⁹ OPA § 1018(a), 33 U.S.C.A. § 2718(a) (West Supp. 1991). *See, e.g., In re Harbor Towing Corp.*, 335 F. Supp. 1160 (D. Md. 1971).

¹⁴⁰ Seventeen states have no limits of liability for oil spills. *Oil Spill Liability Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 173, 233 (1985).

¹⁴¹ How any list could be broader is doubtful.

in the OPA if the responsible party proves by a preponderance of evidence that the discharge or threat of discharge was caused solely by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee, agent, or contractee of the responsible party; or (4) any combination of these.¹⁴² Further, the third party defense is made contingent upon the responsible party being able to prove, by a preponderance of the evidence, that he or she exercised due care regarding the nature of the oil discharged and took precautions against foreseeable acts or omissions of the third party.¹⁴³

These defenses are in many ways much more circumscribed than those found in section 311 of the Clean Water Act. The OPA raises the burden of proof for proving a defense and deletes a defense afforded for the negligence of the United States Government.¹⁴⁴ More importantly, the Act greatly restricts the third party defense by decreasing the class of third parties whose actions may provide a defense, and by requiring the exercise of due care in the selection and control of the actions of a third party. On the one hand, it is reasonable to question the fairness of imposing liability on the owner of an oil barge when the towing vessel is at fault, merely due to the existence of a contract between the two. On the other hand, the defense restrictions may induce the selection of a competent towing company. Additionally, a barge owner could protect against an unfair result by placing an indemnification clause in the contract to ensure that the towing company ultimately pays for its error.

If an alleged responsible party is successful in claiming a third party defense, the third party becomes the responsible party for purposes of the OPA. The third party would then be allowed to use the claims and defenses available to the original responsible party, including limits of liability.¹⁴⁵ Assertion of an eventually successful third party defense does not immediately relieve the original responsible party of her burden, however, because even if she alleges that a third party caused the oil spill, she must still pay the removal costs and damages up front for the incident. The original responsible party would then be entitled to subrogation for those claims against the third party or the Federal Oil Spill Liability Trust Fund, if necessary.¹⁴⁶

Responsible parties also void any defense under the OPA if they fail to report a known reportable spill, to cooperate and assist responsible officials in removal actions, or to comply with an order issued under subsections 311(c) or (e) of the Clean Water Act as amended by the OPA, or under the Intervention on the High Seas Act.¹⁴⁷ These actions can also result in fines and imprisonment under the OPA and Clean Water Act.¹⁴⁸ On the other hand, responsible parties are not liable to claimants to the extent that those claimants are grossly negligent or engage in willful misconduct.¹⁴⁹ This represents an elevated comparative negligence standard, but it will not protect the pocketbook of the responsible party from merely negligent claimants.

4. Federal Oil Spill Liability Trust Fund

While the responsible party is monetarily liable for the harm caused by a spill, there is another source of money which is also available to pay necessary expenses in some circumstances. The Federal Oil Spill Liability Trust Fund (Federal Fund), is available to pay for oil-spill related costs when the spiller cannot be identified, when the spiller can successfully defend against a charge of liability, when the spiller can invoke liability limits and claims exceed those limits, when the spiller is not

¹⁴² OPA § 1003(a), 33 U.S.C.A. § 2703(a) (West Supp. 1991). An exception is created in the law for contracts involving the transportation of oil provided by a common carrier—a boon for railroad companies.

¹⁴³ *Id.* It should be recognized that the OPA's third party defense is essentially identical to that found in CERCLA for potentially responsible persons involved in the release of a hazardous substance. 42 U.S.C. § 9607(b)(3) (1988). Therefore, the case law defining the applicability and limitations of the CERCLA third party defense should be instructive in the context of the OPA. Importantly, that case law points out the difficulty in raising an effective third party defense. *See, e.g.,* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).

¹⁴⁴ Some have suggested that the third party defense retained under the OPA would include government actions. *H.R. 1465 Hearing, supra* note 20, at 189.

¹⁴⁵ OPA § 1002(d), 33 U.S.C.A. § 2702(d) (West Supp. 1991).

¹⁴⁶ OPA § 1008, 33 U.S.C.A. § 2708 (West Supp. 1991). This is another provision reflecting sympathy toward those harmed by a spill by allowing Caster compensation from an identified source rather than delaying payment until the issue of liability has been settled.

¹⁴⁷ OPA § 1003(c), 33 U.S.C.A. § 2703(c) (West Supp. 1991).

¹⁴⁸ OPA § 4301(a), 33 U.S.C.A. § 1321(b)(5) (West Supp. 1991). *See* discussion on increased penalties, *infra*, notes 205–22 and accompanying text.

¹⁴⁹ OPA § 1003(b), 33 U.S.C.A. § 2703(b) (West Supp. 1991).

subject to United States jurisdiction (a foreign spiller), or when a spiller is insolvent or otherwise cannot make good on its obligations under the OPA.¹⁵⁰

The Federal Fund, as amended by the OPA, is capitalized through several sources: (1) a five-cent per barrel tax on oil;¹⁵¹ (2) excess natural resource damages recovered by trustees under section 1006(0) of the OPA;¹⁵² (3) amounts recovered by the Fund through subrogation under section 1015 of the OPA;¹⁵³ (4) amounts transferred to the Fund from the Clean Water Act section 311(k) Fund, the Deepwater Port Liability Fund,¹⁵⁴ the Offshore Oil Pollution Compensation Fund,¹⁵⁵ and the Trans-Alaska Pipeline Liability Fund;¹⁵⁶ and (5) penalties collected under sections 311 and 309(c) of the Clean Water Act, the Deepwater Port Act of 1974, and section 207 of the Trans-Alaska Pipeline Authorization Act.¹⁵⁷

Payments from the Federal Fund are restricted in several ways. First, a \$1 billion per incident cap is established, and of this \$1 billion, no more than \$500 million can be paid for natural resource damages.¹⁵⁸ Additional borrowing authority is authorized for \$1 billion. Although this is a significant increase over amounts authorized by the section 311(k) fund in existence before passage of the OPA, even this would not cover the obligations incurred by Exxon for the Exxon Valdez oil spill.¹⁵⁹ Perhaps this reflects Congress' understanding that most spills are small and will not require enormous Federal backing for removal of the oil and damages. In addition, the Federal Fund is truly a secondary source of funding behind a responsible party.

Under section 1012 of the OPA,¹⁶⁰ the Fund is available, generally subject to appropriation by Congress,¹⁶¹ to the President for:

- (1) the payment of removal costs consistent with the NCP incurred by Federal authorities;
- (2) the payment of up to \$250,000 to a state for removal costs consistent with the NCP for the immediate response to a discharge or threat of a discharge;¹⁶²
- (3) the payment of costs incurred by a natural resource trustee consistent with the NCP;
- (4) the payment of removal costs consistent with the NCP as the result of a discharge from a foreign offshore source;
- (5) the payment of uncompensated claims for removal costs determined by the President to be consistent with the NCP;¹⁶³
- (6) the payment of otherwise uncompensated damages;¹⁶⁴

¹⁵⁰ OPA § 9001, 26 U.S.C.A. § 9509 (West Supp. 1990). Prior to the OPA, liability expenses were funded through several separate sources. These sources have been consolidated by the OPA. See *infra*, notes 151–57 and accompanying text.

¹⁵¹ Omnibus Budget Reconciliation Act of 1989 § 7505(b), 26 U.S.C.A. § 4611(c)(2)(B) (West Supp. 1991) (triggering collection of this tax).

¹⁵² 33 U.S.C.A. § 2706(f) (West Supp. 1991).

¹⁵³ 33 U.S.C.A. § 2715 (West Supp. 1991).

¹⁵⁴ This Fund was established under section 18(f) of the Deepwater Port Act of 1974, 33 U.S.C. § 1517(f) (1988), *repealed by* OPA § 2003, 33 U.S.C.A. §§ 1503, 1617 (West Supp. 1991), 26 U.S.C.A. § 9506 note (West Supp. 1991).

¹⁵⁵ This fund was established under section 302 of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1812(1988), *repealed by* OPA § 2004, 26 U.S.C.A. § 9509 note (West Supp. 1991).

¹⁵⁶ This fund was established by section 204 of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c) (1988).

¹⁵⁷ These provisions were also amended in Title II of the Oil Pollution Act. OPA § 4304, 26 U.S.C.A. § 9509(b)(8) (West Supp. 1991).

¹⁵⁸ OPA § 9001(c), 26 U.S.C.A. § 9509(c)(2) (West Supp. 1991).

¹⁵⁹ Exxon has spent over \$2 billion in cleanup costs related to the Exxon Valdez oil spill. Telephone interview with Otto Harrison, General Manager of Alaska Operations, Exxon Corp. (Nov. 27, 1990). Additionally, Exxon agreed to a \$1.2 billion dollar settlement to cover civil and criminal penalties. DeBenedictis, *Oil-Spill Settlement Okayed*, A.B.A.J., Dec. 1991, at 31.

¹⁶⁰ 33 U.S.C.A. § 2712 (West Supp. 1991).

¹⁶¹ Up to \$50 million is available without appropriation each year as an immediately accessible emergency fund to cover Federal oil spill removal actions and to begin natural resource damage assessments. OPA § 6002, 33 U.S.C.A. § 2752 (West, Supp. 1991).

¹⁶² Eligibility for the emergency monies is contingent on the state entering into an agreement with the Federal government under section 1012(d) of the OPA. This represents a retreat from a position taken by the House of Representatives in its predecessor bill which gave states "direct draw" access to the Federal Fund for emergency removal actions. H.R. 1465, 101st Cong., 1st Sess. § 1012(a), 135 CONG. REC. H8126 (daily ed. Nov. 8, 1989).

¹⁶³ No appropriation is needed for these costs.

¹⁶⁴ No appropriation is needed for these damages.

- (7) the payment of Federal administrative, operational, and personnel costs reasonably necessary for the implementation of the OPA;¹⁶⁵
- (8) expenses authorized under sections 5 and 7 of the Intervention on the High Seas Act;
- (9) the payment of costs necessary for carrying out subsections 311(b), (c), (d), (j), and (l) of the Clean Water Act; and
- (10) payment of liabilities incurred by other Federal oil spill trust funds.

This section makes clear that the Federal Fund is open to much more limited claims than those to which a responsible party is subject. Consequently, states are likely to bear a greater portion of the costs. For example, a responsible party is open to claims made for removal costs incurred by a state consistent with state law. If the responsible party cannot or will not pay these costs, the state would be limited to Federal Fund reimbursement of \$250,000 for emergency removal actions plus only those nonemergency removal expenses which are consistent with the NCP. Of course, a state could use its own resources to respond to a spill. Responsible parties who erroneously paid or overpaid claims for removal costs and damages can also seek compensation from the Fund under section 1008 of the OPA.¹⁶⁶

The provision allowing for the payment of otherwise uncompensated damages from the Federal Fund would seem to allow open-ended claims. "Damages," however, is defined in the OPA to include only natural resource damages, harm to real or personal property, loss of subsistence use, net loss of revenues, loss of profits, and net costs of public services. This means that although a claimant may be entitled to payment under state law for damages, unless the claim falls within the definition of damages under the OPA, the claimant will not be paid from the Federal Fund. On the other hand, it is hard to imagine any category of damages which would not fall within the OPA's broad definition of damages.

Similar to a responsible party, the Federal Fund can limit its liability for removal costs or damages by demonstrating that the claimant was grossly negligent or otherwise engaged in willful misconduct.¹⁶⁷ Once payment is made by the Fund to a claimant, the Fund is subrogated to the rights of the claimant and may sue responsible parties or others for the recovery of sums paid.¹⁶⁸ The statute of limitations for filing Fund claims is six years from completion of removal actions for removal costs, and three years from discovery of injury for damages.¹⁶⁹ In addition, the OPA prohibits double recovery for removal costs and damages from the Fund.¹⁷⁰

5. How Clean is Clean?

A major issue decided by the House-Senate oil spill Conferees was the extent to which officials of states affected by an oil spill would be involved in the decision by Federal authorities to end oil spill removal operations. Section 106(d) of the Senate predecessor bill to the OPA¹⁷¹ required the President to consult with affected states on the appropriate oil spill removal action to be taken. Under the Senate provision, the removal action was to be considered complete when so determined by the President and the governor or governors of the affected states.¹⁷²

Section 1011 of the House predecessor bill to the OPA¹⁷³ required the President to consult with a natural resource trustee on the appropriate removal action to be taken. Under this approach, removal actions were considered to be complete when determined by the President in consultation with the affected governor or governors. Although this provision did not give states a veto over the decision of the President to end removal actions, the House approach allowed additional removal actions under state law to continue. The OPA adopted the House approach, but with the

¹⁶⁵This is further limited to \$25 million per year to the U.S. Coast Guard, \$30 million per year to establish the National Response System under Clean Water Act section 311(j), and \$27.250 million per year for research under Title VII of the OPA.

¹⁶⁶33 U.S.C.A. § 2708 (West Supp. 1991).

¹⁶⁷OPA § 1012(b), 33 U.S.C.A. § 2712(b) (West Supp. 1991).

¹⁶⁸OPA § 1012(f), 33 U.S.C.A. § 2712(f) (West Supp. 1991).

¹⁶⁹OPA § 1012(h), 33 U.S.C.A. § 2712(h) (West Supp. 1991). This statute of limitations for Federal Fund claims must be differentiated from that allowed for the filing of actions under the OPA. Section 1017(f)(1) and (2) of the OPA, 33 U.S.C.A. § 2717(f)(1)-(2) (West Supp. 1991), allows only three years to file an action for both damages and removal costs. This means that a Federal Fund administrative claim for removal costs could be filed three years after the statute of limitations tolled for filing an action in court under the Oil Pollution Act to collect removal costs.

¹⁷⁰OPA § 1012(i), 33 U.S.C.A. § 2712(i) (West Supp. 1991).

¹⁷¹S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S10,412 (daily ed. Aug. 15, 1989).

¹⁷²H.R. REP. NO. 653, *supra* note 57, at 111.

¹⁷³H.R. 1465, 101st Cong., 1st Sess., 135 CONG. REC. H8126 (daily ed. Nov. 8, 1989).

clarification that additional removal actions undertaken by states under state law may not be supported by the Federal Fund.¹⁷⁴

6. Claims

An elaborate claims procedure is provided by sections 1013 and 1014 of the OPA.¹⁷⁵ First, the President is to identify the responsible party for the oil discharge (or threat of discharge) and notify the responsible party and the party's guarantor of the designation. The responsible party then has fifteen days to advertise a procedure for paying claims. If the identified responsible party fails to advertise its procedures, the President will then determine and announce the procedures for the responsible party. The President will advertise the availability of the Federal Fund to pay claims if the responsible party and the party's guarantor both deny culpability within five days of receiving a notice of designation, if the spiller is a public vessel, or if the spiller cannot be identified.¹⁷⁶

Claims must first be presented to the responsible party unless the President advertises the availability of the Federal Fund, the responsible party is presenting a claim,¹⁷⁷ or for claimants filing due to a discharge or threat of discharge from a foreign offshore facility. If a claim is not settled by a responsible party within ninety days of presentation or advertisement (whichever is later), the claimant may either pursue his or her case in court or look to the Federal Fund for compensation.¹⁷⁸ No claims may be paid by the Federal Fund while a court is considering the same claim.

7. Limits of Liability

Notwithstanding the broad statutory exposure for removal costs and damages, and the limited opportunity to evoke a complete defense to liability, responsible parties may still be able to invoke liability limits for costs and damages under section 1004 of the OPA.¹⁷⁹ However, the OPA establishes much higher liability limits than those which previously applied under section 311 of the Clean Water Act. The new limits are the greater of \$1,200 per gross ton or \$10 million for tank vessels greater than 3,000 gross tons, \$1,200 per gross ton or \$2 million for tank vessels 8000 gross tons or less, and \$600 per gross ton or \$500,000 for other vessels. For offshore facilities, liability is limited to \$75 million plus all removal costs.¹⁸⁰ For onshore facilities and deepwater ports, the limit is \$350 million. The OPA allows certain liability limits to be adjusted downward. This is true for classes of onshore facilities,¹⁸¹ and deepwater ports and the vessels calling on them.¹⁸² All liability limits are to be adjusted at least once every three years to reflect changes in the Consumer Price Index.¹⁸³

While extending these liability limits in subsection 1004(a), the OPA retracts them in certain instances in section 1004(c).¹⁸⁴ Limits of liability may be breached by gross negligence or willful misconduct on the part of the responsible party (or the party's agent, employee, or contractee) which proximately causes the oil spill. The previous Clean Water Act liability regime required that the gross negligence or willful misconduct must have been within the "privity or knowledge"¹⁸⁵ of the

¹⁷⁴ OPA § 1012(i), 33 U.S.C.A. § 2712(i) (West Supp. 1991). H.R. REP. NO. 653, *supra* note 57, at 111-112.

¹⁷⁵ 33 U.S.C.A. §§ 2713-2714 (West Supp. 1991).

¹⁷⁶ OPA § 1014(c), 33 U.S.C.A. § 2714(c) (West Supp. 1991).

¹⁷⁷ Such a claim would be filed, for example, if the responsible party first compensated a claimant, and later successfully argued a defense or a limit of liability.

