



National Association of Waterfront Employers

September 28, 2023

## NAWE News

### Latest with NAWE

**FMC Commissioner Carl W. Bentzel to Hold Webinar on MTDI and FMC Update** – On October 3, Federal Maritime Commission (FMC) Carl W. Bentzel will hold a briefing for NAWE members on the Maritime Transportation Data Initiative's (MTDI's) Maritime Transportation Data System (MDTS) Report and to provide an update from the Federal Maritime Commission (FMC). Members will have an opportunity to ask Commissioner Bentzel questions related to MTDI, the Dye Proposal, as well as other issues in front of the FMC. The details of the webinar are as follows:

Who: FMC Commissioner Carl W. Bentzel

What: Update on the MDTS Report and the FMC

When: Tuesday, October 3 from 12 p.m. – 1 p.m. ET

Where: Virtual Meeting (Calendar appointment is attached to this email)

Furthermore, the webinar provides an opportunity to be briefed on the MDTS prior to the FMC's October 16 deadline for supply chain stakeholders and members of the public to submit comments on the [MTDI's Recommendations and Views Report](#) via the Request for Information (RFI) questions posted on August 16, 2023. Those questions are available on [Regulations.gov](#) and the [Federal Register](#).

**NAWE President Rob Murray Meets with U.S. Representative Jake Auchincloss** – NAWE President Rob Murray met with U.S. Representative Jake Auchincloss (D-MA-04) and his staff following the [submission of a bipartisan letter](#) he drafted with U.S. Representative Brian Babin (R-TX-36) urging the Federal Maritime Commission (FMC) to follow the intent of Congress by removing marine terminal operators (MTOs) from the substantive demurrage billing requirements under the proposed rulemaking for the Ocean Shipping Reform Act of 2022 (OSRA-2022). During the meeting, Rep. Auchincloss shared that he was very pleased with the outcome of the letter and the process by which it was submitted. Based on the quality of the final product, Rep. Auchincloss expressed interest in working with NAWE on future legislation and has also agreed to sign on to [H.R. 4993, NAWE-endorsed legislation that would expand the Capitol Construction Fund](#), to allow MTOs to deposit a portion of their taxable income into a CCF tax-deferred account to maximize purchasing power of cargo handling equipment. Rep. Auchincloss has been a champion for NAWE, as he represents a maritime district and has a deep understanding of maritime issues. We look forward to fostering an even closer relationship with him and his staff. This meeting is also further confirmation that NAWE's message is being heard by the House Transportation and Infrastructure Committee.

Rob is also meeting with Chairman Dan Webster and Congressman Brian Mast on Thursday, September 28, to request their support for H.R. 4993 and to provide them the Auchincloss/Babin letter.

**ICYMI: Secretary Buttigieg States He's Ready to Work with Congress on CCF Expansion Proposal** – Last week, U.S. Secretary of Transportation Pete Buttigieg testified before the full House Transportation and Infrastructure Committee in its “*Oversight of the Department of Transportation’s Policies and Programs.*” During the hearing, Congressman Mike Ezell (R-MS), [lead sponsor of H.R. 4993](#) to expand the Capitol Construction Fund (CCF), asked the Secretary for his thoughts on expanding the CCF as proposed in the NAWE-endorsed legislation. The Secretary responded by saying that MARAD would work with Congress to fully implement the legislation. This is a great update for NAWE and our members, and one we plan to use in our outreach to congressional offices. [Linked here](#) you will find a clip of the exchange to view

**Congressman Mike Ezell (MS-04):** *“As we know, improving our nation’s supply chain requires significant investment in our infrastructure, not just our highways but also our ports, such as the Port of Pascagoula and the Port of Gulfport in my district. However, it is my understanding that even with increased appropriations for programs that support our ports, such as the Port Infrastructure Development Program are already overprescribed. To accomplish this goal, we need to incentive private investment to compliment federal funds. I am excited to see private and public partnerships already in my district such as the one between the Port of Gulfport and Ports America. This is why I, along with my colleague on the Gulf Coast, Congressman Carter introduced bipartisan legislation that seeks to expand the uses of the Capital Construction Fund enabling port operators to make the required upgrades to their cargo handling equipment without need for appropriated funding and at no expense to the taxpayer you agree that the expanding the use of the CCF would grant our porch additional resources to be more efficient provide a cost effective solution to help address our supply chain.”*

