

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILES 8672  
1539 SCOMM 57: SENATE SPECIAL COMMITTEE ON OIL & GAS, 1987-1988

1336

## VI. EVALUATION OF REGULATORY OPTIONS

To evaluate the options available to the Department on this issue, the transportation costs that would result under each option were calculated over a four-year period (1985 to 1988). Changes in the trade after 1988, such as the all-American pipeline, declining ANS crude oil production, increasing share of ANS crude oil shipments to the West Coast, possibility of the Valdez Refinery, will provide transportation savings which will be small when discounted back to 1987. Based upon 1986 tanker demand, recent tanker rates and the most likely changes in tanker demand projected for the future, the supply of tankers in various size ranges was determined since the total CDS payback rule became effective through 1988. In addition to transportation costs the other important impacts for each option are evaluated.

### A. Rulemaking

This option would allow the four VLCCs totalling 976,000 DWT, which have repaid their CDS to remain in the trade. This option permits the most efficient use of the U.S.-flag tanker fleet in the various Alaskan tanker trades and gives employment to four VLCCs which have no employment in the U.S. foreign commerce. CDS repayment for the three vessels totaled \$105.8 million.

MARAD estimates that the transportation savings resulting from CDS repayment will be approximately \$674 million (present value). Appendix II shows the transportation savings for the years 1985 through 1988 by trade. Appendix III shows the rates used to estimate the transportation savings by trade and vessel size. These rates reflect market rates and also include fuel costs.

Since the payback rule became effective four VLCCs that were previously in the trade on six-month waivers have defaulted and two VLCCs have partially defaulted on a total of \$137.5 million in Title XI. These losses are irreversible. Shipyard demand for new crude tankers would be little affected, remaining at the minimal levels of the past. With regard to shipbuilding, Congress has not appropriated funds to build the 300 ships contemplated in the 1970 Act.

Existing tanker owners would incur the least disruption as for any other option. The Court of Appeal's decision to vacate the rule has caused considerable uncertainty in the market. This option would reduce uncertainty about the future. This option will further the general goals of the Act by offsetting the adverse impact on the small tankers with the benefit of employing the VLCCs.

**B. Do Nothing**

If no action is taken on July 16, 1987, the rule is vacated and the four VLCCs would have to leave the domestic trade. There would not be enough Jones Act tonnage to meet the demands as shown in the Do Nothing table without section 506 waivers. Table VI-1 shows the expected tanker employment for 1987 under both options. The table shows that without four VLCCs in the trade the 170-190,000 DWT replace the over 200,000 DWT in the Panama trade. The size vessel most affected by allowing the four VLCCs to remain the trade can be seen by comparing the total column in each option.

Table VI-1

**Expected Tanker Employment  
In the ANS Crude Oil Trade - 1987  
(Full Time Equivalent (000 DWT))**

Rulemaking

| DWT             | Valdez-<br>Panama | Valdez-<br>West Coast | Panama<br>Gulf/East Coast | Total   |
|-----------------|-------------------|-----------------------|---------------------------|---------|
| >200            | 1,532.7           | 0                     | 0                         | 1,532.7 |
| 170-190         | 900.4             | 588.0                 | 0                         | 1,488.4 |
| 114-140         | 0                 | 1,092.4               | 0                         | 1,092.4 |
| 55-92           | 0                 | 639.6                 | 843.6                     | 1,483.2 |
| <55             | 0                 | 0                     | 241.1                     | 241.1   |
| Total           | 2,433.1           | 2,320.0               | 1,084.7                   | 5,837.8 |
| Demand          | 2,443.1           | 2,320.0               | 1,084.7                   | 5,837.8 |
| Surplus/Deficit | 0                 | 0                     | 0                         | 0       |

Do Nothing

|                 |         |         |         |         |
|-----------------|---------|---------|---------|---------|
| >200            | 817.3   | 0       | 0       | 817.3   |
| 170-190         | 1,615.8 | 26.0    | 0       | 1,641.8 |
| 114-140         | 0       | 1,234.1 | 0       | 1,234.1 |
| 55-92           | 0       | 1,059.9 | 423.3   | 1,483.2 |
| <55             | 0       | 0       | 661.4   | 661.4   |
| Total           | 2,433.1 | 2,320.0 | 1,084.7 | 5,837.8 |
| Demand          | 2,433.1 | 2,320.0 | 1,084.7 | 5,837.8 |
| Surplus/Deficit | 0       | 0       | -156.1  | -156.1  |

Do Nothing With 506 Waivers

|                 |         |         |         |         |
|-----------------|---------|---------|---------|---------|
| >200            | 773.5   | 0       | 0       | 773.5   |
| 170-190         | 1,659.6 | 19.3    | 0       | 1,678.9 |
| 114-140         | 0       | 1,234.8 | 0       | 1,234.8 |
| 55-92           | 0       | 1,065.9 | 417.4   | 1,483.3 |
| <55             | 0       | 0       | 667.3   | 667.3   |
| Total           | 2,433.1 | 2,320.0 | 1,084.7 | 5,837.8 |
| Demand          | 2,433.1 | 2,320.0 | 1,084.7 | 5,837.8 |
| Surplus/Deficit | 0       | 0       | 0       | 0       |

Fiscal benefits would be less than the Rulemaking option: No CDS repayments of \$142 million from the four VLCCs; Alaska state revenues would be reduced because of the higher transportation costs in later years. There would be less risk on government loan exposure on existing Jones Act tankers. Shipyard demand for new crude tankers would continue to be minimal, just as under the Rulemaking option.

#### C. Unrestricted CDS Repayment

The third option would provide a six month window for other U.S.-flag tanker owners to repay CDS in return for unrestricted domestic trading privileges. Under this approach those vessel owners with the best prospects for employment would likely choose to repay within the specified time period. Unrestricted repayment would reduce the need for federal issuance of temporary permission to enter the ANS trade. Fiscal benefits could also be the greatest under this option. However, it is unlikely that any more vessels would repay under this option, since only three repaid when the window was open for one year and two 209,000 DWT Jones Act tankers have been or will be delivered soon. These four vessels were chartered by Sohio and Exxon. It would not matter if a three-month or one year window was chosen, the result would still be that the same four VLCCs would repay. This option would cause the most disruption to the Jones Act as there would be uncertainty in the market for another six months. Shipyard demand for new crude tankers would remain at the minimal levels of the past under this option.

#### D. Other Options Considered

A number of other options were considered including keeping only one, two or three VLCCs in the trade.

There would be great difficulty deciding which of the four VLCCs would be removed from the trade. Alternatives could be in the order in which they repaid, by length of their charters, by the company with the greatest fiscal difficulties, etc. This would be a somewhat arbitrary means of making a decision on this matter.

#### E. Conclusion

The Rulemaking is the option which best meets the purposes and policies of the Act. Allowing the four VLCCs to repay the outstanding CDS (plus interest) in return for unrestricted access to the Jones Act crude oil trades further the policy and purposes of the Act by making the domestic segment of the American merchant marine better balanced than it would be without these vessels in the trade. In addition, these vessels because of their characteristics, including size, permit the Secretary to make progress toward the goal of developing a merchant marine with well equipped, safe and suitable vessels. That is, the four VLCCs are more suitable vessels for the long-haul, high volume ANS trades than smaller ships. Furthermore, the elimination of the current uncertainty on the use of the VLCCs in the ANS trade would make it easier for oil companies and tanker owners to plan for the future. Given the relative higher operating costs for U.S.-flag tankers and the amount of idle tonnage over 200,000 DWT in the world fleet, it is very likely that the four VLCCs would be laid up if they were required to leave the domestic trade.

Table VI-2

Fiscal Impacts of CDS Repayment Option  
Four Year Period  
(In Million of 1987 Dollars)

| <u>Option</u>                    | <u>Transportation<br/>Savings</u> | <u>Repaid<br/>CDS</u> | <u>Increase in<br/>Alaska Revenues</u> | <u>Title XI<br/>Defaults</u> |
|----------------------------------|-----------------------------------|-----------------------|----------------------------------------|------------------------------|
| A. Rulemaking                    | \$664-\$674 <u>1/</u>             | \$142                 | \$186-\$189                            | \$88                         |
| B. Do Nothing                    | 0                                 | 0                     | 0                                      | 0                            |
| C. Unrestricted CDS<br>Repayment | \$674.4                           | \$142                 | \$186-189                              | \$88                         |

1/ \$664 is savings with 506 waivers, while \$674 is without.

Table VI-3

Other Impacts of CDS Repayment Option  
Occurring through 1988

|                                  | <u>Total<br/>Tankers<br/>Displaced</u> | <u>Handy-Sized<br/>Tankers<br/>Displaced</u> | <u>Jones Act<br/>Seaman<br/>Displaced</u> | <u>New Crude<br/>Tankers<br/>Orders</u> | <u>Potential<br/>Title XI<br/>Defaults</u> |
|----------------------------------|----------------------------------------|----------------------------------------------|-------------------------------------------|-----------------------------------------|--------------------------------------------|
| A. Rulemaking                    | 12                                     | 12                                           | 600                                       | 0                                       | 5                                          |
| B. Do Nothing                    | 0                                      | 0                                            | 0                                         | 0                                       | 0                                          |
| C. Unrestricted CDS<br>Repayment | 12                                     | 12                                           | 600                                       | 0                                       | 5                                          |

## VI. REGULATORY FLEXIBILITY DETERMINATION

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress in order to ensure, among other things, that small entities are not disproportionately affected by government regulations. The RFA requires agencies specially to review rules which may have a "significant economic impact on a substantial number of small entities." The Maritime Administrator certifies that it would have no significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) The companies owning and chartering the four VLCCs at issue, and companies owning or chartering tankers possibly affected by the rulemaking in the foreign and domestic trades are either large oil companies or large independent shipping companies.

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# Appendix I

## U.S.-flag Tankers Deleted from the Fleet 1984-86

| Vessel Name                       | DWT    | Year<br>Built | Year<br>Rebuilt | Deleted | Age at<br>Scrapping* | Coating | Militarily<br>Useful<br>(JSCAP88)** | PTSA<br>Features | ANS<br>Trade | Reason for Deletion  |
|-----------------------------------|--------|---------------|-----------------|---------|----------------------|---------|-------------------------------------|------------------|--------------|----------------------|
| Achilles                          | 41,200 | 1960          |                 | 1984    | 24                   | No      | Yes                                 | IGS/COW/ST       | Yes          | Scrapped             |
| American Eagle                    | 32,600 | 1959          |                 | 1984    | 25                   | Yes     | Yes                                 | None             | Yes          | Lost at sea          |
| American Osprey                   | 33,100 | 1958          |                 | 1984    | 26                   | Yes     | Yes                                 | None             | Yes          | Reserve Fleet        |
| Bangor                            | 28,163 | 1953          |                 | 1984    | 31                   | Yes     | Yes                                 | IGS/ST           |              | Scrapped             |
| Bordeaux                          | 27,154 | 1945          |                 | 1984    | 39                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Capricorn                         | 24,400 | 1943          |                 | 1984    | 41                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Chuyenne                          | 28,600 | 1956          |                 | 1984    | 28                   | Yes     | Yes                                 | None             | Yes          | Scrapped             |
| Coastal Florida                   | 25,088 | 1944          |                 | 1984    | 40                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Cove Spirit                       | 25,200 | 1954          |                 | 1984    | 30                   | No      | Yes                                 | None             | Yes          | Scrapped             |
| Exxon Chester                     | 28,503 | 1952          |                 | 1984    | 32                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Exxon Huntington                  | 28,112 | 1953          |                 | 1984    | 31                   | Yes     | Yes                                 | IGS/ST           |              | Scrapped             |
| Exxon Newark                      | 28,553 | 1952          |                 | 1984    | 32                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Frio                              | 25,455 | 1945          |                 | 1984    | 39                   | Yes     | Yes                                 | None             |              | Scrapped             |
| George Whitlock II                | 1,500  | 1942          |                 | 1984    | 42                   | Yes     | Yes                                 | n/a              |              | Out of documentation |
| Houston                           | 25,729 | 1942          |                 | 1984    | 42                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Llano                             | 25,145 | 1944          |                 | 1984    | 40                   | Yes     | Yes                                 | ST               |              | Scrapped             |
| Medina                            | 30,200 | 1953          |                 | 1984    | 31                   | No      | Yes                                 | None             |              | Scrapped             |
| Mobil Oil                         | 31,750 | 1959          |                 | 1984    | 25                   | No      | Yes                                 | IGS/COW          | Yes          | Scrapped             |
| Monticello Victory                | 47,056 | 1961          |                 | 1984    | 23                   | No      | Yes                                 | n/a              |              | Scrapped             |
| Overseas Anchorage                | 50,562 | 1960          |                 | 1984    | 24                   | Yes     | Yes                                 | ST               | Yes          | Scrapped             |
| Overseas Joyce                    | 49,842 | 1961          |                 | 1984    | 23                   | Yes     | Yes                                 | ST               | Yes          | Scrapped             |
| Piscos                            | 24,430 | 1945          | 1962            | 1984    | 39                   | No      | Yes                                 | None             |              | Scrapped             |
| Puma                              | 31,145 | 1958          |                 | 1984    | 26                   | Yes     | Yes                                 | n/a              |              | Scrapped             |
| Red River                         | 26,900 | 1945          | 1961            | 1984    | 39                   | Yes     | Yes                                 | ST               |              | Scrapped             |
| Sabine                            | 33,000 | 1949          | 1966            | 1984    | 35                   | Yes     | Yes                                 | ST               |              | Scrapped             |
| San Jacinto                       | 26,900 | 1944          | 1962            | 1984    | 40                   | Yes     | Yes                                 | ST               | Yes          | Scrapped             |
| San Marcos                        | 27,400 | 1949          |                 | 1984    | 35                   | Yes     | Yes                                 | ST               |              | Scrapped             |
| Texas New Jersey                  | 20,836 | 1944          | 1959            | 1984    | 40                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Worth                             | 91,800 | 1976          |                 | 1984    | 8                    | Yes     | Yes                                 | IGS/COW          |              | Conv. to hosp. ship  |
| Subtotal, vessels deleted in 1984 |        |               |                 | 29      |                      |         |                                     |                  |              |                      |
| Aero                              | 30,100 | 1959          |                 | 1985    | 26                   | Yes     | Yes                                 | None             |              | Scrapped             |
| American Trader                   | 27,600 | 1943          | 1967            | 1985    | 22                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Comanche                          | 28,600 | 1954          |                 | 1985    | 31                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Cove Mariner                      | 30,200 | 1955          |                 | 1985    | 30                   | Yes     | Yes                                 | IGS/ST           |              | Scrapped             |
| Cove Sailor                       | 34,900 | 1959          |                 | 1985    | 26                   | Yes     | Yes                                 | ST               |              | Scrapped             |
| Fairwind                          | 25,700 | 1942          | 1962            | 1985    | 43                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Hillyer Brown                     | 17,700 | 1953          |                 | 1985    | 32                   | Yes     | Yes                                 | None             |              | Out of documentation |
| Mobil Fuel                        | 31,145 | 1957          |                 | 1985    | 28                   | Yes     | Yes                                 | None             | Yes          | Reserve Fleet        |
| Mona                              | 19,900 | 1944          | 1958            | 1985    | 41                   | Yes     | Yes                                 | None             |              | Scrapped             |
| Overseas Aleutian                 | 39,810 | 1953          | 1971            | 1985    | 32                   | Yes     | Yes                                 | None             | Yes          | Scrapped             |
| Reliable                          | 1,450  | 1942          |                 | 1985    | 39                   | Yes     | Yes                                 | n/a              |              | Closed to            |
| Rose City                         | 91,800 | 1976          |                 | 1985    | 9                    | Yes     | Yes                                 | IGS/COW          |              | Conv. to hosp. ship  |
| Texas Wisconsin                   | 33,200 | 1958          |                 | 1985    | 27                   | No      | Yes                                 | None             |              | Scrapped             |
| Subtotal, vessels deleted in 1985 |        |               |                 | 13      |                      |         |                                     |                  |              |                      |

| Vessel Name         | DWT    | Year<br>Built | Year<br>Rebuilt | Deleted | Age at<br>Scrapping* | Coating | Militarily<br>Useful<br>(JSCAP88)** | PTSA<br>Features | ANS<br>Trade | Reason for Deletion |
|---------------------|--------|---------------|-----------------|---------|----------------------|---------|-------------------------------------|------------------|--------------|---------------------|
| Champion            | 50,900 | 1959          |                 | 1986    | 27                   | No      | Yes                                 | IGS/SBT          | Yes          | Scrapped            |
| Cove Navigator      | 32,000 | 1951          |                 | 1986    | 35                   | Yes     | Yes                                 | None             |              | Scrapped            |
| Montpellier Victory | 49,500 | 1962          |                 | 1986    | 24                   | No      | Yes                                 | IGS/COW/SBT      | Yes          | Scrapped            |
| Scorpio             | 24,500 | 1944          | 1961            | 1986    | 42                   | No      | Yes                                 | None             |              | Scrapped            |
| Suzanne             | 19,900 | 1945          | 1958            | 1986    | 41                   | Yes     | Yes                                 | None             |              | Scrapped            |
| Texas Trader        | 27,500 | 1944          | 1969            | 1986    | 42                   | Yes     | Yes                                 | None             |              | Scrapped            |
| Washington Trader   | 43,500 | 1959          | 1976            | 1986    | 27                   | Yes     | Yes                                 | IGS              | Yes          | Scrapped            |

Subtotal, vessels deleted in 1986 7

Total number of vessels deleted--36

Total number of vessels in ANS trade--26

Total number of vessels with PTSA features--23

Total number of ANS vessels with PTSA features--12

Average age of vessels deleted--32.1 years

Average age excluding three vessels deleted at 8 or 9 years of age--32.9 years

\*Based upon year of construction

\*\*Militarily useful includes coated and uncoated petroleum tankers, chemical tankers and integrated tug barges between 6,000 and 100,000 DWT, plus selected coated tankers below 6,000 DWT.

n/a--Information regarding PTSA equipment on these vessels is not available.

# APPENDIX II

PVIF 10%; 1985-1988, Base Year 1987

Discount Rate

10%

## Transportation Savings

|                      | Year | Route            | Bbl/Day | Bbl/Year | Savings/<br>Barrel | Annual<br>Savings | Pres. Val.<br>Savings |
|----------------------|------|------------------|---------|----------|--------------------|-------------------|-----------------------|
| 1985                 |      | Valdez-Gulf/East | 636     | 232,140  | \$0.13             | \$29,702          | \$35,940              |
|                      |      | Valdez-WC        | 1,038   | 378,870  | \$0.03             | \$12,061          | \$14,594              |
|                      |      | Total            | 1,674   | 611,010  | \$0.07             | \$41,764          | \$50,534              |
| 1986                 |      | Valdez-Gulf/East | 576     | 210,240  | \$0.46             | \$97,276          | \$107,003             |
|                      |      | Valdez-WC        | 1,112   | 405,880  | \$0.14             | \$56,434          | \$62,077              |
|                      |      | Total            | 1,688   | 616,120  | \$0.25             | \$153,709         | \$169,080             |
| 1987 (4 Out w/o 506) |      | Valdez-Gulf/East | 533     | 194,545  | \$0.73             | \$142,242         | \$142,242             |
|                      |      | Valdez-WC        | 1,254   | 457,710  | \$0.26             | \$117,718         | \$117,718             |
|                      |      | Total            | 1,787   | 652,255  | \$0.40             | \$259,959         | \$259,959             |
| 1987 (4 Out w/506)   |      | Valdez-Gulf/East | 533     | 194,545  | \$0.69             | \$134,680         | \$134,680             |
|                      |      | Valdez-WC        | 1,254   | 457,710  | \$0.25             | \$115,239         | \$115,239             |
|                      |      | Total            | 1,787   | 652,255  | \$0.38             | \$249,918         | \$249,918             |
| 1988 (4 Out)         |      | Valdez-Gulf/East | 280     | 102,200  | \$0.68             | \$69,967          | \$63,606              |
|                      |      | Valdez-WC        | 1,378   | 502,970  | \$0.29             | \$144,393         | \$131,266             |
|                      |      | Total            | 1,658   | 605,170  | \$0.35             | \$214,360         | \$194,873             |
| Total Benefits       |      |                  |         |          |                    |                   |                       |
| 4 Out w/o 506        |      |                  |         |          |                    | \$669,792         | \$674,446             |
| 4 Out w/506          |      |                  |         |          |                    | \$659,751         | \$664,405             |

# APPENDIX III

## Estimated Transportation Costs With and Without CDS Repayment 1/ (Dollars per Ton)

### 985 Without CDS Repayment:

| Size Range   | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|--------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 000) DWT     |                   |                        |                          |                        |                   |                   |                      |
| 00 to 265    | 10.21             |                        |                          |                        |                   |                   |                      |
| 70 to 190    | 15.92             | 7.73                   | 6.72                     |                        |                   |                   |                      |
| 14 to 140    | 17.22             | 8.33                   | 7.24                     | 5.60                   |                   |                   | 6.34                 |
| 55 to 92     | 17.77             | 8.59                   | 7.46                     | 5.77                   | 9.53              | 3.10              | 6.52                 |
| less than 55 | 21.68             | 10.44                  | 9.07                     | 6.99                   | 11.59             | 3.82              | 7.90                 |

### 985 With CDS Repayment:

| Size Range   | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|--------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 000) DWT     |                   |                        |                          |                        |                   |                   |                      |
| 00 to 265    | 9.38              |                        |                          |                        |                   |                   |                      |
| 70 to 190    | 10.58             | 5.09                   | 4.42                     |                        |                   |                   |                      |
| 14 to 140    | 14.56             | 7.01                   | 6.09                     | 4.69                   |                   |                   | 5.31                 |
| 55 to 92     | 16.73             | 8.07                   | 7.01                     | 5.41                   | 8.96              | 2.91              | 6.12                 |
| less than 55 | 22.20             | 10.70                  | 9.29                     | 7.17                   | 11.88             | 3.92              | 8.11                 |

### 986 Without CDS Repayment:

| Size Range   | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|--------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 000) DWT     |                   |                        |                          |                        |                   |                   |                      |
| 00 to 265    | 8.81              |                        |                          |                        |                   |                   |                      |
| 70 to 190    | 14.17             | 6.97                   | 6.09                     |                        |                   |                   |                      |
| 14 to 140    | 14.94             | 7.34                   | 6.41                     | 5.01                   |                   |                   | 5.63                 |
| 55 to 92     | 15.11             | 7.43                   | 6.49                     | 5.07                   | 8.22              | 2.88              | 5.69                 |
| less than 55 | 18.07             | 8.89                   | 7.76                     | 6.07                   | 9.83              | 3.55              | 6.78                 |

