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**Written Testimony of Kurt J. Nagle**  
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**Prepared for the**  
**United States Senate**  
**Committee on Environment and Public Works**  
**Hearing: “The Harbor Maintenance Trust Fund**  
**and the Need to Invest in the Nation’s Ports”**  
**January 31, 2013 – 10:00 a.m.**  
**Room 406 Dirksen Senate Office Building**

Chairman Boxer, Ranking Member Senator Vitter and Members, I want to thank you for the opportunity to provide written testimony to the Committee on Environment and Public Works on the Harbor Maintenance Trust Fund and the need to invest in the nation’s ports. I am Kurt Nagle, President and CEO of the American Association of Port Authorities.

I present this written testimony on behalf of the American Association of Port Authorities which represents the interests of the leading U.S. public port authorities as well as public port authorities throughout the western hemisphere from Canada to Argentina including the Caribbean. The testimony presented today is on behalf of AAPA’s U.S. public port members.

Since maintaining our nation’s Federal channels to constructed dimensions is of critical importance to the health of the port industry and the nation’s economy, we appreciate the Committee’s leadership in addressing the need to both examine the harbor maintenance tax and trust fund, as well as assess the need for increasing investment in the nation’s port infrastructure on both the landside and waterside.

I will focus my testimony on the need to fully utilize the harbor maintenance tax annual revenue, the need for and benefits of Federal investment in port-related infrastructure and the need to modernize the processes for delivery of the projects necessary to carry out the infrastructure investments for both maintenance and capital improvements. I also will address the need to put streamlining and efficiency provisions in place that will allow projects to move along more quickly. We can no longer take decades to respond to economic opportunities that occur daily. The nation loses jobs and economic opportunities in the process of waiting.

International trade accounts for more than a quarter of the nation's GDP with the trade moving through America's seaports providing more than 13 million high-paying, family-wage jobs. The historic partnership between seaports and the Federal government finds its roots in the Commerce Clause of the U.S. Constitution and is the oldest and most of all the Corps of Engineers' missions. That partnership has built much of the water-side infrastructure we maintain and use today.

U.S. public ports and their private sector partners are doing their part, funding the lion's share of port-related infrastructure improvements. According to our most recent survey, ports and their partners will invest more than \$46 billion over the next five years.

However, increasingly we find that the Federal partner is unable to uphold its part of the bargain in funding new infrastructure and channel maintenance/ improvement projects. As a result, the growth in jobs and income is not being realized to the same extent as in the past. We are calling upon the Committee to consider a series of streamlining and efficiency provisions that permit more flexibility and new options for financing and maintaining Federal channel projects.

We are very pleased that the Committee has placed a focus and emphasis on the harbor maintenance tax and its use in facilitating maintenance dredging and related activities that are so critical to keeping channels at the required depth to handle the modern world fleet. In fact, maintenance dredging impacts the bottom line at every port in the country; on the dock, at the terminals and in the yard. It also directly impacts the transportation savings we are able to create

for all who depend on the ports and the Federal channels that handle more than 90 percent of our world trade. Dredging directly equates to jobs, income and international competitiveness. And not just for coastal states. On average, every state depends on as many as 15 different seaports for its overseas trade.

This past Fall the American Society of Civil Engineers released a report entitled “*Failure To Act: The Economic Impact of Current Investment Trends in Airport, Inland Waterways and Marine Ports Infrastructure.*” This report concluded that aging infrastructure for marine ports, inland waterways, and airports threatens more than one million U.S. jobs. We cannot let that forecast become a reality.

Just as our channels and infrastructure need to meet world market demands, so do our institutional arrangements and planning and project development processes need to be current and reflect the need to have flexible authorities available to the Corps of Engineers. We ask the Committee to consider more flexible policies and authorities that allow the non-Federal sponsor to assume a more up-front role in project financing when desired or needed.

Now, I’d like to turn to the harbor maintenance tax. This Committee has been very supportive of an adequate dredging program for all the nation’s commercial ports, large and small. We were pleased to see the Committee address the need for full use of the harbor maintenance tax annual revenue in MAP21 this summer. We’re asking you to take another step forward in assuring full use of the tax, especially if the Administration’s Fiscal Year 2014 budget request does not include full use of the revenue collected in the prior year, as stipulated in MAP21.