**Secretary Pete Buttigieg:** *“Well certainly that represents another tool in the toolkit at a very important time for supporting our ports and our supply chains and if that bill were to be enacted we would make sure that MARAD and our department are working with you to implement it fully.”*

**TCW v. Evergreen** – Oral arguments in Evergreen’s appeal of the FMC’s ruling that the imposition of weekend detention was an unreasonable practice under the Shipping Act are scheduled to occur on October 20. **Based upon discussions with Evergreen’s counsel, it appears Evergreen intends to rely heavily on the amicus brief filed jointly by NAWE and World Shipping Council during such arguments.** Specifically, NAWE anticipates that Evergreen will advance arguments from our *amicus* brief regarding (a) the FMC’s violations of the Administrative Procedure Act by creating an inflexible standard when assessing the reasonableness of demurrage and detention charges, instead of a case-by-case approach provided by the Interpretive Rule, and (2) the negative impact that the FMC’s decision has on supply chain congestion and MTO operational efficiencies. NAWE continues to monitor the case closely and will provide further updates following oral arguments.

## NAWE Legislative Updates

**Washington Braces for Imminent Federal Government Shutdown** – With Fiscal Year 2023 ending at midnight on September 30, Congress must either pass an appropriations package or a continuing resolution (CR) to avoid a federal government shutdown. However, at this point, House and Senate leaders do not appear anywhere close to reaching an agreement on a CR—instead forging divergent paths forward—complicating the chances to avert a shutdown.

In the House, the GOP leadership has scheduled floor votes on four of the 12 Fiscal Year 2024 appropriations bills as Speaker Kevin McCarthy (R-CA-20) and his team tries to persuade hardline conservative Republicans to support a revised version of a CR that would provide 31 days of funding after October 1st and would include cuts to federal domestic spending and include border spending increases opposed by the White House and congressional Democrats. Last week, members of the House Freedom Caucus opposed procedural votes to bring the Defense Appropriations bill to the House floor.

In the Senate, Majority Leader Charles Schumer (D-NY) scheduled a vote on Tuesday, September 26 on a cloture motion to proceed to the House-passed Federal Aviation Administration (FAA) reauthorization bill (H.R. 3935), which will serve as the Senate vehicle for a short-term FY 2024 Continuing Resolution (CR). Unlike the House, the Senate’s CR reportedly will extend funding for all federal agencies for 45 days through November 17th, at Fiscal Year 2023 levels, and will include \$6 billion in relief funding for recent federal-declared disasters and \$6 billion in military assistance for Ukraine.

The Senate plans to vote on the CR and send it over to the House to try to force a vote on its CR, and early reports are that the House GOP may try to amend the Senate CR with its controversial border protection bill, H.R. 2, which the White House and Senate Democrats strongly oppose. So, the path toward passage of a CR seems uncertain and a federal government shutdown for some period of time seems almost a certainty.

### **White House Makes Public Federal Department and Agency Contingency Plans as Government Shutdown**

**Looms** – In preparation for the likelihood of a federal government shutdown, the White House published weblinks for the contingency plans of the various Executive Branch departments and agencies in the lapse of passage of Fiscal Year 2024 appropriations bills or a CR. Under the Antideficiency Act, federal agencies are generally prohibited from incurring obligations that are in advance of, or that exceed, an appropriation. Thus, except in certain limited circumstances (such as express statutory authorizations and the exercise of the President's constitutional authorities), an agency may not incur obligations when the funding source for the obligation would be an appropriation that has lapsed.

**For your reference, the NAWE team has provided links below to the federal departments and agencies of greatest interest to our association members:** [Federal Government Shutdown Contingency Plans](#)

### **Department of Transportation**

**U.S. Maritime Administration (MARAD)** - Activities that will continue during the shutdown are those that would address imminent hazards to the safety of human life and protection of vessels of the U.S. Government.