¹⁷⁸ This is yet another example where speedy compensation is provided to those harmed by a spill.

¹⁷⁹ 33 U.S.C.A. § 2704 (West Supp. 1991).

¹⁸⁰ The Oil Pollution Act applies a special rule for mobile offshore drilling units. OPA § 1004(a), 33 U.S.C.A. § 2704(a) (West Supp. 1991).

¹⁸¹ Liability limits for onshore facilities may be reduced from \$350 million to as low as \$8 million, taking into consideration size, oil throughput, history of spills, type of oil handled, among other factors. OPA § 1004(d)(1), 33 U.S.C.A. § 2704(d)(1) (West Supp. 1991).

¹⁸² The Secretary of Transportation must first conduct a study to determine if the risk of a spill is lessened by the use of these deepwater ports, which are located far offshore. If the Secretary finds that the use of deepwater ports results in a lower operational or environmental risk, the Secretary must set liability limits between \$50 and \$350 million. OPA § 1004(d)(2), 33 U.S.C.A. § 2704(d)(2) (West Supp. 1991).

¹⁸³ OPA § 1004(d)(4), 33 U.S.C.A. § 2704(d)(4) (West Supp. 1991).

¹⁸⁴ 33 U.S.C.A. § 2704(c) (West Supp. 1991).

¹⁸⁵ [P]rivacy or knowledge of the fault which occasioned damages . . . must be actual and not merely constructive, and must involve a personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered. The words import actual knowl-

responsible party;¹⁸⁶ this requirement was deleted in the OPA.¹⁸⁷ The removal of this condition may have broad-reaching impacts for entities which arrange for the transportation of oil. Additionally, the OPA's use of the term "gross negligence" rather than the willful negligence standard of the Clean Water Act may lower the negligence standard required before liability limits can be breached. However, some commentators have indicated that there is no practical difference between the two standards.¹⁸⁸

The issue of simple versus gross negligence was one of the most hotly-contested battles during consideration of the predecessor bill to the OPA in the House of Representatives. The bill presented to the House had a gross negligence standard. During consideration of the bill, an amendment was offered that would have imposed simple negligence as the standard for voiding liability limits.¹⁸⁹ During debate on the amendment, one Member inquired, "Why after the Exxon Valdez should the Congress give the oil and shipping industries a reward for acting carelessly and unreasonably?"¹⁹⁰ This question may be seen as a reflection of the great anger toward the entire oil industry, not just Exxon, after the Exxon Valdez.¹⁹¹ The proponents of the simple negligence standard argued that many states' oil spill laws had unlimited liability which had not disrupted the transportation of oil in those waters. In addition, there was some fear that claims would go unpaid if a spill caused catastrophic damage.

The opponents of the simple negligence standard argued that the gross negligence and willful misconduct standard is applied in other environmental laws, such as CERCLA, the Clean Water Act, and the Outer Continental Shelf Lands Act. They questioned why the OPA should have a significantly different standard. More importantly, it was argued, applying a simple negligence standard would effectively ensure that no operator would ever be able to limit liability, since almost every oil spill is caused by some level of negligence.¹⁹² The amendment also ignored that even in the event a responsible party is able to invoke the liability limits, claimants would still be paid for their losses from the Federal Fund, primarily funded from truces on oil companies. Finally, maritime interests noted that they would be unable to obtain insurance to operate oil tankers and barges without some type of reasonable cap on liability. Despite these arguments, initially, the simple negligence standard was adopted, 213 to 207.¹⁹³

The day after the amendment passed, a separate vote was requested on the amendment in a parliamentary maneuver that permits the House to vote again on amendments previously adopted.¹⁹⁴ This time, the simple negligence standard was defeated by a vote of 197–185. This change of heart can be attributed to both intense lobbying—by the White House, the oil and shipping industries, and certain senior House members—and the fact that some members of Congress had left town for the weekend.

Liability limits are also breached by a violation of an applicable federal safety, construction, or operating regulation by the responsible party (or the party's agent, employee, or contracted) which proximately causes the oil spill.¹⁹⁵ This would mean, of course, that violation of a vessel operating standard such as the failure to carry a sufficient number of life preservers would not automatically breach a liability limit, as this type of violation would not likely be the proximate cause of a spill. On the other hand, failure by a vessel to have sufficiently trained personnel, where such inexperience leads to the grounding of the vessel and a subsequent release of oil, could trigger this exception. Limits of liability can also be revoked for failure to report a known reportable spill or failure to cooperate with responsible officials during a removal action.¹⁹⁶ A special rule applies to vessels carrying oil as cargo from an OCS facility. Responsible parties for these vessels are liable for all removal costs incurred by government entities despite limits on liability and the existence

edge of the things causing or contributing to the loss, or knowledge or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting proper means to prevent it. BLACK'S LAW DICTIONARY 1080 (5th ed. 1979).

¹⁸⁶ 33 U.S.C. § 1321(g) (1988).

¹⁸⁷ OPA § 1002(d), 33 U.S.C.A. § 2702(d) (West Supp. 1991).

¹⁸⁸ BLACK'S LAW DICTIONARY 1034 (6th ed. 1990).

¹⁸⁹ 135 CONG. REC. H8157–65 (daily ed. Nov. 8, 1989).

¹⁹⁰ *Id.* at H8157.

¹⁹¹ Some felt that environmentalists were determined to make the Oil Pollution Act the "Oil Punishment Act." Wall Street Journal, Oct. 10, 1989, at A18, col. 1.

¹⁹² 135 CONG. REC. H8160 (daily ed. Nov. 8, 1989) (statement of Congressman Billy Tauzin).

¹⁹³ 135 CONG. REC. H8165 (daily ed. Nov. 8, 1989).

¹⁹⁴ 135 CONG. REC. H8286 (daily ed. Nov. 9, 1989).

¹⁹⁵ OPA § 1004(c)(1)(B), 33 U.S.C.A. § 2704(c)(1)(B) (West Supp. 1991).

¹⁹⁶ OPA § 1004(c)(2)(B), 33 U.S.C.A. § 2704(c)(2)(B) (West Supp. 1991).

of defenses.¹⁹⁷ Of course, as noted above, the responsible party for an OCS facility is also liable for all removal costs incurred by a government entity without limitation.

8. Financial Responsibility

Section 1016 of the OPA sets out financial responsibility requirements under the OPA.¹⁹⁸ Such requirements ensure that a potential spiller is able to meet financial liability limits. Evidence of financial responsibility can be supplied by proof of insurance, surety bond, guarantee, letter of credit, or qualification as a self-insurer.¹⁹⁹ Vessels affected by this requirement are those over 300 gross tons (except barges not carrying oil as cargo or fuel) using any place subject to the jurisdiction of the United States or any vessels using the waters of the United States Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States.²⁰⁰ If a person is a responsible party for more than one vessel, only evidence of financial responsibility to meet the greatest potential liability from the largest vessel is required.²⁰¹ Failure to provide evidence of financial responsibility can result in seizure and forfeiture of the vessel, denial of entry to United States ports or navigable waters, detention of the vessel, or refusal of clearance to leave a United States port by the Secretary of the Treasury under section 91 of the Appendix to Title 46.²⁰²

Section 1016(c) establishes the requirements for financial responsibility for offshore facilities. Financial responsibility of \$150 million is required for offshore facilities, except where the President has reduced limits of liability for deepwater ports. In that case, evidence of financial responsibility for the lower limit would be required.

Where financial responsibility has been supplied through insurance or other guarantee by a person other than the responsible party, a claimant may assert a claim directly against the guarantor or insurer.²⁰³ Guarantors or insurers may then avail themselves of all rights and defenses otherwise applicable to the responsible party or can avoid payment by successfully proving that the oil discharge was caused by the gross negligence or willful misconduct of the responsible party.²⁰⁴

9. Penalties

Subtitle C of title IV of the OPA contains the penalty provisions for violations of the OPA and other related statutes. In all cases penalties are substantially increased, driven, as most other sections of the OPA are, by a desire not to appear soft on polluters. The hope that draconian penalties might lead to more careful behavior on the part of oil transporters and thus prevent more oil spills is another aim of subtitle C, although its effectiveness is questionable given the already enormous potential liability for cleanup costs and monetary damages.

Section 4301 of the OPA²⁰⁵ amends section 311(b) of the Clean Water Act to increase penalties and prison terms for violations of that law. A person who fails to notify the appropriate Federal official of a discharge will now be subject to a fine of not more than \$250,000 for an individual and not more than \$500,000 for an organization, imprisonment of not more than three years, or both. Prison sentences of five years are authorized in the case of subsequent convictions.²⁰⁶

For discharges of oil, failure to comply with Tank Vessel and Facility Response Plans, or failure to comply with orders of the President, the OPA greatly increases

¹⁹⁷ OPA § 1004(c)(3), 33 U.S.C.A. § 2704(c)(3) (West Supp. 1991).

¹⁹⁸ 33 U.S.C.A. § 2716 (West Supp. 1991).

¹⁹⁹ OPA § 1016(e), 33 U.S.C.A. § 2716(e) (West Supp. 1991).

²⁰⁰ OPA § 1016(a)-(2), 33 U.S.C.A. § 2716(a)(1)-(2) (West Supp. 1991). Public vessels are not affected by this provision.

²⁰¹ *Id.* There is a drafting distinction in the Oil Pollution Act in how financial responsibility requirements are met for offshore facilities and deepwater ports. In these cases "each" lessee, permittee, or licensee is required to have evidence of financial responsibility to the limits of liability. However, logic would dictate that these facilities should be treated on a par with vessels and onshore facilities, so that in cases where there are multiple potentially responsible parties for a single facility, only one need supply evidence of financial responsibility up to the greatest liability limits.

²⁰² OPA § 1016(b), 33 U.S.C.A. § 2716(b) (West Supp. 1991).

²⁰³ OPA § 1016(e), 33 U.S.C.A. § 2716(e) (West Supp. 1991). However, in no case may a guarantor or insurer be liable for more than the amount of the guarantee or insurance. *Id.*

²⁰⁴ OPA § 1016(f), 33 U.S.C.A. § 2716(f) (West Supp. 1991).

²⁰⁵ 33 U.S.C.A. § 1321(b) (West Supp. 1991).

²⁰⁶ OPA § 4801(a), 33 U.S.C.A. § 1321(b)(5) (West Supp. 1991). The previous penalty under this section was a maximum \$10,000 fine, or one year in prison, or both. 33 U.S.C. § 1321(b)(5) (1988).

administrative, civil, and criminal penalties. Administrative penalty authority is now available to both the Coast Guard and EPA. Administrative penalties for a discharge and for violations of contingency plan requirements are increased from \$5,000 to \$10,000 for each offense, with a \$25,000 maximum for a class I penalty.²⁰⁷ The OPA also creates a new class II administrative penalty category. A class II offender may be fined \$10,000 per day of violation, with a \$125,000 maximum.

Before enactment of the OPA, the Clean Water Act had given the Administrator of EPA authority to commence a civil action against a person subject to the administrative penalties under that Act.²⁰⁸ The Administrator considered certain factors in deciding whether to commence a civil action.²⁰⁹ The penalty in such cases was limited to \$50,000; evidence of “willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge,” however, allowed for a maximum penalty of \$250,000.

The OPA amends the Clean Water Act to make civil penalty assessment authority available to both EPA and the Coast Guard.²¹⁰ These penalties are increased to up to \$25,000 per day of violation or up to \$1,000 per barrel of oil discharged.²¹¹ Failure to properly remove the oil or to comply with an order exposes a violator to a penalty of up to \$25,000 per day of violation or an amount equal to three times the costs the Federal Fund incurs as a result of those failures.²¹² Gross negligence or willful misconduct may subject the violator to a civil penalty of not less than \$100,000 and not more than \$3,000 per barrel of oil.²¹³

The criminal penalties imposed under Clean Water Act section 309(c) are extended to include violations of section 311(b)(3) for a discharge of oil.²¹⁴ The penalties for negligent violations include fines of not less than \$2,500 nor more than \$25,000 per day of violation, imprisonment for not more than one year, or both.²¹⁵ For a violation committed after a first conviction, a person may be liable for not more than \$50,000 per day of violation, imprisonment of not more than two years, or both. The penalties for knowing violations include fines of not less than \$5,000 nor more than \$50,000 per day of violation, imprisonment for not more than three years, or both.²¹⁶ Subsequent convictions could mean a fine of not more than \$100,000 per day, imprisonment of not more than six years, or both. Finally, for knowing endangerment, the penalties include a fine of not more than \$250,000, imprisonment of not more than fifteen years, or both.²¹⁷ An organization could be subject to a fine of not more than \$1 million. For a subsequent conviction, the maximum fine or imprisonment could be doubled.

Penalties are also established for failure to comply with the financial responsibility requirements pursuant to section 1016 of the OPA.²¹⁸ The President may impose a civil penalty of not more than \$25,000 per day of violation. In determining the amount of the penalty, various factors may be considered, such as the circumstances, nature, and gravity of the incident, prior violations, and ability to pay. In addition, the Attorney General may compel compliance with the requirements for financial responsibility by issuing an order to terminate operations.

²⁰⁷ Penalty classes are based on the severity of the offense.

²⁰⁸ 33 U.S.C. § 1821(b)(6)(B) (1988).

²⁰⁹ *Id.* The Administrator was to take into account the “gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge.” *Id.* In addition, the Administrator considered the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. *Id.*

²¹⁰ OPA § 4301(b), 33 U.S.C.A. § 1321(b)(7) (West Supp. 1991).

²¹¹ *Id.* The \$1,000 penalty also applies to each unit of hazardous substance discharged.

²¹² OPA § 4801(b), 33 U.S.C.A. § 1321(b)(7)(B) (West Supp. 1991).

²¹³ OPA § 4301(b), 33 U.S.C.A. § 1321(b)(7)(D) (West Supp. 1991). If a person has been assessed an “administrative” civil penalty under 33 U.S.C. § 1321(b)(6), that person would not be subject to a penalty under 33 U.S.C. § 1321(b)(7). OPA § 4301(b), 33 U.S.C.A. § 1321(b)(7)(F) (West Supp. 1991). In addition, the OPA provides that penalties under section 311 may not be imposed if penalties have been imposed under section 809(c) for the same discharge. OPA § 4301(b), 33 U.S.C.A. § 1321(b)(11) (West Supp. 1991).

²¹⁴ OPA § 4301(b), 33 U.S.C.A. § 1321(c) (West Supp. 1991).

²¹⁵ 33 U.S.C.A. § 1319(c)(1) (West Supp. 1991).

²¹⁶ *Id.* § 1319(c)(2).

²¹⁷ *Id.* § 1319(c)(3).

²¹⁸ OPA §§ 1016, 4303, 33 U.S.C.A. §§ 2716, 2716a (West Supp. 1991).

Finally, numerous other penalties are covered in OPA section 4302.²¹⁹ Among other things, the penalties are increased for negligent operation of a vessel,²²⁰ negligent pilotage,²²¹ and for violations of the Ports and Waterways Safety Act.²²²

10. Natural Resource Damages

The OPA offers much greater detail than previously existed regarding the authority of a designated governmental trustee to collect for harm done to natural resources belonging to, are managed by, controlled by, or appertaining to the United States. . . .²²³ This authorization for monetary damages is in addition to that allowed for economic damages suffered by private parties for harm to those resources.²²⁴ Under pre-existing Clean Water Act section 311(f)(5), only Federal and state trustees could bring an action for natural resource damages. The OPA expands the list of those who can recover for such damages to include Indian tribes and foreign governments.²²⁵ The OPA delineates the duties of the trustee to include assessment of harm and development of a plan to restore, rehabilitate, or replace the damaged resource.²²⁶

The most important change to this area of the law is the formulation of how harm to a natural resource is measured. Under previous regulations for conducting natural resource damage assessments, the measure of damage is the lesser of the diminution of use of the resource or its replacement cost.²²⁷ This standard was successfully challenged by several states in *Ohio v. United States Department of the Interior*.²²⁸

The new measure of damage provided in the OPA reflects the standard adopted by the court in *Ohio*: the cost of restoration, rehabilitation, or replacement *plus* the diminution in value of the resources pending restoration.²²⁹ The costs of assessing the harm to those resources is also added to this total to ensure that natural resource damage cases do not fail merely because assessment monies are unavailable.²³⁰ New regulations implementing this standard are to be promulgated by the National Oceanic and Atmospheric Administration, in consultation with the heads of affected Federal agencies.²³¹ As under previous law²³² calculations of harm by trustees using these new regulations are afforded a rebuttable presumption of correctness in any administrative or judicial proceeding brought under the OPA.²³³

Sums recovered by trustees under this section are to be retained by the trustee to pay costs incurred in performance of the trustee's duties under the OPA.²³⁴ Any amounts in excess of this are to be deposited in the Federal Fund.²³⁵ The OPA also provides a limited citizens' suit provision which allows suits to be brought against federal officials for failure to carry out nondiscretionary duties.²³⁶ The Congressional Conference Report for the OPA states that the citizens' suit provision is not

²¹⁹ OPA § 4302 (codified as amended in scattered sections of 33 U.S.C.A. and 46 U.S.C.A.).

²²⁰ 46 U.S.C.A. § 2302 (West Supp. 1991).

²²¹ 46 U.S.C.A. § 8502 (West Supp. 1991).