### 986 With CDS Repayment:

| Size Range   | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|--------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 000) DWT     |                   |                        |                          |                        |                   |                   |                      |
| 00 to 265    | 7.99              |                        |                          |                        |                   |                   |                      |
| 70 to 190    | 8.84              | 4.33                   | 3.78                     |                        |                   |                   |                      |
| 14 to 140    | 12.27             | 6.03                   | 5.26                     | 4.11                   |                   |                   | 4.60                 |
| 55 to 92     | 14.07             | 6.92                   | 6.04                     | 4.72                   | 7.65              | 2.69              | 5.28                 |
| less than 55 | 18.59             | 9.15                   | 7.99                     | 6.24                   | 10.11             | 3.64              | 6.98                 |

1987 Without CDS Repayment:

| Size Range<br>(000) DWT | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|-------------------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 200 to 265              | 10.19             |                        |                          |                        |                   |                   |                      |
| 170 to 190              | 12.04             | 5.92                   |                          |                        |                   |                   |                      |
| 114 to 140              | 16.01             | 7.87                   | 6.87                     | 5.37                   |                   |                   | 6.05                 |
| 55 to 92                | 18.23             | 8.98                   | 7.85                     | 6.14                   | 9.93              | 3.44              | 6.90                 |
| Less than 55            | 23.78             | 11.73                  | 10.25                    | 8.02                   | 12.96             | 4.58              | 9.01                 |

1987 With CDS Repayment:

| Size Range<br>(000) DWT | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|-------------------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 200 to 265              | 7.99              |                        |                          |                        |                   |                   |                      |
| 170 to 190              | 8.84              | 4.33                   | 3.78                     |                        |                   |                   |                      |
| 114 to 140              | 12.27             | 6.03                   | 5.26                     | 4.11                   |                   |                   | 4.60                 |
| 55 to 92                | 14.07             | 6.92                   | 6.04                     | 4.72                   | 7.65              | 2.69              | 5.28                 |
| Less than 55            | 18.59             | 9.15                   | 7.99                     | 6.24                   | 10.11             | 3.64              | 6.98                 |

1988 Without CDS Repayment:

| Size Range<br>(000) DWT | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|-------------------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 200 to 265              | 10.19             | 4.38                   |                          |                        |                   |                   |                      |
| 170 to 190              | 12.04             | 5.92                   |                          |                        |                   |                   |                      |
| 114 to 140              | 16.01             | 7.87                   | 6.87                     | 5.37                   |                   |                   | 6.05                 |
| 55 to 92                | 18.23             | 8.98                   | 7.85                     | 6.14                   | 9.93              | 3.44              | 6.90                 |
| Less than 55            | 23.78             | 11.73                  | 10.25                    | 8.02                   | 12.96             | 4.58              | 9.01                 |

1988 With CDS Repayment:

| Size Range<br>(000) DWT | Valdez-<br>Panama | Valdez-<br>Los Angeles | Valdez-<br>San Francisco | Valdez-<br>Puget Sound | Valdez-<br>Hawaii | Valdez-<br>Alaska | Panama-<br>Gulf/East |
|-------------------------|-------------------|------------------------|--------------------------|------------------------|-------------------|-------------------|----------------------|
| 200 to 265              | 7.99              | 3.35                   |                          |                        |                   |                   |                      |
| 170 to 190              | 8.84              | 4.33                   | 3.78                     |                        |                   |                   |                      |
| 114 to 140              | 12.27             | 6.03                   | 5.26                     | 4.11                   |                   |                   | 4.60                 |
| 55 to 92                | 14.07             | 6.92                   | 6.04                     | 4.72                   | 7.65              | 2.69              | 5.28                 |
| Less than 55            | 18.59             | 9.15                   | 7.99                     | 6.24                   | 10.11             | 3.64              | 6.98                 |

1/ Includes fuel costs.

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JUNEAU

April 28, 1987

The Honorable John C. Stennis  
Chairman  
Senate Appropriations Committee  
SD-135 Dirksen Senate Office Bldg.  
Washington, D.C. 20510

Dear Senator Stennis:

As a member of the Senate Appropriations Committee participating in this year's Supplemental Appropriations mark up, you will be considering an issue involving the Construction Differential Subsidy (CDS) provided by the United States for four oil supertankers.

A condition of the subsidy was that the supertankers built under the program could only operate in international shipping. The transportation companies that received these subsidies paid the money back to the United States so that the supertankers could ply the American shipping trade. The provision in the Supplemental Appropriations bill would return the CDS paybacks for the four supertankers and would eliminate these ships from the domestic market.

I urge you to reject this provision.

The provision would cause \$142 million in direct refunds to supertanker owners who repaid the subsidy. Litigation costs may also be incurred by the Federal government, if the supertankers are denied access to the American trade. To my knowledge, none of these costs has been considered in either the House or Senate versions of the budget resolution.

The CDS repayments would also mean long term tax losses to the Federal government and to my state. Supertankers carry significantly more oil and are more efficient to operate than their smaller counterparts. According to the U.S. Maritime Administration (MarAd), the Federal government would lose about \$44 million annually in income taxes, owing to the less profitable trade which would result from the use of smaller non-CDS tankers. These figures were derived for three CDS tankers, and now that a fourth tanker may also be involved, the Federal tax loss would probably be even greater.

The CDS issue was debated and supposedly settled in the last Congress. The transportation companies, after participation in a lengthy rulemaking process with the Federal government, relied on this legislation to pay back the CDS on their supertankers. The U.S. Department of Transportation established its rules and developed its plans around this law. After only a short period of time, certain special interests are contending that the ground rules should be changed again. Without hearings or consideration by the appropriate authorizing committee, these interests were successful in inserting a rider in the House version of the Supplemental Appropriations bill.

As you are no doubt aware, the CDS administrative rulings, growing out of previous Congressional action, have been the subject of extensive litigation. In the eleventh hour of those determinations, we believe that it would not be sound public policy for the Congress to intervene. Several of the parties to the litigation relied on the legislation recently enacted by Congress; all parties are well-represented in the judicial forum.

Additionally, the CDS provision is not a "jobs" issue. Although the U.S. Maritime Administration (MarAd) predicts that about 500 new jobs would ultimately be created by prohibiting the CDS ships in the Alaska trade, even this figure is in dispute. MarAd calculated this number based on the assumption that the smaller tankers replacing the CDS ships would hire about 800 crewmen. However, 300 jobs would be lost on the three CDS tankers. Further, the transportation companies point out that some supertankers would continue to ply the Alaska North Slope oil trade under the current six month waiver rule. Therefore, fewer jobs would be created than MarAd has predicted. In any case, the costs to the Federal government and the State of Alaska associated with the creation of each new job would be immense.

As Congress and all Americans search for new ways of "competitiveness" in the world market, we will need to develop and transport our natural resources on an economical basis. The CDS supertankers represent an asset that was manufactured in the United States, and we believe that it would be irresponsible to prohibit these ships from transporting American products on an efficient, year-round basis.

For the reasons outlined above, I urge you to reject the provision which would force these ships out of the American trade. At the very least, I respectfully suggest that before Congress acts, hearings be held to consider the important policy implications of the proposed amendment.

Thank you for your consideration of this matter.

Sincerely

*John W. Katz for*

Steve Cowper  
Governor of Alaska

cc: Senator Ted Stevens  
Senator Frank M. Murkowski  
Congressman Don Young

Identical Letters Sent to Each Committee Member

**FIRST ATTRANSCO TANKER CORP.**

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**Elizabeth H. DOLE, Secretary, U.S. Department of Transportation, et al.**

No. 85-6008, 85-6009, 85-6184 to  
85-6188 and 85-6163.

United States Court of Appeals,  
District of Columbia Circuit.

**Argued Nov. 10, 1986.**

**Decided Jan. 16, 1987.**

Owners and operators of United States flag tankers built entirely with private capital and employed in domestic trade filed suit challenging rule which purportedly would allow subsidized vessels to enter domestic shipping market upon repayment of subsidy. The United States District Court for the District of Columbia, Thomas Penfield Jackson, J., 620 F.Supp. 1289, sustained validity of rule. Owners and operators appealed. The Court of Appeals, Bork, Circuit Judge, held that: (1) promulgation of "payback rule" was well within Secretary of Transportation's authority under Merchant Marine Act, but (2) Secretary's statement of basis and purpose failed to provide adequate account of how rule served Merchant Marine Act's objectives.

**Rule vacated.**

### 1. Shipping €=3

**Promulgation of "payback rule" releasing tanker vessels built with assistance of federal construction differential subsidy from foreign-trade-only requirement if they agreed to repay unamortized portion of subsidy plus interest during specified one-year period, fell within Secretary of Transportation's statutory authority under Merchant Marine Act. Merchant Marine Act of 1936, §§ 501-506, as amended, 46 U.S.C.A. §§ 1151-1156.**

## 2. Administrative Law and Process

**Q-405**

**Shipping C-3**

Secretary of Transportation's statement of basis and purpose for "payback rule," releasing tanker vessels built with assistance of federal construction differential subsidy from foreign-trade-only requirement if they agreed to repay authorized portion of subsidy plus interest during specified one-year period, failed to give adequate account of how that rule served objectives of Merchant Marine Act and why alternative measures were rejected in lieu thereof; statement expressed belief that rule would benefit U.S. Merchant Marine and would leave industry in healthier, more viable condition but gave unsatisfying responses to concerns about its effect on fleet's ability to carry substantial portion of foreign commerce and to serve as naval auxiliary. 5 U.S.C.A. § 553(c); Merchant Marine Act of 1936, § 101, as amended, 46 U.S.C.A. § 1101.

### 3. Administrative Law and Procedure

816. 819

In fashioning remedy for administrative agency's failure to present adequate statement of basis and purpose for rule as required by Administrative Procedure Act, Court of Appeals may either remand for specific procedures to cure deficiency without vacating rule or may vacate rule, thus requiring agency to initiate another rule-making proceeding if it would seek to confront problem anew. 5 U.S.C.A. § 553(e)

Appeals from the United States District Court for the District of Columbia (Civil Action Nos. 85-01555, 85-01740, 85-01752 and 85-1771).

Joseph A. Klausner, with whom Allan A. Tuttle, Washington, D.C., was on brief for appellant, Independent U.S. Tanker Owners Committee in Nos. 85-6068 and 86-6134.

Amy Loeserman Klein, with whom William E. Cohen and Marc A. Bernstein, New York City, were on brief for appellants,

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Daniel P. Levitt  
Wertheimer, Was  
brief for appellant  
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Robert J. Black  
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Int, Alaska Bulk  
No. 85-6069.

No. 85-6137.  
William E. McI  
and Jonathan Bl  
were on brief for  
Inc. in Nos. 85-61  
85-6137.

Kenneth N. V  
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Transp., with w  
Asst. Atty. Gen.,  
brief for appellee  
al. in Nos. 85-606  
and Robert S. G  
Justice, Washing  
ances for appelle

**Roy G. Bowman**, Washington, appellee, American 85-6068, et al.

Michael Joseph  
as L. Mills and  
ington, D.C., we  
Atlantic Richfiel  
1968, et al.

**Before EDWA  
Judges, and SWY  
Judge.**

**Opinion for the  
Judge BORK.**

**BORK, Circuit**  
These consolidated appeals from the district court, 620 F.Supp. 1000, affirmed the validity of the Secretary's

\* Of the United States Seventh Circuit.

*Shut Atreanese Tanker Corp., et al.* in Nos. 85-6136 and 85-6138.

Daniel P. Levitt, with whom Richard J. Wertheimer, Washington, D.C., was on brief for appellant, Overseas Shipbuilding Group, Inc. in No. 85-6138.

Robert J. Blackwell, Anne E. Mickey, Jeffrey R. Maai and Linda L. Martin, Washington, D.C., were on brief for appellant, Alaska Bulk Carriers, Inc., et al. in No. 85-6069.

William E. McDaniels, Kevin T. Baine and Jonathan Blank, Washington, D.C., were on brief for appellant, Seatrain Lines, Inc. in Nos. 85-6134, 85-6135, 85-6136 and 85-6137.

Kenneth N. Weinstein, Deputy Asst. Gen. Counsel for Litigation, Dept. of Transp., with whom Richard K. Willard, Asst. Atty. Gen., Dept. of Justice, was on brief for appellees, Secretary of Transp., et al. in Nos. 85-6068, et al. Michael Kimmel and Robert S. Greenspan, Attys., Dept. of Justice, Washington, D.C., entered appearance for appellees.

Roy G. Bowman and Richard H. Saltzman, Washington, D.C., were on brief for appellees, American Petrofina Inc. in Nos. 85-6069, et al.

Michael Joseph, Mark P. Schlefer, Thomas L. Mills and Donald M. Squires, Washington, D.C., were on brief for appellees, Atlantic Richfield Co., et al. in Nos. 85-6068, et al.

Before EDWARDS and BORK, Circuit Judges, and SWYGERT,\* Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

These consolidated cases are before us on appeal from a decision of the district court, 620 F.Supp. 1289 (1985), which sustained the validity of a rule promulgated by the Secretary of Transportation. Appel-

lants challenge the rule as exceeding the Secretary's statutory authority and as arbitrary and capricious agency action; they also raise a battery of specific procedural objections to the manner in which the rule was promulgated. We find that the Secretary was well within her statutory authority in promulgating the rule, but that she failed to provide an adequate account of how the rule serves the objectives set out in the governing statute, the Merchant Marine Act of 1936, ch. 858, 49 Stat. 1985 (codified as amended at 46 U.S.C. §§ 1101-1295g (1982)).

# I.

The rulemaking that gives rise to this case is the latest of numerous attempts by the Congress, the Maritime Administration, and the Department of Transportation to address the recurrent problems of the United States merchant marine fleet. The American fleet has had great difficulty competing in foreign commerce. American ships typically have higher construction and operating costs than their foreign competitors, not only because they typically must meet more stringent environmental and safety standards, but also because foreign ships often are subsidized and otherwise assisted by their own governments. Congress confronted these problems in 1936 and authorized the United States government to pay up to half the construction costs of American ships that will operate in foreign commerce. 46 U.S.C. §§ 1151-1152 (1982). In addition, Congress authorized the government to subsidize the operating costs of these ships where necessary to meet foreign competition. *Id.* §§ 1171-1172. Despite these provisions, American ships have continued to fare poorly against their competitors in foreign commerce.

Merchant ships that operate in the domestic shipping market do not receive these government subsidies. They are protected from the rigors of foreign competi-

to 28 U.S.C. § 294(d) (1982).

tion, however, by the Jones Act, which requires all cargo transported between points in the United States to be carried on ships built in the United States, registered in the United States, and owned by American citizens. 46 U.S.C. § 883 (1982).<sup>1</sup> They are also protected from having to compete against any of the ships that have received construction subsidies or operating subsidies from the government, except in a few specific and very limited instances.<sup>2</sup> Since the Trans-Alaska Pipeline opened in 1977, however, the domestic fleet has been unable to satisfy the great new demand for large tankers to carry Alaskan oil to other points in the country. The Maritime Administration has responded to this situation by invoking its statutory authority to allow certain subsidized ships to operate in the domestic market for up to six months in a given year if the ships repay a proportional share of the construction subsidy that they have received. 46 C.F.R. Part 250 (1984). Yet this step has only partly solved the problem.

The rule at issue in this case permitted tanker vessels built with the assistance of a federal construction-differential subsidy, which had been barred from competing in domestic trade on account of that subsidy, to undertake domestic operations if they agreed to repay the unamortized portion of the subsidy plus interest during a period that began on June 6, 1985, and closed one year later. See Construction-Differential Subsidy Repayment; Total Payment Policy, 50 Fed. Reg. 19,170 (1985) (codified at 46 C.F.R. § 276.3 (1985)) (hereafter the "payback rule"). This rule addressed problems in both the foreign and domestic markets by providing an opportunity for ships that are not competitive in foreign commerce to enter the domestic market where the demand for their services has increased, but

only by agreeing to relinquish their financial advantage over unsubsidized ships. The Maritime Administration has considered proposals for individual ships to repay their subsidies at least since 1964. In 1977, several owners of unsubsidized ships challenged the Administration's approval of repayment by one vessel in particular. The Supreme Court upheld the government's authority to approve subsidy repayment in exchange for permission to enter the domestic market. See *Seatrane Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 100 S.Ct. 800, 63 L.Ed.2d 88 (1980). Shortly thereafter, the Administration established an interim rule that extended this authorization to undertake domestic shipping, upon repayment of the full subsidy plus interest, to a limited class of large tankers whose owners demonstrated "exceptional circumstances" of dismal prospects in foreign commerce to justify the application of the rule. See 45 Fed. Reg. 68,393 (1980). The interim rule was challenged, and this court invalidated it, finding that although the Administration had statutory authority to promulgate the rule, it had acted arbitrarily and capriciously by providing an inadequate discussion of the basis and purpose of the rule. See *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918-20 (D.C.Ct. 1982). At that point, the Secretary of Transportation proposed the payback rule. This rule is similar to the earlier proposed interim rule except that it covers all tankers and does not require tankers to make any showing of "exceptional circumstances" to qualify for the benefits of subsidy repayment.

## II.

Appellants initially question the Secretary's statutory authority to promulgate

the Secretary of Transportation's determination that an exemption is necessary or appropriate to carry out the purposes of the Merchant Marine Act, although the latter exception does not allow a subsidized ship to operate in the domestic trade for more than six months in a given year. 46 U.S.C. § 1156 (1982).

the payback rule. The Supreme Court has held that the government's authority to regulate the operations of a ship's crew for the life of the ship is a subsidy re individualized exigent need for Court did. Instead, the "the Secret and discretion" of the "directly" of Act." *Id.* stressed the need for release requirement, its subsidy market, it might remain taking ad and profit leaving w/ *Id.* The release w/ permanent as it was of the sub fall." *Id.* n. 31.

[1] The terms and the Secret the Merel §§ 1151-1 U.S. Tar. 917-18 (f

1. Congress has also established a loan guarantee program to assist the financing of domestic ships. 46 U.S.C. §§ 1271-1276 (1982).

2. A subsidized ship is not permitted to operate in domestic commerce except in a few limited circumstances, such as on the first or last leg of an overseas voyage if the owner repays a prorated portion of the original subsidy, or upon

3. In the Secretary's determination to cumstan justifying 577, 100 noted the "eign con cessful," have bee tanker n

the payback rule. In *Seatrain*, however, the Supreme Court expressly recognized the government's authority under the Merchant Marine Act to approve the repayment of a ship's construction subsidy in return for the lifting of restrictions on domestic operations by that ship. 444 U.S. at 588, 100 S.Ct. at 809. Although in *Seatrain* the subsidy repayments were granted on an individualized basis and on a showing of exigent circumstances that justified the need for the government's action, the Court did not rely on either of these facts. Instead, the Court rested its conclusion on "the Secretary's broad contracting powers and discretion to administer the Act," especially the power to approve measures that "directly further the general goals of the Act." *Id.* In particular, the Court stressed the difference between a permanent release from the foreign-trade-only requirement, which requires a vessel to repay its subsidy before it can enter the domestic market, and a temporary release that might render a subsidized ship "capable of taking advantage of every shift in trade and profitability, skimming the cream and leaving what remains to those less mobile." *Id.* The Court stated that a temporary release would be very problematic, but a permanent release was not, at least insofar as it was conditioned on "full repayment" of the subsidy so as to confer no "wind-fall." *Id.* at 589 & n. 31, 100 S.Ct. at 810 & n. 31.

[1] The payback rule satisfies these criteria and thus its promulgation falls within the Secretary's statutory authority under the Merchant Marine Act. See 46 U.S.C. §§ 1151-1156 (1982); see also *Independent U.S. Tanker Owners Comm.*, 690 F.2d at 917-18 (finding the earlier interim rule to

be in harmony with the statutory mandate of the Merchant Marine Act). Indeed, this rule comes much closer to satisfying the Court's concern about "cream-skimming" in the domestic market by subsidized ships than did the Maritime Administration's previous response to the problem, undertaken pursuant to specific congressional authorization, which was to allow certain subsidized ships to operate in the domestic market for up to six months in a given year if they agree to repay a proportional share of their subsidy. See *id.* § 1156; 46 C.F.R. Part 250 (1984).<sup>3</sup>

### III.

Appellants contend that even if the Secretary acted within her statutory authority in promulgating the payback rule, it should be invalidated because it is the product of agency action that was "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A) (1982). In particular, appellants contend that the Secretary failed to provide a sufficiently reasoned discussion of why this rule was adopted and alternatives were rejected in light of the purposes of the Merchant Marine Act, which are the very purposes Congress intended the Secretary to serve when it gave her "broad" discretion to administer the Act. See 46 U.S.C. § 1151 (1982); *Seatrain*, 444 U.S. at 588, 100 S.Ct. at 809-10.

It is unfortunate that, once more, we must agree with this contention. This court vacated the previous interim rule because the government "failed completely to fulfill its obligations" to set out an adequate statement of basis and purpose for the rule. *Independent U.S. Tanker Own-*

<sup>3</sup> In the Notice of Proposed Rulemaking, the Secretary identified facts that might be sufficient to establish the kind of exceptional circumstances that were touched on in *Seatrain* as justifying subsidy repayment. See 444 U.S. at 577, 100 S.Ct. at 803-04. In particular, she noted that American tankers operating in foreign commerce "have not been financially successful," largely because of recent events that have been "financially devastating for the world tanker market." 48 Fed.Reg. 4408 (1983). Yet

we do not hold that these exceptional circumstances are a *sine qua non* to the Secretary's statutory authority to adopt this rule, given her "broad contracting powers and discretion to administer the Act." *Seatrain*, 444 U.S. at 588, 100 S.Ct. at 809. As long as the rule consists of a permanent release from restrictions upon full repayment of the subsidy plus interest, it is within the Secretary's authority under the Merchant Marine Act.

ers. *Comm.*, 686 F.2d at 919. Now, four years later, we must vacate a similar rule on similar grounds.

Under the Administrative Procedure Act, when an agency initiates a rulemaking that the governing statute does not require to be undertaken "on the record," the agency is nonetheless bound to comply with the requirements for "notice and comment" rulemaking set out in 5 U.S.C. § 553 (1982). See, e.g., *United States v. Florida East Coast Ry.*, 410 U.S. 224, 234-41, 98 S.Ct. 810, 815-19, 35 L.Ed.2d 223 (1973). One requirement is that after the agency considers the comments presented by the participating parties, it "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). This statement need not be an exhaustive, detailed account of every aspect of the rulemaking proceedings; it is not meant to be the more elaborate document, complete with findings of fact and conclusions of law, that is required in an on-the-record rulemaking. See *id.* § 557(c). On the other hand, this court has cautioned against "an overly literal reading of the statutory terms 'concise' and 'general' . . . [which] must be accommodated to the realities of judicial scrutiny." *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C.Cir.1968). At the least, such a statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve. See *National Wildlife Fed'n v. Costle*, 629 F.2d 118, 134 (D.C.Cir.1980); *Automotive Parts*, 407 F.2d at 338; see also S.Doc. No. 248, 79th Cong., 2d Sess. 20 (1946) ("The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the object or objects sought.").