- **Port Infrastructure Development Program (PIDP)** grants would continue operations utilizing carry-forward balances from FY 2023 appropriations. Staff required for the award and oversight of the PIDP grants will continue to work and are funded from no-year carry-forward funds available for administrative requests.
- **The United States Marine Highway (USMH) Grant program** would continue utilizing carry-forward balances. Staff required for the award and oversight of the AMH grant will continue to work and are funded from no-year carry-forward funds available for administrative expenses.

### **Department of Homeland Security**

**US Coast Guard (USCG)** – USCG activities related to life and safety will continue during the shutdown. Approximately 44,000 of the USCG's total of 50,000 uniformed servicemembers and employees are "exempt/excepted" from furlough and are retained during lapses in appropriations. USCG will cease all other activities not identified as exempt/excepted functions and the roughly 6,000 USCG employees will be furloughed within 4 business hours following the notification of a lapse in appropriations.

**Customs and Border Protection (CBP)** – CBP cargo security and examination activities at our nation's seaports will continue if there's a government shutdown. CBP indicates that of their more than 64,000 total employees, 59,000 are exempt/excepted from furlough in the event of a lapse in appropriations.

### **Department of Labor**

**Office of Workers' Compensation Programs (OWCP)** – Under the Department of Labor's contingency plan for a federal government shutdown, DOL will continue to provide support for the payments of benefits for which the funding has not lapsed, including under the Coronavirus Aid Relief and Economic Security (CARES) Act, Federal Employees' Compensation Act, Energy Employees Occupational Illness Compensation Act, Longshore and Harbor Workers' Compensation Act, War Hazards Compensation Act and Trade Adjustment Assistance (TAA) Program, DOL will also provide support to states and other Federal agencies for the administration and payment of unemployment insurance benefits.

Notwithstanding the shutdown, DOL will allow its relevant agencies to pursue and handle legal cases or investigations in jeopardy of being lost due to statute of limitations.

Among the DOL agencies that will completely cease operations are the Office of Administrative Law Judges, Administrative Review Board, Benefits Review Board, and Employees' Compensation Appeals Board. Excepting those for which non-annual funds are available, all worker protection agency investigations will cease unless they involve responding to or preventing fatalities, catastrophes, or imminent danger. Unless non-annual funds are available, agencies' technical assistance, compliance assistance, regulatory, policy, research, advisories, responding to inquiries, most oversight, hearing preparation, and cooperative activities will cease.

### [Federal Maritime Commission](#)

According to FMC's contingency plan for a federal government shutdown, only activities that are necessary to protect life and property, are necessarily implied by law, and/or are necessary to the discharge of the President's constitutional duties and powers—limited to the safe and secure maintenance of agency physical offices and continued communication and responsiveness to the Office of Management and Budget (OMB) and/or the Office of Personnel Management (OPM) will be performed.

FMC **will cease** all work that furthers the Commission's mission to ensure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices.

All Commission employees will be furloughed except when performing any of the above enumerated functions and activities. Because Commissioners are Presidentially-appointed, Senate-confirmed (PAS) Officers of the United States who are paid an annual salary that is not dependent on the hours or days they work, they are exempt from furlough because of a shutdown. Accordingly, the Commission's Chairman and its Commissioners may continue to work but will not be paid until funds have been appropriated. Similarly, the employees required to perform excepted activities (including employees providing legal advice and making decisions on whether certain activities fall within excepted activities) will report for duty as necessary to accomplish the excepted activities and will not be paid until funds have been appropriated.

The FMC contingency plan may be accessed at the following link: [Shutdown Due to Lapse in Appropriations \(fmc.gov\)](#)

### [United States Army Corps of Engineers \(USACE\)](#)

Under the USACE's contingency plans for a government shutdown, financial obligations are allowed only to conduct an orderly shutdown of operations or to continue those activities that are determined to be "excepted." In the absence of annual appropriations, the USACE Organization must shut down all "non-excepted" activities until Congress passes a CR or enacts an appropriation bill to fund the USACE Organization.

USACE operations that are funded with multi-year or no-year available funds can continue to operate until those funds are exhausted. When the funds are exhausted, a determination must be made as to whether those activities are "excepted" or "non-excepted" activities.