²²² 33 U.S.C.A. § 1232 (West Supp. 1991).

²²³ OPA § 1006(a), 33 U.S.C.A. § 2706(a) (West Supp. 1991).

²²⁴ H.R. REP. NO. 663, *supra* note 57, at 108.

²²⁵ OPA § 1006(a)(3)-(4), 33 U.S.C.A. § 2706(a)(3)-(4) (West Supp. 1991).

²²⁶ OPA § 1006(c)(1)-(4), 33 U.S.C.A. § 2706(c)(1)-(4) (West Supp. 1991). The availability of money from the Federal Fund to repair natural resources must be in accordance with this plan. However, when emergency action is necessary, this requirement is waived. OPA § 1012(j), 33 U.S.C.A. § 2712(j) (West Supp. 1991). Federal trustees may also conduct damage assessments for other trustees on a reimbursable basis. OPA § 1006(c)(1)(B), 33 U.S.C.A. § 2706(c)(1)(B) (West Supp. 1991).

²²⁷ 40 C.F.R. pt. 11 (1990). These regulations apply to harm caused by oil spills under the Clean Water Act and releases of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act.

²²⁸ 880 F.2d 432 (D.C. Cir. 1989).

²²⁹ OPA § 1006(d)(1), 33 U.S.C.A. § 2706(d)(1) (West Supp. 1991).

²³⁰ *Id.*

²³¹ This change reflects congressional dissatisfaction with the Department of the Interior, which promulgated the first set of damage assessment regulations.

²³² 43 C.F.R. § 11.10 (1990).

²³³ OPA § 1006(e)(2), 33 U.S.C.A. § 2706(e)(2) (West Supp. 1991).

²³⁴ A similar scheme is outlined in section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(f) (1988). However, recoveries made under that authority have been deposited in the United States Treasury and not used to restore or replace harmed natural resources. By specifically authorizing the retention of the recovered sums by the trustee and exempting these sums from appropriation, the use of these monies to restore natural resources is guaranteed.

²³⁵ OPA § 1006(f), 33 U.S.C.A. § 2706(f) (West Supp. 1991).

²³⁶ OPA § 1006(g), 33 U.S.C.A. § 2706(g) (West Supp. 1991).

intended to “expand or diminish rights existing under current law.”²³⁷ Since general authority to compel Federal officials to take nondiscretionary duties already exists under section 1361 of title 28, United States Code, it appears that the provision is superfluous. In any case, it appears that citizens can seek to require the promulgation of damage assessment regulations under section 1006(g) of the OPA. However, its effect on forcing a trustee to bring a lawsuit for harm to a resource is unclear.²³⁸

11. Jurisdiction and Venue

Review of regulations promulgated under the OPA may be filed in the District of Columbia Circuit Court of Appeals within ninety days of the date of promulgation.²³⁹ No collateral challenges to these regulations are allowed. All other controversies under the OPA may be adjudicated in an appropriate United States district court.²⁴⁰ The OPA also establishes statutes of limitation for filing actions for removal costs and damages under the Act, as well as for contribution and subrogation actions.²⁴¹ In addition, state courts of competent jurisdiction to hear cases over removal cost and damage claims (as defined in the OPA), may consider claims under the OPA or state law.²⁴²

12. Preemption of State Laws

The jurisdiction under the OPA of state courts to hear claims for removal costs and damages is not surprising, as the OPA explicitly does not preempt state law in the area of oil spill liability and compensation. This issue has been one which divided the Houses of Congress and is generally the one identified as stalling passage of a comprehensive oil spill liability regime for over fifteen years.²⁴³ State liability laws were preempted in each of the House of Representative’s oil spill bills introduced since the mid-1970s.²⁴⁴ Preemption of state law was thought to assure certainty and uniformity of oil spill laws, thereby guaranteeing that oil would continue to be transported while those harmed by a spill would be compensated. However, this view was not shared by the Senate. The Senate argued that the existing regime should be allowed to continue—each state should be allowed to establish its own liability and compensation laws, particularly, imposition of unlimited liability.

The House predecessor bill to the OPA, H.R. 1465, stopped short of total preemption of state law in an attempt by the House authors to compromise early with the Senate on this issue. The version of H.R. 1465 considered on the House floor provided that actions arising out of discharges of oil from a vessel or facility had to be brought under the Federal regime, including recovery of removal costs and damages. It specifically exempted actions for wrongful death and personal injury, which could be brought under state law. The House bill did not preclude a state from continuing or establishing an oil spill compensation fund or from requiring any person to contribute to that fund. However, if the state fund was capitalized by a tax or fee imposed on the same persons who were contributing to the Federal Fund, the state fund was barred from compensating any claimant for damages under the OPA. H.R. 1465 also did not preempt a state from exacting fines or penalties for an oil spill.²⁴⁵

The House had passed oil spill bills preempting states from imposing their own liability regime with little opposition since 1977.²⁴⁶ However, here again, the significance of the Exxon Valdez can clearly be seen. Members of the House previously

²³⁷ H.R. REP. NO. 663, *supra* note 57, at 109–110.

²³⁸ Some courts have held that pursuit of a legal action is a discretionary duty, not subject to citizen suit actions. *City of Seabrook v. Costle*, 659 F.2d 1371 (5th Cir. 1981); *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *Committee for the Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006 (4th Cir. 1976). *But see* *South Carolina Wildlife Fed’n v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978); *Illinois ex rel. Scott v. Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977); *Wisconsin’s Env’tl. Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313 (W.D. Wis. 1975).

²³⁹ OPA § 1017(a), 33 U.S.C.A. § 2717(a) (West Supp. 1991).

²⁴⁰ OPA § 1017(b), 33 U.S.C.A. § 2717(b) (West Supp. 1991).

²⁴¹ OPA § 1017(f), 33 U.S.C.A. § 2717(f) (West Supp. 1991). See discussion, *supra* note 169, regarding conflict of this section with statute of limitations for filing claims for removal costs against the Federal Fund.

²⁴² OPA § 1017(c), 33 U.S.C.A. § 2717(c) (West Supp. 1991).

²⁴³ *Jones*, *supra* note 8, at 10,333.

²⁴⁴ H.R. 14862, 94th Cong., 2d Sess. (1976).

²⁴⁵ H.R. 1465, 101st Cong., 1st Sess. §§ 1018, 1019, 135 CONG. REC. H8128 (daily ed. Nov. 8, 1989).

²⁴⁶ H.R. 6803, 95th Cong., 1st Sess. (1977) (passed by a vote of 332–59 on September 12, 1977).

in support of preemption changed their position, while others who had not been active in the legislation took a strong interest in the bill.²⁴⁷

During the House debate on this issue, several lines of argument were drawn. Proponents of preemption argued that a nationally uniform comprehensive oil spill liability regime was needed to ensure protection of United States waters and shores while allowing for economical and environmentally-safe transportation of oil. Oil transporters would not be faced with differing requirements each time they crossed state boundaries; in turn, they would be subject to the highest standard of liability under Federal law. In addition, a billion dollar Federal Fund would be available to ensure that all those who suffered from an oil spill would be fully compensated. Opponents of preemption argued that states are in the best position to protect their own shores and waters from an oil spill. They also pointed out that most other environmental laws allowed for more restrictive state regulation, and that states may wish to pursue other categories of removal costs and damages other than those provided under federal law.

After this divisive debate pitting environmentalists and states righters against supporters of the oil and maritime industry and Federal activists, H.R. 1465 passed the House with almost all preemption language deleted.²⁴⁸ Section 1018 of the OPA²⁴⁹ makes clear that states may impose additional requirements regarding oil spill liability, removal activities, penalties and fines, and state oil spill trust funds. In addition, the Federal Limited Liability Act is also made inapplicable to the states. Neither the OPA nor the Limited Liability Act preempts the authority of any state from imposing additional liability or requirements regarding the discharge of oil or removal activities connected with a spill.

Although it is fairly easy to understand that state liability and compensation laws are not preempted by the OPA, in other areas related to oil spill incidents, the line is harder to draw. Some House Conferees were particularly concerned that the OPA not be interpreted to expand the authority of states over areas traditionally reserved to the Federal government. While attempts were made during negotiations to include language that specified what areas were preempted and what areas were not, the Senate was leery of doing so. The only concession the Senate would make on this point was to include language in the Congressional Conference Report stating that the OPA does not disturb the Supreme Court decision in *Ray v. Atlantic Richfield Company*.²⁵⁰ In *Ray*, the State of Washington had enacted a tanker law that regulated the design, size, and movement of oil tankers in Puget Sound, an area already subject to Federal law. Consequently, the Court held that Federal law preempted Washington's tanker law.²⁵¹

The House Conferees were particularly concerned that states might perceive section 1018 as a license to expand their authority with regard to vessel construction, manning, licensing, or other matter related to oil spill prevention and response, as discussed in *Ray*. That concern now appears to be well founded. In the climate that has existed around the country in the wake of the Exxon Valdez incident, states have rushed to enact strong oil spill laws which edge into this traditional federal arena.²⁵²

IV. 1984 OIL SPILL PROTOCOLS

A. Background

During the drafting of the OPA, an issue that received considerable debate was that of international agreements dealing with oil spill liability. The final section of this paper examines this issue and Congress' failure to ratify existing agreements which the United States had been instrumental in negotiating. In 1969 and 1971, two international instruments covering pollution damage from oil spills were negotiated: the 1969 Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention)²⁵³ and the 1971 Convention on the Establishment of an Inter-

²⁴⁷ For example, one of the sponsors of an early House oil spill bill which contained complete preemption language, H.R. 6803, 95th Cong., 1st Sess. (1977), later led the fight for no preemption during debate on H.R. 1465. See 135 CONG. REC. H8128-8156 (daily ed. Nov. 8, 1989).

²⁴⁸ 135 CONG. REC. H8128-8156 (daily ed. Nov. 8, 1989).

²⁴⁹ 33 U.S.C.A. § 2718 (West Supp. 1991).

²⁵⁰ 435 U.S. 151 (1978). See H.R. REP. NO. 653, *supra* note 57, at 122.

²⁵¹ *Ray*, 435 U.S. 151, 158 (1978).

²⁵² For example, the State of California recently enacted the Lempert-Keene Oil Spill Prevention and Response Act, CAL. GOV'T. CODE § 8670.1-.70 (West Supp. 1991). That Act covers many of the areas covered by the OPA, including liability, damages, financial responsibility, and contingency planning.

²⁵³ Nov. 29, 1969, 973 U.N.T.S. 3.

national Fund for Compensation for Oil Pollution Damage (Fund Convention).²⁵⁴ The Civil Liability Convention establishes strict liability for a shipowner for oil pollution damage, supported by a requirement for insurance to cover the potential oil pollution liability of a shipowner. It also establishes limits of liability for shipowners for oil pollution damage.²⁵⁵ The Fund Convention creates an International Oil Pollution Compensation Fund (International Fund) to provide supplementary compensation to oil spill victims beyond the limits of liability established under the Civil Liability Convention.²⁵⁶ The Civil Liability Convention entered into force in 1975 and the Fund Convention entered into force in 1978. As of February 20, 1990, the Civil Liability Convention had been ratified by sixty-six countries and the Fund Convention by forty-three countries.²⁵⁷

In 1984, a Diplomatic Conference was held by the International Maritime Organization to revise the Civil Liability Convention and the Fund Convention. The most important purpose of the Conference was to increase the amounts of compensation available under the two conventions.²⁵⁸ The Conference adopted an amendment, or protocol, to each Convention.²⁵⁹ The 1984 Protocol to the Civil Liability Convention²⁶⁰ will enter into force when it is ratified by 10 countries, including six countries with total tanker fleets of not less than one million units of gross tanker tonnage each. The 1984 Protocol to the Fund Convention²⁶¹ will enter into force when ratified by eight countries and when at least 600 million tons of contributing oil is received in a given year in those countries.²⁶² The 1984 Protocol to the Civil Liability Convention has been ratified by Australia, the Federal Republic of Germany, France, Peru, St. Vincent and Grenadines, and South Africa. The Protocol to the Fund Convention has been ratified by the Federal Republic of Germany and France.²⁶³ There is little chance that the Protocols will enter into force unless the States ratifies them, an event, as will be seen, that appears unlikely.²⁶⁴

B. Explanation of 1984 Oil Spill Protocols

1. Protocol to the Civil Liability Convention

The Protocol to the Civil Liability Convention covers pollution damage from spills of "persistent"²⁶⁵ oil from ships constructed or adapted for the carriage of oil in bulk as cargo. The Protocol applies exclusively to pollution damage caused in the territory of a country party to the Protocol, including its territorial sea and exclusive economic zone. The Protocol also applies to preventative measures, wherever taken, to prevent or minimize pollution damage in the areas covered by the Protocol.²⁶⁶

Under the Protocol, the shipowner is strictly liable for pollution damage as a result of an oil spill incident caused by his or her ship. There is a defense to liability available to a shipowner who proves that the pollution damage resulted from an act of war or an exceptional natural phenomenon; that the pollution damage was wholly caused by the act of a third party with the intent to cause damage; or that the damage was wholly caused by the negligence of proper authorities to maintain navigational aids.²⁶⁷

No claim for pollution damage may be made against the shipowner except under the Protocol to the Civil Liability Convention.²⁶⁸ The Protocol also prohibits claims against the agents of the owner or the members of the crew; against the pilot or any other person who performs services for the ship; against any charterer, includ-

²⁵⁴ Dec. 18, 1971, 1110 U.N.T.S. 57. See also Director, International Oil Pollution Fund, United International Regime of Compensation for Oil Spills Established by the 1984 Oil Spill Protocols 1 (1990) [hereinafter International Regime].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage of 1969, May 25, 1984, 23 I.L.N. 177 [hereinafter Protocol on Civil Liability].

²⁶¹ Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, May 25, 1984.

²⁶² International Regime, *supra* note 254, at 2.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ The Civil Liability Convention and its 1984 Protocol apply to so called "persistent" oils, that is, heavier oils such as heavy crude oil, fuel oil, heavy diesel, and lubricating oil, and not to lighter oils such as gasoline, jet fuel, and kerosine. Protocol on Civil Liability, *supra* note 260, at art. I, ¶ 5.

²⁶⁶ International Regime, *supra* note 254, at 1.

²⁶⁷ *Id.*

²⁶⁸ Protocol on Civil Liability, *supra* note 260, at art. IV.

ing a bareboat charterer,²⁶⁹ and any manager or operator of the ship; against any person performing salvage operations with the consent of the owner or appropriate public authority; against any person taking preventive measures; and against all servants or agents of persons exempt from paying claims under the Convention. This prohibition of claims against these persons applies unless the damage resulted from their personal act or omission, committed with the intent to cause the oil pollution incident, or recklessly and with knowledge that the oil pollution damage would result.²⁷⁰ Nothing in the Protocol affects the right of recourse of the shipowner against any of these persons, or against any other third party.²⁷¹

For each spill incident, the shipowner is entitled to a limit of liability which does not exceed 69.7 Special Drawing Rights, a figure which translates into approximately \$78 million.²⁷² However, the shipowner is not entitled to limited liability in cases in which the pollution damage resulted from the personal acts or omissions of the shipowner committed with the intent to cause the damage, or recklessly with knowledge that the damage would result.²⁷³ The Protocol contains an expedited procedure to amend the limits of liability for shipowners contained in the Civil Liability Convention.²⁷⁴

The owner of a ship registered in a country that is a party to the Protocol and that carries more than 2,000 tons of oil as cargo is required to maintain evidence of financial responsibility sufficient to cover its liability up to the limit established by the Protocol.²⁷⁵ Actions for compensation against the shipowner and the shipowner's insurer may only be brought in the courts of the country where the pollution damage occurred. Any judgment rendered in a country party to the Protocol is enforceable in any other country party to the Protocol.²⁷⁶

2. Protocol to the Fund Convention

The 1984 Protocol to the Fund Convention establishes an International Fund to provide compensation for pollution damage if: (1) the owner of the ship causing the oil pollution has a defense to liability under the Civil Liability Convention; (2) the shipowner is financially incapable of meeting its obligations under the Civil Liability Convention, and the shipowners financial security is insufficient to satisfy the claims for compensation for the damage; or (3) the damage exceeds the shipowner's limits of liability under the Civil Liability Convention.²⁷⁷ The maximum amount of compensation available from the International Fund for each oil pollution incident is 200 million Special Drawing Rights, approximately \$260 million, including amounts payable by the shipowner under the Protocol to the Civil Liability Convention.²⁷⁸

The International Fund is supported by contributions from any person in a member country who has received over 150,000 tons of crude oil or heavy oil that was carried by sea in a calendar year. Individual contributors are required to pay contributions to the International Fund based upon the amount of oil received. The governments of member countries have no responsibility for these contributions, unless they accept this responsibility.²⁷⁹

C. Conference Debate on the 1984 Oil Spill Protocols

Title III of the House predecessor bill to the OPA contained implementing legislation for the 1984 Protocols.²⁸⁰ The Senate predecessor bill to the OPA did not.²⁸¹ The House-Senate Conference Committee to resolve the differences between the oil spill bills twice debated the merits of including implementing legislation for the

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at para. 5.