In *Seatrains*, the Supreme Court indicated that Congress gave the government broad power to implement the Merchant Marine Act so that the government could take steps that "directly further the gener-

al goals of the Act." 444 U.S. at 558, 100 S.Ct. at 809. Those objectives are to foster the development and encourage the maintenance of an American merchant marine, in both foreign and domestic commerce, that is:

(a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. 46 U.S.C. § 1101 (1982).

[2] The Secretary's statement of basis and purpose fails to give an adequate account of how the payback rule serves these objectives and why alternative measures were rejected in light of them. The Secretary's treatment of these objectives, and of the concerns raised about them in the comment proceedings, is cursory at best. For example, concerns about whether this rule meets the statutory objective of maintaining an American merchant marine "sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce" are met with the statement "The Department believes that the [rule] will benefit the U.S. Merchant Marine." 50 Fed.Reg. 19,170, 19,173 (1985). Her discussion continues further, but it hardly improves:

Although it is true, as many commenters pointed out, that some tankers will be forced out of service by more efficient operators, the industry should be more

competitive and especially since efficient tankers in the fleet should be fully utilized in order to be in a viable condition.

*Id.* at 19,173-74. The proposition that to carry "a substantial portion of the water-borne export and import foreign commerce of the United States" requires the existing tanker fleet. The foreign trade employment of those vessels and employment in the fleet from bright." *Id.* statement strong this rule will have from carriage of Secretary surplus fleet will remain carry an appropriate oil commerce should arise." *Id.* fathom. If there the employment eign trade, then mit the total siz follow its natur ward the level market. Under fore, the rule retain a fleet t traffic and "a eign traffic "at ly set out as at the statute.

The Secretary about the rule's naval auxiliary, similarly unsatis that the project "handy-sized" t implications for retary brushes ing her belief old, small prod less of whether gated because of the U.S. pro claims that oth

competitive and efficient in the future, especially since some of the most efficient tankers in the U.S. flag fleet would be fully utilized. . . . Overall, the industry should be left in a healthier, more viable condition.

At 19,173-74. On the more dubious proposition that the fleet will remain able to carry "a substantial portion" of foreign commerce, the Secretary candidly acknowledges that "the final rule merely recognizes the existing condition of the U.S. tanker fleet. There currently exist few foreign trade employment opportunities for these vessels and the prospects for future employment in the foreign trade are far from bright." *Id.* at 19,174. Though this statement strongly suggests the view that this rule will hasten an American retreat from carriage of foreign commerce, the Secretary surprisingly asserts that the fleet will remain "more than adequate to carry an appropriate share of the U.S. foreign oil commerce if such opportunities should arise." *Id.* This remark is hard to fathom. If there is currently little hope for the employment of American vessels in foreign trade, then the payback rule will permit the total size of the American fleet to follow its natural tendency to decrease toward the level required by the domestic market. Under present conditions, therefore, the rule will make it impossible to retain a fleet that can carry all domestic traffic and "a substantial portion" of foreign traffic "at all times," which is explicitly set out as an objective in section (a) of the statute.

The Secretary's response to concerns about the rule's effects on the fleet as a naval auxiliary, to take another example, is similarly unsatisfying. The Navy warned that the projected loss under this rule of "handy-sized" tankers might have adverse implications for national security. The Secretary brushes aside this comment by stating her belief that "the outlook for these old, small product tankers is poor regardless of whether or not this rule is promulgated because of their age and the decline of the U.S. products trade." *Id.* She also claims that other non-fleet ships could fill

in the gap, *id.*, even though this observation may not help to satisfy the statutory objective that the fleet itself should constitute "a naval and military auxiliary in time of war or national emergency." 46 U.S.C. § 1101(b) (1982).

Rather than providing a more extensive discussion of the Merchant Marine Act's objectives, the Secretary chooses to rely on other policies in defending the rule. She identifies some of the "most important" reasons for the rule as being "economic efficiency," "use of underemployed resources," "increased competition," and "deregulation." 50 Fed.Reg. at 19,172. As she later elaborates: "It is the Department's position that the competitive forces of the market, rather than government regulation, should be relied upon, whenever feasible, to allocate transportation capacity and resources in the domestic trade. This rule reflects that position." *Id.* at 19,175. The central thrust of her approach, quite obviously, is to subject the merchant marine fleet to the discipline of the free market. Thus she finds it significant that the rule will leave the industry "in a healthier, more viable condition," *id.* at 19,174, and she finds it permissible that the condition of the fleet should depend on what economic opportunities become available in the world market. *See id.* This policy may well be defensible, yet it is not among the objectives specified in the Act, and if the Secretary has decided that it is implicit in or compatible with the statutory objectives, it would be useful for her to explain this decision somewhat more fully. She has failed to do so. The closest she comes is the conclusory statement that "it would not be appropriate to let the various program objectives reflected in the Act stand in the way of achieving the Act's broader policy mandates, including that of promoting a more competitive and efficient merchant fleet." *Id.* It may, however, be entirely appropriate for the Act's objectives to stand in the way of the payback rule, and perhaps to favor other alternatives, unless the Secretary can offer a fuller and more persuasive explanation for her view that

the "broader policy mandates" of the Act include the promotion of a "more competitive and efficient merchant fleet."<sup>4</sup>

The Secretary's failure to link the policies served by this rule to the objectives set out in the Merchant Marine Act is particularly problematic because she does not explain in the statement of basis and purpose why she rejects proposed alternatives to the payback rule. One can find this explanation in the Regulatory Impact Analysis, Joint Appendix ("J.A.") at 1049, where the Secretary considers and rejects at least a half-dozen other suggested measures. Once again, however, her account focuses on non-statutory criteria that favor this rule, such as lower transportation costs, collateral fiscal benefits, and more "efficient" use of the fleet. J.A. at 1089, 1093. She admits that the rule "has a number of adverse impacts," including "the displacement of about 18 tankers ... most of which are militarily useful handy-sized tankers, loss of employment opportunities for about 800 seamen, and the possible default on several government loans," *id.* at 1093, problems that impinge on the statutory objectives and that might be avoided under some of the alternative measures. *See, e.g., id.* at 1091-92 (describing effects of "full-time permissions" option, "status quo" option, and "eliminate permissions" option).

In exercising her decisionmaking authority, the Secretary is certainly free to consider factors that are not mentioned explicitly in the governing statute, yet she is not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with her authority under the statute. Her failure to link these non-statutory criteria with Congress' stated objectives in the Act thus makes it impossible for us to uphold the Secretary's decision to reject other mea-

4. It may be, of course, that present conditions in the world shipping market make it impossible for the Secretary to find a way to meet all of the statutory objectives. If this is the problem, she should discuss it frankly and directly when she considers which measures to adopt in light of the objectives explicitly set out in the Act.

asures and adopt this rule in response to the current problems of the merchant marine fleet. Her reliance on these non-statutory criteria is consistently a key point in her justifications for adopting this rule. In order to defend this action as "reasoned decisionmaking," the Secretary must spell out in more detail how her decision to adopt this rule and reject alternative measures by relying on policies of competition and deregulation can be squared with the statutory objectives that Congress specified as the primary guidelines for administrative action in this area. We take no position on whether these policies can be squared with the Act. But in the absence of any such discussion, this court can only conclude that her action is "arbitrary, capricious, or not otherwise in accordance with law," 5 U.S.C. § 706(2)(A) (1982). *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412-13, 416, 91 S.Ct. 814, 821-22, 823-24, 28 L.Ed.2d 136 (1971) (choice made by the agency must be "in accordance with law" as it can be understood in light of the statutory indicia).

#### IV.

[3] We therefore conclude that the Secretary violated section 553(c) of the Administrative Procedure Act by adopting this rule. In fashioning a remedy for an agency's failure to present an adequate statement of basis and purpose, this court may either remand for specific procedures to cure the deficiency without vacating the rule, *see, e.g., National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701, 703-04 (2d Cir.), *cert. denied*, 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44 (1975), or it may vacate the rule, thus requiring the agency to initiate another rulemaking proceeding if it would seek to confront the problem anew. *See, e.g., Tabor v. Joint Bd. for*

5. The grounds of our decision make it unnecessary to discuss the array of more specific procedural objections that appellants have made to this rulemaking. The district court found each of those objections to be without merit, but we take no position on the correctness of those findings.

*Statement of Act*  
706-112 (D.C. Cir. 1971)  
onto the rule because  
nations are quite serious  
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of our mandate unti  
further disruptions  
and to allow the S  
further proceedings  
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Fed.R.App.P. 41(a).  
present rule will be  
returned to the statu  
payback rule took e  
to any further actio  
taken in the interim  
So ordered.



PROFESSIONAL  
SPECIALISTS,  
Petitioner

FEDERAL LAB  
AUTHORITY

PROFESSIONAL  
SPECIALISTS,  
Petitioner

FEDERAL LAB  
AUTHORITY

Nos. 85-17

United States  
District of Columbia

Argued November 1, 1975  
Decided January 13, 1976

Union sought re  
Relations Authority

*Reversal of Actuarial, 586 F.2d 705, 78-1112 (D.C. Cir. 1977).* In this case, we vacate the rule because the Secretary's omissions are quite serious and raise considerable doubt about which of the proposed alternatives would best serve the objectives set out in the Merchant Marine Act. Yet we exercise our power to withhold issuance of our mandate until July 16, 1987, to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade. See Fed.R.App.P. 41(a). As of that date, the present rule will be vacated and conditions returned to the *status quo ante*, before the payback rule took effect, subject of course to any further action that may have been taken in the interim.

So ordered.



**PROFESSIONAL AIRWAYS SYSTEMS  
SPECIALISTS, MEBA, AFL-CIO,  
Petitioner,**

v.

**FEDERAL LABOR RELATIONS  
AUTHORITY, Respondent.**

**PROFESSIONAL AIRWAYS SYSTEMS  
SPECIALISTS, MEBA, AFL-CIO,  
Petitioner,**

v.

**FEDERAL LABOR RELATIONS  
AUTHORITY, Respondent.**

Nos. 85-1769, 85-1827.

United States Court of Appeals,  
District of Columbia Circuit.

Argued Nov. 18, 1986.

Decided Jan. 16, 1987.

Union sought review of Federal Labor Relations Authority order which found that

Federal Aviation Administration had committed unfair labor practices, but which refused to grant back pay. The Court of Appeals, Starr, Circuit Judge, held that: (1) FLRA may apply "but for" test under the Back Pay Act to determine whether to award back pay because of procedural violation of bargaining duties by agencies; (2) per se rule against back pay for violation of impact and implementation bargaining requirements is not proper under the Act; and (3) FLRA did not adequately explain departure from past precedent.

Petitions granted and case remanded.

**1. United States ¶39(8)**

"But for" test is properly applied in determining to award back pay under the Back Pay Act to government employee who establishes procedural violation of the federal service labor-management relations statute. 5 U.S.C.A. §§ 5596, 7116.

**2. Labor Relations ¶632**

There is no per se prohibition on award of back pay under the Back Pay Act for federal employee who establishes that agency committed unfair labor practice by failing to engage in impact and implementation bargaining. 5 U.S.C.A. §§ 5596, 7116.

**3. Labor Relations ¶632**

In applying the "but for" test to determine whether to award back pay for procedural violations of government's bargaining duties, Federal Labor Relations Authority must recognize the value of procedural integrity and must allow for the fact that it is highly difficult for adversely affected employees to establish that bargaining which never occurred because of the agency's violation would have prevented the loss of pay occasioned by the change implemented by the agency. 5 U.S.C.A. §§ 5596, 7116.

**4. Administrative Law and Procedure  
¶507**

**Labor Relations ¶598**

Federal Labor Relations Authority statement that it had "been engaged in the



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

MAY 4 1987

April 28, 1987

The Honorable John C. Stennis  
Chairman  
Senate Appropriations Committee  
SD-135 Dirksen Senate Office Bldg.  
Washington, D.C. 20510

Dear Senator Stennis:

As a member of the Senate Appropriations Committee participating in this year's Supplemental Appropriations mark up, you will be considering an issue involving the Construction Differential Subsidy (CDS) provided by the United States for four oil supertankers.

A condition of the subsidy was that the supertankers built under the program could only operate in international shipping. The transportation companies that received these subsidies paid the money back to the United States so that the supertankers could ply the American shipping trade. The provision in the Supplemental Appropriations bill would return the CDS paybacks for the four supertankers and would eliminate these ships from the domestic market.

I urge you to reject this provision.

The provision would cause \$142 million in direct refunds to supertanker owners who repaid the subsidy. Litigation costs may also be incurred by the Federal government, if the supertankers are denied access to the American trade. To my knowledge, none of these costs has been considered in either the House or Senate versions of the budget resolution.

The CDS repayments would also mean long term tax losses to the Federal government and to my state. Supertankers carry significantly more oil and are more efficient to operate than their smaller counterparts. According to the U.S. Maritime Administration (MarAd), the Federal government would lose about \$44 million annually in income taxes, owing to the less profitable trade which would result from the use of smaller non-CDS tankers. These figures were derived for three CDS tankers, and now that a fourth tanker may also be involved, the Federal tax loss would probably be even greater.

The CDS issue was debated and supposedly settled in the last Congress. The transportation companies, after participation in a lengthy rulemaking process with the Federal government, relied on this legislation to pay back the CDS on their supertankers. The U.S. Department of Transportation established its rules and developed its plans around this law. After only a short period of time, certain special interests are contending that the ground rules should be changed again. Without hearings or consideration by the appropriate authorizing committee, these interests were successful in inserting a rider in the House version of the Supplemental Appropriations bill.

As you are no doubt aware, the CDS administrative rulings, growing out of previous Congressional action, have been the subject of extensive litigation. In the eleventh hour of those determinations, we believe that it would not be sound public policy for the Congress to intervene. Several of the parties to the litigation relied on the legislation recently enacted by Congress; all parties are well-represented in the judicial forum.

Additionally, the CDS provision is not a "jobs" issue. Although the U.S. Maritime Administration (MarAd) predicts that about 500 new jobs would ultimately be created by prohibiting the CDS ships in the Alaska trade, even this figure is in dispute. MarAd calculated this number based on the assumption that the smaller tankers replacing the CDS ships would hire about 800 crewmen. However, 300 jobs would be lost on the three CDS tankers. Further, the transportation companies point out that some supertankers would continue to ply the Alaska North Slope oil trade under the current six month waiver rule. Therefore, fewer jobs would be created than MarAd has predicted. In any case, the costs to the Federal government and the State of Alaska associated with the creation of each new job would be immense.

As Congress and all Americans search for new ways of "competitiveness" in the world market, we will need to develop and transport our natural resources on an economical basis. The CDS supertankers represent an asset that was manufactured in the United States, and we believe that it would be irresponsible to prohibit these ships from transporting American products on an efficient, year-round basis.

For the reasons outlined above, I urge you to reject the provision which would force these ships out of the American trade. At the very least, I respectfully suggest that before Congress acts, hearings be held to consider the important policy implications of the proposed amendment.

Thank you for your consideration of this matter.

Sincerely

*John W. Katz for*

Steve Cowper  
Governor of Alaska

cc: Senator Ted Stevens  
Senator Frank P. Murkowski  
Congressman Don Young

Identical Letters Sent to Each Committee Member



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

May 20, 1987

The Honorable Jamie Whitten  
U.S. House of Representatives  
2314 Rayburn House Office Bldg.  
Washington, D.C. 20515

Dear Congressman Whitten:

As a member likely to be appointed to the Supplemental Appropriations Conference Committee, you will probably be considering an issue involving the Construction Differential Subsidy (CDS) provided by the United States for four oil supertankers. The CDS provision is in the House bill, but after full debate it was stricken from the measure that passed the Appropriations Committee. As you know, the Supplemental Appropriations bill has yet to be considered on the Senate floor.

I urge that the House accede to the Senate on the CDS provision.

The provision would cause \$142 million in direct refunds to supertanker owners who repaid the subsidy. Litigation costs may also be incurred by the Federal government, if the supertankers are denied access to the American trade.

To my knowledge, none of the CDS cost has been considered in either the House or Senate versions of the budget resolution. In fact, the 1988 report on the House Concurrent Budget Resolution begins by stating that the Committee recognizes, "the need to reduce substantially and permanently the large budget deficits which have weakened the economy, enlarged the trade deficit, eroded the Nation's international competitiveness and destroyed American businesses and jobs." With this goal in mind, there is no compelling reason to create another \$142 million in costs to the Federal government, especially when the overall budget authority for the transportation function in the House Budget Resolution has been decreased by \$1.35 billion.

The CDS repayments would also mean long term tax losses to the Federal government and to my state. Supertankers carry significantly more oil and are more efficient to operate than their smaller counterparts. According to the U.S. Maritime Administration (MarAd), the Federal government would lose about \$44 million annually in income taxes, owing

May 20, 1987

to the less profitable trade which would result from the use of smaller non-CDS tankers. These figures were derived for three CDS tankers, and now that a fourth tanker may also be involved, the Federal tax loss would probably be even greater.

The CDS issue was debated and supposedly settled in the last Congress. The transportation companies, after participation in a lengthy rule making process with the Federal government, relied on this legislation to pay back the CDS on their supertankers. The U.S. Department of Transportation established its rules and developed its plans around this law. After only a short period of time, certain special interests are contending that the ground rules should be changed again.

As you are no doubt aware, the CDS administrative rulings, growing out of previous Congressional action, have been the subject of extensive litigation. In the eleventh hour of those determinations, we believe that it would not be sound public policy for the Congress to intervene. Several of the parties to the litigation relied on the legislation recently enacted by Congress; all parties are well-represented in the judicial forum.

Additionally, the CDS provision is not a "jobs" issue. Although the U.S. Maritime Administration (MarAd) predicts that about 500 new jobs would ultimately be created by prohibiting the CDS ships in the Alaska trade, even this figure is in dispute. MarAd calculated this number based on the assumption that the smaller tankers replacing the CDS ships would hire about 800 crewmen. However, 300 jobs would be lost on the three CDS tankers (and the proposed rule making has expanded its scope to four CDS tankers). Further, the transportation companies point out that some supertankers would continue to ply the Alaska North Slope oil trade under the current six month waiver rule. Therefore, fewer jobs would be created than MarAd has predicted. In any case, the costs to the Federal government and the State of Alaska associated with the creation of each new job would be immense.

As Congress and all Americans search for new ways of "competitiveness" in the world market, we will need to develop and transport our natural resources on an economical basis. The CDS supertankers represent an asset that was manufactured in the United States, and we believe that it would be irresponsible to prohibit these ships from transporting American products on an efficient, year-round basis.

The Hon. Jamie Whitten

- 3 -

May 20, 1987

For the reasons outlined above, I urge you to reject the provision which would force these ships out of the American trade. At the very least, I respectfully suggest that before Congress acts, hearings be held to consider the important policy implications of the proposed amendment.

Thank you for your consideration of this matter.

Sincerely

*John W. Katz for*  
Steve Cowper  
Governor

cc: Senator Ted Stevens  
Senator Frank H. Murkowski  
Congressman Don Young

Identical Letters Sent to Each Likely House Conference  
Committee Member

FRANK H. MURKOWSKI  
ALASKA

f. o. w. STR 43

Am

ANCHORAGE  
U.S. FEDERAL BUILDING  
701 C STREET, BOX 1, 99513  
(907) 271-3736

FAIRBANKS  
U.S. FEDERAL BUILDING  
101 12TH AVENUE, BOX 7, 99701  
(907) 486-0233

JUNEAU  
U.S. FEDERAL BUILDING  
BOX 1647, 99802  
(907) 886-7400

COMMITTEES:  
VETERANS' AFFAIRS (RANKING MEMBER)  
ENERGY AND NATURAL RESOURCES  
FOREIGN RELATIONS  
INDIAN AFFAIRS  
INTELLIGENCE

## United States Senate

WASHINGTON, DC 20510  
(202) 224-6666

May 15, 1987

Honorable Bettye M. Fahrenkamp  
515 Seventh Avenue, Suite 320  
Fairbanks, Alaska 99701

Dear Bettye:

Thank you for your May 7 letter advising me of the approval of House Joint Resolution 33.

The potential loss of four VLCC (supertanker) ships from the Alaska oil trade is a grave concern, and I very much appreciate your support for a new rule-making to allow these vessels to enter the trade permanently.

There is no gain saying the fact that we face stiff opposition from certain quarters, primarily the maritime unions, but I am hopeful that our point of view will prevail.

As this is a matter of great mutual interest, let me briefly describe events since the January 16 U.S. Court of Appeals decision:

- \* On April 15 of this year, the Department of Transportation (DOT) published a new proposed rule, intended to satisfy the court's concerns.
- \* On April 23, the House passed H.R. 1827, the supplemental budget for fiscal year 1987, which included a provision preventing the Department of Transportation from using any portion of its funding to proceed with this rulemaking.
- \* Also on April 23, DOT Secretary Elisabeth Dole wrote to Senator John Stennis, Chairman of the Senate Appropriations Committee, expressing the Administration's strong opposition to the House language.
- \* April 30, The Senate Appropriations Committee met to mark up its own version of the supplemental. During this meeting, the House language was stricken from the Senate version of the bill.

Throughout this process, I have maintained a very active personal interest. In conversation and in formal correspondence, I have repeatedly urged key members of the committee from both parties to reject the House provision. My staff has also been working closely on this matter with other Senate staff, with the Governor's office and with others.

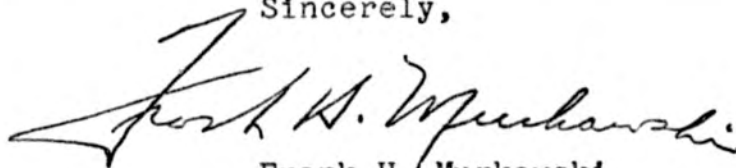
Honorable Bettye M. Fahrenkamp  
May 15, 1987  
Page 2

The next step is up to the other side, which may or may not choose to offer the same language as a floor amendment. I do not believe this will occur, but if it does I am prepared to argue our case on the floor.

It is more likely that proponents of this prohibition will attempt to achieve their goal when the supplemental goes to conference. It is impossible to predict the outcome at this point; however, I have prepared strong arguments which will be forwarded to the Senate conferees at the appropriate time. I remain hopeful.

Incidentally, I am enclosing a recent New York Times editorial you'll enjoy. The Times' perspective may be from a slightly different angle, but the message is clear.

Sincerely,

A handwritten signature in dark ink, appearing to read "Frank H. Murkowski". The signature is fluid and cursive, with a large initial "F" and "M".