We believe it is now time to revisit the 26-year-old Harbor Maintenance Tax and Trust Fund authorized in the 1986 WRDA that is the sole source for reimbursement of Federal maintenance dredging funding. Port and harbor users are paying for 100 percent of maintenance dredging and getting half in return. The tax revenue collected is currently at about \$1.5 billion annually and, if fully applied, should be adequate to maintain Federal channels once they are restored to their constructed dimensions.

The AAPA convened a task force to develop a set of guiding principles, referenced below, in regard to the harbor maintenance tax. We encourage the Committee to adopt legislation that addresses these principles.

- **Principle 1** – AAPA advocates for full use of all HMT revenues.
- **Principle 2** – Funding from HMT revenues first should be used for historical intended purposes, ensuring: 1) all Federal navigation channels are brought up to and maintained at their constructed depths and widths; 2) needs are met for disposal of maintenance dredged material and construction and maintenance of confined disposal facilities; 3) jetties and breakwaters are properly maintained, and 4) related studies and surveys are funded.
- **Principle 3** – AAPA is supportive of providing more equity for HMT donors.
- **Principle 4** – U.S. Tax Policy should not disadvantage U.S. ports and maritime cargo.
- **Principle 5** – The U.S. must have a process to efficiently study and construct deep draft navigation projects.
- **Principle 6** – The cost-share formula for maintenance and deepening should be reflective of the current cargo fleet.

In addition, attached is a list of policy and efficiency measures we believe need to be enacted in the interest of bringing the Corps' planning and project delivery process up to date to help meet the nation's maritime needs.

And finally, we commend the Committee leadership for recognizing the nexus between water resources development and economic prosperity. Especially in these challenging fiscal times, Federal investments in port-related infrastructure are an essential, effective utilization of limited resources, paying dividends through increased trade and international competitiveness, sustainable job creation and more than \$200 billion annually in local, state and Federal tax revenues. We urge you to develop and pass a Water Resources Development Act at the earliest possible time that includes a real solution to make the harbor maintenance tax annual revenue fully available to the Corps of Engineers to fulfill its channel maintenance mission.

## Attachment to Testimony of Kurt J. Nagle

**1. A permanent solution to ensure full utilization of the Harbor Maintenance Tax, such as providing an offset to collections or causing the use of collected revenue to be mandatory.**

**2. Process Updating. Change the cost-share formula hinge point from 45 to 55 feet** (53 feet in prior House WRDA bills) to reflect current world fleet requirement for draft as follows:

(a) Payments During Construction- Section 101(a)(1) of the Water Resources Development Act of 1986 (33 U.S.C. 2211(a)(1); 100 Stat. 4082) is amended in each of subparagraphs (B) and (C) by striking `45 feet' and inserting `55 feet'.

(b) Operation and Maintenance- Section 101(b)(1) of such Act (33 U.S.C. 2211(b)(1)) is amended by striking `45 feet' and inserting `55 feet'.

(c) Definitions- Section 214 of such Act (33 U.S.C. 2241; 100 Stat. 4108) is amended in each of paragraphs (1) and (3) by striking `45 feet' and inserting `55 feet'.

(d) Applicability- The amendments made by subsections (a), (b), and (c) shall apply only to a project, or separable element of a project, on which a contract for physical construction has not been awarded before October 1, 2003.

(e) Revision of Partnership Agreement- The Secretary shall revise any partnership agreement entered into after October 1, 2003, for any project to which the amendments made by subsections (a), (b), and (c) apply to take into account the change in non-Federal participation in the project as a result of such amendments.

**3. Regulatory Streamlining. Permanent authority needed to contribute funds for dedicated regulatory support (Sec 214).**

Section 214 is currently being used by over 41 public agencies in 20 Corps Districts. Section 214 has allowed local governments to more efficiently move forward with vital infrastructure projects. Permit backlogs impact the timeliness and cost of these investments - costs eventually borne by U.S. consumers and shippers. Amend as follows:

**FUNDING TO EXPEDITE THE EVALUATION AND PROCESSING OF PERMITS.**

Section 214 of the Water Resources Development Act of 2000 (33 U.S.C. 2201 note; 114 Stat. 2594, 117 Stat. 1836, 119 Stat. 2169, 120 Stat. 318, 120 State. 3197) is amended by striking subsection (c).