²⁷² *Id.* at art. V, para. 1. The limits of liability for a shipowner are: (1) for a ship less than 5,000 gross tons, three million Special Drawing Rights (approximately \$8.9 million U.S.); (2) for a ship of at least 5,000 but less than 140,000 gross tons, three million Special Drawing Rights plus 420 Special Drawing Rights (approximately \$550 U.S.) for each additional ton; and (3) for a ship of 140,000 gross tons or more, 69.7 million Special Drawing Rights (approximately \$78 million U.S.).

²⁷³ Protocol on Civil Liability, *supra* note 260, at art. V, para. 2.

²⁷⁴ International Regime, *supra* note 254, at 2.

²⁷⁵ *Id.* at 1.

²⁷⁶ *Id.* at 2.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ International Regime, *supra* note 254, at 3.

²⁸⁰ H.R. 1465, 101st Cong., 1st Sess., tit. III, 136 CONG. REC. H8247 (daily ed. Nov. 9, 1989).

²⁸¹ S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S10,406 (daily ed. Aug. 15, 1989).

1984 Protocols in the OPA. Although there were some opponents to the 1984 Protocols on the Conference Committee from the House of Representatives, most of the opposition to the Protocols came from the Senate conferees.²⁸² The opposition arguments and concerns can be grouped into four major categories:

- (1) *The role of the Senate should not be bypassed.*
 - The Protocols should not be implemented by legislation until the Senate first ratifies the Protocols.²⁸³
- (2) *Compensation Limits of the Protocols would be restrictive.*
 - The Protocols provide protection to oil spill victims only under a limited set of circumstances.²⁸⁴
 - The Protocols preempt state unlimited liability laws.²⁸⁵
 - The Protocols limit compensation to oil spill victims to the amounts available from the International Fund and the Federal Fund.²⁸⁶ Because the amounts paid from the International Fund consist of contributions from the Federal Fund, United States taxpayers actually bear these costs, not the spiller.²⁸⁷ Shipowners spilling oil may make claims against the International Fund for oil spill expenses they incur above their limits of liability, which also limits compensation from the International Fund.²⁸⁸
- (3) *Other shortcomings of the Protocols should be recognized.*
 - The standard contained in the Protocols for breaching a ship owner's limit of liability is lower than the standard contained in the oil spill bills passed by the House of Representatives and the Senate, and would preempt higher Federal and state standards that make it easier to breach limits of liability.²⁸⁹
 - The third party defense to liability available to shipowners under the Protocols is inconsistent with the third party defenses contained in the oil spill bills passed by the House of Representatives and the Senate, or with the defenses under the laws of most states.²⁹⁰
 - The defense to liability available to shipowners under the Protocols for oil pollution damage resulting from the negligence of the claimant preempts Federal and state law prohibiting defenses of this type, and would require Federal and state governments and other claimants to seek reimbursement and compensation from the International Fund and the Federal Fund.²⁹¹
 - The Protocols require "channeling" of claims for oil pollution damage to the shipowner, and prohibit actions against other potentially liable persons.²⁹²
 - The Protocols define pollution damage in a way that limits liability for natural resource damages.²⁹³
 - The Protocols require state court actions to be removed to Federal court.²⁹⁴
- (4) *Renegotiation of the Protocols should be pursued.*
 - The United States should renegotiate the Protocols to accommodate the arguments against their ratification.²⁹⁵

On the other hand, the supporters of implementing the Protocols in the OPA were from the House of Representatives,²⁹⁶ and they made the following arguments and counterarguments in favor of the Protocols:

- (1) *Role of the Senate would not be bypassed.*

²⁸² Minutes of the House-Senate Conference on H.R. 1465, the Oil Pollution Act of 1990, 32 (Apr. 25, 1990) [hereinafter April 26 Conference].

²⁸³ *Id.* at 26–27.

²⁸⁴ *Id.* at 39.

²⁸⁵ *Id.* at 40.

²⁸⁶ *Id.* at 25.

²⁸⁷ Letter from Senator George J. Mitchell to Congressman Dante B. Fascell, Chairman, Foreign Affairs Committee, U.S. House of Representatives (Apr. 23, 1990) [hereinafter Mitchell Letter]. Senator Mitchell argues that any tax on oil consumed in the United States is ultimately paid by the American people. April 26 Conference, *supra* note 282, at 25.

²⁸⁸ April 25 Conference, *supra* note 282, at 25.

²⁸⁹ Mitchell Letter, *supra* note 287, at 4.

²⁹⁰ *Id.* at 5.

²⁹¹ *Id.*

²⁹² *Id.* at 6.

²⁹³ April 25 Conference, *supra* note 282, at 28.

²⁹⁴ Mitchell Letter, *supra* note 287, at 9.

²⁹⁵ Minutes of the House-Senate Conference on Title III of H.R. 1465, the Oil Pollution Act 19 (June 28, 1990) [hereinafter June 28 Conference].

²⁹⁶ *Id.* at 13.

- There is no requirement that the Senate ratify an international agreement before legislation is enacted to implement the agreement.²⁹⁷
- (2) *International nature of oil pollution requires entry into an international agreement.*
 - The most effective oil spill liability and compensation system depends on international participation, and should represent a united international, federal, and state effort.²⁹⁸
- (3) *Limitations on Federal and state law would be minimal.*
 - The effect of the Protocols on state law is limited to one type of state statute imposing unlimited liability on persons responsible for oil spills.²⁹⁹
 - State unlimited liability laws will not, in reality, provide unlimited compensation to victims of oil spills.³⁰⁰
 - The greatest weakness in an oil spill system that depends exclusively on state and Federal law is its lack of enforceability against other sovereigns.³⁰¹
- (4) *Compensation of oil spill victims would be maximized under the Protocols.*
 - The most important goal of an oil spill compensation system is to deliver prompt and complete compensation to victims of oil spills, and the amounts available from the International Fund are necessary to provide full and prompt compensation to oil spill victims.³⁰²
 - The Protocols contain over \$260 million to compensate oil spill victims and clean up the environment, with the potential of nearly \$400 million once the United States ratifies the Protocols and begins contributing to the International Fund.³⁰³
- (5) *Accomplishing the goals of the oil spill system are more likely to be achieved under the Protocols.*
 - Under the Protocols, states are free to accomplish all of the goals of oil spill compensation, cleanup, prevention, and punishment. Some revision of state law maybe required, but that is a small price to pay for the benefits of an international solution to the problem of oil spills.³⁰⁴
 - The best way to punish persons responsible for oil spills is directly through civil or criminal penalties. Penalties are not affected by the Protocols, and states are free to impose civil or criminal penalties against persons responsible for oil spills.³⁰⁵
 - The best way to prevent or deter oil spills is directly through vessel operational requirements monitored by Federal and state officials. The Protocols do not affect the increased vessel requirements for prevention imposed by the oil spill bills passed by the House of Representatives and the Senate.³⁰⁶
- (6) *Misunderstandings surrounding the Protocols should be corrected.*

²⁹⁷ *Id.* at 8.

²⁹⁸ April 25 Conference, *supra* note 282, at 18.

²⁹⁹ Memorandum from Henry Cohen, Legislative Attorney, American Law Division, Congressional Research Service, Library of Congress, to the Comm. on Merchant Marine and Fisheries, U.S. House of Representatives, on the Extent to Which Title III of the Oil Pollution Act of 1989 Would Preempt State Law (Apr. 18, 1990).

³⁰⁰ June 28 Conference, *supra* note 295, at 10.

“Mr. Studds: Let me emphasize this last point because it’s important. Some have suggested that only the unlimited liability provisions of state laws can guarantee full compensation in the event of another Exxon Valdez. This argument is flawed by the fact that most tanker operators are not Exxon and would not have the resources needed to provide full compensation in a case where damages exceed the billion dollars or so that could be recovered from [the] fund.”

Id. at 5.

³⁰¹ *Id.* at 10.

³⁰² April 25 Conference, *supra* note 282, at 18; Memorandum from Merchant Marine and Fisheries Minority Staff to Republican Oil Spill Conference Staff on Answers to Frequently Asked Questions on International Oil Spill Protocols 2–3 (Apr. 20, 1990) [hereinafter Staff Memo]. “The International Protocols will ensure that United States’ citizens are fully and promptly compensated for their losses. Since the International Oil Pollution Compensation Fund was established in 1979, it has established a reputation for quick settlement of claims. The average time period for payment of claims is six months. For the average citizen, this process is preferable to a complicated, lengthy litigation process. An instructive example for those who argue that litigation is superior to administrative settlement of claims through the International Fund is the Amoco Cadiz incident. In the Amoco Cadiz oil spill, which occurred in France in 1978 before the entry into force of the Fund Convention, not a single cent has been paid to *any* claimant. Complicated litigation is still pending in courts in the United States, with no resolution in sight.” *Id.*

³⁰³ April 25 Conference, *supra* note 282, at 18.

³⁰⁴ *Id.* at 17–18.

³⁰⁵ Staff Memo, *supra* note 302, at 1.

³⁰⁶ *Id.* at 5.

- Many legal scholars have stated that the Protocols standard for breaking limits of liability is the same as the gross negligence standard provided in the oil spill bills passed by the House of Representatives and the Senate, thus defusing the argument that the Protocols would make it harder to breach limits of liability.³⁰⁷
- Natural resource damages are not limited by the Protocols, because damages above those paid from the International Fund may be compensated from the Federal Fund and from state oil spill funds.³⁰⁸
- (7) *Clarification of the Protocols is possible.*
 - Most of the objections raised to the Protocols can be overcome in the implementing legislation to harmonize the international, federal, and state oil spill systems.³⁰⁹
- (8) *Renegotiation of the Protocols is not an option.*
 - Because of its failure to ratify the Protocols, the United States has lost stature with the international community. For this reason, renegotiation of the Protocols to benefit the United States is not an option.³¹⁰

D. Final Conference Action

On June 28, 1990, the House and Senate Conferees met to decide whether to implement the Protocols. At this meeting, Congressman Gerry Studds of Massachusetts offered a compromise proposal to respond to the arguments in opposition to the Protocols. The compromise proposal clarified the relationship of the Protocols to Federal and state law, and provided for the repeal of the implementing legislation for the 1984 Protocols within five years if certain amendments to the Protocols were not adopted internationally.³¹¹

The proposal responded to the major arguments cited in opposition to the 1984 Oil Spill Protocols. The proposal: (1) clarified that the adoption of implementing legislation for the Protocols does not constitute a ratification or endorsement of the Protocols; (2) clarified that liability limits may be breached under the Protocols if an oil spill is caused by the gross negligence or willful misconduct of the responsible party; (3) clarified that the Protocols do not preempt a claim under any other law for removal costs or damages that are not covered by the Protocols; (4) clarified that the Protocols do not preempt claims under Federal or state law from the Federal Fund, including the measure of damages for natural resource damages, the total of removal costs or damages, or the period during which claims may be brought for oil spill damages; (5) clarified that the Protocols do not preempt a claim against a person who is not the owner of a ship or the shipowner's agent; and (6) clarified that the Protocols do not preempt the right of Federal or state governments to impose civil or criminal penalties for an oil spill.³¹²

Finally, the compromise proposal expressed the sense of Congress that the President should take steps to denounce the Protocols within five years of ratification unless the President finds that United States participation in the international oil spill system under the Protocols has not undermined Federal and state efforts to prevent and provide compensation for oil spills, and that the Protocols have been revised to make them comparable to certain provisions of the OPA. The last provision of the compromise proposal repealed legislation implementing the Protocols after five years, and prohibited the President from making payments to the International Fund after that date unless the foregoing conditions were satisfied.³¹³

During the debate on the proposal, members of the Conference Committee from the House of Representatives emphasized that state unlimited liability laws cannot guarantee adequate compensation for victims of an oil spill. They explained that most oil tanker operators do not have the assets of a company like Exxon and would not have the resources needed to compensate oil spill claimants following an oil spill where damages exceed the billion dollars available from the Federal Fund. The supporters of the compromise pointed out that the oil transportation industry may simply organize around state unlimited liability statutes to protect the assets of their

³⁰⁷ *Id.* at 4.

³⁰⁸ Reasons to Support the International Oil Spill Protocols (May 9, 1990).

³⁰⁹ April 25 Conference, *supra* note 282, at 19–20.

³¹⁰ June 28 Conference, *supra* note 295, at 7.

³¹¹ Memorandum from Congressman Gerry Studds to House and Senate Conferees on Title III of Comprehensive Oil Pollution Legislation (H.R. 1465/S. 686) 2 (June 25, 1990).

³¹² *Id.* at 2–3.

³¹³ *Id.*

companies from bankruptcy. They observed that state unlimited liability laws encourage oil to be transported by one-ship, undercapitalized companies.³¹⁴

Another argument stated in favor of the proposal concerned the need for international enforceability of judgments of United States courts. Without this enforcement authority, billion dollar judgments from state or Federal courts against persons responsible for oil spills are worthless to oil spill victims.³¹⁵ Finally, the supporters of the proposal argued that the Senate position in favor of renegotiation of the 1984 Protocols was unrealistic. It was under the Senate's direction that the United States had successfully negotiated the 1984 Protocols in the first place. The United States was now no longer in a position to dictate to other countries on this issue, because of its failure to ratify the 1984 Protocols.³¹⁶

Not surprisingly, the House Conferees voted to accept the compromise proposal, and offered it to the Senate Conferees for their consideration.³¹⁷ During their debate on the proposal, the Senate conferees argued against accepting the proposal on several grounds. First, they contended that the proposal would preempt important objectives in Federal and state oil spill liability matters; second, it would create confusion with respect to American law concerning oil spills; third, it would compromise the constitutional role of the Senate; and fourth, it would shift exposure for unlimited liability from persons responsible for oil spills to the American taxpayer.³¹⁸ Consequently, the Senate rejected the compromise.³¹⁹

The persistent House of Representatives, however, had yet another proposal in the wings.³²⁰ The House Conferees agreed to recede to the Senate on the Protocols issue in exchange for the Senate's agreeing to another, milder proposal.³²¹ The result is OPA section 3001, which expresses the sense of Congress "that it is in the best interests of the United States to participate in an international oil pollution . . . regime that is at least as effective as Federal and State laws in preventing [oil spills] and in guaranteeing full and prompt compensation for damages resulting from such incidents."³²²

E. Outlook for International Solutions

Because of the international nature of the oil transportation industry, the problem of oil pollution must be addressed internationally. The oil pollution compensation, cleanup, prevention, and punishment system for the United States will not be complete until it includes international participation.

Recently, the Diplomatic Conference for the Oil Pollution Preparedness and Response Convention was concluded in London, England. While most delegations agreed with the United States that the Oil Pollution Preparedness and Response Convention was too important to allow the failure of the United States to ratify the Protocols to stand in the way of the Convention, many delegations and individuals privately emphasized that the United States has lost stature internationally because of its failure to ratify the 1984 Protocols.³²³

With this reality, the Europeans, with the United Kingdom in the lead, are searching for a solution to the international oil spill problem, and are considering a number of possibilities. It remains to be seen whether the Europeans will propose to renegotiate the 1984 Protocols, or whether they develop another scheme to address international oil pollution. Unfortunately, the United States' failure to ratify the Protocols will probably prevent the United States from being a leader in the upcoming negotiations.³²⁴

V. CONCLUSION

As can be seen by the foregoing lengthy discussion, the Oil Pollution Act has made substantial changes in Federal oil spill law. The OPA generally reflects an anti-oil industry bias, by raising penalties, limiting defenses to liability, providing

³¹⁴ June 28 Conference, *supra* note 295, at 5, 9, 10.

³¹⁵ *Id.* at 10.

³¹⁶ *Id.* at 7; see also Letter from Senators Robert T. Stafford, Jennings Randolph, and John H. Chafee to Rear Admiral Bobby F. Hollingsworth, Chief, Office of Marine Environment and Systems, U.S. Coast Guard (Apr. 20, 1984).

³¹⁷ June 28 Conference, *supra* note 295, at 13.

³¹⁸ *Id.* at 14.

³¹⁹ *Id.* at 21.

³²⁰ This second proposal was offered by Congressman Jones.

³²¹ June 28 conference, *supra* note 295, at 22-23, 24.

³²² OPA § 3001.

³²³ Telephone interview with Daniel F. Sheehan, Technical Advisor, Office of Marine Safety, Security, and Environmental Protection, U.S. Coast Guard (Dec. 12, 1990).

³²⁴ *Id.*

more and quicker compensation for those hurt by a spill, and imposing sometimes onerous new prevention and planning requirements on the oil transportation industry. It has been over a year since the OPA was signed into law, and the reactions to the new requirements of the OPA are varied. Representatives of the oil transportation industry threaten to stop moving oil through United States ports unless they receive some relief from exposure to unlimited liability. Members of environmental groups think that the OPA did not go far enough to deter oil transporters from spilling oil and to punish responsible persons. The Coast Guard and other Federal agencies charged with implementing and administering the OPA are struggling with the enormous task of writing regulations to give effect to Congress' intent in enacting the OPA. Finally, the members of Congress and their staff who developed the Act are watching all these developments with interest, but without an incentive to reconsider any significant issue decided as part of the OPA.