Frank H. Murkowski  
United States Senator

Enclosure

# The New York Times

Founded in 1851

ADOLPH S. OCHS, Publisher 1896-1935  
ARTHUR HAYS SULZBERGER, Publisher 1935-1961  
ORVIL E. DRYFOOS, Publisher 1961-1963

ARTHUR OCHS SULZBERGER, Publisher

MAX FRANKEL, Executive Editor

ARTHUR GELB, Managing Editor

JAMES L. GREENFIELD, Assistant Managing Editor

WARREN HOGE, Assistant Managing Editor

JOHN M. LEE, Assistant Managing Editor

ALLAN M. SIEGAL, Assistant Managing Editor

JACK ROSENTHAL, Editorial Page Editor

LESLIE H. GELB, Deputy Editorial Page Editor

A. M. ROSENTHAL, Associate Editor

ARTHUR OCHS SULZBERGER JR., Assistant Publisher

LANCE R. PRIMIS, Exec. V.P., General Manager

RUSSELL T. LEWIS, Sr. V.P., Circulation

J. A. RIGGS JR., Sr. V.P., Operations

HOWARD BISHOP, V.P., Employee Relations

ERICH G. LINKER JR., V.P., Advertising

JOHN M. O'BRIEN, V.P., Controller

ELISE J. ROSS, V.P., Systems

## Senator Hollings's Tanker Ploy

Faced with such a big budget deficit, Congress might be expected to embrace owners of oil tankers who have, voluntarily, repaid \$142 million in Federal subsidies. In fact, many members of Congress are demanding that the Transportation Department return the money. Leading the fight is Senator Ernest Hollings, who as co-author of the Gramm-Rudman-Hollings balanced budget law ought to be doubly embarrassed by the naked defense of special interests.

In 1970, shipyard interests persuaded Congress to subsidize a new fleet of very large oceangoing oil tankers. Eleven were built, with Uncle Sam paying about half the cost. But even with the subsidy, the tankers couldn't compete in a world market glutted with more-efficient foreign vessels.

Hope for the idle tankers centered on the opening of the Trans-Alaska pipeline in 1977, combined with a prohibition against exports of Alaskan oil. This generated enormous demand for tankers to carry crude to refineries in the lower 48 states. But present law prohibits use of foreign-built ships or ships built with Government subsidies to serve the coastal trade when unsubsidized domestic vessels are available. These coastal tankers are old, slow and small. To prevent shipping rates from soaring, the Transportation Department permitted a few of the large ocean tankers temporarily to enter the protected trade.

Overcoming fierce opposition from coastal shipping interests, the Reagan Administration

ruled in 1985 that the big tankers could repay their subsidies and join the coastal fleet permanently. Everyone benefited — except the coastal-ship owners. Earlier this year, they convinced a Federal appeals court that the Administration hadn't adequately documented the case for a payback.

Most analysts expected the Transportation Department to meet the court's objections. What they didn't anticipate was Congressional intervention. Without hearings or debate, the House prohibited Transportation from spending a dime to rewrite the rule. But Ernest Hollings, who does much of the heavy lifting for the rust bucket fleet, failed with the same ploy in the Senate. He will still represent his colleagues when the two bills are reconciled.

Coastal shipowners claim they will go broke if forced to compete and thus wouldn't be available for military emergencies. If the vessels were worth saving, though, the Navy could buy them at scrap value and put them in mothballs.

The only real issue is whether Congress will be able to resist the lure of PAC politics. Shipping interests learned long ago that it was more profitable to start political action committees and invest in "Congressional access" than in more efficient ships or retraining. In 1985-86, the tiny seafarers' union alone contributed \$1.2 million just to House members. With money like that floating around, there's reason to wonder if a majority of conferees will have the conscience to put the public's financial interest ahead of their own.

## Legal Life Jacket for Mr. Meese

It's no longer remarkable to find the U.S. Attorney General under investigation by a special prosecutor. The case of the Wedtech Corporation marks the third time that an independent counsel, appointed by a court under the Ethics in Government

The public cannot be expected to believe that Justice would prosecute its boss vigorously or give him a believable clean bill of health. That's why Mr. Meese, confident of vindication, asked to transfer that investigation to an independent counsel. Such a

BITS FROM BETTYE

ALL ALASKA WEEKLY

TELECOPY TO TOM SNAPP

456-6426

May 6, 1987

Four of the oil supertankers that transport Alaskan oil from Valdez to the lower 48 may be removed from the trade on July 16. These large, efficient tankers have been allowed to operate under a special waiver from the U.S. Department of Transportation. A recent U.S. Court of Appeals decision held that these waivers were improperly drafted, but allowed the ships to operate until July 16, 1987. If new rules are not adopted by that date, these ships will have to be replaced with smaller, less efficient vessels. The resulting increase in the transportation costs for Alaska North Slope oil will decrease wellhead values and could result in a loss of revenue to the state of from \$18 - \$150 million annually.

These ships were built with federal construction differential subsidies (CDS), a program designed to help U.S. built ships to compete in foreign trade markets. To alleviate the shortage of

suitable Jones Act tankers, the U.S. Department of Transportation has allowed these ships to enter the domestic trade after repaying the subsidy.

In response to the court decisions, the U.S. Department of Transportation is in the process of adopting new rules that would allow the four ships to remain in the domestic trade. However, pending amendments in Congress may prohibit such new rulemaking. Maritime unions and owners of smaller ships are urging Congress to stand by the original terms of the subsidies and keep the supertankers out of the domestic market, arguing that the competition would seriously harm all smaller operators. A supplemental appropriations bill containing prohibitive language has passed the U.S. House of Representatives. The U.S. Senate version of the bill, which has deleted this amendment, may be voted on this week.

State oil revenues are based on "wellhead" values. The wellhead value is determined by taking the market price of the oil delivered in the lower 48 and subtracting transportation costs. The use of smaller, less efficient tankers will increase shipping costs by \$.25 to \$1.00 per barrel. This will decrease our wellhead values and result in a loss of state revenues from taxes and royalties of from \$18 to \$150 million a year.

In terms of environmental risks, these supertankers are among the safest ships built. By replacing them with many smaller and older ships, the chances of accidental oil spills may increase.

I have introduced legislation (SJR 43) that urges the Secretary of the U.S. Department of Transportation to adopt new rules by July 16, 1987 that would enable these ships to continue to operate without interruption. The Legislature has recognized the urgency of this issue and the resolution should be approved by both bodies by the end of this week.

It is possible that Congress may be acting on this critical issue as early as this week. SJR 43 will send a clear message that it is in the best interest of all the people of our state that these supertankers be allowed to continue plying our waters.

TO: DONNA WALKER

## STATE OF ALASKA

## THE LEGISLATURE

1987

Source

HJR 33Legislative  
Resolve No.16

Relating to the shipping of Alaska oil.

## BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS on January 16, 1987, the United States Court of Appeals for the District of Columbia vacated a United States Department of Transportation rule under which three very large crude oil carrier ships, the Arco Independence, the Arco Spirit, and the Brooklyn, were allowed to operate in the United States domestic shipping market; and

WHEREAS the court decision would require all three ships to stop domestic shipping of Alaska oil by July 16, 1987, unless the United States Department of Transportation adopts another rule to allow the ships to continue their domestic shipping; and

WHEREAS a fourth ship, the Bayridge, that is used in Alaska oil shipping may also be affected by the court decision; and

WHEREAS Alaska oil production has increased significantly in the last year, and these four ships currently move 200,000 barrels of Alaska oil to market every day; and

WHEREAS if the four ships are prohibited from engaging in domestic shipping, a large number of much smaller, less efficient, and more expensive ships will be required to take their place to transport Alaska oil to market, and this change would raise the cost of transportation for all Alaska oil shipped in these smaller ships by an estimated \$.25 to \$1.00 per barrel, and netback values on the oil would decline accordingly; and

WHEREAS if the Arco Independence, the Arco Spirit, and the Brooklyn are not allowed to engage in the domestic shipment of Alaska oil, the direct economic loss to the state will be between \$18,000,000 and \$150,000,000 annually; and

WHEREAS if the United States Department of Transportation fails to adopt a rule by July 16, 1987, allowing these four ships to operate in the domestic shipping market, the transportation of Alaska oil may be disrupted, the transportation costs will increase dramatically, and the state and the federal government will lose a significant amount of revenue; and

WHEREAS the substitution of a large number of smaller ships could disrupt the transportation of Alaska oil because the smaller ships are often older, less well-equipped, and less safe, and because the increased number of ships could cause congestion at docking facilities; and

WHEREAS the best-equipped and fastest ships should be used for the transportation of oil in order to protect the environment and communities through which the ships pass;

BE IT RESOLVED that the Alaska State Legislature respectfully urges the Secretary of the United States Department of Transportation to adopt before July 16, 1987, a rule that would enable the Arco Independence, the Arco Spirit, the Bayridge, and the Brooklyn to continue to operate in the United States domestic shipping market without interruption.

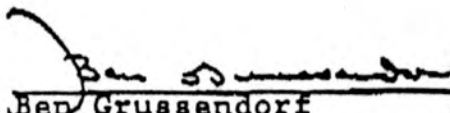
COPIES of this resolution shall be sent to the Honorable Elizabeth H. Dole, Secretary of the U.S. Department of Transportation; and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the Alaska delegation in Congress.

## AUTHENTICATION

The following officers of the Legislature certify that the attached enrolled resolution, House Joint Resolution No. 33

was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

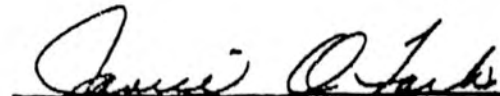
Passed by the House May 6, 1987

  
Ben Grussendorf  
Speaker of the House

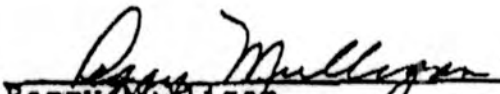
ATTEST:

  
Irene Cashen  
Chief Clerk of the House

Passed by the Senate May 7, 1987

  
Janice O. Faiks  
President of the Senate

ATTEST:

  
Peggy Mulligan  
Secretary of the Senate

  
Steve Cowper  
Governor of Alaska

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

May 14, 1987

MAY 18 1987

The Honorable Elizabeth Hanford Dole  
Secretary  
Department of Transportation  
400 7th Street, S.W.  
Washington, D.C. 20590

Dear Secretary Dole:

On behalf of the State of Alaska, I hereby submit the following comments in support of the proposed rule published at 52 Federal Register, Volume 52, 12199 (April 15, 1987). This rule would reaffirm the allowance of the repayment of Construction Differential Subsidies (CDS), with interest, which permits four U.S.-flag vessels to engage in the American trade. These vessels received CDS pursuant to section 506 of the Merchant Marine Act of 1936, 46 United States Code 1156. The four vessels have repaid their CDS and are currently transporting Alaska crude oil.

The State of Alaska urges that the four CDS-tankers, the ARCO Independence, the ARCO Spirit, the Brooklyn and the Bay Ridge, be allowed to continue in the American maritime trade. These ships are urgently needed to meet existing and future transportation needs for Alaska crude oil. About 22 percent of our nation's oil production comes from Alaska North Slope crude oil (ANS), and this percentage should continue to increase.

The State agrees with the premises of the new regulation namely:

- o that full-time operations by the four CDS-tankers is urgently needed to meet the demands associated with the Trans-Alaska Pipeline System, since demand for U.S.-flag tanker tonnage has increased after the pipeline opened in 1977 and has not been met by the existing Jones Act fleet;
- o that revision affirms previous rules which allowed the four CDS-tankers to pay back their Construction Differential Subsidies with interest in exchange for permission to carry crude oil from Alaska to the lower 48 states and will encourage the development of a more efficient U.S. - flag merchant marine; and
- o that the proposed regulation represents an important step in the efforts to minimize the Federal

government's interference with the marketplace decisions of vessel operators.

When the Trans-Alaska Pipeline System was first opened in 1977, it was assumed that ANS oil would be used primarily to meet West Coast demand. In 1977, ANS production was 0.63 million bbl/day. By 1986, approximately 1.8 million bbl/day of Alaskan crude oil were produced and transported by U.S.-flag tankers; and in 1987, production is expected to increase by another 200,000 bbl/day.

For the last several years, there have not been enough Jones Act tankers to meet ANS oil transport demand. As you know, this situation led the U.S. Department of Transportation to initiate a six-month per year waiver program which permitted CDS-tankers into the American trade on a temporary basis. Waivers became less common after 1986, when five CDS-tankers (including the four tankers involved in this proposed rule making) were involved in the ANS trade.

If the four tankers are not allowed into the American trade on a full time basis, but only on a six-month basis, increased costs and inefficiencies would result. Under the waiver rule, CDS-tankers, for all practical purposes, can only be used for six months out of the year, forcing their owners to include their lay up costs in their charter rates. Also, under the six-month waiver program Jones Act carriers can engage in a practice known as "blocking." Blocking involves the refusal of employment by a Jones Act vessel unless it receives an artificially high charter price. A higher charter rate could be obtained from a charterer for the laied up Jones Act vessel because the lower cost CDS-tankers are not allowed to be chartered until all the large crude Jones Act tankers are employed.

Not only are the CDS-tankers needed to move the full capacity of ANS oil from Alaska, but also to provide economical transshipment of ANS oil to Panama. The majority of smaller Jones Act tankers were built to transport oil on medium-haul voyages, for example to the Puget Sound and California refineries from Valdez, and from Panama to East and Gulf Coast refineries. In the last few years, however, West Coast oil demand has not kept up with increased ANS oil production. Current law prohibits ANS oil from being exported abroad. Because ANS oil production exceeds West Coast demand, much more ANS oil than originally anticipated is being transported to the Gulf and East Coasts. This oil is primarily transshipped to Panama by CDS tankers and transferred by pipeline to Jones Act tankers.

Overall, the CDS tankers have lower fuel, labor and insurance costs than their smaller counterparts. Analysis by the State of Alaska Department of Revenue, Petroleum Research Section in June 1985 showed that CDS-tankers save

45 percent on average shipping costs over non-CDS-tankers. This amounts to \$1.25/bbl for Gulf Coast shipments and \$0.57/bbl for West Coast shipments. Since the CDS transportation companies made the repayments, there has been a drop in the average tanker rate to Alaska of \$0.75/bbl. Because increased transportation costs on ANS oil ultimately reduce the severance taxes and royalties that the State of Alaska receives, elimination of the four CDS-tankers would significantly reduce the State's revenue.

The CDS-tankers are among the most efficient vessels in the world. From an environmental standpoint, these ships are safer because they are newer and make fewer trips than smaller tankers. Environmental concerns are a major factor for Alaska with its scenic, recreational, marine mammal and fishery resources.

The loss of the CDS-tankers would have direct national economic ramifications. Removing the four CDS-tankers from the American trade would cause \$142 million in direct refunds to supertanker owners who repaid the subsidy. Litigation costs may also be incurred by the Federal government, if the supertankers are denied access to the American trade. Additionally, the CDS repayments would mean long-term tax losses to the Federal government in lost income taxes owing to the less profitable trade which would result from the use of smaller Jones Act tankers. The adverse economic effects of revoking a CDS payback have not been considered by the House and Senate in their 1988 Federal Budget Resolutions and would cause an increased Federal budget deficit.

Other major industrial maritime nations have developed large fleets of supertankers to deliver and transport oil to their countries. For example, most of the oil that Japan receives from the Middle East is shipped by over 90 supertankers that are either owned or controlled by the Japanese. As we have already mentioned, free market economics dictate that it is much more efficient to use supertankers to transport oil over long distances than to use small tankers.

The CDS provision is not a "jobs" issue. Some new jobs would probably be created by prohibiting CDS-tankers from the domestic trade because Jones Act tankers are more labor intensive. However, the six-month waiver program, allowing CDS-tankers into the trade on a limited basis, would minimize the amount of new jobs actually created. As maritime transportation costs increase, especially transshipment charters to Panama, pipelines in the United States, such as the Four Corners Pipeline, would be able to compete effectively with the maritime trade. This would also minimize the creation of more jobs and the use of Jones Act vessels.

May 14, 1987

The Alaska Legislature has recently considered the issue that is currently pending before the Department of Transportation in this proposed rule making and has passed a resolution urging you to allow the four vessels to continue in the American trade. We are enclosing a copy of House Joint Resolution Number 33 which was unanimously passed by both Houses of the Legislature.

In our opinion, the proposed rule addresses a very real problem in a constructive manner, and is in the best interests of a sound U.S. merchant marine, domestic shippers, and consumers of petroleum products. For this reason, the State strongly supports the proposal.

Thank you for your consideration of these comments.

Sincerely,

*John W. Katz for*  
Steve Cowper  
Governor

Enclosure

cc: Senator Ted Stevens  
Senator Frank Murkowski  
Congressman Don Young

STEVE COWPER  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

May 12, 1987

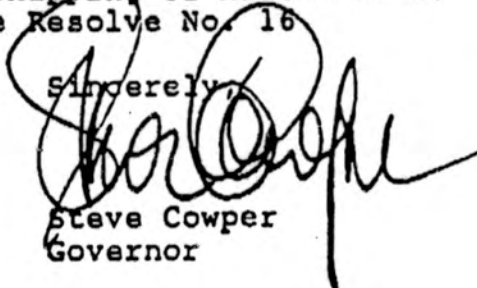
The Honorable Ben Grussendorf  
Speaker of the House  
Alaska State Legislature  
P.O. Box V  
Juneau, AK 99811

Dear Representative Grussendorf:

I have signed the following resolution and am transmitting the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

HOUSE JOINT RESOLUTION NO. 33  
(Relating to the shipping of Alaska oil.)  
Legislative Resolve No. 16

Sincerely,

  
Steve Cowper  
Governor



OFFICE OF THE GOVERNOR

**JOHN W. KATZ**

Director of State/Federal Relations  
And Special Counsel to the Governor

Hall of the States  
444 North Capital Street, N.W.  
Suite 518  
Washington, D.C. 20001  
(202) 624-5858

Pouch A  
Juneau, Alaska 99811  
(907) 465-3500



OFFICE OF THE GOVERNOR

**ERIC OSTROVSKY**  
ASSOCIATE DIRECTOR  
FINANCE AND HUMAN RESOURCES

Hall of the States  
444 North Capitol Street, N.W.  
Suite 518  
Washington, D.C. 20001

(202) 624-5858

f. SJR 43

MAY 19 1987



STEVE COWPER  
GOVERNOR

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
WASHINGTON, D.C.

May 15, 1987

To Whom It May Concern:

The State of Alaska has sent a corrected version of its comments on the proposed rule making on CDS-tankers to the U.S. Department of Transportation.

The only change to the comments are at page 3, paragraph 1, second to last sentence. Instead of stating that "there has been a drop in the average tanker rate to Alaska of \$0.75/bbl.", the revised version states that "there has been a drop in the average tanker rate to destinations east of Panama of \$0.75/bbl."

We are enclosing a copy of the revised third page for your information.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, reading "Eric Ostrovsky".  
Eric Ostrovsky

45 percent on average shipping costs over non-CDS-tankers. This amounts to \$1.25/bbl for Gulf Coast shipments and \$0.57/bbl for West Coast shipments. Since the CDS transportation companies made the repayments, there has been a drop in the average tanker rate to destinations east of Panama of \$0.75/bbl. Because increased transportation costs on ANS oil ultimately reduce the severance taxes and royalties that the State of Alaska receives, elimination of the four CDS-tankers would significantly reduce the State's revenue.

The CDS-tankers are among the most efficient vessels in the world. From an environmental standpoint, these ships are safer because they are newer and make fewer trips than smaller tankers. Environmental concerns are a major factor for Alaska with its scenic, recreational, marine mammal and fishery resources.

The loss of the CDS-tankers would have direct national economic ramifications. Removing the four CDS-tankers from the American trade would cause \$142 million in direct refunds to supertanker owners who repaid the subsidy. Litigation costs may also be incurred by the Federal government, if the supertankers are denied access to the American trade. Additionally, the CDS repayments would mean long-term tax losses to the Federal government in lost income taxes owing to the less profitable trade which would result from the use of smaller Jones Act tankers. The adverse economic effects of revoking a CDS payback have not been considered by the House and Senate in their 1988 Federal Budget Resolutions and would cause an increased Federal budget deficit.

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The CDS provision is not a "jobs" issue. Some new jobs would probably be created by prohibiting CDS-tankers from the domestic trade because Jones Act tankers are more labor intensive. However, the six-month waiver program, allowing CDS-tankers into the trade on a limited basis, would minimize the amount of new jobs actually created. As maritime transportation costs increase, especially transshipment charters to Panama, pipelines in the United States, such as the Four Corners Pipeline, would be able to compete effectively with the maritime trade. This would also minimize the creation of more jobs and the use of Jones Act vessels.

# The New York Times

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Letters

## Senator Hollings's Tanker Ploy

Faced with such a big budget deficit, Congress might be expected to embrace owners of oil tankers who have, voluntarily, repaid \$142 million in Federal subsidies. In fact, many members of Congress are demanding that the Transportation Department return the money. Leading the fight is Senator Ernest Hollings, who as co-author of the Gramm-Rudman-Hollings balanced budget law ought to be doubly embarrassed by the naked defense of special interests.

In 1970, shipyard interests persuaded Congress to subsidize a new fleet of very large oceangoing oil tankers. Eleven were built, with Uncle Sam paying about half the cost. But even with the subsidy, the tankers couldn't compete in a world market glutted with more-efficient foreign vessels.

Hope for the idle tankers centered on the opening of the Trans-Alaska pipeline in 1977, combined with a prohibition against exports of Alaskan oil. This generated enormous demand for tankers to carry crude to refineries in the lower 48 states. But present law prohibits use of foreign-built ships or ships built with Government subsidies to serve the coastal trade when unsubsidized domestic vessels are available. These coastal tankers are old, slow and small. To prevent shipping rates from soaring, the Transportation Department permitted a few of the large ocean tankers temporarily to enter the protected trade.

Overcoming fierce opposition from coastal shipping interests, the Reagan Administration

ruled in 1985 that the big tankers could repay their subsidies and join the coastal fleet permanently. Everyone benefited — except the coastal-ship owners. Earlier this year, they convinced a Federal appeals court that the Administration hadn't adequately documented the case for a payback.

Most analysts expected the Transportation Department to meet the court's objections. What they didn't anticipate was Congressional intervention. Without hearings or debate, the House prohibited Transportation from spending a dime to rewrite the rule. But Ernest Hollings, who does much of the heavy lifting for the rust bucket fleet, failed with the same ploy in the Senate. He will still represent his colleagues when the two bills are reconciled.

Coastal shipowners claim they will go broke if forced to compete and thus wouldn't be available for military emergencies. If the vessels were worth saving, though, the Navy could buy them at scrap value and put them in mothballs.

The only real issue is whether Congress will be able to resist the lure of PAC politics. Shipping interests learned long ago that it was more profitable to start political action committees and invest in "Congressional access" than in more efficient ships or retraining. In 1985-86, the tiny seafarers' union alone contributed \$1.2 million just to House members. With money like that floating around, there's reason to wonder if a majority of conferees will have the conscience to put the public's financial interest ahead of their own.

## Legal Life Jacket for Mr. Meese

It's no longer remarkable to find the U.S. Attor-

The public cannot be expected to believe that

MAY 10 1987



STEVE COWPER  
GOVERNOR

STATE OF ALASKA

OFFICE OF THE GOVERNOR  
WASHINGTON, D.C.