**4. Process streamlining. Amend Sec 203** (authority for non-Federals to do feasibility study with reimbursement) to mirror Section 204(e) language that allows the Corps to do studies prior to construction without being subject to Thomas amendment that limits Corps participation as follows:

Section 203 of the Water Resources Development Act of 1986 (33 USC 2231) is amended-

- (1) By re-designating subsection (b) as subsection (c);
- (2) By re-designating subsection (c) as subsection (d);
- (3) By re-designating subsection (d) as subsection (e);
- (4) By inserting after subsection (a) the following:

(b) STUDIES AND ENGINEERING. -When requested by the non-Federal interest the Secretary is authorized to undertake studies and engineering for any feasibility study to be undertaken under

the terms of subsection (a) of this section, if the non-Federal interest contracts with the Secretary to furnish the United States funds for such studies and engineering during the period that they are conducted.

**5. Organizational accountability. Deep draft navigation center of expertise--**add language requiring an annual report to Congress on center staffing, accomplishments and state-of-the-art technology being employed to assist ports and channel deepening studies.

**6. Process streamlining. Eliminate the Recon Report for channel deepening studies.**

Recon reports add time and cost and develop little in the determination of Federal interest. We recommend language be included to eliminate the recon phase of study for feasibility studies that modify an existing Federal project (cutting up to two years off study time). Direct that when a feasibility study is authorized to investigate improvements or modifications to an existing Federal project, the Secretary need not conduct reconnaissance study under Section 905(b) of WRDA 86 as amended.

**7. Process streamlining. Repeal Sec. 2034 Independent Peer Review and Sec. 2035 Safety Assurance Review.**

There is no evidence that these sections included in WRDA 2007 have contributed to the efficiency or accuracy of Corps feasibility studies. In fact, there appear to be time and cost penalties associated with these provisions with no corresponding benefit.

## **8. Process Streamlining. Maintenance of Improved Federal Projects and Navigation**

### **Features.**

(a) FINDING. -- In some instances Federal navigation projects have been improved by non-Federal interests. Such improvements of existing, authorized navigation projects can provide demonstrated economic, operational and/or environmental benefits.

(b) IN GENERAL. -- The Secretary shall be responsible for the maintenance of Federal navigation projects as improved by a non-Federal sponsor if the Secretary determines that such maintenance is economically justified and environmentally acceptable and that the project was improved in accordance with applicable permits and appropriate engineering and design standards. The Secretary shall make an assessment and determination if the non-Federal interest, having made such an improvement to a Federal project, --

(1) Requests in writing that the Secretary undertake such an assessment, and

(2) Contributes materially to the conduct of that assessment.

(c) COMPLETION OF ASSESSMENT. -- Not later than two-years after a request is received, the Secretary shall make a determination as provided in subsection (b) and advise the non-Federal sponsor of the Secretary's determination.

(d) FUNDING OF ASSESSMENT. -- The assessment for the assumption of maintenance responsibility as provided in subsection (b) shall be fully funded as an eligible use of the Harbor Maintenance Trust Fund.

**9. Process Streamlining. Clarify the Eligibility for Cost-sharing Credit of Ports' In-kind Contributions to Disposal Facilities.**

There is uncertainty in whether the cost-sharing credit for ports' in-kind work provided for in Section 2003 of WRDA 2007 would apply to cost-shared disposal facilities for maintenance of existing navigation projects. Corps implementation guidance for Section 2003 does not deal with disposal facilities.

As part of the work group's research, the Port of Cleveland submitted an inquiry on this issue and Corps headquarters determined that Section 2003 of WRDA 2007 does authorize in-kind credit for ports' work on cost-shared disposal areas authorized in WRDA 1996. The basis for this determination by Corps Headquarters is:

The provisions of Section 221 agreements apply to projects authorized in or subsequent to the date of enactment of WRDA 1986 (November 1986).

Section 201 of WRDA 1996 (authorizing Federal participation in disposal areas) represents a "modification" of authorized projects and therefore meets the date threshold of Section 221 as established in WRDA 1986.

The amendment to Section 221 found in Section 2003 of WRDA 2007 does apply to disposal areas carried out pursuant to WRDA 1996, wherein ports may receive credit for in-kind contributions to disposal areas constructed under Section 201 of WRDA 1996.

A crediting agreement consistent with Section 221 would be needed before the sponsor's work commences.

There remains the need to clarify implementation guidance consistent with the policy finding documented here. Discussions in the work group focused on the completion of the Dredged Material Disposal Management Plan as the proposed milestone to trigger the port sponsor's eligibility to seek an in-kind credit agreement for proposed work on the disposal facility.