## NAWE Regulatory Updates

**FMC Commissioner Seeks Comments on Maritime Transportation Data Initiative RFI** – On August 23, FMC Commissioner Carl Bentzel released a statement on the release of the Commission's RFI on the Maritime Transportation Data Initiative (MTDI). Commissioner Bentzel explains in his statement that, "the purpose of this RFI is to solicit further public review and comment on the proposed processes and definitions identified in the MTDI Report. Your input will help better standardize information sharing; clear standards for understanding container availability, earliest return dates, and other key metrics that arise when cargo is transferred between nodes; and information on fees and charges. All of these issues were raised in the 18 MTDI public meetings as well as my subsequent meetings with individual stakeholders and the National Shipper Advisory Committee." Click here to view [Statement of Commissioner Carl W. Bentzel on the Release of the Maritime Transportation Data Initiative \(MTDI\) Request for Information \(RFI\)](#).

**Chairman Maffei to Speak to Virginia Maritime Association on October 4** – FMC Chairman Daniel Maffei will address the "[VMA 2023 International Trade Symposium](#)" during a fireside chat entitled "Reliability through Regulatory Compliance &

Rulemaking.” The symposium is being hosted by the Virginia Maritime Association. Click [here](#) for additional details about the event, including registration and costs.

**Chairman Maffei Giving Keynote at WESCCON 2023 on October 27** – FMC Chairman Daniel Maffei will provide the breakfast keynote address at “[WESCCON 2023](#),” the annual meeting of the Pacific Coast Council of Customs Brokers and Freight Forwarders (PCC). Information on registration and cost to attend can be found on the PCC website.

## NAWE Event Updates

We are two weeks away from the NAWE Annual Meeting in New Orleans happening October 11-13 at the Ritz-Carlton, New Orleans. Tickets are still available to [purchase for both the conference](#) as well as [spouse/companion tickets](#). We look forward to a stellar line up of [diverse speakers](#) from Federal Maritime Commission Commissioner Max Vekich to the U.S. Army Corps of Engineers 65<sup>th</sup> Commander and District Engineer for the New Orleans District Col. Cullen Jones to U.S. Deputy Administrator of MARAD Tamekia Flack and more!

To cap off another successful annual meeting, we will tour the Port of New Orleans on Friday, October 13. You must be registered for the port tour to ensure we have an accurate head count for transportation. If you’re registered for the annual meeting and have not signed up for the port tour, you can do so [at the link here](#).

## Articles of Interest

### Journal of Commerce

[Pandemic, shipping reform boost caseload for harried FMC](#)  
Sept. 22, 2023

The Federal Maritime Commission (FMC) is taking on an unprecedented amount of formal complaints and small claim cases, helped to a degree by increased staffing but still challenging for a small agency that has seen caseload activity rocket since the pandemic and through newly gained regulatory powers. Formal proceedings submitted to the agency more than tripled in fiscal year 2022 compared with fiscal year 2019 — the last full pre-pandemic year — according to the FMC. Formal complaints, akin to lawsuits, are initiated when one party alleges another violated US shipping statutes under the commission’s authority and a legal proceeding is heard before one of the FMC’s three administrative law judges.

### Marine Link

[The Real Cost of Net Zero Ports](#)  
Sept. 26, 2023

The U.S. Environmental Protection Agency (EPA) is working on two high-profile port initiatives that it hopes will move the needle in a big way towards U.S. ports’ zero emissions (ZE) operations and clean air goals. The first initiative started last May when EPA published a request for information and comments that would help the agency develop guidance it could use to evaluate funding requests for projects for zero-emission vehicles, port equipment and related infrastructure. EPA has \$4 billion available for these investments: \$1 billion is for heavy duty vehicles; \$3 billion is for clean ports.

### NextGov FCW

[CISA task force aims to improve supply chain security with new hardware standards](#)  
Sept. 25, 2023

The Cybersecurity and Infrastructure Security Agency released a new framework to help standardize how technology hardware vendors communicate their purchases with customers to further mitigate risks in the systems that make up the U.S. supply chain.

Developed by the Information and Communications Technology Supply Chain Risk Management Task Force within CISA, the new [Hardware Bill of Materials Framework](#) is intended to be used by customers and suppliers within the hardware technology industry to better understand technological interoperability through more codified standards.