April 22, 1987

MEMORANDUM

TO: FILE

FROM: ERIC OSTROVSKY, Associate Director for Revenue

THROUGH: *WJK* JOHN W. KATZ, <sup>EO</sup> Director of State/Federal Relations  
and Special Counsel to the Governor

SUBJECT: 1) ALASKA REVENUE IMPACT CAUSED BY DENYING THREE  
VLCC CDS SHIPS TO THE ALASKA TRADE  
2) THE NUMBER OF NEW JOBS CREATED BY USING SMALLER  
TANKERS

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REVENUE IMPACT

The Alaska Department of Revenue, Petroleum Research Section (Research Section) in a recent analysis has indicated that if three CDS tankers owned by ARCO and Petrofina were taken out of the Alaska trade, the direct economic loss to the State of Alaska would be \$18 - \$150 million annually. This revenue loss would result from a decrease in Alaska's oil royalty and severance taxes. The decrease would be caused by a decrease in the wellhead price of oil, which is calculated as the price of oil at its final destination minus pipeline shipping and other allowable costs.

The U.S. Maritime Administration and the major oil companies effected by the issue predict that Alaska would likely lose about \$50 million annually. The Research Section indicates that the \$50 million estimate is probably accurate. Since the time that the Research Section determined the revenue impact, the U.S. Department of Transportation in its proposed rule making has indicated that a fourth VLCC CDS tanker, the Bay Ridge, would also have to be taken out of the Alaskan trade if the ruling in Independent U.S. Tanker Owners Committee v. Dole takes effect. If the Bay Ridge is also taken out of the Alaska trade, the revenue impact that follows would have to be increased by roughly 33 percent.

Each CDS super oil tanker can carry significantly more oil than its smaller counterparts, and the CDS tanker transports oil at a cheaper rate. A study last year by the Research

Section showed that CDS tankers could save an average of 45 percent in shipping costs over non-CDS tankers. This amounts to \$1.25/bbl for Gulf Coast shipments and \$0.57/bbl for West Coast shipments. Since the three CDS tankers were introduced into the Alaska trade in between July, 1985 and May, 1986, the average tanker rate overall to the Gulf Coast has dropped by \$0.75/bbl.

The three CDS tankers (the Bay Ridge is not included in the following calculations) now engaged in Alaska North Slope (ANS) oil shipments are transporting about 60 million barrels annually. The following equation reflects the reason why the Research Section predicts that the State would lose at least \$18 million annually:

#### Royalty Effect

$60 \text{ (million barrels of oil)} \times (\$1.25 \text{ savings}) \times 0.125 \text{ (12.5 percent royalty)} = \$9.4 \text{ million}$

plus

#### Severance Tax Effect

$60 \times 1.25 \times 0.15 \text{ (severance rate)} \times 0.84 \text{ (economic limit factor)} \times 1 - 0.125 \text{ (severance tax adjustment)} = \$8.3 \text{ million}$

TOTAL \$17.7 million.

The severance tax adjustment is needed because this severance tax is levied only on non-royalty oil, ie, a tax on oil left after the royalty oil is subtracted. The economic limit factor, which reduces the effective severance tax rate as well productivity declines, is estimated to be 0.84 percent over the near term.

The reason why \$18 million is a conservative estimate is that the reduced competition from the removal of the tankers (the tanker market is currently fully extended) could raise the transportation cost for all ANS oil, so that, the State could lose over \$50 million annually if tanker rates on all shipments of the Gulf Coast returned to the previous level. The following equation shows how the \$50 million figure was derived:

#### Royalty Effect

$300 \text{ (millions of barrels of ANS oil delivered to the Gulf Coast)} \times 0.75 \text{ (actual overall rate reduction when the three CDS vessels were introduced into the trade)} \times 0.125 = \$28.1 \text{ million}$

plus

#### Severance Tax Effect

$300 \times \$0.75 \times 0.15 \times 0.84 \times (1 - 0.125) = \$24.8 \text{ million}$

TOTAL \$52.9 million.

If the shipping rate on all ANS oil shipments both to the Gulf and West Coast were to increase the full 45 percent, Research Section estimates that the revenue impact on the State could go as high as \$150 million annually.

#### POTENTIAL JOBS CREATED BY THE CHANGE

The United States Maritime Administration (MarAd) predicts that about 500 new jobs would ultimately be created by prohibiting the CDS ships in the Alaska trade. MarAd predicated this figure based on the assumption that the smaller tankers replacing the CDS tankers would hire about 800 crewmen. On the other hand, about 300 jobs would be lost on the three CDS tankers, reducing the new jobs created to 500.

The oil companies point out that CDS tankers could continue to be waived into the Alaska trade on a six month basis even if the proposed amendment passes. Under this scenario, CDS tankers could fill in the gap for the four vessels taken out of the trade on a full time basis. Because large tankers would still be in use, no new jobs would be created. Nevertheless, the tankers waiving into the trade for six month periods would still have much higher transportation costs than the four CDS tankers taken out of the trade. The tankers waived into the trade for six months would most likely be docked for the rest of the year and the six months of inactivity would have to be factored into the tankers' over all operating costs.

Assuming that CDS tankers are not allowed to waive into the Alaska trade for a six month period and with the tanker market in the Alaska trade currently fully extended, it is not certain whether new seafarer jobs would be created or that only transportation costs would rise due to increased demand. Moreover, if the wellhead price drops, ANS oil could not compete against the world market price, and ANS oil production would decrease, which is what happened recently when the Milne Point oil field shut down. This effect would also limit potential jobs. The ability of ANS oil to compete on the world market will become a greater factor as new, more costly methods are needed to extract ANS oil, and the cost of transportation may become an even more significant component in determining whether ANS oil can compete.

Finally, there would be a \$114 million direct and immediate loss to the Federal Treasury caused by denying the Alaska

trade to the three CDS tankers. Part of the costs, \$105.8 million would come from the CDS repayments, and, the remainder, another \$8 million would be in interest. According to the U.S. Maritime Administration (MarAd), the Federal government would also lose about \$44 million annually in Federal income taxes due to the less profitable trade caused by the use of non-CDS tankers. MarAd determined the tax loss by estimating that it would cost an extra \$128 million in shipping expenses to transport ANS oil in non-CDS ships. On top of these expenses there would be additional expenses for the Bay Ridge if it is also forced to discontinue in the Alaska trade.

Attached is a copy of the proposed U.S. DOT rule making which recently appeared in the Federal Register.

The theoretical maximal residue contribution (TMRC) for existing tolerances is 0.001256 mg/kg/day for the total U.S. population. The proposed use will contribute an additional 0.000004 mg/kg/day (a 0.3 percent increase).

The nature of the residues is adequately understood and an adequate analytical method, gas chromatography, is available for enforcement purposes. Analytical enforcement methods are currently available in the Pesticide Analytical Manuals (PAM) Volumes I and II. There are presently no actions pending against the continued registration of this chemical.

Based on the data and information considered, and the fact that tabasco peppers are not considered an animal feed commodity, the Agency concludes that the proposed tolerance will protect the public health. Therefore, it is proposed that the tolerance be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this notice in the Federal Register that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act. As provided for in the Administrative Procedure Act [5 U.S.C. 553(d)(3)], the comment period is shortened to less than 30 days because of the necessity to expeditiously provide a means for weed control in tabasco pepper production.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 6F3378/P414]. All written comments filed in response to this petition will be available in the Information Services Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1104, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in

the Federal Register of May 4, 1981 (40 FR 24950).

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 3, 1987.  
Edwin F. Tinsworth,  
Director, Registration Division, Office of  
Pesticide Programs.

#### PART 180—[AMENDED]

Therefore, it is proposed that 40 CFR Part 180 be amended as follows:

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.368 is amended by removing the entry for "peppers, chili. . . . 0.5" from the table in paragraph (a), by revising the introductory paragraphs to the list of commodities in paragraphs (a) and (b), and by adding paragraph (c) to read as follows:

#### § 180.368 Metolachlor; tolerances for residues.

(a) Tolerances are established for the combined residues of the herbicide metolachlor (2-chloro-N-[2-ethyl-6-methylphenyl]-N-[2-methoxy-1-methylethyl]acetamide) and its metabolites, determined as the derivatives, 2-[(2-ethyl-6-methylphenyl)amino]-1-propanol and 4-[(2-ethyl-6-methylphenyl)-2-hydroxy-5-methyl-3-morpholinone, each expressed as the parent compound in or on the following raw agricultural commodities:

• • • • •

(b) Tolerance are established for indirect or inadvertent residues of metolachlor in or on the following raw agricultural commodities when present wherein as a result of the application of metolachlor to growing crops listed in paragraph (a) of this section to read as follows:

• • • • •

(c) Tolerances with regional registration as defined in § 180.1(n), are established for the combined residues of the metolachlor and its metabolites in or on the following raw agricultural commodities:

| Commodities      | Parts per million |
|------------------|-------------------|
| Peppers, chili   | 0.5               |
| Peppers, tabasco | 0.5               |

[FR Doc. 87-8161 Filed 4-14-87; 8:45 am]

BILLING CODE 5599-50-M

#### DEPARTMENT OF TRANSPORTATION

##### Maritime Administration

#### 46 CFR Part 276

[Docket NO. 110]

#### Construction-Differential Subsidy Repayment

April 10, 1987.

AGENCY: Maritime Administration,  
Department of Transportation.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** This rule would allow four vessels that repaid their construction-differential subsidy (CDS) in exchange for the right to operate in the domestic trade to remain in that trade. Three of those vessels have been operating in the Alaska oil trade after repaying their CDS under a 1985 Department of Transportation rule. A recent court decision vacated that rule, but delayed the effective date of its order to July 16, 1987. The fourth vessel was approved to repay its CDS by an administrative decision in 1980 under conditions of an interim rule that was subsequently vacated by the court. However, the court allowed the vessel to remain in the domestic trade pending agency reconsideration of the rule. In response to those court decisions, this proposed rule would allow those four vessels to remain in the domestic trade in the furtherance of the purposes and policies of the Merchant Marine Act, 1936, as amended.

**DATES:** Comments must be received by May 15, 1987.

**ADDRESS:** Submit comments to James E. Saarl, Secretary, Maritime Administration, Room 7300, 400 Seventh Street SW., Washington, DC 20590. The Maritime Administration requests that commenters send six copies of their comments.

**FOR FURTHER INFORMATION CONTACT:** Lynne Adams-Whitaker, Chief, Division of Regulations, 400 Seventh Street SW., Washington, DC 20590, Tel (202) 366-5181.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Jones Act (46 U.S.C. 883) generally provides that all cargo transported in the domestic trade between points in the United States must be carried on vessels built in the United States, documented under United States law and owned by United States

citizens. While United States vessels in the domestic trade operate under the protection of the Jones Act (46 U.S.C. 883), vessels operating in the foreign trade do not have such protection. Thus, vessels operating in the foreign trade must compete with foreign-flag vessels that have lower operating and construction costs. To offset these higher U.S. construction costs, Congress passed Title V of the Merchant Marine Act, 1936, as amended ("the Act"), which authorized the payment of construction-differential subsidy (CDS) for the purpose of building ships in U.S. shipyards to be operated in foreign commerce. 46 App. U.S.C. 1151 *et seq.* The Secretary of Transportation, through the Maritime Administration (MARAD), may pay as much as half the construction costs of vessels used in the U.S. foreign trade. 46 App. U.S.C. 1152. There is no corresponding subsidy program for vessels constructed by U.S. owners exclusively for use in the domestic trade. In 1970, Congress expanded the scope of the Act to include bulk (i.e., tanker or dry bulk) vessels. Merchant Marine Act of 1970, Pub. L. 91-469, 84 Stat. 1018.

In addition, Title VI of the Act authorized the payment of an operating-differential subsidy (ODS) for U.S.-flag vessels manned by U.S. citizens and operated in accordance with U.S. safety standards. 46 App. U.S.C. 1171. By a policy decision, ODS was not paid to CDS-built bulk-vessels over 100,000 DWT. Because of the large economy of scale of these vessels, labor costs, which are the essential subsidized item under the ODS program, are relatively small in terms of the overall project cost.

CDS-built vessels are subject to certain restrictions. Under section 506 of the Act, vessels constructed with CDS "shall be operated exclusively in foreign trade or on a round-the-world voyage. . . ." 46 App. U.S.C. 1156. Section 506 of the Act allows CDS vessels to be operated in the domestic trade in the following limited circumstances: (1) On a round voyage from the west coast of the United States to European ports which includes Intercoastal U.S. ports; (2) on a round voyage from the Atlantic coast of the U.S. to the Orient which includes intercoastal ports of the U.S.; (3) on a foreign voyage including a stop in Hawaii or an island possession or territory of the U.S. In addition, CDS vessels may be operated in the domestic trade with the consent of the Secretary of Transportation for up to six months in any year under authority of section 506 with the requirement that the vessel owner repay the subsidy on a *pro rata*

basis. All domestic trading restrictions for each CDS-built vessel lapse at the end of the vessel's statutory life. Section 9 of Pub. L. 86-318 (74 Stat. 216) sets a 20 year economic life for tankers.

The overall objectives of the 1970 amendments to the Act were to encourage U.S. shipbuilding, thus enhancing the U.S. merchant marine fleet, and to serve the needs of national commerce and defense. The specific goal of the 1970 amendments was to build 30 ships per year over ten years, with emphasis on building bulk carriers, including tankers, for operation in the foreign commerce.<sup>1</sup> Prior to the 1970 amendments, the direct subsidy programs of the Merchant Marine Act had been confined to liner vessels, which operated scheduled services in foreign commerce under the regulatory supervision of the Federal Maritime Commission. The Congress, in extending the reach of these programs to the unregulated bulk trades, specifically recognized the need to make these vessels "competitive" with foreign flag ships. See H. Rep. No. 1073, 91st Cong., 1st Sess., 38 (1969); Merchant Marine Act, 1936, 603(b), 46 U.S.C. 1173(b). There was however, no guarantee that even with these subsidies U.S.-flag vessels could compete in the U.S. foreign commerce.

Unfortunately, the governmental subsidy programs offered to U.S.-flag very large crude carriers ("VLCCs", i.e., tankers over 160,000 DWT) has not enabled them to be competitive in the foreign trade. In 1970, Congress did not foresee, and perhaps could not have foreseen, the drastic changes that would occur in the world oil market. The decline in export of crude oil from the Middle East, in addition to an oversupply of world tankers built since 1970, has been financially devastating for the world tanker market. Further, the gap between foreign construction costs and U.S. construction costs widened beyond the level Congress authorized under the CDS program. As a consequence, the two ultra large crude carriers and nine VLCCs constructed with CDS under the 1970 amendments were left with no significant competitive opportunities in the foreign commerce.

The domestic market, however, has not fared as poorly. With the opening in 1977 of the Trans-Alaska Pipeline System, the demand for U.S.-flag tanker tonnage has increased and that demand has not been completely met by the existing Jones Act (domestic) fleet. To alleviate the shortage of suitable Jones

Act tanker vessels, MARAD has allowed CDS-built tankers to enter the trade for up to six month periods after repaying the subsidy *pro rata* under section 506 of the Act and in accordance with 48 CFR Part 250.<sup>2</sup> Since 1977, MARAD has approved 43 such applications for CDS-built tanker service in the Alaska oil trade (of those approvals, 37 were for VLCCs). However, because of the limited duration and availability of these temporary permissions and the depressed market conditions confronting tankers in the foreign trade, several CDS tanker owners (predominantly those owning VLCCs) applied for permission to enter the domestic market on a permanent basis in exchange for the total repayment of any unamortized CDS received plus interest.

Prior to 1978, requests for permanent repayment were handled *ad hoc*. No hearings were held on these requests and notice of the proposed determinations was not given to the public. However, after MARAD admitted the VLCC *Stuyvesant* (operated by Seatrain Lines) to the domestic trade, competitors in that trade brought suit-challenging MARAD's action. The ultimate disposition of the suit was that, on writ of certiorari, the Supreme Court held that the Secretary's broad contracting powers and discretion to administer the Act encompass the authority to grant permanent release to vessels under CDS restriction. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980).

In 1978, MARAD issued a notice of proposed rulemaking (NPRM) that would have set guidelines for permanent CDS repayment. Charterers and owners of six CDS-built vessels applied for CDS repayment. On October 15, 1980, MARAD adopted and made immediately effective an interim rule to govern applications for CDS repayment. Under the interim rule, MARAD retained greater discretion than proposed in the (NPRM) to determine whether to grant or deny CDS repayment applications. Approvals would be granted only for vessels of at least 100,000 DWT and only in exceptional circumstances, after a

<sup>2</sup> 48 CFR Part 250 establishes procedures by which MARAD may temporarily waive (i.e., for no more than six months in any twelve month period) the domestic trade restrictions on CDS-built vessels over 100,000 deadweight tons (DWT) in the Alaska-Panama Canal trade. Applications for such waiver must be accompanied by information showing that suitable vessels (i.e., those over 100,000 DWT) of a competitor would not be available for the prospective voyage.

<sup>1</sup> In fact, only 34 petroleum tankers were built with CDS authorized by the 1970 amendments.

determination that no favorable opportunities existed for viable employment of the vessel in foreign trade during a protracted period. MARAD was to consider a number of factors in determining whether exceptional circumstances existed.

On November 13, 1980, through an adjudicative decision, MARAD approved the CDS repayment application for the *Bay Ridge*, another Seatrain vessel. MARAD deferred action on the other pending CDS repayment applications. On November 25, 1980, the independent U.S. Tanker Owners Committee filed a complaint in the U.S. District Court for review of the interim rule and the *Bay Ridge* decision, alleging substantive and procedural defects in connection with both actions. The District Court granted summary judgment for defendants on all counts. An appeal was taken.

The Court of Appeals considered the alleged substantive and procedural defects of the interim rule. The Court concluded that MARAD was not legally obligated to issue regulations limiting its discretion and that the interim rule itself did not constitute an abuse of MARAD's statutory discretion. Nevertheless, the Court vacated the interim rule on procedural grounds. It concluded that the rule lacked a general statement of basis and purpose, as required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), to explain MARAD's position on the various issues raised during the rulemaking proceeding. The Court also found that adjudication allowing the *Bay Ridge* repayment was procedurally and substantively flawed.

The Court of Appeals remanded the case to the District Court with instructions to vacate the interim rule and to order new rulemaking procedures, and to vacate the approval of the *Bay Ridge* application, but to allow the *Bay Ridge* to continue in domestic operation pending reconsideration of the *Bay Ridge* adjudication. The Court left to MARAD's discretion whether the new *Bay Ridge* decision should await publication of a permanent rule regarding CDS repayment. The Court also left to MARAD's discretion whether to adopt a permanent rule similar to the interim rule so long as the justification for the rule adopted was "clearly and thoughtfully presented in a statement published contemporaneously with the rule". *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 906, 920 (D.C. Cir. 1982) [hereinafter referred to as *ITOC v. Lewis*].

The Department of Transportation published a new NPRM on January 31, 1983, 48 FR 4408. That NPRM, which was

issued by the Secretary, proposed to permit total CDS repayment for all U.S. tanker vessels. The notice reviewed the entire history of this issue since the MARAD first accepted total repayment on the *VLCC Stuyvesant* and reviewed the comments received on earlier MARAD rulemakings pertaining to total repayment in return for domestic trading privileges. It invited further comment on these issues and assessed the economic impact of allowing the owner/operators of these vessels to determine on their own whether to repay their CDS. The rulemaking concluded that the Government was not in a position to assess, on its own, which vessels should, and which should not, be allowed to meet the needs for additional capacity in the domestic trade. For example, it pointed out that only allowing operators in financial jeopardy to repay their CDS was not consistent with the objectives of the 1936 Act. 48 FR at 4412.

The Department concluded that the marketplace decisions of individual operators would best serve the needs of the fully deregulated domestic tanker trade, provided that those operators that repaid were placed on an equal competitive cost footing with the existing Jones Act fleet. *Id.* at 4409-4410. Accordingly, the proposed rule would require repayment of an additional amount consisting of compound interest on the unamortized subsidy from the date of its original receipt. The addition of this amount, which frequently could exceed the unamortized subsidy itself, would duplicate the financial conditions inherent in a private sector decision to commit any comparable new asset to the domestic trade, with an allowance only for its age, by allowing the amortization of the subsidy pursuant to its statutory useful life of 20 years. See 48 FR 4408-4414. Since the Government does not otherwise regulate entry of new capacity in the domestic trade, duplicating the conditions ordinarily governing such entry was deemed the most appropriate approach.<sup>3</sup>

Shortly after the close of the comment period on the NPRM, the Congress took action to prevent the Secretary from promulgating a final rule. The DOT FY 84 Appropriations Act (Pub. L. 96-78), August 15, 1983) prohibited the enforcement of any rule with respect to the repayment of CDS until 60 days following the promulgation of any such

<sup>3</sup> Similarly, damaged foreign-built vessels may be acquired and reconstructed for use in the domestic trade under the Wrecked Vessels Act without prior government approval, provided a specific amount is expended in the reconstruction (i.e., three times their salvage value). 46 App. U.S.C. 14.

rule. Thereafter, the Commerce Department's FY 84 Appropriations Act (Pub. L. 98-166, November 28, 1983) imposed an additional restriction that prohibited DOT from enforcing any CDS repayment rule until after June 15, 1984. In August of 1984, the FY 85 Appropriations Act for Commerce, Justice and State, which provides appropriations for MARAD, imposed yet another restriction. That Act prohibited the Department from enforcing any CDS repayment rule until May 15, 1985 (Pub. L. 96-411, August 30 1984). Thereafter, Congress considered, but did not extend, these prohibitions.

On May 7, 1985, the Department published in the Federal Register a final rule which allowed any owner or operator of a tanker built with CDS to repay its subsidy (with interest) and consequently obtained a permanent removal of domestic trading restrictions. The amount of repayment included the unauthorized CDS on the vessels plus compounded interest on that amount. The interest rate, to be used for computational purposes, was the rate at which the original Title XI obligation was made or the Title XI long-term bond rate at the vessel's delivery. The final rule included a one-year time limit after the rule's effective date during which total CDS repayment had to be made irreversibly.

That time limit was from June 6, 1985 to June 6, 1986. During that time, three VLCCs repaid the CDS: the Arco Independence (262,400 DWT), ARCO SPIRIT (262,400 DWT), and the Brooklyn (226,200 DWT). The total amount of CDS repaid by these ships was \$105.8 million. Those ships are now operating in the domestic trade.