Despite the various arguments against certain provisions of the OPA, there is little interest in Congress in revisiting the OPA's major provisions. The decisions made on the most important issues of the OPA, including the preemption of state law, implementation of International Oil Spill Protocols, and double hulls for oil tank vessels, were extremely difficult to resolve in the Conference on the OPA. There were close to eighty members of Congress who were conferees on the OPA with divergent views on the issues under consideration. It is our opinion that no significant changes will be made to the OPA unless a crisis or catastrophe of the proportions of an Exxon Valdez oil spill causes Congress to reopen issues decided as part of the OPA. None of us has a crystal ball, but we predict that the current "wait-and-see" attitude of Congress toward the OPA will prevail until events allow us to determine the actual effects of the OPA.

Chair PETERS. Thank you, Commissioner Dye.

Chairman Maffei, as you mentioned, both of you in your opening remarks, in June 2022 we saw the Ocean Shipping Reform Act signed into law. Those have provided the FMC with additional authorities to address international ocean shipping transportation-related supply chain challenges, along with improved tools to investigate unfair shipping practices, and fees, and other charges.

OSRA also amended the Shipping Act to prohibit international ocean carriers from unreasonably denying U.S. cargo, and established a certification process for detention and demurrage charges to improve transparency and enforcement.

And Chairman Maffei, I know you talked about that in your opening remarks, but perhaps you could provide the committee with a little more detailed update as to FMC's progress in utilizing these additional authorities and improved tools provided by the law, and any other comments related to the law that you think is important for this committee to hear?

Mr. MAFFEI. Absolutely, Senator Peters. And I, very briefly, do want to recognize that Max Vekich, the first Commissioner we have ever had from the State of Washington, is also actually here today. So we both have Commissioners Sola and Vekich in our audience, and I appreciate. And I know Commissioner Dye appreciates their support.

Look, I am a very fortunate person in that when I wake up in the morning I don't have to do a to-do list because my to-do list was written by the Senate Commerce Committee endorsed by a vast bipartisan majority in the Senate, and yes, even the House, and signed by the President of the United States.

OSRA implementation is the top priority of the Commission. My top priority within that is now, and particularly now that the Detention Demurrage Billing Rule is done, to get the mandated rule addressing unreasonable refusal to deal for importers, exporters finished. You mentioned the—unreasonably denying U.S. cargo,

which is clearly now illegal, thanks to the Ocean Shipping Reform Act.

When we started our process of the Act actually mandates the refusal to deal part of it, it did not mandate in this first rule that we put unreasonable denying of cargo; however, when we came out with our first draft, nobody liked it, on either side, and we realized, and at least I realized, that we needed to also make sure that unreasonably denying cargo was in the same rule as not allowing any sort of unreasonable refusal to deal.

We rewrote the rule, we put it back out in a supplemental rule-making, that has taken a little bit longer than I wanted, but I think we are going to have a much better result that our exporters, whether we are talking about cherries from Michigan, or cotton from Texas, are definitely going to like, and I expect that to be out in the next few months in final form.

I have kept in touch with all those groups, by the way, in the meantime, and fortunately, because of market forces, it is not as urgent as it could have been, but we will make sure that is out. In the meantime, by the way, denying U.S. cargo unreasonably is illegal, of course, and we can enforce that.

Look, we are on all cylinders firing on the enforcement and consumer stuff, particularly given that that was a major priority in OSRA. You mandated that we hire seven people in various roles. We hired nine in those roles. We continue to up our enforcement efforts. We have hired a senior executive service-level person to oversee our enforcement. We have hired a—actually even before the bill, but now we—but it corresponds with the bill, an export advocate within our Consumer Affairs Division, and we continue every day to keep the pressures on.

There are a number of other requirements in OSRA, frankly a dozen or more, that we have completed, and I am happy to provide you with a list of those in writing, but I don't think we need to get into that here.

Chair PETERS. Very good, Chairman Maffei. And as you recall from our days serving in the House together, where I believe your district included the first port of call into the Great Lakes. We cannot forget about the important role that Great Lakes shipping always plays in our economy, and I believe that part of the solution to preventing the congestion and supply chain disruptions that we saw following the pandemic, is to make better use of our ports in the Great Lakes.

Our Great Lakes ports can play a significant role in easing congestion at coastal ports, improving the efficient movement of freight, and reducing emissions in the process.

However, in order to achieve these goals, we need to ensure that all seaports have equitable access to Federal resources, and are also held to the same standards. And that is why I am committed to working with our smaller seaports as they work to balance security concerns and evolving threats with port business operations needed to move that freight.

My question for you, Chairman Maffei, is: Can you comment on the role our Great Lakes ports can play in alleviating congestion at these larger ports and through the supply chain?

Mr. MAFFEI. Yes, absolutely. I mean I love the question, of course, Senator Peters, being from—I think I might be the first Chairman that comes from the Great Lakes area of the country. I think that it already plays an important role. There is a—now, most of Great Lakes shipping is not containerized, it is bulk shipping, et cetera, break bulk of liquid fuels, et cetera, and there are certain issues there.

But in terms of container shipping, which is what we primarily regulate, there is indeed a container service to the Great Lakes. It goes from Antwerp to Cleveland, of course it is seasonal. And it has been very, very successful. So successful in fact that the Port of Duluth is also considering container shipping, and I think also Monroe, Michigan.

Chair PETERS. Um-hmm.

Mr. MAFFEI. It is extraordinarily helpful. For instance, during the pandemic, a rubber manufacturer in Houston, Texas, which found that the Port of Houston, although a fantastic port, was basically at its capacity. Ships didn't have any more space. So what they did was, in order to get their product to Europe, they sent it up to Cleveland and exported it on containers out of Cleveland. So indeed, I think an expansion of services along the Great Lakes would help the entire country because it would add to that ability to diversify the supply.

Chair PETERS. Thank you, Chairman Maffei.

Ranking Member Cruz, you are recognized for your questions.

Senator CRUZ. Thank you Mr. Chairman. I appreciate it. Welcome to both the Commissioners, thank you for being here, thank you for your service.

Last month the FMC held a hearing on the impact of the Houthi attacks in the Red Seas, and to hear from stakeholders. I would be interested in your telling the Committee, what did you learn at that hearing?

Mr. MAFFEI. Yes, Senator, I think the biggest thing that I learned, and I want to yield to Commissioner Dye, if you will allow but—was that there really has been a lack of transparency. It is not so much as you mentioned in your opening statement. Obviously, carriers faced with the prospect of their crews and officers being put at risk, or shouldn't put them at risk for a single shipment.

Nonetheless, when you have a threat to Freedom of the Seas and they had to—they do have to go around they do charge more because there are additional fees, and it does change the market because a ship taking longer will be less available to carry other cargos. And they did, they did put in some of these fees to compensate for that.

However, the consumer, the shippers, exporters, and importers really had no idea, no way of knowing whether those were fair. And so what we have tried to do already is start putting through our VOCC Audit Program, asking these questions, trying to get answers, and trying to encourage the ocean carriers to be more transparent.

So the transparency was the number one thing, better transparency I think would help everybody figure out whether they are getting their money's worth.

Senator CRUZ. Commissioner Dye, did you have anything you wanted to add to that?

Ms. DYE. Yes. Thank you, Senator Cruz. The two main costs that carriers are incurring are fuel and wear and tear on the ships. They also have to acquire additional capacity by charter, and significant new tonnage is coming into the marketplace as well. Shippers are concerned and suspicious about the amount of the surcharges, and we understand that. I definitely understand that after having heard the complaints and concerns during the steep rise in prices during the pandemic.

It is our responsibility to make sure that those surcharges are reasonable, and we, during the hearing, assured the shippers that we would do that, and that we are in the process now of making sure. As I understand it the rate of increase is comparable to what happened during the pandemic, but the actual price is short of that, and as the carriers begin to negotiate with their contract shippers, then what we hope to see is moderation.

Senator CRUZ. So what has the impact been so far to American consumers and American businesses of these Houthi attacks in the Red Sea?

Mr. MAFFEI. Well, the impact, so far, has been relatively limited, because even though I mentioned 30 percent of containerized traffic, that it is global containerized traffic. The U.S. is less of that. It is really the combined effect of the Suez situation with the Panama Canal situation that has created an issue because of—mostly due to lack of capacity. And Fitch estimates that that could lead to approximately four-tenths a percent of inflation.

However, the good news, if you can call it that, is that there are a lot of new ships coming online over the next few months. During COVID most of these carriers ordered a great deal more capacity because they were so short during COVID, and those ships will come online.

I think once that happens, provided we as the Commission do what we need to do to preserve the fact that there is competition, market competition, that even if the situation in the Red Sea continues, the rates will go down. They may not go down to where they were last year, but they will decline to a more acceptable level.

Senator CRUZ. So one of the things both of you talked about in your opening testimony were detention and demurrage fees, and as you discussed, during the pandemic some ports applied what they call “dwell fees” on containers that were not picked up in time. Notably, the Port of Los Angeles and Long Beach took these fees to the extreme. They started at \$100 per day, after the ninth day on a terminal, and they increased by \$100 a day.

This could lead to an extraordinary sum, \$46,000—\$46,500 in just 30 days. Now, if I understood your testimony, as well, you both said that you thought detention and demurrage fees should be used to actually incentivize the movement of goods. Is that correct as to your understanding? And how would the new rule that you released operate?

The Port of Los Angeles and Long Beach have rescinded the dwell fees, but if they had stayed in place, how would the new rule have impacted those fees?

Ms. DYE. The fees were not described as demurrage and detention fees. But our position was if it walks like, quacks like demurrage and detention, it is subject to our rules. And all of our shippers, our importers, were under pressure because, as we said before, they had ordered an overwhelming supply of goods, to respond to the American consumers during that time, and did not have anywhere to put it.

And so the cargo continued to build on the ports, you couldn't even move the containers around. Shippers were finding other property to store a cargo, and it was a terrible time for everybody. Regardless, we made plain to LA that those were not reasonable fees under the—under the Incentive Principle. And we were pleased that they didn't actually move to collect those.

Senator CRUZ. Thank you.

Chair PETERS. Thank you, Ranking Member Cruz.

So Chairman Maffei, I understand that in 2005 the FMC helped the Lake Carriers Association with an investigation regarding the Canadian Coast Guard charging U.S. "Lakers" significantly higher harbor service fees than they charged Canadian Lakers moving the exact same cargo between the United States and Canada.

I also understand that they have recently asked you to proceed with another investigation regarding a transport Canada issue. And as I think you know, it is incredibly important that American Lakers have the ability to effectively move cargo on the Great Lakes including between the United States and Canada.

So my question for you, Chairman Maffei, is first of all I want to thank you for the FMC efforts on this issue today, but could you assure me and the Committee that you will look into this issue, and perhaps comment on how important it is to make sure that we get a fair resolution to this?

Mr. MAFFEI. I am happy to assure you of that. The Lake Carriers' petition has been investigated by the Commission for some time, there was a—we were waiting for other agencies of the United States, and to see this, whether the situation would evolve to a point where the petition would no longer be needed. However, the lake carrier—it is indeed the Lake Carriers who reasserted this petition.

Now, I do have to be careful here, because I cannot talk about this particular case because it is an ongoing investigation, but I can tell you what this is, what part of the law this is, and how that works. And assure you that I will be, that we—I believe all members of the Commission are very interested in making sure that we do our duty toward this.

Under Section 19 of the Merchant Marine Act of 1920 the FMC has the authority to take action when conditions unfavorable to shipping in the foreign trade exist. For example—I will use a different example; in February 1997 the Commission found that certain port regulations in Japan discriminated against U.S. shippers in Japanese harbors, and the FMC ordered a fee of \$100,000 back then, per each cargo vessel of the three major Japanese carriers, that was brought into a U.S. port.

So this is the kind of thing that can happen if we indeed find that any other government has created a condition that discriminated against U.S. shippers.

Chair PETERS. Well, thank you. Thank you. This next question is to each of you. And I will start with Ms. Dye first. Michigan's agricultural industry is expected to export about \$2.2 billion in agricultural products, it plays a vital role in supporting our state's economy. Export opportunities are critical for success of our agricultural sector as it is, of course, all over the country. But supply chain disruptions, when they occur, threaten our farmers' ability to market their products around the globe.

So I want to ask each of you, if you would let the Committee know, how rulemakings the FMC is working on now, will actually ensure reliable supply chains for our agricultural exports? So, what can I tell my farmers and other folks in the agricultural industry, is being done to ensure that for them?

Commissioner Dye.

Ms. DYE. Yes, Mr. Chairman. I am very pleased with the response that we have received on our recent Demurrage and Detention Billing Rule from exporters, in particular, and their truckers, and especially in LA/Long Beach. The clarity and predictability of the rule's requirements assure that exporters do not have to spend time tracking down an invoice that is 6 months old, because today the bills have to be sent in 30 days, which is a reasonable amount of time.

And so the effectiveness of these—of the approach in this rule will make sure that they save—that they save money, and I think that is the most important thing at this point.

Chair PETERS. Great. Thank you.

Chairman Maffei.

Mr. MAFFEI. Yes, Senator. As I already talked about the specific rule that will be coming out that will help us enforce the prohibition against unreasonably denying cargo that is important. However, there are a lot of other important initiatives that the Commission is working on. Part of the challenge with the shipments is the unpredictability, generally speaking, of when ships are going to leave, the possibility of what we call "blank sailing" when a ship does not go.

These affect all cargo importers and exporters, but particularly agricultural exporters who may have a shelf life of their product or whose product is desperately needed. If you need, you know, protein products from dairy farms in Michigan to feed your people you cannot, you cannot necessarily put those off.

So Commissioner Dye has done a lot of good work on this, she is sometimes too modest about how to—working with her supply chain taskforces to make sure—to figure out better ways of predicting these things, and how we can get those to shippers. This is not a completely government approach, we are not going to mandate things, I don't think. But what we are talking about is getting—is being—using our power as conveners to help get things together.

I will be attending the Agricultural Shippers Conference this year, I think usually we sort of alternate those, but always, at least one Commissioner is there to sort of see how we can be helpful there. And then the enforcement is extraordinarily important, and the fact particularly on detention and demurrage, that the FMC now is willing to stand up for American shippers, particularly

America's agricultural exporters, to ensure that they are given fair treatment. And so there is a lot of—a lot of stuff that we do.

Oh. And I did mention, I think, already, but just in case I didn't. There is a specific advocate for exports in our Consumer Affairs Division that can be called on if an exporter has an issue and just does not know what to do. I mean not everything falls into an easy category of, file a case with the FMC, or get the FMC to investigate it, or call the carrier and ask them to waive a fee. So we have a specific person assigned to that in our Consumer Affairs Division.

Chair PETERS. Great. Thank you. A final issue I want to raise for both of you, and hear your thoughts, something that I know you agree on. But investing in the modernization of our ports so they can handle bigger ships and prevent congestion is absolutely critical for our entire national economy.

In fact, by 2045, port infrastructure investments could produce economy-wide returns of between \$2 to \$3 for every dollar spent. That is a real good return on investment over that time period. That is why I led, and strongly supported efforts to increase the funding for the Maritime Administration's Ports Infrastructure Development Program, which is the PIDP Grants. These grants can be used to fund the port infrastructure needed to improve freight mobility, address port congestion, and improve port competitiveness.

The Infrastructure Investment and Jobs Act, that we passed contains \$17 billion for investing in our port infrastructure and waterways, including \$2.25 billion for the PIDP. The express purpose of this funding is to be used in modernizing port infrastructure, making it more resilient, and sustainable, and to help remove bottlenecks, as well as reduce some environmental impacts.

So I would like to hear from both of you, if you could speak as to how these increased investments in our port infrastructure, such as what was contained in the Infrastructure Investment and Jobs Act, as well as our Build Back Better Act that passed recently through Congress and signed by President Biden, will help alleviate congestion in our ports throughout the supply chain?

Commissioner Dye, do you want to start?

And then Chairman Maffei, you can wrap it up.

Ms. DYE. Thank you very much. Of course, our executive directors of our ports are impressive people, and their recommendations for what they need in their ports, is the best place to start. I am familiar with the MARAD Program, and I know it is very well regarded among port directors. And of course, all infrastructure; roads and other infrastructure directly related to the port, can help alleviate bottlenecks.

Chair PETERS. Thank you, Commissioner.

Chairman Maffei.

Mr. MAFFEI. Yes. I mean, I want to make sure I am wearing the right hat for this because, of course, when I was a Congressman, I was a huge supporter of these things, and unfortunately, we could not get that passed when I was in Congress. But it is true that it is not in our jurisdiction, of course, to administer any of these programs.

But in terms of the supply chain that we care about and we monitor, it is extraordinarily important that, in my view, that the coun-

try continue to make those investments. I think Commissioner Dye is absolutely right. If you want to build better railroads, if you want to build bridges in Indiana, or in Michigan, that helps us on the coasts, it helps us everywhere. It is one integrated supply chain system.

And I think one of the lessons of COVID is that you can even have ports that are operating relatively well, but they will still look completely clogged because of the lack of infrastructure, or other sorts of things.

So this money, it is my understanding, can be used for all sorts of port improvements. LA and Long Beach have both found land that is not exactly on the water but helps in the event that they have a surge in cargo. And I will give you one example from the past, the port of—that I am most familiar with, the port of New York/New Jersey, the major port I am most familiar with, did the difficult task of raising a bridge, the Bayonne Bridge.

That didn't just help the port of New York and New Jersey, and ports on the north—in the northeast or shippers in the northeast, it helped the entire coast, it helped Savannah in Senator Warnock's state.