**10. Process Streamlining. Port Access to User Fees Collected for Corresponding Federal Disposal Facilities.**

Corps districts routinely collect tipping or user fees for placement of non-Federal dredged material in confined disposal facilities. These fees are returned to the Treasury in a designated fund, but must be appropriated for use by the Districts that collect them. Ports support legislation to allow user fees that are collected as port user fees to be expended on the facilities for which they are collected, without appropriation.

WRDA Section 217 (b)(2) provides that, subject to advance appropriations, any monies received through collection of user fees under this subsection shall be available to the Secretary, and shall be used by the Secretary, for the operation and maintenance of the disposal facility from which the fees are collected. Energy and Water Appropriations Acts generally recognize the potential utilization of these user fees by indicating in the discussion of the Operation and Maintenance appropriation that “such funds as become available from fees collected under section 217 of Public law 104-303 shall be used to cover the cost of operation and maintenance of the dredged material disposal facility for which such fees have been collected.” However, these user fees are not recognized as a source for appropriations in the President’s Budget and although a “Fund” was alleged to have been created in the Treasury, there is no indication that the Fund is actively monitored or managed or that the balances in the fund, to the extent they exist, have any role in budgetary or appropriations decisions. Authority exists for use of a portion of recreational user fees collected at Corps projects, and similar authority is desired for the subject user fees.

Consider amending Section 217 of WRDA 1996 to direct that disposal area user fees be available, without further appropriation, to the Secretary of the Army (the Secretary), and shall be used by the Secretary, for the operation and maintenance of the disposal facility from which the fees were collected.

#### **11. Process Updating. Elimination of the 10 Percent Repayment in Harbor Cost Sharing**

Cost-sharing for navigation provides for variable cost-sharing depending on project depth and an “additional” 10 percent share that is paid back over a period of 30 years. Costs for lands, easements, rights-of-way and relocations (LERR) provided by a port for the project are credited against this additional 10 percent share. The additional 10 percent port share, payable over time, results in less funding being available for project construction. The credit against the 10 percent share results in ports not receiving full LERR credit for projects where LERR exceeds 10 percent of project costs.

Consider amending WRDA Section 101 to: 1) increase the project cost-share by 10 percent for each depth zone; 2) eliminate the 10 percent repayment over time; and 3) include required lands, easements, rights-of-way, relocations, and the non-Federal interests share of utility relocations as part of general navigation features and provide credit for the value or costs of these items against the non-Federal share of construction costs.

## **12. Process Updating. Continuing Contracts for Operations**

The current prohibition on ‘continuing contracts’ has burdened the Corps either to wait for full funding of a contract for a project, or to rely on other contracting means such as base plus options, with the hope of obtaining funds in the next appropriation. This has caused delays as well as cost increases, as contractors have to balance the risk of funds not arriving as well as committing assets for an uncertain amount of time. A large majority of navigation projects receive consistent O&M funding on an annual basis. It seems logical that, with construction durations, environmental and other windows, the use of continuing contracts are beneficial for the management of the channels that serve the nation’s ports. While the exact amount of annual funding is uncertain, those projects receiving consistent funding could benefit from their ability to plan and contract based on an average of past appropriations.

Consider amending law to authorize the use of continuing contracts for operations and maintenance of port and harbor projects.

## **13. Process Updating. Advanced Funds Authority for Studies and Maintenance Dredging.**

The Corps has authority (33 U.S.C 561) for acceptance and reimbursement of advanced funds for river and harbor projects. This authority does not extend to studies and it is unclear if it would apply to maintenance dredging. The work group established this action item in order to explore the applicability of this authority for maintenance dredging and, if necessary, to draft legislation extending advanced funds authority to studies and to operations and maintenance.

Communication with Corps Headquarters confirmed that Section 11 of the Act approved March 3, 1925, does not provide authority to accept advanced funds for studies but does authorize the

Secretary to accept advanced funds for operations and maintenance. Headquarters also advised that parties interested in advanced funds should remember that the Appropriations Committees generally discourage acceptance of advance funds because of a perception that they may be obligated to reimburse them. The Administration generally doesn't budget for reimbursement of advances and is reluctant to accept such funds. Current policy requires that before advances can be accepted, the Appropriations Committees must be notified.

Consider amending Section 11 of the Act approved March 3, 1925 (43 Stat. 1197, 33 U.S.C. 561) to provide advanced funds authority for studies.