On January 16, 1987, the Court of Appeals for the District of Columbia held that the Secretary of Transportation violated section 553(c) of the Administration Procedure Act by adopting a final rule on CDS repayment which did not contain a statement of basis and purpose giving an adequate account of how the rule served the objectives of the Act and why alternatives were rejected in light of them. *Independent U.S. Tanker Owners Committee v. Dole*, Civil Action Nos. 85-01555, 85-01740, 85-01752 and 85-1771. (D.C. Cir. January 16, 1987) [hereinafter referred to as *ITOC v. Dole*]. The court found that the Secretary's failure to provide an adequate statement of basis and purpose was arbitrary and capricious. The court vacated the rule, but withheld issuance of its mandate until July 16, 1987 "to avoid further disruptions in the domestic market and to allow the Secretary to undertake

further proceedings to address the problems of the merchant marine trade." Slip op. at 16. The court ruled that, as of July 16, 1987, the present rule will be vacated and conditions will be returned to the *status quo ante*, before the CDS repayment rule took effect, subject to any "further action" that the agency may have taken in the interim.

By letter dated March 10, 1987, counsel for the *Bay Ridge* requested that a proceeding on the *Bay Ridge* should be conducted independently of proceedings with respect to the three vessels which repaid CDS pursuant to the repayment rule that has been vacated by the Court of Appeals. The court in *ITOC v. Lewis* specifically left to MARAD's discretion whether or not the *Bay Ridge* decision should await publication of a permanent rule governing repayment applications. MARAD has decided that it would be appropriate to consider the *Bay Ridge* in this rulemaking, since it affects the same domestic trade as the other three vessels at issue.

#### The Proposed Rule

This proposed rule would reaffirm the allowance of the repayment of CDS, with interest, and rescission of the domestic trading restriction for tankers that applied to and were approved by MARAD between June 8, 1985 and June 6, 1986. The approved applications were for the *Arco Independence*, *Arco Spirit* and *Brooklyn*. Further, this proposed rule would reaffirm the allowance of the repayment of CDS, with interest, and rescission of the domestic trading restrictions for the *Bay Ridge*, which was approved to repay its CDS in November 1980. It would impose the same conditions on the *Bay Ridge* that were imposed in 1980.

This proposed rule would differ from the 1985 CDS repayment rule in that it does not provide a one-year window for applicants to seek MARAD approval of their CDS repayment. This proposed rule would impose the same terms and conditions on the three tankers that repaid during the one-year window as were required in the 1985 CDS repayment rule.

#### Comments

MARAD solicits comments on this proposed rule from all interested parties. In particular, MARAD seeks comments on the future of the Alaska North Slope (ANS) trade.

#### The Purposes and Policies of the Merchant Marine Act

The preamble to the Merchant Marine Act, 1936, as amended, states that the intent of the Act is "[t]o further the

development and maintenance of an result and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense. . . ." The specific goals of the Merchant Marine Act, 1936, as amended, as set out in section 101 of the Act, are to foster the development and encourage the maintenance of an American merchant marine that is

(a) sufficient to carry its domestic waterborne commerce and a substantial portion of the waterborne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign waterborne commerce at all times, (b) capable of serving as a naval auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. 46 App. U.S.C. 1101.

MARAD believes that this proposed rule, which would allow the four CDS-built very large crude carriers ("the four VLCCs") to remain in the domestic trade, would benefit the domestic waterborne commerce by providing vessels that are the "most suitable" for the Alaska-Panama oil trade, which would result in a "well-balanced" American merchant marine. Although originally built to operate in the foreign trade, these VLCCs are not competitive in that trade. If not allowed to operate in the domestic trades, the four VLCCs would likely be unemployed and possibly scrapped.

The balance of this statement discusses how this proposed rule would fulfill the objectives of the Act. The suitability of these vessels for the Alaska-Panama trade is discussed in more detail in Section I. Section II discusses the effect of this proposed rulemaking on the U.S. tanker fleet operating in the foreign commerce. Section III analyzes the effect of this proposed rulemaking on the naval auxiliary. Section IV addresses the effects of this rulemaking on shipyards. Section V considers other objectives of the Act that support this rulemaking. Section VI addresses the alternatives considered by MARAD.

#### I. The Alaska Oil Trade and the Need for Suitable Tankers

The main purpose for allowing the four VLCCs to remain in the domestic trade is to foster the development of suitable vessels for that trade. "Suitability" is determined not only by the physical ability of a vessel to carry a

certain product, but by market conditions. As will be shown below, market conditions in the oil trade have fluctuated drastically since the advent of the CDS program, affecting the distribution of oil in both foreign and domestic markets.

#### A. ANS Crude Oil Production

When the Trans-Alaska Pipeline opened in 1977, Alaska North Slope (ANS) crude oil loadings averaged 629,000 barrels per day (b/d). Average loadings have steadily increased since then. In 1982, average loadings reached 1.82 million b/d. Production for 1987 is expected to be 1.8 million b/d. The most rapid growth occurred between 1978 and 1980 when average loadings grew at an annual rate of 18.4 percent. Average loadings from 1980 to 1986 grew at an annual rate of 2.2 percent. (See Table 11-2 in Regulatory Impact Analysis).

#### B. The Distribution of ANS Crude Oil

While ANS crude oil production has grown steadily since 1977, the distribution of that oil has changed dramatically. ANS crude oil is shipped to the West Coast, to Panama, to the Gulf and East Coasts from Panama, and to the Virgin Islands around Cape Horn.<sup>4</sup> In the five months of 1977 when ANS oil production began, approximately 75 percent of the oil from Valdez, Alaska was shipped to the West Coast, 24 percent to Panama (to be shipped to the Gulf/East Coasts), and two percent to the Virgin Islands. Shipments to Panama increased to 30 percent of total loading in 1980, and peaked at 43 percent in 1982. During this period, the volume of oil going to the West Coast dropped from 63 percent to 50 percent. During 1986, 32 percent of the Alaska oil was shipped to Panama, and 62 percent to the West Coast.

The amount of future ANS shipments to Panama will likely decline, for several reasons. More ANS crude oil will likely be shipped to the West Coast during 1988 due to the imminent opening of the All-American pipeline from Southern California to the Texas Gulf, assuming the pipeline is completed in that time frame. This pipeline will have a capacity of 300,000 b/d and will ship surplus West Coast crude to the Gulf Coast for refining. While increases in West Coast crude production are anticipated, the surplus pipeline capacity would probably eliminate some need for vessels to carry the oil to Panama (to be shipped to the Gulf).

<sup>4</sup> All of the oil carried to the Virgin Islands currently is moved in foreign-flag vessels via Cape Horn.

Valdez loading may decline in the 1990's due to production reduction as well as the potential construction of a 105,000 b/d (rated capacity) refinery at Valdez by Alaskan Refining, Inc. Products from the refinery may be transported abroad on foreign-flag tankers, thus reducing the shipments of oil from Valdez for U.S.-flag tankers.

#### C. Tanker Demand in the ANS Crude Oil Trade

Tanker demand in the ANS trade depends on ANS oil production and the distribution of the oil. As production increases, so does the amount of tonnage needed to carry the oil. However, the increase in demand for tankers may not be proportional to oil production if there is also a change in the distribution of the oil. For example, tanker demand peaked in 1982 when approximately 182 billion-barrel miles of oil were shipped. This peak in demand was due not only to the increased production of oil, but also due to the peak in shipments to Panama (43 percent of total loadings). A drop in ANS crude oil shipments between 1982 and 1984 (from 7.2 million DWT to 5.9 million DWT) was attributable not to production, which remained fairly constant, but to a drop in oil shipments to Panama and corresponding rise in shipments to the West Coast.

The distribution of oil affects the demand for certain size tankers. Historically, VLCCs have carried the majority of oil from Alaska to Panama (see Table 111-2 in the Regulatory Impact Analysis). During 1986, about half the full-time equivalent tanker employment in the Alaska-Panama trade was for vessels from 200,000 DWT to 265,000 DWT; most of the other half was for VLCCs from 170,000 DWT to 190,000 DWT. A small percentage was carried by tankers from 110,000 DWT-137,000 DWT, while only 0.6 percent in 1986 was carried by vessels under 100,000 DWT. (Historically, the share carried by tankers under 100,000 DWT has been no more than 6 percent.) Even prior to the 1985 CDS repayment by four of the VLCCs, the Valdez-Panama trade was dominated by tankers over 100,000 DWT. Many of these were CDS built VLCCs operating under six month permissions in the domestic trade.

Several factors contribute to the suitability of the four VLCCs for this trade. VLCCs are more suitable for long-haul, high volume trades than smaller tankers, due to economies of scale. That is, tanker operating costs do not rise as fast as cargo volumes. Thus, VLCCs are more efficient and economical than smaller tankers for long-haul, high-

volume trades. Studies of optimal ship size have shown that optimal ship size is determined by minimizing costs per ton at sea and in port. (In port, costs per ton increase with ship size; at sea, however, costs per ton decline with ship size). J.O. Jansson and D. Shneerson, "The Optimal Ship Size," *Journal of Transport Economic and Policy*, 217, 223 (Sept. 1982). VLCCs are more suitable for the Panama leg of the ANS trade because of the length of the voyage (approximately 4,950 miles). The at-sea time is significantly longer than any other legs of U.S.-flag oil shipments in the U.S. Another factor contributing to the suitability of the VLCCs for the Panama leg is the deep-draft of the Panama port, which can accommodate those larger tankers. Because of these factors, VLCCs are able to carry oil in that trade more efficiently than small tankers under 100,000 DWT.

Conversely, smaller tankers are more suitable for the West Coast and upcoast (Gulf/East Coast) trade than the Panama trade. The Valdez-West Coast ANS trade has been served by vessels in all DWT ranges: 47 percent of the full-time equivalent tanker employment in that trade is carried by vessels under 100,000 DWT; 53 percent is carried by tankers over 100,000 DWT.

Once the oil reaches Panama, smaller tankers (i.e., under 150,000 DWT) are needed to carry the oil to the Gulf and East Coasts. (VLCCs are less suitable than smaller tankers for such short haul, low volume trades, because their capital and port charges, which are higher than those for smaller tankers, are spread over smaller cargo volumes.) Tankers under 55,000 DWT carry 22 percent of the Panama-Gulf/East Coast ANS oil. Tankers in the 55,000 DWT to 92,000 DWT range now carry about two-thirds of the ANS oil in this trade. Such tankers are more suitable for that trade than larger tankers because they often stop at many ports (which would not be economical for larger tankers to do), and most Gulf/East Coast ports are not deep-draft. Further, the at-sea time is much less because of the shorter distances involved.

The Regulatory Impact Analysis indicates certain trends in the distribution of oil by trade and by vessel tonnage. Since the permanent entrance of the three CDS-built VLCCs in the domestic trade (i.e., from 1985-1986), the percentage of full-time equivalent tanker employment for VLCCs over 200,000 DWT in the Alaska-Panama trade has risen considerably, and employment by vessels under that tonnage range has decreased correspondingly. It appears that the trend of these VLCCs carrying

the majority of Valdez-Panama ANS trade will continue.<sup>3</sup>

Allowing the four VLCCs to remain in the domestic trade makes the domestic fleet better balanced than it would be without these vessels in the trade. It should be noted that, even with the four VLCCs in the domestic trade, shortages of tankers have led to one smaller CDS-built tanker, the *Beaver State*, entering the trade for a month under a section 506 waiver. (See Regulatory Impact Analysis). Further, only six percent of the domestic tankers (12 tankers) were in lay-up as of February 1987. This percentage is quite low, considering that February is a slow month for the upcoast oil trade and is a reasonable reserve to cover temporary losses from the active fleet due to casualties, safety inspections and repairs as well as seasonal increases in upcoast petroleum movements. As for the future, while ANS tanker loadings have increased from 629 thousand barrels per day in 1977 to 1,788 thousand barrels per day in 1986, loadings are expected to fall over the period 1988-95, due to a gradual decline in ANS production (Table II-2 of the Regulatory Impact Analysis) with uncertain consequences. Comments are invited specifically on the extent and the consequences of this decline in ANS production.

Finally, no data has been developed yet on the extent that the lower costs of transporting ANS crude on VLCCs, including those that repaid their CDS, has increased shipments to Panama since those four vessels were admitted to the trade. To the extent that occurs, overall tanker demand in the trade would be increased, and the displacement caused by the entry of those vessels thereby reduced. Commenters are invited to submit such data.

#### D. Availability of Tankers in the Trade

When ANS crude oil loadings began in 1977, there were 215 privately-owned unsubsidized tankers (8.0 million DWT) in the U.S.-flag fleet (excluding special product tankers). Of those, only seven were over 100,000 DWT (totaling 848,000 DWT). An additional 15 tankers (2.3 million DWT) were on order for the domestic trade, of which 12 (2.0 million DWT) were over 100,000 DWT. Two tankers (totaling 259,900 DWT) were rebuilt under the Wrecked Vessel Act in 1981 and 1983 respectively. Five VLCCs repaid their CDS from 1977 to 1986

<sup>3</sup> It should be noted, however, that in some years, the full-time equivalent of three VLCCs operated in the ANS trade under six month waivers pursuant to 46 CFR Part 250.

(totaling 1.2 million DWT). One new EXXON tanker was delivered in November 1986 and the second in April 1987 (those two vessels total 418,000 DWT). Both are currently operating in the domestic trade. No other U.S. tankers are currently under construction.

With the opening of the Alaskan pipeline in 1977, there has been a recurring shortage of suitable tankers in the ANS oil trade. MARAD has tried to alleviate this shortage in several ways. First, MARAD issued a rule in 1977 allowing CDS tankers over 100,000 DWT to carry ANS crude oil in the domestic trade for six months in a twelve month period in exchange for a *pro rata* repayment of their CDS (46 CFR Part 250). Under that rule ("Part 250 rule") MARAD has approved temporary transfers of CDS-built VLCCs to the Alaska-Panama trade on 37 occasions. Such transfers peaked between 1980 and 1983 when there were approximately three CDS vessels (totaling 750,000 DWT) operating in the trade on a full-time basis.

Permissions for three CDS-built VLCCs—*Arco Independence*, *Maryland* and *Williamsburgh*—to operate temporarily in the Alaskan oil trade were terminated on January 12, 1984. Their approval had been conditioned on the acquisition of suitable employment (by January 1984 when they would become available) of four over 100,000 DWT Jones Act vessels—*Overseas Boston*, *Overseas Juneau*, *Ogden Columbia*, and *Prince William Sound*. When the latter two were not chartered, the conditional approvals were terminated in accordance with the order of October 7, 1983. No CDS-built VLCCs entered the ANS trade after that until the *Maryland* on November 15, 1984. Two additional VLCCs were granted waivers in January 1985 and January 1986. In addition, a CDS-built 90,000 DWT tanker (the *Beaver State*) made two voyages in the Valdez to West Coast trade under a section 506 waiver in March 1986.

From 1977 to the last approved transfer on November 1, 1985, eight CDS VLCCs operated under six month waivers at various times in the ANS trade. Of those eight, four are the subject of this rulemaking.

The other four CDS-built vessels are the *Maryland*, *Massachusetts*, and *New York* (each 264,100 DWT), and the *Williamsburgh* (225,100). None of those vessels has applied to enter the ANS trade under Part 250 since November 1985. (The *New York* applied in November 1985 and operated until July 1986). At present, those four are in lay-up.

While the Part 250 rule alleviated the shortage of tankers to a large extent, it did not totally solve the problem. To alleviate the shortage, MARAD began accepting total repayment of CDS in exchange for domestic trading privileges. Since 1977, five vessels have totally repaid their CDS. The first was the VLCC *Stuyvesant* (224,700 DWT), which was allowed to enter the domestic trade in August 1977.

The second was the *Bay Ridge* (225,000 DWT) which repaid its CDS in November 1980, after entering the trade for six months under a Part 250 temporary waiver in 1979. The other three VLCCs repaid their CDS pursuant to the most recent rule, and are still operating in the domestic trade. The four VLCCs in the trade that are the subject of this rulemaking total 976,000 DWT. They represent approximately 43 percent of the capacity operating in the Valdez-Panama trade.

Employment prospects for the four VLCCs in the ANS trade appear to be positive at least for the near future. It is with this near future in mind that these vessels repaid their CDS. Domestic trading restrictions for CDS-built vessels are lifted at the end of their statutory life (i.e., 20 years). The *Arco Independence* and *Arco Spirit* were built in 1977, the *Brooklyn* in 1973, and the *Bay Ridge* in 1979.<sup>4</sup> Since no new tankers are on order, and prospects for new buildings seem unlikely, these four VLCCs would be among the most suitable vessels for the Alaska-Panama trade. If the four VLCCs remain in the domestic trade, there would be an adequate supply of suitable tonnage to carry oil in that trade even if other older tankers are scrapped and if no new tankers are built.

If the four VLCCs were removed from the domestic trade, a shortage of the most suitable tonnage in the Alaska-Panama trade would occur, necessitating the entrance of smaller, less suitable tankers in that trade, and would also likely result in those VLCCs being laid up, since they are unable to compete in the foreign trade (see Section II of this proposed rule).

In conclusion, as far as can reliably be foreseen, the continued employment in the Alaskan oil trade of the four VLCCs that repaid CDS would benefit the U.S. domestic waterborne commerce by providing vessels that are most suitable for the Alaska-Panama oil trade and by providing an employed well-balanced

merchant marine. The following other benefits would flow: The Treasury would retain the CDS repaid amount (\$142 million), the shipping public would receive transportation savings (estimated \$664-674 million) and the State of Alaska would earn revenues from reduced tanker rates (estimated \$186-189 million). It is not clear that there would be any negative impact on the domestic fleet by allowing such repayment. It is recognized that 12 tankers were in lay-up in February and with their lay-up, the seamen to operate them were unemployed.<sup>2</sup> This is only six percent of the total U.S.-flag domestic tanker fleet and provides a needed reserve for peak demand.

#### E. Safety of the VLCCs.

Allowing the four VLCCs to remain in the domestic trade would also further the goal of section 101 of the Act to encourage the development of a fleet composed of the "safest" vessels. As is shown in the Environmental Assessment prepared for this proposed rule, these VLCCs are among the safest tankers, in terms of environmental risks. The change in oil spills risk for the ANS fleet is expected to continue to improve as more VLCCs and other large tankers replace, where permitted by navigation channel depths, smaller tankers. If the four VLCCs were not allowed to remain in the domestic trade, a tonnage shortfall could cause a greater oil spill risk if additional small vessels such as barges were to be employed to compensate for the shortfall.

#### II. The Foreign Trade

One of the goals of the Act is to encourage the development and maintenance of a merchant marine sufficient to carry "a substantial portion of the waterborne export and import foreign commerce of the United States . . ." 46 U.S.C. 1101(a). The Court of Appeals criticized the previous CDS repayment rule for its "dubious proposition that the fleet will remain able to carry 'a substantial portion' of foreign commerce . . ." *ITOC V. Dole*, slip op. at 11.

The Court noted in a footnote to its decision overturning the prior CDS rule:

It may be, of course, that present conditions in the world shipping market make it impossible for the Secretary to find a way to meet all of the statutory objectives. If this is a problem, she should discuss it frankly and directly when she considers which measures to adopt in light of the objectives explicitly set out in the Act. *Id.* at 13-14, n. 4.

While this proposed rulemaking would provide a domestic tanker fleet that is (1) sufficient to carry the domestic waterborne commerce of the

<sup>4</sup> Even without the present rulemaking, these vessels would be allowed to enter the domestic trade at the end of their 20 year useful life. Thus, the effects of this rulemaking would expire in the mid to late 1990s.

United States and (2) composed of the "best equipped, safest, and most suitable types of vessels," MARAD acknowledges that it would have no effect on the U.S.-flag share of the water-borne export and import bulk foreign commerce of the United States.

The U.S.-flag foreign trade tanker fleet currently consists of 26 CDS-built tankers totaling three million deadweight tons, including six VLCCs and two ULCCs. (This excludes the four VLCCs that are the subject of this rulemaking and three CDS-built integrated tug-barges, but includes two CDS-built ore-bulk-oil carriers built with CDS.) This tonnage is insufficient to carry a substantial portion of the bulk foreign commerce. The six CDS-built VLCCs and two ULCCs (ultra large crude carriers) are currently laid up. Only one of the CDS-built tankers under 100,000 DWT is laid up. Seven of the tankers are employed in the foreign trade, while the remaining 12 tankers are employed under charter to the Military Sealift Command (6) or are employed in the preference trades (6) carrying Strategic Petroleum Reserve oil.

While the intent of MARAD's CDS and ODS programs was to provide a basis for a U.S.-flag fleet that is sufficient to carry a substantial portion of our bulk import and export trade, the assumptions of those programs were not met for VLCC tankers and most of these tankers built under the 1970 program are not competitive in the international market, as evidenced by the lay-ups. Moreover, even with the benefit of CDS, the capital costs of CDS-built VLCCs exceeds those of comparable foreign-built tankers. In addition, even the provision for full ODS could not offset the cost disadvantages of operating U.S.-flag tankers in the foreign trades, let alone address the capital cost disadvantages faced by these carriers.

The United States currently imports approximately 6.0 million barrels per day of crude oil and refined product, of which only three percent is carried on U.S.-flag tankers. Furthermore, a substantial portion of our crude oil imports—approximately 45 percent—are received from nearby sources including Canada, Mexico, Venezuela and the Caribbean region. The CDS-built VLCCs are unsuitable for these nearby import trades. (The CDS-built VLCCs are more suitable for long-haul voyages; see section 1 above). Approximately 32 percent of U.S. crude oil imports are received from the distant Arabian Gulf and North Sea regions for which VLCCs would be suitable. In contrast, ten years ago U.S. crude oil and refined product

imports averaged 8.8 million barrels per day. Only 14 percent of our crude oil imports were received from nearby sources while over 40 percent of our oil imports were received from the Arabian Gulf and North Sea regions.

During the last year, there has been an increase in oil exports from the Arabian Gulf region and a corresponding rise in demand for VLCCs in the international trade. Despite this increase it is unlikely that the U.S.-flag share of U.S. oil imports would increase, due to an oversupply of tonnage in the world tanker fleet.

As of January 1987, the world fleet contained over 235 million deadweight tons, of which approximately 200 million deadweight tons (85 percent) were actively employed. The remaining 35 million deadweight tons (15 percent) were idle; however, 30 million deadweight tons were in the over 200,000 DWT size class. The amount of idle capacity in the over 200,000 DWT size class represents more than 26 percent of the available tonnage in that class. Therefore, given the relative higher operating costs for U.S.-flag tankers and the amount of idle tonnage over 200,000 DWT in the world fleet, it is very likely that the four VLCCs that are the subject of this rulemaking would be laid up if they are required to leave the domestic trade, with loss of jobs to Jones Act seamen, or possibly scrapped.

In fact, of the nine VLCCs and two ULCCs built with CDS under the 1970 program, none has had any significant employment in the foreign commercial trades, other than occasional shipments of oil to the Strategic Petroleum Reserve, which are reserved to U.S.-flag carriage. The *Boy Ridge*, which repaid its CDS in 1980, has been operating actively in the domestic trade since 1980. The other three VLCCs have been operating in the domestic trade regularly under six month waivers under Part 250 (a total of 17 times since 1978). Thus, the deployment of these four VLCCs to the domestic trade would have no impact on U.S.-flag tanker presence in foreign trades. Finally, should world market conditions even reach the point where U.S.-flag VLCCs could be employed in the U.S. foreign or foreign-to-foreign trades, VLCCs that have continued to be active in the domestic trade would be much more readily available to the foreign fleet than vessels that are laid up and wasting or scrapped.