And the reason is because when ships come, they usually, they make a first call, and then they may make a last call. So anyone in that vicinity is helped. Improving Houston helps the Port of Gulfport, improving San Francisco; it can help the ports in the Puget Sound.

So yes, I think it is very, very important that the country continue these priorities. Though, again, it is not anything that we would administer or get involved in, but generally speaking, it helps all of us, and helps us do our job to make sure that there are good supply chain options.

Chair PETERS. We are expecting another member to be here shortly, so I get a chance to ask a few more questions.

So Chairman Maffei, the lake that allows the Panama Canal to function is at its lowest level since 1995, due to an extended lack of rainfall in that region. In response, the Panama Canal Authority has substantially scaled back daily traffic, limiting the number of vessels allowed to transit the canal from 38 ships a day down to 24, which is a significant reduction.

Mr. MAFFEI. And it may go down even further, is the plan for them. Sorry to interrupt.

Chair PETERS. That is OK. We are friends, you can do that. The Panama Canal handles roughly 40 percent of all U.S. container traffic and is critical for the transportation of energy commodities. So my question for you, Chairman Maffei, is: In light of the situation in the Red Sea, can you speak to what FMC is doing to ensure that the Panama Canal drought does not compound all of these ongoing problems, with delayed shipments, and transportation costs? Are there things that you could be doing? And how concerned, you mentioned, that this is going to get worse before it gets better? Is this something you lose sleep over?

Mr. MAFFEI. I do. I do lose sleep over it. You know me, you know me well Senator. I lose sleep over things that other people probably wouldn't take note of, but. And I am extraordinarily concerned about it. In terms of the FMC's role, that is a little more chal-

lenging. We do not want to overstep our authority in any of these ways.

But I will say a couple of things. One is, obviously, there are additional fees associated with Panama Canal transits that we do need to keep an eye on to make sure if there are extra fees, we don't regulate rates, but we can look at whether a fee is doing what it says, and is making sure it is not unreasonable in the way it is presented, or an unreasonable rate increase in disguise. So we can take a look at that. We can also, you know, look at the overall supply chain options that shippers have.

That said, though, myself and Commissioner Louis Sola, who I mentioned is here today, are going to conduct a preliminary inquiry into the water level issues, and Panama's handling of them, to determine whether there are any other ways that the FMC can be helpful without overstepping our authority.

The two of us have already talked about that, and we expect to commence that, and probably make a fact-finding trip to Panama, just to make sure that we have the appropriate information that we need to make that determination.

I have tried to lengthen this answer, Mr. Chairman, but I think I am done. So I am going to—Mr. Chairman. If you remember, Mr. Chairman, I didn't serve in the Senate, so I don't know how to filibuster.

[Laughter.]

Chair PETERS. I guess I can ask both of you to answer. After the pandemic, of course, we had all sorts of issues related to the pandemic, but actually truck chassis, the shortage of truck chassis was an element there. Could you give the Committee an update as to what is happening, what actions can be taken, and what we should be thinking about for the future? And clearly some of the lessons learned in the pandemic are ones that we should take to heart because—let us hope there is not another pandemic for over a hundred years—but we cannot be assured of that, nor can we be assured of some other type of challenge confronting us.

But if you could talk about truck chassis, in general, and the response to that, but perhaps other things that you learned from the pandemic that you think we should be thinking about in the future, and we can—

Either one of you, who would respond; whoever wants to go first?

Ms. DYE. Most recently, the Commission has released an Order concerning a case that was filed by the American Trucking Association, and it concerns chassis, but the chassis are not an issue in that case. The issue was whether or not the so-called "Box Rules" that ocean carriers imposed on the railroads were reasonable under our authority on reasonable practices.

Our ALJ issued an exhaustive opinion. The Commission reviewed it, and we affirmed her decision. And so currently, there are certain issues that will be, by that Order, referred back to the ALJ for decision. But in the meantime, the Order on the unreasonableness of these Box Rules is in effect and can be enforced today. But if we—we don't regulate chassis.

Chair PETERS. Right.

Ms. DYE. And this is not an attempt to regulate chassis.

Chair PETERS. Correct.

Ms. DYE. But the ocean carriers do have contracts with them, the case was about the ocean carriers' restrictions not, in any way, the chassis themselves.

Chair PETERS. Thank you. Chairman Maffei.

Mr. MAFFEI. Yes, Senator. I think the Commissioner did well by that particular question. You also asked about lessons from COVID. I would say there are two specific lessons, one for the FMC—and one for the FMC, but broadly speaking. The one for the FMC is that we can no longer afford, I think, for many, many years—the FMC did a good job, a diligent job of setting the rules, but there was not necessarily a sense that you had to be a referee on the field.

So you would set the rules, the game would be played, and then afterwards, people could bring cases, or maybe if there was something egregious, the FMC would investigate.

I think what COVID showed us is that, unlike just setting the rules and letting the game be played, there needs to be a referee on the field. Shouldn't be playing the game, shouldn't be involved in the game, shouldn't be setting rates, we shouldn't—our market-based system has, by and large, worked for American shippers, but should be there making sure that the Shipping Act is enforced, that there are no unreasonable acts, or discrimination, and that our competition rules are followed.

And the second broader lesson is that the United States does remain vulnerable, and U.S. companies remain vulnerable because of the lack of diversification in their supply chains. You have said that, you know, hopefully there won't be another pandemic in a hundred years, and that may very well be the case. But I can guarantee you there will be another crisis; and perhaps a confluence of crises, even worse, potentially, than we have now, that will affect shipping in a similar way.

It is not predictable, even if you could have predicted the COVID pandemic; I would submit to you that very few people predicted that the impact on shipping would be tremendous demand and no—and not sufficient supply, as opposed to the reverse.

And so, in that treacherous environment, and it is only becoming more treacherous as geopolitical factors contribute even more to the difficulties of America's importers or exporters, to the extent that we all can, at the FMC, but at other agencies of Government, and even in the Congress, promote diversification of the supply chain,

Having companies do whatever they need to do, Euro-shoring, French-shoring, offshoring, Jersey-shoring, whatever you need to do to make sure that we—that your factory won't be shut down. That you have given your products the best chance of being exported to their markets, and so that is, you know, I mean, it is more of using my mini-pulpit, but I go—wherever I go, I try to remind shippers of that.

Chair PETERS. Well, thank you, Chairman Maffei.

We are joined by the Chair of the Committee, Chair Cantwell.

**STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON**

Chair CANTWELL. Thank you, Senator Peters. Thank you so much for chairing this important hearing; and nominations of our two colleagues back to the Federal Maritime Commission.

And thank you for both being here, and joined with also Commissioner Vekich, thank you for being here.

During COVID-19, we were just discussing this writ large, right? And I think the word that we are using, is how do you de-risk your supply chain? And so, meaning can't afford to have this level of risk in our supply chains that we saw during COVID.

But with the offloading of imports, and then leaving the dock without picking up American product and taking it back was the major issue. And in some cases, our agricultural products spoiled on the docks. So the Federal Shipping Act makes it unlawful to unreasonably deny cargo. The Commission didn't step up and put a stop to this problem during the pandemic, and that is why the Ocean Shipping Reform Act was required, and the Commission to enter a rulemaking, and to define what is unreasonable and put it into this practice once and for all.

So Chairman Maffei, cargo stranded at ports harm American shippers, they harm our farmers, our fishermen, our businesses that rely on those ocean carriers to get their products to market across the globe. So I was pleased to see an initial proposed rule on September 21, 2022, followed by a second public comment period that closed last summer. But despite that progress, I am concerned that we are not quite there yet.

So what is the status of this unreasonable denial of cargo rule-making? What can we do to help our farmers and business people get this final rule?

Mr. MAFFEI. I do believe that the Final Rule is forthcoming in the next couple of months. And the reason for the delay, I don't believe is substantive. I think that the Final Rule will be very close to the supplemental rule. But it is very, very important that we do everything we can to, one, avoid any unintended consequences. We don't want to harm America's agricultural exports while trying to help them. I don't think that will happen, but we are going to make sure it does not.

And second, we want to make sure that it is bulletproof in terms of being challenged in front of the courts. And we are finishing that up. We are getting the Detention and Demurrage Rule done is very important also, just because of the—

Chair CANTWELL. Just one on that point, because you are making me think that you think intimidation by these foreign carriers to our agriculture economy, where they are going to retaliate if they don't like the rule that you are coming out with, is something you might be referring to, because we are not going to put up with that. We are not going to put up with foreign carriers intimidating our agricultural economy.

Mr. MAFFEI. No. And we wouldn't at the FMC either. And you have given us the tools in OSRA 2022, I think, to enforce that greatly.

Chair CANTWELL. Well, you said you were going to do something, but not if you felt like it will ultimately harm farmers. And while

we were working on this legislation we heard the same kind of chatter, which is really the foreign carriers, basically, threatening retaliation. So I am going to get to a second question that will illuminate a little of—

Mr. MAFFEI. Yes. I don't know that the—

Chair CANTWELL. But just that comment you made, please don't—focus on protecting American businesses, focus on using our leverage. If you want access to our ports, guess what, there are rules to that, and that is that you call on our ports, you have to take stuff out of our ports, and you can't, you know, have unreasonable scheduling where you are not communicating with these customers.

Mr. MAFFEI. Well said.

Chair CANTWELL. If you want to call on our ports, if you want to call on our ports.

Mr. MAFFEI. Well said, Senator.

Chair CANTWELL. OK. Great. So I want to hear from both you Commissioners Dye/Maffei, on the fact, what else can we do to protect our businesses on this access to reasonable and reliable ocean shipping? What else do you think we should be doing?

Ms. DYE. Chair Cantwell, I think that we need to get ready now, that the supply chain needs to be strengthened. There are certain bottlenecks that occur, every cargo surge, and every peak season. And I have encouraged marine terminals in LA, Long Beach, New York/New Jersey to work with us and address these concerns now, because we know, inevitably, there will be other problems with the supply chain.

We hope and pray that there won't be another pandemic, as Chairman Peters mentioned, but there will be another dislocation. And so I have started working with them, and we will keep you informed on the progress, because I think that the system, the supply chain needs to be strengthened. It will benefit the competitiveness of the United States, overall, in addition to be more responsive to the needs of importers and exporters.

Chair CANTWELL. OK. I was thinking broadly, but.

Mr. MAFFEI. Yes. No—I agree with what my colleague said, but may I also address the question?

Chair CANTWELL. Yes, please.

Mr. MAFFEI. OK. Yes, Madam Chair. One of the issues that is—has been a big problem is that a lot of—this happened during COVID, but frankly it has been happening since before COVID, where agricultural shippers will show up with their cargo, and there will not be enough space on the ship for the cargo, which is very puzzling because, of course, most of the time our ports are importing more than they are exporting.

And so there have been some issues with that. And again it particularly happened during COVID when actual space was becoming a problem, but sometimes, you know, a ship would be—shipping would be canceled, what we call blank sailings, or what have you. And so what they would do is start booking multiple times on various ships to make sure they could get this precious cargo, much of it perishable, to the markets where it was needed, and where it was demanded.

Then the ocean shipping companies seeing this—seeing all this overbooking, or seeing them overbook, started overbooking themselves, and putting 120–130 percent of their shipping, and that just created this death spiral, if you will. So unraveling that I do think is something the FMC could have a role in, and I do—I would like to commence hearings on that as soon as we kind of have the bandwidth. I think we have to get our rule out first, frankly, but we definitely think we need to do that.

The other issue that I do keep an eye on is equipment. Our agricultural exports in particular, need the right—not just a container, but the right kind of container. It has to be clean, and in good condition, sometimes it has to be what we call a refer container, or refrigerated container. Often because of the weight, the relative weight of agricultural exports, a 20-foot container is much more useful than a 40-foot container.

And also, a lot of our agricultural exports not the—not most of them in Washington State, but even in Washington state they tend to be more in the eastern part of the state, Walla Walla, et cetera, that is not where the containers necessarily go with the consumer goods. So repositioning of containers is something else that I do think we should keep an eye on, both at the FMC and the Congress.

Chair CANTWELL. Do you mean delinking that?

Mr. MAFFEI. Hmm?

Chair CANTWELL. Some people have talked about delinking that, the ownership, so that you could have a more robust system.

Mr. MAFFEI. That I mean, I am not necessarily advocating that now, I do not know enough about it, but I have heard that as a possibility. I mean another—there could be some role for the Department of Agriculture, there could—just a number of different things that we could talk about.

Chair CANTWELL. Well, let me ask you about the detention and demurrage fees issue, because between 2020 and 2022, nine of the largest carriers charged approximately \$8.9 billion in demurrage and detention fees, these are—fees above the cost of shipping.

So just last week the Commission published a Final Rule on detention and demurrage practices to help cut down on these costs and improve transparency. Can you tell me how this new rule will cut down on those costs facing shippers in the United States?

Ms. DYE. I can give you an example that directly affected exporters who did everything right, their cargo was waiting on the dock, but the ship didn't pull in on time, and they were being charged fees for storage, although they had done everything according to port practices. And so that was the first—one of the first things, that I and my colleagues emphasized to ocean carriers, that no charges will lie against an exporter under the Incentive Principle, that from our regulation, against exporters because the ship didn't pull in on time.

And I am pleased to say that the ocean carriers changed their systems to stop that. There are a few other examples like that that our Interpretative Rule, the Incentive Principle has outlawed. This is the first—these detention and demurrage fees are despised internationally. And the United States was really the—we were the first

ones who really took action to make sure that they serve the purpose for which they are intended.

Chair CANTWELL. Well, these are exorbitant fees passed on to the consumers, and we can't afford that. And so we—I don't know how confident you are that this rule is going to get rid of those exorbitant fees. Could you tell me?

Ms. DYE. I believe that we have, "we" in the marketplace, there is much broader compliance. And of course in OSRA you provided a complaint process, that if carriers don't actually mitigate or avoid fees then shippers are free to come to the Federal Maritime Commission and we will investigate.

Chair CANTWELL. Well, investigations is one thing I thought you would say when I said but, you know, what can more can you do? I would have thought maybe you would talk about your investigation—

Ms. DYE. Yes.

Chair CANTWELL.—because you have done some good investigations and you—

Ms. DYE. Yes, I misspoke, Chair Cantwell. We will certainly, if our investigation shows that the fees should not be charged then we will either act with our enforcement, or what often happens is that the carriers will just avoid it, voluntarily.

Chair CANTWELL. I am sorry. They will avoid those fees?

Ms. DYE. They will not charge.

Chair CANTWELL. Thank you.

Ms. DYE. They will cancel the charge.

Chair CANTWELL. Thank you.

Mr. MAFFEI. And sometimes they will get, they will get scared off. And Senator, I also want to bring up the charge complaints thing, because this was specific to OSRA and it has put a fast track on the kinds of complaints that shippers might have on detention and demurrage, and that has been extraordinarily important. And in fact, has resulted already in refunded or waived fees of \$2.25 million, and these are often fairly small cases. So in terms of limiting the abuse of these fees, I think that program has a lot to do with it. Look—

Chair CANTWELL. So you would say that the most important measures that you have been taking on the implementation of compliance with the Ocean Shipping Reform Act, is these investigations? Is that—or are there other enforcements at seaports?

Mr. MAFFEI. Well, I don't—I don't like to choose between my children. All of the OSRA initiatives are extraordinarily important, but I think on detention and demurrage, it is a multifaceted issue. And I will say this. I do believe that our new D and D Rule will be very, very effective in helping to eliminate some of the billing abuses.

But there might still be more. And then we will do another rule. But we will, we will fully enact both the OSRA, but also whatever we need to do to make sure that Senator Dye's authored initial Interpretive Rule that said: These fees are for the promotion of the movement of cargo, they are not to pad the bottom line of an ocean shipping company, they are not for other purposes. They are supposed to be used for that, and if they are not used for that they are unreasonable. And we will do whatever it takes until we get there.

Chair CANTWELL. Well, we would like to see a report to the Committee on what types of complaints you have investigated, what kind of enforcement actions, what kind of results have you had in driving down the cost to our consumers and businesses that are trying to be involved in international trade.

And I guess if there is a meta message here; look, I hope that you are thinking about more competition, certainly more transparency, which that is probably your investigations and enforcement, but I also think we need to think about more technology. I am a big fan of blockchain technology when it comes to an immutable manifest.

So we should be moving toward some system where we know where everything is at every moment, it is just kept in a more private way. And that way we would get a lot of the mystery out of this situation, and get a system that could be more dependable and reliable.

I am not asking you to, necessarily, lead the charge, but you can lead a discussion about what some of those options are to make shifting even more cost-effective in the United States. But I don't want—I represent a big trade state. I have a lot of people whose, 90 percent of their product is exported. So we want to see a more aggressive FMC. We don't want to see a sleepy little agency when 95 percent of consumers live outside the United States.

We want trade to work, we want—if you want to call on our market, we want you to know that there is rules to come into our market, and that we have an aggressive agency. We are not going to gouge people. We are just going to stop people from being gouged. That is the key thing. And if you could lead that charge then obviously we will continue to work with you all. But we need an aggressive agency.

Thank you, Mr. Chairman. Thank you for doing this.

Chairman PETERS. Thank you, Madam Chair.