### III. The Naval Auxiliary

One of the objectives of the Act is to foster the development of a merchant marine fleet "capable of serving as a

naval and military auxiliary in time of war or national emergency. . . ." 40 U.S.C. 1101(b).

In its comments on the prior CDS rule, the Defense Department expressed concern over the security implications of losing militarily-useful (i.e., product) tankers as a result of CDS repayment. MARAD has considered the effect on the naval auxiliary of allowing the four VLCCs to remain in the domestic trade (see Regulatory Impact Analysis). Market conditions and statutory requirements have contributed to a reduction in the number of U.S.-flag product tankers, including a declining upcoast (U.S. Gulf/East Coast) petroleum trade (the principal market for U.S.-flag product tankers), the opening of the Trans-Panama Pipeline in 1982, and the anti-pollution standards of the Port and Tanker Safety Act (PTSA).

As a result of these factors, over a three year period for 1984 to 1986, 41 tankers, of the type considered highly militarily useful, were scrapped (see Regulatory Impact Analysis, Appendix 1). All had exceeded their statutory life of 20 years (see Regulatory Impact Analysis, Appendix 1). The average age of these tankers was 34 years. Further, the 1978 Port and Tanker Safety Act (PTSA) set certain anti-pollution requirements for tankers entering United States waters. By January 1, 1986, vessels between 20,000 and 40,000 DWT were required to have certain anti-pollution systems to prevent the discharge of oil-tainted water. To comply with the PTSA requirements, tanker owners had the option of retrofitting existing systems, reducing load lines (so as to carry less than 20,000 DWT), using port reception facilities to dispose of oily water, or scrapping ships. Due to the cost of retrofitting and resulting loss of cargo capacity, and the inherent limitations of reducing load lines or using port reception facilities to discharge oily water, many tanker owners scrapped their older, less efficient vessels. The PTSA served to speed up the natural process of scrapping that occurs when tankers exceed their useful life.

Of these 41 that were scrapped, 25 were scrapped in 1984, nine in 1985, and seven in 1986. The vast majority of those lacked some or all of the anti-pollution features required by the PTSA.

These figures indicate that the scrapping that has occurred in the past three years is not attributable to CDS repayment but rather to the age of the vessels, their inability to economically retrofit to satisfy PTSA requirements and poor market conditions. Since the

effective date of the PTSA (January 1, 1986), the number of product tankers scrapped has declined. MARAD believes that this decline will continue, since many older, more inefficient tankers have now been scrapped. In addition, since the enactment of the PTSA, a number of new product tankers have been built.

Further, any effect that the four VLCCs would have on the militarily-useful tankers would be indirect, unlike the above factors. VLCCs and these smaller tankers generally do not compete in the same trades. As discussed above, VLCCs have historically served the Alaskan-Panama trade, and smaller tankers serve the Panama Gulf/East Coast trades. While a mix of vessels serve the West Coast, the four VLCCs have not entered that trade. Thus, any effect the VLCCs may have on the smaller tankers would be through an indirect displacement. That is, the VLCCs, being more cost-effective, may "bump" other large tankers that could serve the Alaska-Panama trade. In turn, these large tankers could operate in the West Coast and Panama/Gulf trade, picking up oil that could have been carried by smaller tankers. A trend in this direction is indicated by Table 111-2 in the Regulatory Impact Analysis. However, such "bumping" effects are much more remote than the effects of the PTSA, the Trans-Panama Pipeline, and declining market conditions, over which MARAD has no control.

Moreover, the current goal of the Navy is to increase the number of tankers in the Ready Reserve Force from eight to twenty by the year FY 1992. Even if there were a direct corollary to CDS repayment and the 12 tankers laid up in February 1987, the Navy has the opportunity to purchase those vessels for their military usefulness at such time as they became commercially unattractive.

Based solely upon these objectives of section 101 of the Act, the Secretary concludes that the CDS repayment rule proposed herein furthers those objectives. The four VLCCs would increase the most suitable U.S. domestic fleet with minimal impact on the existing fleet, and they are not expected to have a significant impact on carriage of U.S. foreign commerce, U.S. shipyard construction, or the U.S. Naval auxiliary capacity. Their retention in the Jones Act fleet will also result in \$142 to the U.S. Treasury for CDS repayment, transportation savings to the shipping public and increased revenues for the State of Alaska.

#### IV. Shipyards

One of the objectives of the Act is to encourage the development of a

merchant marine fleet "supplemented by efficient facilities for shipbuilding and ship repair." While this proposed rulemaking would not actively promote this goal, it also would not have a significant adverse effect on U.S. shipbuilding. MARAD acknowledges that future shipbuilding prospects with or without this proposed rule do not look positive. Even without CDS repayment, the growth prospects for the domestic petroleum trades are not sufficient to require the construction of additional tanker capacity.

No orders for the construction of unsubsidized tankers over 100,000 DWT were placed between April 1976 and August 1984. On August 27, 1984, EXXON placed an order for construction of two 209,000 DWT tankers in the United States for employment in the ANS trade. Since then, no orders have been placed to build unsubsidized tankers over 100,000 DWT.

Two foreign-flag tankers over 100,000 DWT were rebuilt in the United States for the ANS crude oil trade in 1981 and 1983 under the Wrecked Vessel Act (46 U.S.C. 14). Under this Act, foreign-built vessels that are wrecked off the U.S. coast are eligible to enter the U.S. domestic trade provided the vessel is purchased by a U.S. citizen and rebuilt in the United States at a cost that is at least three times the appraised salvage value.

The first vessel, the Overseas Boston (123,700 DWT), was rebuilt in 1981 and the second vessel, the Ogden Columbia (136,000 DWT), was rebuilt in 1983. Due to the existing capacity in the domestic trade and the predicted growth patterns in the petroleum trade, allowing the four CDS-built VLCCs to remain in the domestic Jones Act fleet permanently will have little effect on the amount of domestic tanker construction.

#### V. Other Objectives of the Act

While section 101 of the Act establishes the general objectives of the Act, other parts of the Act give more specific guidance on interpretation and implementation of these goals. The Act explicitly and implicitly establishes other policy goals in furtherance of the maintenance and development of the U.S. merchant marine fleet. Among these goals, mentioned in the prior CDS final rule (50 FR 19170), are efficiency and competition. Each of these goals has been recognized by the courts as valid policies for promoting the U.S. merchant marine fleet.

#### A. Efficiency

The goal of efficiency of the fleet is mentioned throughout the Act. Among the express goals of section 101 is that the merchant marine shall be composed

of "suitable" vessels manned by "efficient" crews. Certainly, the idea of "suitable" vessels should encompass efficiency as a principal component.

The goal of efficiency is particularly important in the CDS program, which is designed to produce vessels of "high transport capability and productivity." Merchant Marine Act, 1936, as amended, section 501 (46 U.S.C. App. 1151). Other provisions in the Act are intended to promote fleet modernization. Under section 213, the Secretary is required to report to Congress annually on the scrapping of old vessels, and the relative cost of ship construction and reconditioning in U.S. shipyards. The capital construction reserve fund was established in section 511 to promote construction or acquisition of new vessels. The Secretary's authority to acquire obsolete vessels for an allowance of credit under section 510(b) is intended "to promote construction of new, safe, and efficient vessels to carry the domestic and foreign waterborne commerce of the United States. . . ."

While the Act appears to clearly promote the policy of efficiency, the Department of Transportation authorization statute further declares it to be an overriding purpose that national transportation policies and programs be "conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent therewith. . . ." 49 U.S.C. 1101. Any ambiguity in the Merchant Marine Act regarding the goal of promotion of efficiency is resolved in favor of that goal through the purposes and policies established in the Department's statute.

In addition to these explicit statutory provisions promoting efficiency of the U.S. merchant marine fleet, several recent court decisions have affirmed that one objective of the Act is to encourage modernization and efficiency. For example, the Supreme Court's decision confirming the Secretary's statutory authority to grant permanent release to vessels under CDS restrictions found that a basic goal of the Act was to encourage the maintenance of an "effective merchant marine" with a "fleet [that] was to be modern and efficient." *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 584 (1980). Further, the DC Circuit recently described the first goal of the Act as promoting "a well-equipped and efficient merchant fleet." *American Trading Transportation Co. v. United States*, 791 F.2d 942, 944 (D.C. Cir. 1986); see also *Sea-Land v. Dole*, 723 F.2d 975, 976 (D.C. Cir. 1983).

The above statutory provisions and judicial interpretations strongly support the goal of promoting efficiency and

modernization of the U.S. merchant marine fleet. These goals would be furthered by this proposed rulemaking, which will allow the four VLCCs, which are among the most efficient U.S. tankers in the fleet, to remain active in the domestic trade.

#### B. Competition

While the Act does not explicitly list competition as one of its goals, the promotion of competition in the foreign and domestic trades is implicit in the Act. The Act's ODS and CDS programs are intended to give the U.S. merchant marine fleet certain financial resources to compete with lower-cost foreign fleets while not guaranteeing any profit. In particular, Congress made this objective clear in enacting the Merchant Marine Act of 1970, which extended those programs to the unregulated bulk trades. See Merchant Marine Act, 1936, 603(b) 46 U.S.C. 1173(b); H. Rep. No. 1073, 91st Cong., 1st Sess., 38 (1969). The Jones Act trade does not receive such financial assistance, but is insulated from foreign competition by the Act's bifurcation of the foreign and domestic trades. That is, the Act restricts competition in the Jones Act trade only to the extent necessary to protect unsubsidized U.S. operators from the benefits of the Act's financial assistance programs (such as ODS and CDS) which assist the U.S. foreign trade vessels in competing against low-cost foreign-flag competition. In the domestic trade, the Secretary has a duty "to minimize interference with the free market forces normally at work. . . ." *ITOC v. Lewis*, supra, 690 F.2d at 917.

In its seminal case on the relation between the foreign and domestic trades, the DC Circuit stated that "competition is not 'unfair' within the meaning of the Act when it does not involve diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator. Congress plainly did not intend to prevent that sort of competition." *Pacific Far East Line, Inc. v. Federal Maritime Board*, 275 F.2d 184, 186 (D.C. Cir. 1960). Other courts have likewise recognized the overriding public policy in favor of competition in the domestic trade and in national transportation policy. See e.g., *Matson Navigation Co., v. Connor*, 258 F. Supp. 144, 158 (N.D. Cal. 1966), *aff'd per curiam*, 394 F.2d 514 (9th Cir. 1968); *Bowman Transportation, Inc., v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 198-99 (1974).

Finally, the Supreme Court made clear its preference for fair competition (as

opposed to regulated entry under six month permissions) in its decision confirming the Secretary's authority to accept permanent repayment in *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 589-90 (1980):

Section 506 . . . permit[s] a vessel that enjoys the benefits of CDS to operate outside the foreign market only in narrow circumstances, generally upon a highly discretionary administrative decision, and no more than six months a year. And we have no doubt that it would be flatly inconsistent with one congressional intent were the Secretary or this court to conclude that a temporary release not meeting these conditions was proper. But a permanent release upon full repayment is quite different. If irrevocably locates the vessel in the unsubsidized fleet and, thus, poses no danger of a supercompetitor skimming the cream from each market. It creates no long-term instability. And it confers no windfall. On the contrary, at least where repayment of the CDS includes some amount reflecting capital costs which would have been incurred had no subsidy been available, such a transaction merely permits a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade. It was not the purpose of the Act to prohibit such entry. . . .

Thus, to the extent that the capacity allowed to enter the domestic trade under CDS repayment would have been allowed to participate in the trade under six month permissions, allowing total CDS repayment therefore would necessarily be consistent with the "purpose of the Act" *Id.*

In fact, where the Secretary issued the *NPRM* on total CDS repayment in January 1983, the full time equivalent of three CDS built VLCCs had been operating in the trade under six month permissions. Thus, allowing total repayment for three VLCCs under that rulemaking is squarely within the Supreme Court's holding.

#### VI. Alternatives

MARAD has considered three alternatives in preparing this rulemaking. The first is to maintain the *status quo*, i.e., to allow the four VLCCs to remain in the domestic trade. The costs and benefits of this alternative have been discussed at length in this statement, and in the Regulatory Impact Analysis. Further costs, evaluated in the Regulatory Impact Analysis, include the recent Title XI defaults of three VLCCs that were previously in the domestic trade under six-month waivers, and partial defaults of two other CDS-built VLCCs (*Stuyvesant* and *Bay Ridge*). These costs were not necessarily attributable to CDS repayment and in any event are irreversibly expended at this time (i.e., returning the four VLCCs

to the foreign trade would not recover this money). The total default cost to the government has been \$137.5 million.

Another relevant consideration is the effect on the existing Jones Act (i.e., domestic) fleet. As of February 19, 1987, twelve Jones Act tankers were laid up (totaling approximately 650,000 DWT). On the other side of the ledger, if CDS repayment is not allowed for the four VLCCs, they are likely to be laid up (approximately 705,000 DWT).

MARAD believes that the suitability of the four VLCCs for the Alaska-Panama trade outweighs any possible disadvantages. Of the twelve tankers that are laid up, three tankers (totaling 146,000 DWT) are over 20 years old. The remaining nine tankers include the one tanker (the *Prince William Sound*, 123,400 DWT) and eight smaller tankers that could serve in the ANS trade, although at a much higher cost per ton than VLCCs currently operating in that trade (see Regulatory Impact Analysis). For example, the cost of operating a 50,000 DWT tanker in the Valdez-Panama trade is approximately \$25.00 per ton, compared to \$9.19 per ton for a 265,000 DWT VLCC operating in the same trade. Further, as noted above, larger tankers are more suitable than smaller tankers from an environmental standpoint because they make fewer voyages and port calls than smaller tankers to carry the same amount of oil, thus reducing the risk of collisions and oil spills (see Environmental Assessment).

A second alternative considered would be for MARAD to do nothing, i.e., to allow the rule to be vacated as of July 16, 1987, and for the three VLCCs to leave the domestic trade, and to consider the *Bay Ridge* separately. The costs of doing nothing would be a shortage of the most suitable tonnage for the Valdez-Panama trade and the likely lay-up of the three VLCCs that repaid CDS under the 1985 rule. Other costs of this alternative would be the loss to the government of CDS repayments of \$105.8 million from those three VLCCs, the reduction of Alaska state revenues due to higher transportation costs in later years, and the loss of transportation savings to the shipping public.

The benefits of this alternative could be reduced government loan exposure risk on existing Jones Act tankers and the possibility of some of the laid up domestic tankers operating in the ANS trade. However, due to the age and small size of most of those tankers, they would be unsuitable for the Valdez-Panama trade. Further, only six percent of the domestic tanker fleet is laid up. A

six percent lay-up is a reasonable reserve for covering temporary losses from the active fleet due to casualties (three in 1986), surveys and repairs, as well as seasonal increases on the upcoast petroleum movements.

Under this second alternative, shipbuilding demand for new crude tankers would still be minimal, if any, due to the high cost of U.S. shipbuilding, the unlikely availability of future CDS funds due to budget constraints, and the predicted future decline in the volume of crude carried in the Alaska-Panama trade.

The third alternative considered would provide for other U.S.-flag tanker owners to repay CDS in return for unrestricted domestic trading privileges. Under this approach, those vessel owners with the best prospects for employment would likely choose to repay within the specified time period. Unrestricted repayment would reduce the need for federal issuance of temporary permission to enter the ANS trade. Fiscal benefits could also be the greatest under this alternative. However, it is unlikely that any more vessels would repay under this alternative, since only three repaid when the window was open for one year and two EXXON 209,000 DWT Jones Act tankers have recently delivered. This alternative would cause the most disruption to the Jones Act as there would be uncertainty in the market. Shipyard demand for new crude tankers would remain at a minimal or non-existent level.

#### E.O. 12291, Statutory Requirements and DOT Procedure

The Maritime Administrator has determined that this rule is major under the criteria of Executive Order 12291. Pursuant to the Department of Transportation's Regulatory Policies and Procedures (February 26, 1979), this rule is also considered to be "significant" because it concerns a matter on which there is substantial public interest.

The Maritime Administrator certifies that it would have no significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) The companies owning and chartering the four VLCCs at issue, and companies owning or chartering tankers possibly affected by the rulemaking in the foreign and domestic trades, are either large oil companies or large independent shipping companies.

A draft Regulatory Impact Analysis has been prepared and is available for public review and copying in the Docket

(R-110) in the Office of the Secretary, Maritime Administration (room 7300). It discusses the important economic aspects of this proposed rule.

An Environmental Assessment of the proposed rule has also been prepared, and may be inspected at the Office of the Secretary, Maritime Administration, room 7300. The Environmental Assessment concludes that the effect of the proposed rule would be that greater quantities of ANS oil would be transported in VLCCs than in smaller vessels, fewer total trips would be made by a smaller number of vessels, the risk of accidental oil spill would be reduced as the number of trips decreases. In addition, the tankers which have repaid CDS include a number of safety and environmental features required by statute. Overall, the risk to the environment would be reduced with the proposed rule as compared to without it. On the basis of the environmental assessment, the Maritime Administration has tentatively concluded that the proposed rule would not result in a significant environmental impact to the human environment.

#### List of Subjects in 46 CFR Part 276

Grant programs—transportation, Maritime carriers, Reporting and recordkeeping requirements.

#### PART 276—[AMENDED]

It is proposed to amend 46 CFR Part 276 as follows:

1. The authority citation for Part 276 continues to read as follows:

Authority: Secs. 204(b), 207, 506, and 714, Merchant Marine Act, 1936, as amended (46 U.S.C. 1114(b), 1117, 1156 and 1204) Pub. L. 86-518 (74 Stat. 216); Reorganization Plans No. 21 of 1960 (64 Stat. 1273) and No. 7 of 1961 (75 Stat. 840), as amended by Pub. L. 91-409 (84 Stat. 1036); and Dept. of Commerce Organization Order 10-8 (36 FR 19707, July 23, 1973), unless otherwise noted.

2. 46 CFR 276.3 is revised to read as follows:

#### § 276.3 Total Repayment

(a) The Maritime Administration reaffirms the allowance of the irreversible total repayment of unamortized construction-differential subsidy (CDS), with interest, and rescission permanently of the domestic trading restrictions related to the grant of CDS for tankers of any deadweight tonnage for applications and approval between June 6, 1985 and June 5, 1986, in accordance with the terms and conditions of subsection (b). The approved applications were for the *Arco Independence*, *Arco Spirit* and *Brooklyn*.

(b) *Repayment terms.* The full repayment amount consists of the unamortized CDS, as determined by the Maritime Administration, with compounded interest on that amount. The interest rate is the same as the long-term interest rate the owner obtained, or would have obtained if long-term debt financing had been used, in financing the owner's portion of the tanker. Unless the Maritime Administrator determined that using interest rates other than long-term bond rates was justified, such rates are used. If more than one long-term bond was issued to finance the owner's portion of a specific tanker, or if one or more of such bonds has more than one rate (such as a serial bond) an average interest rate is computed weighted by the proportion of each bond par value to the total par value of all long-term bonds issued to finance the owner's tanker. The interest payable on the unamortized CDS is computed by continuous compounding of the interest until the day of repayment. For purposes of this paragraph, "long-term bond rates" are either actual Title XI bond rates on a specific owner's tanker or the Title XI long-term bond rate at the time the tanker's statutory life began.

(c) The Maritime Administration reaffirms the allowance of the irreversible total payment of unamortized construction-differential subsidy with interest and rescission permanently of the domestic trading restrictions relating to the grant of CDS for the *Boy Ridge*, which repaid on November 1980.

Dated: April 10, 1987.

By Order of the Maritime Administrator,  
James E. Saari,

Secretary, Maritime Administration.

[FR Doc. 87-8472 Filed 4-14-87; 8:45 am]

BILLING CODE 4910-61-M

#### FEDERAL MARITIME COMMISSION

#### 46 CFR Part 502

[Docket No. 87-7]

#### Implementation of the Equal Access to Justice Act in Commission Proceedings

AGENCY: Federal Maritime Commission.  
ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission proposes to adopt rules implementing the Equal Access to Justice Act, as revised, for its formal adjudicatory proceedings. These rules will provide for the award of attorney fees and other expenses to parties who

# Alaska State Legislature

REPRESENTATIVE  
PAT POURCHOT

HOUSE FINANCE COMMITTEE,  
VICE CHAIR

HOUSE ETHICS COMMITTEE, CHAIR

LEGISLATIVE BUDGET & AUDIT  
COMMITTEE



## House of Representatives

May 7, 1987

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JUNEAU

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The Honorable Frank Murkowski  
United States Senate  
720 Hart Building  
Washington, D.C. 20510

Dear ~~Frank~~ Senator:

On Thursday, May 7, 1987, the Alaska Legislature unanimously approved House Joint Resolution 33, which we sponsored, urging the Secretary of Transportation to adopt new rules to permit continued shipment of Alaskan oil by four large tankers. Although you will be receiving a copy of this resolution from the Lieutenant Governor's office shortly, we are forwarding a copy for your early review and use.

As you know, on January 16, 1987, the U.S. Court of Appeals decision (First Attranco Tanker Corp. vs. Dole) vacated a Department of Transportation ruling. The DOT ruling permitted three very large crude carrier ships to repay the remainder of their construction subsidies in 1985-86. In doing so, they became Jones Act ships rather than just U.S. flag ships.

The Court ruled that the Secretary of Transportation was well within her authority to permit this repayment. However, the Court also ruled there were procedural defects in that she did not adequately explain the effect of this action on other Jones Act ships. Thus the ruling was unjustified. The decision requires all three ships to cease Alaskan service on July 16, 1987, unless the Department of Transportation explains the effect other Jones Act ships to the Court's satisfaction. A fourth ship which entered Jones Act trade under generally similar circumstances is also vulnerable to the ruling.

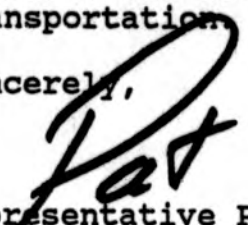
In total these four ships are currently moving 200,000 barrels of Alaskan oil to market every day. If they are taken out of the fleet, then a large number of much smaller, less efficient and more expensive ships must take their place if the Alaskan oil is to get to market.

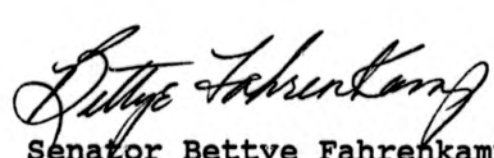
Page two

This issue is significant to the State of Alaska as well as the oil industry. The financial effect on the State of Alaska in reduced royalties and severance taxes due to the increased transportation costs is estimated to be between \$18,000,000 and \$150,000,000 annually if new rules are not adopted.