Before we close today's hearing I have one more question, and we ask this of every nominee that comes before this committee. If confirmed, will you pledge to work collaboratively with this committee, provide thorough and timely responses to our request for information, as we put together and address important policy issues, and would you appear before this committee when requested?

So if we could answer yes or no; Commissioner Dye?

Ms. DYE. Yes. Thank you.

Chairman PETERS. Chairman Maffei?

Mr. MAFFEI. Some would argue that I tried to appear before this committee too much. But absolutely, Senator, and I think my record and the record of Commissioner Dye, and the other Commissioners, in working with this committee, and in putting together the drafts of—the drafts of OSRA, show that my—we have absolutely done that, and it has been to the advantage of U.S. importers and exporters. And I, certainly, will continue to do that.

Chairman PETERS. Well, very good. Well, I want to thank both of you. Thank both of you for being here today. I also want to congratulate you on your renomination for these important jobs, and your willingness to take on this work. As it is very clear with the questions that were posed today, and your answers, this is a very

serious business, and one that is vitally important for our country and for our country's economy.

Senators will have until close of business Monday, March 4, to submit questions for the record, to the Committee. And witnesses will have into will close a business Monday, March 11, to respond to those questions.

Thank you, once again.

And this now concludes today's hearing.

[Whereupon, at 11:07 a.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO
HON. DANIEL B. MAFFEI

Due to the unfair treatment by the foreign carriers, the *Ocean Shipping Reform Act* directed the Federal Maritime Commission to establish a process for shippers to file complaints against carriers and contest unfair charges. The law also shifts the burden of proof onto ocean carriers to prove that charges are reasonable.

Question 1. In your testimony, you note that the Federal Maritime Commission has already received twice as many new cases in the first two months of 2024 as in the entire year of 2020. How has the *Ocean Shipping Reform Act* empowered shippers to file complaints against unreasonable practices by carriers?

Answer. In the part of my testimony referenced by your question, I was referring to formal cases filed with FMC's Office of Administrative Law Judges, specifically that 19 formal cases have been initiated since January 2024. By demonstrating FMC's willingness to enforce cases even against some of the largest ocean carriers, the FMC assured aggrieved U.S. importers and exporters that they would not be wasting their time by filing an FMC case.

In addition to the formal cases I was referring to, the FMC has seen significant growth in the number of cases filed under the OSRA-mandated "charge complaint" process.¹ To implement OSRA's charge complaint provisions, the Commission quickly promulgated an interim procedure to process the new complaints efficiently and effectively. This process allows a person to submit to the Commission "information concerning complaints about charges assessed by a common carrier."² Upon receipt of any such information, the Commission must accept the information and "promptly investigate the charge with regard to compliance with section 41104(a) and section 41102" of the Shipping Act.³ Importantly, section 41310(c) requires the common carrier to refund any charge that the Commission determines to be violative of the Shipping Act.⁴ Moreover, section 41310(d) empowers the Commission with the discretion to assess civil penalties against a common carrier who assessed the illicit charge.⁵ Since OSRA's enactment, the charge complaint process has resulted in the refund of approximately \$2.3 million to aggrieved shippers.

Since the enactment of OSRA 2022, the FMC's Bureau of Enforcement, Investigations, and Compliance has investigated 202 detention and demurrage and/or carrier charge-related inquiries. Of those, 135 of the active investigations were resolved by the carrier after initial contact/notification from our investigators, with 41 investigations resulting in a finding of no violation and 10 complaints being referred to our Office of Enforcement. Furthermore, our consumer affairs office is available for consultations to help shippers determine how best to get assistance with their specific issues. The FMC website has various tools to assist shippers such as a webinar on how to utilize the charge complaint process. The webinar has more than 1,800 views online—an indication that the shipping public is using this resource to facilitate the surge in charge complaint filings the FMC has seen since OSRA's enactment.⁶ The Commission also developed and posted written guidance on the interim charge complaint procedure, providing an additional resource for America's shippers to bring their claims before the Commission.⁷

Beyond these web-based resources, myself, along with each of my fellow Commissioners, have made a concerted effort to publicize FMC enforcement during public appearances and speaking engagements. I have worked to ensure that aggrieved shippers are well aware of the various avenues that the FMC can provide and, with

¹ See 46 U.S.C. § 41310.

² 46 U.S.C. § 41310(a).

³ 46 U.S.C. § 41310(b).

⁴ 46 U.S.C. § 41310(c).

⁵ 46 U.S.C. § 41310(d).

⁶ <https://www.youtube.com/watch?v=Wf1jQAJdE9g>.

⁷ <https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/>.

specific regard to charge complaints, the speed and efficiency with which the process can bring resolution to their claims.

Global trade routes have been disrupted in recent months in attacks by Iran-backed Houthi militants on commercial shipping in the Red Sea, forcing vessels to go around the Cape of Good Hope. During this crisis, costs to some shippers have risen more sharply than during early months of the pandemic.⁸ Some shippers are concerned about the lack of transparency from ocean carriers regarding the duration of the emergency surcharges and fines, which cargo is subject to those surcharges, and what those surcharges specifically cover.

Question 2. How is the Federal Maritime Commission facilitating communication between shippers and carriers about the reasons and duration of surcharges and fines?

Answer. The Commission is helping to facilitate communication between shippers and carriers, and we have the authority and responsibility to ensure that the carriers are not operating in a manner contrary to America's shipping laws.

In pursuit of these goals, the Commission recently held a public hearing on the threats to shipping caused by the current conditions in the Red Sea and Gulf of Aden regions. The Commission had the benefit of discussing the impacts of the Red Sea crisis with three panels, comprised of representatives of shippers, carriers, ports, and a maritime security expert. One of the primary takeaways from the hearing was the need for additional transparency from the ocean carriers to enable shippers to understand how the fees and surcharges related to specific operational adaptations to the Red Sea situation are calculated. Indeed, the shippers we heard from did not object to the assessment of such fees—geared to ensure the safe passage of mariners and cargo alike—but instead their objections were based on the inability to discern exactly what fees were being charged to meet those goals.

Following the hearing, I instructed Commission staff to begin reviewing the agency's process for granting "special permissions," which allow carriers to institute new fees under their filed tariffs without the usual 30-day notice.⁹ I believe that the circumstances surrounding the Commission's granting of these special permissions was warranted. That said, I am committed to ensuring that the Commission's processes are geared to ensure fair and transparent dealings between the carriers and their customers. Moreover, as I emphasized during the hearing, the granting of the special permissions is not an approval of the fees themselves, which the Commission evaluates independently of any special permission request submitted. The FMC's VOCC Audit Program is gathering further information to help evaluate the reasonableness of these fees. The VOCC Audit team will seek clarity as to the internal processes that carriers use when calculating and instituting the charges. Where appropriate, the Commission will request the carriers be more transparent with such information. If a carrier that does not participate in this effort by the VOCC Audit Program, the FMC has several options to compel carriers to provide the Commission with its justification for the Red Sea-related charges. Furthermore, any specific complaint against a carrier alleging the carrier misused or misrepresented any Red Sea-related charge will be prioritized.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RAPHAEL WARNOCK TO
HON. DANIEL B. MAFFEI

Federal Maritime Commission's Detention and Demurrage Rule

Georgia's deepwater ports are critical to its economy. Storage fees are one way that Georgia's marine terminal operators incentivize shippers and importers to promptly remove their cargo and keep our ports efficient.¹⁰ The Federal Maritime Commission's new rule on Demurrage and Detention Billing Requirements institutes changes to this practice, and these changes may lead to confusion across the maritime industry, delays, and increased costs.¹¹

Question 1. Are you concerned that the Federal Maritime Commission's new detention and demurrage rule—specifically its invoice and fee mitigation provision,

⁸ <https://www.xeneta.com/blog/red-sea-crisis-newsfeed>.

⁹ 46 U.S.C. § 520.14.

¹⁰ *Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports*, Federal Maritime Commission (April 3, 2015), <https://www.fmc.gov/wp-content/uploads/2019/04/report-demurrage.pdf> at 12 ("The primary goal of reduced free time and increased demurrage was to encourage shorter dwell times at the terminal and thereby increase the overall velocity of the equipment, which reduces the VOCC's equipment inventory needs and its operational costs").

¹¹ 46 CFR § 541.

and refund, or waiver requests provisions—may lead to delays in fee collection and ultimately congestion at America’s ports?

Answer. The Commission’s newly promulgated Demurrage and Detention Rule (D&D Rule or Rule), is designed to fulfill a requirement of the Ocean Shipping Reform Act of 2022 (OSRA):

Not later than 45 days after the date of enactment of this Act, the Federal Maritime Commission shall initiate a rulemaking further defining prohibited practices by common carriers, maritime terminal operators, shippers, and ocean transportation intermediaries under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges.¹²

In drafting the Rule, the Commission thoroughly considered the public comments submitted to write a workable and beneficial regulation to serve its intended purpose—ensure predictable and clear billing practices while minimizing negative unintended consequences such as confusion, delays, and increased costs.

As with any substantive regulatory change, this Rule will require regulated entities to conduct parts of their business in a different manner than they have in the past. While adjustments in operational practices are implemented, it is not impossible that there may be questions or confusion on the part of a terminal operator. The FMC stands ready to assist such terminals in finding the easiest way toward compliance. Furthermore, I commit to you that I will reach out to the senior leadership at the Georgia Ports Authority to ensure that the FMC is doing everything appropriate to inform it about the Rule.

Regarding concerns about delays in fee collection and the risk of congestion, I would note that prior to this Rule, there was no time limit for invoice issuance and fee mitigation, refund, or waiver requests. This led to unpredictable situations for terminals and shippers alike. The 30-day requirement provisions will result in predictable practices and serve to protect American importer and exporters. No longer will billing parties be allowed to delay in calculating the fees imposed or sending an accurate invoice to the appropriate party. The billing party will have to give 30-days in case the shipper wants to dispute the charge but will benefit from not having charges be challenged later than that.

With limited time windows, the connection between the charge and moving the cargo will be fully conveyed, deterring congestion. Detention and demurrage invoices must also be issued to the company that contracted for the freight service or the company who is actually receiving the cargo to ensure that the billed party has the most interest and control over picking up the container. Previously, terminals would sometimes bill trucking companies with which they had no contractual relationship—these truckers did not necessarily have any control over when their clients would hire them to pick up the cargo. If these trucking companies did not pay, often a terminal operator would lock them out and prevent them from picking up other cargo, thus creating more congestion. In this and other areas, the new D&D Rule requires carriers and marine terminal operators to adjust the way they conduct business in order to ensure a system promoting cargo fluidity in America’s ocean-linked supply chains.

Port Congestion Mitigation

Georgia’s deepwater ports are an economic engine for the entire state.

Question 1. As Chairman of the Federal Maritime Commission, what actions have you taken or supported to protect against future supply chain bottlenecks at our Nation’s ports?

Answer. During COVID, ocean carriers and terminals often charged detention and demurrage fees in cases when it was impossible for American shippers to move their full or empty containers more quickly due to congestion or other issues beyond their control. Many of the invoices were confusing, lacked key information, or were issued many months later after the fact. So many invoices were sent out by ocean carriers and terminals that many American companies just threw up their hands and paid the fees, feeling they had no choice and that they would get charged even if they were responsible about moving their cargo and returning their empties. In this way, the system of detention and demurrage lost credibility as it was no longer an incentive to American shippers to move cargo or return empties timely.

To address these issues and restore credibility to the system of detention and demurrage, the FMC under my leadership has:

- Implemented the fast-track charge complaints process;

¹²Ocean Shipping Reform Act of 2022, 136 Stat. 1272, 1275 (2022).

- Reorganized FMC's enforcement and priorities;
- Added staff to FMC enforcement and compliance including a senior executive level supervisor;
- Started the VOCC Audit Program that conducts one-on-one meetings with carriers and MTOs to promote compliance; and
- Created a Supply Chain Monitoring program to enable the FMC to forecast future supply chain disruptions, and to engage with the ocean shipping industry on solutions to challenges before problems arise.

In addition to these commission-wide efforts I, as Chairman, will get involved if there is a way I can help reduce congestion. To be effective in these efforts, it is important to be in touch with and, if possible, visit our Nation's major ports, and this includes the Georgia Ports in Savannah, which I visited in 2022. Given this first-hand appreciation for the challenges faced by our major ports, I advise and consult with other Federal officials, such as the President's Port Envoy housed in the Department of Transportation, to assist that office's efforts to relieve port congestion. In that capacity, I can be helpful in drawing public or industry attention to a matter. In short, I have and will continue to personally engage with our Nation's ports to proactively address congestion concerns.

Question 2. What more would you like to see the Commission do to ease congestion and promote supply chain resiliency and efficiency at our Nation's ports?

Answer. Since the FMC is a regulatory agency which has no authority to direct Federal investments, the best way to promote supply chain resiliency and efficiency is to ensure American shippers are empowered to diversify their supply chains.

In 2021, I initiated the Supply Chain Monitoring Program to enable the FMC to forecast future supply chain disruptions, and to engage with the ocean shipping industry on solutions before problems arise. We will continue to build this program with a goal to harness the Commission's relevant industry data collections to create useful informational tools concerning the supply chain for the Commission and the ocean shipping industry.

I also aim to build on the Commission's successes in our newly reorganized enforcement program and continue my focus on unlawful practices that negatively impact American shippers trying to make informed decisions about their supply chains. This new focus for the FMC places a strong emphasis on complex and substantive cases that have a larger and more meaningful impact on dissuading improper conduct by companies providing ocean transportation and related services. This was a shift from previous enforcement cases which involved primarily small ocean transportation intermediaries (OTIs). The deterrence impact on the ocean shipping industry through increased enforcement on substantive transportation matters ultimately keeps cargo moving and benefits the supply chain greatly.

The ongoing work of all Commission programs will continue to make a difference in easing port congestion and building supply chain efficiencies and resiliency. We appreciate the Congressional support provided to the Commission to increase and manage these important programs.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO
HON. DANIEL B. MAFFEI

Question. We have seen a number of supply chain disruptions over the past several years, most recently as a result of attacks on ships in the Red Sea. These disruptions often have impacts on the cost of consumer goods in the U.S. and the ability for U.S. farmers to export their products. We must build a durable supply chain that can adapt to these disruptions and minimize their impacts. How can improving the availability of data on the movement of goods in the supply chain help build resilience against these disruptions?

Answer. One of the purposes of the Shipping Act, 46 U.S.C. §§ 40101—46107, is to “ensure an efficient, competitive, and economical transportation system in the ocean commerce of the United States” and, thus, supply chain resilience is important to the FMC.¹

The sharing of data among carriers, terminals, and shippers throughout the ocean-linked supply chain would increase efficiency since it would better empower decision makers to make the choices best for them. For example, if an agricultural exporter in the middle of the country can know enough in advance that an ocean cargo service from the port closest to them will be cancelled this week, then that

¹46 U.S.C. § 40101.

exporter can determine for itself whether it is worth it to inland transport to another port to get out that week or simply settle for delayed service from the original port. Being able to see these sorts of choices also would contribute to resilience since it allows an importer or exporter to see alternatives and therefore plan for what would happen if a particular route were cut off for some reason.

Since the ocean-linked supply chain system involves the entire world, a vast array of events—global, regional, local, and on board a single ship—that can affect one data point. Each unpredicted outcome can then affect many others. For example, a single storm could require several ships to detour and fall behind schedule. If they all come into a terminal at once, that can create congestion impacting other ships that never went anywhere near the storm. If there were uniform technological systems among industry stakeholders, it would allow clarity to track these compound effects. However, because ships come from different companies and countries and service ports all over the world, data systems are far from uniform.

There are some relatively straightforward steps that can be taken by carriers and shippers to share some limited data to achieve a more efficient system. For example, during my confirmation hearing, I testified that it is important for agricultural exporters to have access to the right kind of container, whether it be an appropriately sized container or a refrigerated container, to ensure the cargo can be loaded/unloaded easily and does not spoil during the voyage. Agricultural cargo is often heavy in comparison to other goods, such as electronics or clothing. As such, smaller, 20-foot containers are better suited to transport these commodities because the laden weight of the container is lighter and can be safely loaded/unloaded with the existing infrastructure at our ports. All too often, however, larger 40-foot containers are the only equipment made available to agricultural exporters. Refrigerated containers are necessary for the safe transport of perishable agricultural exports but, again, the availability of this type of container is often sparse when and where it is needed most. One way to alleviate these issues is through the sharing of information between supply chain participants to preemptively position the appropriate equipment, *i.e.*, the proper kind of container, to the location where it is needed.

By sharing container location data, supply chain participants would be better positioned to ensure that the right container is available to meet the particular needs of the cargo being shipped by our Nation's agricultural exporters.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TED BUDD TO
HON. DANIEL B. MAFFEI

In *IMCC vs OCEMA*—Docket #20–14, the Federal Maritime Commission (FMC) suggests that they have the authority to prevent ocean carriers from withdrawing from interoperable gray chassis pools.

Question 1. Please cite the specific authorizing language enacted by Congress that you believe grants the FMC authority to regulate ocean carrier's chassis procurement decisions, including not allowing them to pull out of certain pools or markets.