We hope that this resolution will help you in your efforts to expedite the needed actions by the U.S. Department of Transportation. Thank you.

Sincerely,

  
Representative Pat Pourchot

  
Senator Bettye Fahrenkamp

enclosure

# Alaska State Legislature

REPRESENTATIVE  
PAT POURCHOT

HOUSE FINANCE COMMITTEE,  
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May 7, 1987

The Honorable Elizabeth H. Dole  
U.S. Department of Transportation  
400 7th Street, SW, Room 10200  
Washington, D.C. 20590

Dear Madam Secretary:

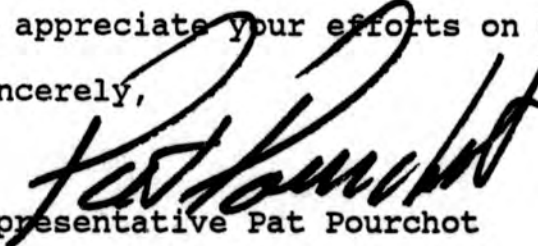
On Thursday, May 7, 1987, the Alaska Legislature unanimously approved House Joint Resolution 33, which we sponsored, urging you to adopt new rules to permit continued shipment of Alaskan oil by four large tankers.

Although you will be receiving a copy of this Resolution from the Alaska Lieutenant Governor's office shortly, we are forwarding a copy for your review and use. Specifically, we are requesting that the Resolution be included in the record on the Department of Transportation's proposed rulemaking for Construction-Differential Subsidy Repayment.

As you know, this issue is significant to the State of Alaska as well as the oil industry. The financial effect on the State of Alaska in reduced royalties and severance taxes due to the increased transportation costs is estimated to be between \$18,000,000 and \$150,000,000 annually if new rules are not adopted.

We appreciate your efforts on this matter. Thank you.

Sincerely,

  
Representative Pat Pourchot

  
Senator Bettye Fahrenkamp

enclosure

# Alaska State Legislature

REPRESENTATIVE  
**PAT POURCHOT**

HOUSE FINANCE COMMITTEE,  
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### MEMORANDUM

DATE: May 7, 1987

TO: Members of the Senate

FROM: Rep. Pat Pourchot

SUBJECT: HJR 33 - Relating to the Shipping of Oil

House Joint Resolution 33, relating to the shipping of Alaska oil, is scheduled for consideration in the Senate.

This resolution urges the Secretary of the United States Department of Transportation to adopt before July 16, 1987, a rule that would enable four very large crude oil carrier ships to continue to operate in the United States domestic shipping market without interruption.

Attached is a brief background and summary of the reason for this resolution. It is important that we act expeditiously on the resolution because if the U.S. Department of Transportation fails to adopt a rule by July 16, 1987, the transportation of Alaska oil may be disrupted. In addition, the transportation costs will increase substantially, and the state government could stand to lose a significant amount of money.

I appreciate your consideration on this resolution. Thank you.

## HOUSE JOINT RESOLUTION 33

### HISTORY

On January 16, 1987, the U.S. Court of Appeals decision (First Attransco Tanker Corp. vs. Dole) vacated a Department of Transportation ruling. The DOT ruling permitted three very large crude carrier ships to repay the remainder of their construction subsidies in 1985/6. In doing so, they became Jones Act ships rather than just U.S. flag ships.

The Court ruled that the Secretary of Transportation was well within her authority to permit this repayment. However, the Court also ruled there were procedural defects in that she did not adequately explain the effect of this action on other Jones Act ships. Thus the ruling was unjustified. The decision requires all three ships to cease Alaskan service on July 16, 1987, unless the Department of Transportation explains the effect on other Jones Act ships to the Court's satisfaction.

Prior to repaying the subsidy, these three large, efficient U.S. flag ships were not allowed to carry Alaskan oil unless there were no suitable Jones Act ships available. Even under those circumstances these ships could only be used part time (no more than six months out of the year). A fourth ship which entered Jones Act trade under generally similar circumstances in 1983 is also vulnerable to the ruling.

In total these four ships are currently moving 200,000 barrels of Alaskan oil to market every day. If they are taken out of the fleet, then a large number of much smaller, less efficient and more expensive ships must take their place if the Alaskan oil is to get to market. This would raise the market price for all Jones shipping by an estimated 25 cents to \$1.00 per barrel.

An increase in the cost of transportation not only reduces oil company income and incentive in Alaska but also reduces the netback value of all Alaskan production. For example, each 50 cent increase in per barrel transportation cost would reduce state income by roughly \$75 million per year.

Given this situation, Alaska should support the DOT's intention to issue a new rule confirming that these vessels should remain Jones Act vessels as soon as possible because of the July 16, 1987 deadline.

Attached is further information regarding this "Repayment of Construction Differential Subsidies (CDS)".

Repayment of Construction Differential Subsidies (CDS)  
(also called "CDS Sanitization")

DISCUSSION ISSUES:

The following information should be noted in discussion of CDS Sanitization:

- This is a significant economic issue for Alaska. Removal of the four large efficient ships will require using nearly all the smaller ships available, driving the market price for all shipping up by \$.25 to \$1 per barrel. Netback values on the crude oil will decline accordingly. Each \$.50 per barrel reduction in netback represents roughly \$75 MM per year in lost state revenues.
- Alaskan oil production has increased significantly in the last year, highlighting the need for efficient transportation. The Lisburne field (40-50 MBD) began commercial production in early 1986, Prudhoe Bay production increased with natural gas liquid (NGL) recovery in early 1987 (50 MBD). Kuparuk has reached peak production, and Endicott field is expected to begin production in the fourth quarter of 1987 (up to 100 MBD).
- Largely because of the increased Alaskan production the four large, efficient VLCC vessels in question have been in continuous service since repayment of their remaining subsidy: the BROOKLYN and the BAYRIDGE under charter to EXXON, and the ARCO INDEPENDENCE and the ARCO SPIRIT under long term charter to Standard Oil.
- Larger vessels make the transport of crude oil to the West Coast and Gulf Coast more economically efficient than smaller vessels. This is especially true to the Gulf Coast, which accounts for a substantial portion of the Alaskan oil delivered.

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## United States Senate

COMMITTEE ON APPROPRIATIONS  
WASHINGTON, DC 20510-8025

June 15, 1987

The Honorable Bettye Fahrenkamp  
515 7th Street, Suite 130  
Fairbanks, Alaska 99701

Dear Bettye:

Thank you for your letter regarding the Construction Differential Subsidy (CDS) payback rule.

As you know, a recent court decision required the Secretary of Transportation to reconsider the rule. In the interim period, Congressman Carr succeeded in attaching an amendment to the House Supplemental Appropriations bill which would prohibit the Arco vessels from continuing to operate in the domestic tanker trade.

We managed to defeat that amendment in the Senate. It will be considered shortly in conference, but I am hopeful that the amendment will ultimately be stripped from the bill.

With best wishes,

Cordially,



TED STEVENS

JUN 22 1987

# HJR 33

## MEMORANDUM

TO: Members, Senate Special Committee on Oil and Gas  
FROM: Committee Staff  
RE: Committee Meeting, May 5, 1987  
DATE: May 4, 1987

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On Tuesday, May 5, at 3:30 pm in the Beltz Room, the Senate Special Committee on Oil and Gas will hear SJR 43, Relating to the shipping of Alaskan oil.

Four of the supertankers currently used to transport oil from Valdez to the West coast and to Panama (for delivery to the Gulf and East coasts) are allowed to operate under a special waiver from the U.S. Department of Transportation. A recent U.S. Court of Appeals decision held that these rules were improperly drafted, but allowed the ships to operate until July 16, 1987. If new rules are not adopted by that date, these ships will have to be replaced with smaller, less efficient vessels. The resulting increase in the transportation costs for Alaska North Slope oil will decrease wellhead values and could result in a loss of revenue to the state of from \$18 - \$150 million annually.

These ships were built with federal construction differential subsidies (CDS), a program designed to help U.S. built ships to compete in foreign trade markets. To alleviate the shortage of suitable Jones Act tankers, the U.S. Department of Transportation has allowed these ships to enter the domestic trade after repaying the subsidy.

In response to the court decisions, the U.S. Department of Transportation is in the process of adopting new rules that would allow the four ships to remain in the domestic trade. However, pending amendments in Congress may prohibit such new rulemaking.

HJR 33  
~~SJR 43~~ urges the Secretary of the U.S. Department of Transportation to adopt new rules by July 16, 1987.

May 5, 1987

SJR 43, RELATING TO THE SHIPPING OF ALASKAN OIL

1) Review CDS Tanker issue

Four supertankers have been allowed to operate in the domestic trade on the condition that they repay their Construction Differential Subsidies (CDS)

In January, the U.S. District Court of Appeals vacated this rule, but allowed the ships to operate until July 16, 1987.

2) Update on U.S Department of Transportation Action

Maritime Administration has filed a Notice of Proposed Rulemaking on the CDS Repayment.

3) Update on Congressional Action

House Supplemental Appropriations Bill has language that would prevent U.S. Department of Transportation from adopting new rules.

Senate amendment was defeated last week by a 14-11 vote in the Senate Appropriations Committee. Could be reinserted on the Senate floor. It may be on the floor by the end of this week.

If its out of the Senate bill, it will be a conferenceable item.

TO TESTIFY:

JIM PALMER, Standard Alaska Production Company

VINCE WRIGHT, Chief of Research Section, Department of Revenue

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, WILLIAM SHEFFIELD, )  
Governor of the State of Alaska, )  
MARSHALL LIND, Commissioner of )  
Education, ELEANOR ANDREWS, )  
Commissioner of Administration, )  
EMIL NOTTI, Commissioner of )  
Community & Regional Affairs, LOREN )  
LOUNSBURY, Commissioner of Commerce )  
& Economic Development, MILTON )  
BARKER, Acting Commissioner of )  
Revenue, all in their official )  
capacities, )

Appellants, )  
Cross-Appellees, )

v. )

FAIRBANKS NORTH STAR BOROUGH and )  
FAIRBANKS NORTH STAR BOROUGH )  
SCHOOL DISTRICT, )

Appellee, )  
Cross-Appellants. )

Nos. S-2122/2141

O P I N I O N

[No. 3180 - May 6, 1987]

Appeal from the Superior Court of the State  
of Alaska, Fourth Judicial District, Fairbanks,  
James Blair, Judge.

Appearances: Robert M. Maynard, Assistant  
Attorney General, Grace Berg Schaible,  
Attorney General, Juneau, for Appellants/  
Cross-Appellees. Mark Andrews, Assistant  
Borough Attorney, Gordon W. Duval, Staff  
Attorney, Paul H. Cragan, Borough Attorney,  
Fairbanks, for Appellee/Cross-Appellants.

Before: Burke, Matthews, Compton, and  
Moore, Justices. (Rabinowitz, Chief Justice,  
not participating).

PER CURIAM.

The judgment is affirmed on the opinion of the superior court, except as noted hereafter. The traditional rule that judicial decisions should apply retroactively governs this case as the resolution of the issue presented was foreshadowed by prior opinions of the state attorney general, there has been no irremediable reliance on the statute in question, and inequity would result if only the appellees were to receive the benefit of this ruling. See Commercial Fisheries Entry Commission v. Byayuk, 684 P.2d 114, 117 (Alaska 1984).

Accordingly, we remand this case to the superior court with instructions to modify its judgment to allow for total retroactivity.

AFFIRMED on the merits, REMANDED as to effect.

Each party is to bear its own  
costs and attorney fees in the  
Supreme Court in this matter.

CDS Tankers —

Appeals court — new rules —

have been issued — are in effect.

→ new action says new interpretation is flawed

→ congress —

CARR amendment  
prevent DOT —

passed in supplemental  
went back in conference

works prospectively

President stated in signing

SA's dealt w/ CDS

- 1) prospective
- 2) unconstitutional to deny MARAD  
authority to defend rules

for new tanks  
would apply

can understand

original case going to Supreme Court  
probably not be heard.

ALCO - petrofia appealing.

Can introduced again in F138

in Senate subcommittee has not met yet.

Hall's chairman may introduce language  
tradeback ally of maritime  
try for more restrictive language.  
Barbara McCulsky

5 ships —

1 allowed Supreme court (Seatri-  
1 seatri — DOT<sup>say</sup> affected by court.

is legis

recess Aug 7 - Sept 9

HB

58

Senate Special Committee on Oil and Gas

Legislation Checklist

Bill number: *CS HB 50 (Fin) am* Sponsor: *L B & A*

Date referred to committee:

Further referrals:

*SA*

Prior committee report:

*Finance*

Back up from sponsor:

Fiscal note(s):

Agency: *(H) Fin*

Requested:

Received:

Agency:

Requested:

Received:

Position paper(s):

Agency:

Requested:

Received: \_\_\_\_\_

Agency:

Requested:

Received:

Sectional Analysis:

Scheduled:

Heard:

Reported out:

Items for committee packet:

To Testify:

Other Contacts:

Original sponsor: Rules/Legislative  
Budget and Audit

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2

CS FOR HOUSE BILL NO. 58 (Finance) am

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FIFTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6

For an Act entitled: "An Act relating to confidential tax information;  
relating to the filing of tax returns; and providing  
for an effective date."

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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\* Section 1. LEGISLATIVE FINDINGS AND PURPOSE. (a) The legislature

11

finds that

12

(1) the majority of the state's revenue is derived from taxation;

13

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(2) tax revenue enables the state to provide essential services to the citizens of the state to ensure the public health and welfare;

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(3) the elected representatives of the people of the state must be assured that the state is receiving all of the income to which it is entitled and that the tax laws are operating in the manner intended by the legislature;

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(4) the legislature must exercise its oversight authority to ensure that tax revenue collection by the Department of Revenue is efficient, fair, prompt, and in the best interest of the state;

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(5) there is a legitimate and compelling governmental interest in the legislature having adequate access to tax-related information to allow responsible oversight;

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(6) without sufficient information, the legislature cannot adequately determine that the state's tax revenue collection functions are properly administered and that tax revenue due the state is promptly received;

27

28

29

1 (7) tax returns and return information contain confidential  
2 information, often regarding sensitive business information;

3 (8) taxpayers have protections against public disclosure of  
4 certain tax information;

5 (9) exchange agreements with the Internal Revenue Service re-  
6 quire that certain tax information not be publicly disclosed;

7 (10) protection of confidentiality fosters full disclosure by  
8 taxpayers to taxing authorities and therefore promotes effective adminis-  
9 tration of tax programs; and

10 (11) legislators and legislative employees who improperly dis-  
11 close confidential tax information should be subject to the same sanctions  
12 imposed against executive branch employees.

13 (b) The purpose of this Act is to ensure that

14 (1) the state is receiving all the tax revenue due the state;

15 (2) oversight of the tax revenue collection function is effec-  
16 tively provided;

17 (3) tax revenue due to the state is available to provide for the  
18 public health and welfare of the citizens of the state;

19 (4) taxpayers are protected from improper disclosure of tax  
20 information;

21 (5) the exchange agreements with the Internal Revenue Service  
22 regarding tax information are not jeopardized;

23 (6) tax programs are administered fairly; and

24 (7) the right of the people to privacy is recognized and may not  
25 be infringed.

26 \* Sec. 2. AS 24.10 is amended by adding a new section to article 2 to  
27 read:

28 Sec. 24.10.070. CONFIDENTIALITY OF INFORMATION. A present or  
29 former employee or agent of the legislature may not disclose tax

1 information contained in a report or return filed under AS 43.05.230  
2 and furnished to the person under AS 43.05.232.

3 \* Sec. 3. AS 24.60.060 is amended by adding a new subsection to read:

4 (b) A person to whom this chapter applies may not disclose tax  
5 information contained in a report or a return filed under AS 43 and  
6 furnished to the person under AS 43.05.232.

7 \* Sec. 4. AS 24.60 is amended by adding a new section to read:

8 Sec. 24.60.172. SPECIAL PROCEEDINGS BEFORE THE COMMITTEE.  
9 Notwithstanding AS 24.60.170, if a complaint before the committee  
10 involves an allegation that a person to whom this chapter applies has  
11 disclosed tax information contained in a report or return filed under  
12 AS 43 with the Department of Revenue and furnished to the person under  
13 AS 43.05.232, and if the taxpayer or a third party whose tax informa-  
14 tion is alleged to have been improperly disclosed does not agree to  
15 the public disclosure of the identity of the taxpayer, the third  
16 party, or the tax information,

17 (1) the hearing may not be held in open session;

18 (2) a transcript containing confidential tax information  
19 shall be edited to prevent the disclosure of the confidential informa-  
20 tion;

21 (3) a decision, if made public, shall be edited to prevent  
22 the disclosure of the tax information and to protect the identity of  
23 the taxpayer or the third party; and

24 (4) a public statement may not contain information identi-  
25 fying the taxpayer, a third party, or the tax information.

26 \* Sec. 5. AS 43.05.230(a) is amended to read:

27 (a) It is unlawful for a current or former officer, employee, or  
28 agent of the state to divulge the amount of income or the particulars  
29 set out or disclosed in a report or return made under this title,

1       except

2               (1) in connection with official investigations or proceed-  
3       ings of the department, whether judicial or administrative, involving  
4       taxes due under this title;

5               (2) in connection with official investigations or proceed-  
6       ings of the child support enforcement agency, whether judicial or  
7       administrative, involving child support obligations imposed or im-  
8       posable under AS 25 or AS 47;

9               (3) as provided in AS 38.05.036 pertaining to audit func-  
10      tions; and

11              (4) as otherwise provided in this section or in AS 43.-  
12      05.232.

13      \* Sec. 6. AS 43.05.230(f) is repealed and reenacted to read:

14              (f) A person who knowingly violates a provision of this section  
15      is guilty of a class A misdemeanor. A person whose gross negligence  
16      results in a violation of this section is subject to a civil penalty  
17      of \$5,000.

18      \* Sec. 7. AS 43.05 is amended by adding a new section to read:

19              Sec. 43.05.232. DISCLOSURE OF CONFIDENTIAL TAX RETURNS AND  
20      RETURN INFORMATION TO THE LEGISLATURE. (a) Confidential tax returns  
21      and return information may not be requested by a legislative committee  
22      under (b) of this section or transferred to a legislative committee  
23      under (c) of this section,

24              (1) unless the purpose of the committee's request under (b)  
25      of this section or of the transfer under (c) of this section is

26                      (A) to assist the committee in carrying out its re-  
27      sponsibilities to consider tax legislation;

28                      (B) to oversee the effective and efficient adminis-  
29      tration of the state's tax laws, including the review of audits,

1           litigation, or settlements; or

2                       (C) to estimate future state revenue;

3                       (2) if the purpose of the request or transfer is to direct  
4 the executive branch in its audit, litigation, or settlement efforts,  
5 or to collect information to embarrass, harass, or discriminate  
6 against a taxpayer.

7           (b) After a legislative committee identifies the scope of an  
8 investigation or inquiry relating to matters of taxation, and after  
9 adoption by either house of the legislature of a simple resolution  
10 giving the committee authority to receive confidential tax informa-  
11 tion, the committee chair or co-chair may request confidential tax  
12 returns and return information and the commissioner of revenue shall  
13 provide the requested returns or return information. The request  
14 shall be in writing and may identify a particular taxpayer. During  
15 the interim between legislative sessions, the chair or co-chair of the  
16 Legislative Budget and Audit Committee may request confidential tax  
17 returns and return information under this subsection without a simple  
18 resolution, if a majority of the members of the Legislative Budget and  
19 Audit Committee vote to approve making the request.

20           (c) When consistent with the purposes set out in (a) of this  
21 section, the commissioner may transfer unrequested confidential tax-  
22 payer returns or return information to a legislative committee after  
23 making a written determination that the transfer of the return or  
24 return information is in the best interest of the state. Before the  
25 return or return information is transferred, the commissioner shall  
26 provide a copy of the commissioner's determination to the taxpayer  
27 whose return or return information is to be transferred. In determin-  
28 ing whether the transfer of the return or return information is in the  
29 best interest of the state, the commissioner shall consider

1           (1) if the legislative committee is reviewing the adminis-  
2     tration of a tax imposed by this title, whether the return or return  
3     information would demonstrate the application of a tax;

4           (2) if the legislative committee is considering adding a  
5     new tax or amending an existing tax, whether the return or return  
6     information would demonstrate the effect on taxpayers of a change in  
7     tax law;

8           (3) whether the return or return information would assist  
9     the legislative committee in estimating future state revenue;

10          (4) whether the return or return information would clarify  
11     or rectify information provided by a taxpayer to a legislative commit-  
12     tee;

13          (5) the potential harm the taxpayer may suffer by the  
14     possible subsequent disclosure of the return or return information  
15     illegally;

16          (6) any other interest of the taxpayer in avoiding the  
17     transfer of the return or return information.

18          (d) A legislative committee shall consider tax returns and  
19     return information transferred under (b) or (c) of this section in  
20     executive session only, unless the taxpayer and any third party whose  
21     tax return or return information is being considered in conjunction  
22     with the taxpayer's return or return information consent in writing to  
23     a disclosure in open session. The executive session must be open to  
24     all legislators. The committee chair or co-chair may designate legis-  
25     lative employees and agents to inspect the confidential tax returns  
26     and return information, but the chair or co-chair shall seek to mini-  
27     mize the number of employees and agents designated. The designated  
28     employees and agents may attend the executive session. The chair or  
29     co-chair may allow a taxpayer whose confidential tax return or return

1 information is being considered to attend the portion of the executive  
2 session that considers that taxpayer's confidential tax return or  
3 return information.

4 (e) When confidential tax returns or return information concern-  
5 ing a specific taxpayer are provided to a legislative committee under  
6 this section, the commissioner shall notify the taxpayer of the con-  
7 tent and delivery of the return and return information to the commit-  
8 tee.

9 (f) Before providing confidential tax return or return informa-  
10 tion under (b) or (c) of this section, the commissioner shall review  
11 the purpose of the proposed transfer of the return or return informa-  
12 tion to determine what types of confidential tax return or return  
13 information will provide the needed information. If more than one  
14 type of confidential tax return or return information will provide the  
15 needed information, the commissioner shall choose the return or return  
16 information that, in the commissioner's discretion, is the least  
17 commercially sensitive.

18 (g) Disclosure contrary to the provisions of this section by a  
19 member or former member of the legislature or by a present or former  
20 employee or agent of the legislature of a return or return information  
21 that is confidential under AS 43.05.230 and transferred to the legis-  
22 lature under this section is a violation of AS 43.05.230. A member of  
23 the legislature or an employee or agent of the legislature, before  
24 receiving or reviewing a return or return information provided by the  
25 commissioner under (b) or (c) of this section, shall, on a form pre-  
26 pared by the commissioner,

27 (1) acknowledge that the return or return information is  
28 confidential and that a disclosure of the return or return information  
29 contrary to the provisions of this section is prohibited by law; and