Answer. The Shipping Act, codified as 46 U.S.C. §§ 40101–46108, is the primary Federal statute that preserves the integrity of U.S. maritime trade and protects the American public from unfair practices by ocean transportation providers. The Commission has exclusive jurisdiction over alleged Shipping Act violations, which cannot be brought in Federal district court or before another Federal agency. If ocean common carriers are operating under an agreement filed with the Commission and in effect, actions authorized by that agreement are insulated from liability under the Federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.

At issue in *IMCC v. OCEMA*, Docket No. 20–14, and particularly germane to your question, are alleged violations of 46 U.S.C. § 41102(c). Section 41102(c) of the Shipping Act prohibits common carriers from “fail[ing] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”² The Commission also has statutory authority to monitor a carrier's activities authorized by an agreement filed with the Commission for compliance with the agreement's terms and for possible negative impacts on competition, as was the case in *IMCC v. OCEMA*.³ These statutory authorities empower the Commission to order ocean carriers to cease and desist withdrawing from interoperable chassis pools and (as part of the same practice) designating a single equipment provider-operated proprietary chassis pool if such withdrawals are determined to be unjust or unreasonable, as was the case in *IMCC v.*

² 46 U.S.C. § 41102(c).

³ 46 U.S.C. §§ 40301–07.

OCEMA.⁴ Importantly, the Commission's Order did not make an ultimate ruling on this issue and instead merely affirmed the ALJ's finding that genuine issues of material fact precluded the determination of whether the specific withdrawals from interoperable gray chassis pools were violative of the Shipping Act.⁵

Broader questions about carriers' procurement decisions in general were not before the Commission in *IMCC v. OCEMA*. The Commission did not make any findings about procurement decisions that do not limit shippers' or motor carriers' chassis usage, or their freedom to choose among or negotiate with chassis providers.

Question 2. How does prospective authority to regulate ocean carrier's involvement in certain chassis pools align with the ruling's statement that the FMC cannot direct non-regulated parties to act or refrain from acting in the marketplace?

Answer. The Commission is charged with enforcing restrictions and prohibitions on carrier practices and policies that are unreasonable and unjust.⁶ When the Commission finds that an ocean carrier has violated these prohibitions, we are required to award relief or take remedial action. Respondents in *IMCC v. OCEMA* were ocean common carriers who are required to operate under these restrictions and prohibitions against unreasonable or unjust behavior. The Commission's Order addressed the Respondents' practices and policies at issue in this case, *not* the legality of conduct by other parties, such as chassis providers, who deal with the carriers but are not regulated entities under the Shipping Act.

The Commission was also fulfilling its obligation to regulate activities carried out under ocean common carrier agreements. Two of the Respondents in *IMCC v. OCEMA* were associations of ocean common carriers who were acting under the authority of agreements filed with the Commission and subject to its ongoing review authority.⁷ When ocean common carriers are operating under an agreement filed with the Commission, actions authorized by that agreement are insulated from liability under the Federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.⁸ Instead, it is the responsibility of the FMC to review such practices.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO
HON. REBECCA F. DYE

Ocean shipping companies charge customers when containers sit at port for too long or are not returned on time. Between 2020 and 2022, nine of the largest carriers serving U.S. liner trade charged \$8.9 billion in these demurrage and detention fees. The *Ocean Shipping Reform Act* makes ocean carriers responsible for proving that any detention and demurrage fees they charge are fair.

Question 1. Last week, the Federal Maritime Commission published a final rule on detention and demurrage billing practices, which will take effect in May. How will these rules protect American shippers from unfair and unreasonable charges?

Answer. The new demurrage and detention rule establishes billing procedures and invoicing information standards to protect industry participants from unfair and unreasonable charges. The rule clarifies who can be charged for demurrage and detention, mandates a reasonable time-frame for when they can be charged, describes the information that must be included in invoices, and ensures that a remedial avenue is available in the event of a billing dispute. The rule requires carriers and marine terminal operators to issue detention and demurrage invoices within 30 calendar days from when charges were last incurred. One of the rule's most important provisions limits carriers and MTOs from sending the same invoices to multiple parties for demurrage or detention charges. The rule states that invoices can only be sent to one billed party.

The rule promotes fairness and supply chain fluidity by better aligning charges for delays in picking up cargo or returning equipment in a timely manner with the appropriate incentivizing fee. It ensures that industry participants receive the information they need to understand demurrage or detention invoices in a timely fashion and follows the direction of Congress in OSRA that any failure by carriers or MTOs to include the required information in an invoice eliminates the obligation of the billed party to pay the charge.

⁴ See 2023 WL 1963455 at *48 (F.M.C.)

⁵ See 2024 WL 641501 at *40–41 (F.M.C.)

⁶ See 46 U.S.C. § 41102(c).

⁷ 46 U.S.C. §§ 40301–07.

⁸ *In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71, 80–81 (3d Cir. 2017); *Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 18–13764, 2018 WL 6522487, at *4–5 (D.N.J. Dec. 12, 2018).

During the COVID–19 pandemic, ocean carriers were unloading containers at American ports but refusing American exports and returning to Asia with empty containers. The *Ocean Shipping Reform Act* sought to crack down on this practice of carriers unreasonably refusing to ship American exports.

Question 2. The Federal Maritime Commission is currently reviewing comments on a supplemental rulemaking to define unreasonable conduct. How would the Federal Maritime Commission’s proposed rules make it more difficult for carriers to refuse American exports?

Answer. The draft rule currently under consideration by the Commission proposes to require carriers to file with the Commission a written report, called a “documented export policy,” which details the carrier’s practices and procedures for U.S. outbound services. The Commission would have the authority to review this report to determine if carrier practices relating to exports violate statutory or regulatory provisions. If a carrier is alleged to have unreasonably refused available cargo space to exporters, the proposed rule states that the Commission may examine whether the carrier followed its documented export policy, whether it made a good faith effort to mitigate the impact of a refusal, and whether the refusal was based on legitimate transportation factors. The proposed rule provides examples of conduct that may be found unreasonable, such as “blank sailings” (cancelled sailings) or other schedule changes with no advance notice or with insufficient advance notice; vessel capacity limitations not justified by legitimate transportation factors; a failure to alert or notify shippers with confirmed bookings; scheduling insufficient time for vessel loading so that cargo is constructively refused; providing inaccurate or unreliable vessel information; or categorically or systematically excluding exports in providing cargo space accommodations. If a carrier is alleged to have unreasonably refused to deal with respect to vessel space accommodations, the proposed rule explains that the Commission may examine whether the carrier followed its documented export policy, whether the carrier engaged in good-faith negotiations, and whether the refusal was based on legitimate transportation factors. The proposed rule provides examples of the kinds of conduct that may be considered unreasonable, including quoting rates that are too far above current market rates to be considered a real offer or an attempt at engaging in good faith negotiations, and categorically or systematically excluding exports in providing vessel space accommodations.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RAPHAEL WARNOCK TO
HON. REBECCA F. DYE

Federal Maritime Commission’s Detention and Demurrage Rule

Georgia’s deepwater ports are critical to its economy. Storage fees are one way that Georgia’s marine terminal operators incentivize shippers and importers to promptly remove their cargo and keep our ports efficient.¹ The Federal Maritime Commission’s new rule on Demurrage and Detention Billing Requirements institutes changes to this practice, and these changes may lead to confusion across the maritime industry, delays, and increased costs.²

Question 1. Are you concerned that the Federal Maritime Commission’s new detention and demurrage rule—specifically its invoice and fee mitigation provision, and refund, or waiver requests provisions—may lead to delays in fee collection and ultimately congestion at America’s ports?

Answer. Fact Finding 28, for which I served as the Commission Fact Finding Officer, stemmed from a petition filed at the Commission by the Coalition for Fair Port Practices, a broad coalition of exporters, importers, and others concerned with detention and demurrage fees charged by ocean carriers, seaports, and marine terminal operators. In Fact Finding 28, I recommended, and the Commission unanimously approved, an approach to address detention and demurrage practices based upon a principle—the “incentive principle.” If cargo owners cannot be further incentivized to pick up cargo or return equipment, no charge may be assessed. This “incentive principle” was embodied in a Commission rule.

¹*Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports*, Federal Maritime Commission (April 3, 2015), <https://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf> at 12 (“The primary goal of reduced free time and increased demurrage was to encourage shorter dwell times at the terminal and thereby increase the overall velocity of the equipment, which reduces the VOCC’s equipment inventory needs and its operational costs”).

²46 C.F.R. § 541.

The billing practices of ocean carriers, ports and marine terminals for detention and demurrage have been particularly problematic for shippers and truckers, leading Congress to specifically address this issue in OSRA 2022. The recent billing rule is the Commission's effort to implement this statutory directive. The purpose of the rule is to bring clarity, predictability, and fairness to a complex operational process. The Commission conducted an extensive and extended rulemaking process, receiving many comments from interested stakeholders. If experience with the rule dictates the necessity, the Commission will certainly revisit the matter.

Port Congestion Mitigation

Georgia's deepwater ports are an economic engine for the entire state.

Question 1. As a Commissioner with the Federal Maritime Commission, what actions have you taken or supported to protect against future supply chain bottlenecks at our Nation's ports?

Answer. During the past five years, I have served as Commission Fact Finding Officer for two investigations that addressed international ocean supply chain bottlenecks.

In Commission Fact Finding 28, I recommended, and the Commission unanimously approved, an approach to address detention and demurrage practices of ocean carriers, ports and marine terminal operators based upon a principle—the “incentive principle.” If cargo owners cannot be further incentivized to pick up cargo or return equipment, no charge may be assessed. This “incentive principle” was embodied in a Commission rule. Though characterized as an interpretive rule, it is enforceable, and the Commission has moved forward with investigations and cases to enforce it. I am pleased to say that this effort is bearing fruit and changing behavior in the marketplace.

The second investigation, Commission Fact Finding 29, was ordered to address problems in the U.S. international ocean supply chain caused by the COVID-19 pandemic. As a result of my investigation, I recommended statutory amendments to the Shipping Act that were enacted into law. The Commission has acted on several of my recommendations and continues to move forward with the final Fact Finding 29 recommendations to address supply chain problems that occurred during the pandemic.

Question 2. What more would you like to see the Commission do to ease congestion and promote supply chain resiliency and efficiency at our Nation's ports?

Answer. I am gratified that OSRA 2022 recognized and ratified the interpretive rule the Commission adopted based on my recommendations in Fact Finding 28 and gives the Commission the opportunity to further clarify specific practices that would be unreasonable under the general incentive principle. If confirmed, I look forward to the Commission implementing a rulemaking to achieve this end, continuing to make the Interpretive Rule more effective.

If confirmed, I also look forward to focusing my efforts on improvements to operational processes that are critical to the systemic success of the U.S. international ocean supply chain: specifically, container return, earliest return date, and a “notice of availability.” The goal is to improve these seaport and marine terminal operational processes by making them clear and predictable, so port users can plan their businesses accordingly.

I have been working with terminal operators at the Ports of Los Angeles and Long Beach, and the Port of New York and New Jersey on programs to address container return, earliest return date, and “notice of availability.” I plan to convene and lead FMC Supply Chain Innovation Teams and operational pilots to consider how these three operational processes may be improved. I will share this experience with other ports and marine terminals so that they may benefit from the lessons learned in these efforts. (<https://www.fmc.gov/commissioner-dye-proposes-reforms-to-international-ocean-supply-chain-practices/>).

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. DEB FISCHER TO
HON. REBECCA F. DYE

Question. We have seen a number of supply chain disruptions over the past several years, most recently as a result of attacks on ships in the Red Sea. These disruptions often have impacts on the cost of consumer goods in the U.S. and the ability for U.S. farmers to export their products. We must build a durable supply chain that can adapt to these disruptions and minimize their impacts. How can improving the availability of data on the movement of goods in the supply chain help build resilience against these disruptions?

Answer. The focus for data availability should be on the critical pieces of information necessary to harmonize smooth supply chain operations. This may best be summed up in a question to seaport users, “what do you need to know, and when do you need to know it?” A good example of this for importers and truckers may be found in a container “notice of availability” from a seaport or marine terminal.

An exporter, importer or trucker does not need a laundry list of “shared” ocean carrier data, but rather specific pieces of information containing actionable knowledge. Seaport users do not routinely need to know everything tracked by a vessel operator, but rather whether their container shipment is available for pickup from a seaport or marine terminal.

Seaport digitization is most effective in mitigating supply chain bottlenecks when underlying operational processes are clear and predictable. I encourage seaport and marine terminals to institute operational processes that contribute most to the performance of the U.S. international ocean supply chain: specifically, container return, earliest return date, and notice of container availability. The goal should be to make these processes that are critical to systemic success of our freight delivery system clear and predictable, so port users can receive actionable information and plan their businesses accordingly. Information provided to marine terminal users concerning operational processes that are clear and predictable will further mitigate supply chain bottlenecks.

I have been working with marine terminal operators at the Ports of Los Angeles and Long Beach, and the Port of New York and New Jersey on programs to address container return, earliest return date, and notice of availability. I plan to convene and lead FMC Supply Chain Innovation Teams and marine terminal operational process pilots to consider how these marine terminal processes might be improved and share the results with other ports and marine terminals so that they may benefit from the lessons learned in these efforts. (<https://www.fmc.gov/commissioner-dye-proposes-reforms-to-international-ocean-supply-chain-practices/>).

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TED BUDD TO
HON. REBECCA F. DYE

In *IMCC vs OCEMA*—Docket #20–14, the Federal Maritime Commission (FMC) suggests that they have the authority to prevent ocean carriers from withdrawing from interoperable gray chassis pools.

Question 1. Please cite the specific authorizing language enacted by Congress that you believe grants the FMC authority to regulate ocean carrier’s chassis procurement decisions, including not allowing them to pull out of certain pools or markets.

Answer. The Shipping Act is the primary federal statute that preserves the integrity of U.S. maritime trade and protects the American public from unfair practices by ocean transportation providers. The Commission has exclusive jurisdiction over alleged Shipping Act violations, which cannot be brought in federal district court or before another federal agency. If ocean common carriers are operating under an agreement filed with the Commission, then actions authorized by that agreement are insulated from liability under the federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.

The Commission is charged with enforcing restrictions and prohibitions on carrier practices and policies that are unreasonable and unjust. See 46 U.S.C. § 41102(c). In addition, when carriers may be engaged in activities authorized by an agreement filed with the Commission, as was the case in *Intermodal v. OCEMA*, Docket No. 20–14, the Commission has statutory authority to monitor those practices for compliance with the agreement’s terms and for possible negative impacts on competition. 46 U.S.C. §§ 40301–40307. Federal courts have held that “activities described in § 40301 that are undertaken pursuant to agreements filed with the FMC are immune from federal antitrust laws.” *In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71, 80–81 (3d Cir. 2017); *Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 18–13764, 2018 WL 6522487, at *4–5 (D.N.J. Dec. 12, 2018). This statutory immunity extends even to activities that the parties reasonably believe are covered by an agreement filed with the Commission and in effect or exempt from filing. 46 U.S.C. § 40307(a)(3). Two of the respondents in *Intermodal* were associations of ocean common carriers acting under the authority of agreements filed with the Commission and subject to its ongoing review. The individual carriers who collectively agreed to abide by the Rules adopted by one of the respondent organizations were only able to do so without risking a violation of federal antitrust law because they were acting under the authority of an agreement filed with the Commission.

The narrow issue that was before the Commission in *Intermodal Motor Carriers Conference v. OCEMA*, Docket No. 20–14, was that multiple individual ocean common carriers and two ocean carrier associations violated Shipping Act restrictions against unjust and unreasonable practices by withdrawing from interoperable pools and (as part of the same move or practice) designating proprietary chassis pools (operated by a single equipment provider) as the chassis supplier for that carrier’s containers. It was in that context that the Commission found that it has jurisdiction to examine the reasonableness of carriers’ decisions to withdraw from an interoperable chassis pool and designate as its replacement a single proprietary pool. That withdrawal decision directly impacts motor carriers and shippers, constrains their choices, and determines the rules they must follow and charges they incur for daily usage of the chassis.

What was not before the Commission in *Intermodal* were broader questions about carriers’ procurement decisions in general. The Commission did not make any findings about procurement decisions that do not limit shippers’ or motor carriers’ chassis usage, or their freedom to choose among or negotiate with chassis providers.

Question 2. How does prospective authority to regulate ocean carrier’s involvement in certain chassis pools align with the ruling’s statement that the FMC cannot direct non-regulated parties to act or refrain from acting in the marketplace?

Answer. All the respondents in the *Intermodal* case were ocean common carriers who operate under rules mandated by the Shipping Act. The Commission is charged with enforcing restrictions and prohibitions on carrier practices and policies that are unreasonable and unjust. See 46 U.S.C. § 41102(c).

The Commission has a duty to adjudicate allegations of Shipping Act violations and award relief or take remedial action if violations are found. That is all that the Commission acted on and determined in this case. The Commission did not rule on the legality of conduct by other parties who deal with the carriers but are not regulated entities under the Shipping Act and were not respondents in the proceeding.

The Commission was also fulfilling its obligation to regulate activities carried out under ocean common carrier agreements. Two of the respondents in *Intermodal* were associations of ocean common carriers who were acting under the authority of agreements filed with the Commission and subject to its ongoing review authority. When ocean common carriers are operating under an agreement filed with the Commission, actions authorized by that agreement are insulated from liability under the federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.