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Senator Mary Landrieu
United States Senate
Washington, D.C. 20510

Re: Clean Energy Jobs and Oil Company Accountability Act (S. 3663)

Dear Senator Landrieu:

On behalf of The American Waterways Operators (AWO), the national trade association for the inland and coastal tugboat, towboat and barge industry, I am writing to express our industry's deep concern with S. 3663, the Clean Energy Jobs and Oil Company Accountability Act. This legislation would make sweeping changes to the Oil Pollution Act of 1990 (OPA 90) spill prevention and response regime affecting tens of thousands of tank and non-tank vessels, and make fundamental changes to admiralty and general maritime law. The effects of these changes will be far-reaching and damaging for energy transportation and jobs, and affect thousands of businesses unrelated to the *Deepwater Horizon*. We urge Congress to focus its attention on addressing the risks posed by deepwater offshore oil exploration and production and avoid harmful consequences that have not been fully explored amidst the urgency of responding to the Gulf spill.

Deepwater oil exploration and production activities present a vastly different risk profile than the operations of tank and non-tank vessels, which carry finite amounts of oil as cargo or fuel and are already governed by rigorous and effective U.S. Coast Guard regulations. To put these comparative risks in perspective, tank barge spill volumes have plummeted by 99.6 percent since enactment of OPA 90, reaching their lowest recorded level – 4,347 gallons – in 2009. At the height of the *Deepwater Horizon* spill, that same quantity of oil was estimated to be escaping from the ocean floor <u>every two minutes</u>.

The following provisions of S. 3663 are particularly problematic.

<u>Section 104 (Oil and Hazardous Substance Response Planning)</u>

Section 104 would significantly expand the volume of information to be included in response plans submitted by tank and non-tank vessels, duplicating information that is better contained in Area Contingency Plans or other required documentation (such as Certificates of Financial Responsibility) and making vessel response plans less useful as a guide for effective spill response. In conjunction with section 624 (Oil Spill Technology Evaluation), this section also

provides that response plans shall include "best available technology," and be based "on performance metrics and standards wherever practicable."

Both of these requirements are problematic in a response planning context. First, we are concerned that the "best available technology" standard threatens to render unusable large quantities of existing spill response equipment that can and should be used effectively in response to a spill. If, for example, "best available technology" is defined as a skimmer with a rated capacity of *x*, will vessel owners be precluded from relying on skimmers with a rated capacity of one-half of *x*, even if they use twice as many of them? Existing Coast Guard regulations for vessel response plans already specify the level of response capability (e.g., skimmer capacity, boom quantity, etc.) that must be available by contract or other approved means. Restricting plan holders to the use of "best available technology" is akin to telling a fire department that only its newest and most advanced fire engine can respond to an emergency, while leaving older but still effective equipment back at the station.

Second, the term "performance standards" implies that a response plan holder will be in violation of the regulations if an element of the response plan fails to perform as planned. In the 20 years since OPA 90 was enacted, the Coast Guard has repeatedly reiterated that its response plan regulations establish planning standards, not performance standards. This is because, given the many variables at play in vessel incidents, it is impossible for a response resource provider to guarantee that it will perform to the exact specifications of the response plan. Faced with the prospect of civil and criminal liability for failure to meet the response planning regulations, spill response resource providers may decline to enter into contracts required by response plan regulations with vessel owners, leaving those vessels unable to operate and disrupting the transportation of vital petroleum products and other critical cargoes.

Section 502 (Repeal of Shipowners' Liability Act of 1851)

Section 502 amends the Shipowner's Limitation of Liability Act of 1851, tripling existing liability and excluding from limitation claims for wages and claims resulting from a discharge of oil. We continue to urge deletion of this provision for two reasons.

First, the most important aspect of the Limitation Act is the concursus provision, which requires all claims to be brought in a single admiralty forum for adjudication. Excluding wage claims from limitation means that such claims will not be subject to concursus, an important procedural device that provides for consolidation of claims in a single judicial venue. Concursus benefits both claimants and responsible parties by facilitating more timely resolution of claims than would otherwise be the case. Under the language proposed, if an individual is injured, claims for pain and suffering would be required to be brought in a limitation action, while claims for wages could be brought outside the limitation action. Furthermore, the Limitation Act already contains a minimum fund for personal injury damages (including lost wages) separate from the general liability limit. It is unclear how the interplay between injury claims subject to the limitation fund and wage claims brought outside the fund would be administered.

Second, claims for oil pollution are already excluded from the Limitation Act under OPA 90. We believe that the most effective mechanism for addressing maritime claims is through the concursus provision of the Limitation Act. We also note that two international Conventions have been adopted, to which most major maritime nations (except the United States) are signatory. There are effective ways to address the limitation issue, but we do not believe the approach taken in this bill will be either fair or efficacious.

Section 503 (Assessment of Punitive Damages in Maritime Law)

Section 503 would reverse Supreme Court precedent and allow unlimited punitive damages for maritime torts, unrelated to the amount of compensatory damages granted. Unlimited exposure to punitive damages is likely constitutionally flawed[1] and will have significant negative impacts on U.S. maritime interests. Punitive damages are arbitrary and fail to provide predictability for those engaging in commerce. To remove the authority of the federal courts to review the fairness of punitive awards will have severe negative impacts on companies doing business in the United States.

Section 504 (Amendments to the Death on the High Seas Act)

Section 504 would amend the Death on the High Seas Act (DOHSA) to allow damage awards for non-pecuniary losses. The effect of this change on the insurability of maritime commerce is unknown but potentially severe.

Given the breadth of Jones Act and DOHSA remedies available to seamen when compared to shore-based workers, there is no justification for widening the remedies to include non-pecuniary damages, which are not available to shore-based workers. In addition, amending DOHSA to include non-pecuniary damages creates an inherently inconsistent system for seamen. Seamen who die on the high seas have remedies both under the Jones Act (for negligence) and under DOHSA for unseaworthiness. We also note that fishing vessels, but not other types of U.S.-flag vessels, are excluded from this amendment. This distinction is unwarranted and unfair.

Finally, we note that expanding DOHSA threatens to overburden the U.S. court system, which will become the forum of choice for foreign claimants for any claim that has any connection to the United States.

Section 506 (Effective Date)

Section 506 applies the changes in Title V of the Act retroactively to actions and claims arising after April 19, 2010, as well as to actions initiated before enactment of the legislation that have not been fully adjudicated. Changing the governing legal framework for claims already underway will needlessly complicate and prolong cases currently in the court system and impede the timely resolution of claims, to the detriment of both vessel owners and claimants.

[1] *See State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408.

Section 628 (Notice to States of Bulk Oil Transfers)

Section 628 would authorize a state to require, by law, 24-hour advance notice to the state and to the Coast Guard of bulk oil transfers of 250 barrels or more. This requirement, which has been proposed in previous legislation but never passed, has no connection to the *Deepwater Horizon* spill and threatens to interrupt the just-in-time delivery of vital energy supplies to industrial users and consumers, with dubious environmental benefit and potentially serious safety consequences. Current Coast Guard regulations already establish effective requirements for ensuring the safety of oil transfers, and the dynamic nature of vessel operations and scheduling means that it is not always possible to provide 24-hour advance notice of an impending transfer. This requirement could stop a tank barge from resupplying a facility with critically low fuel supply, or, even more seriously, prevent a tank barge from taking on product to relieve an overflowing shore tank.

Section 630 (Vessel Liability)

Section 630 would more than double liability limits under OPA 90 for tank barges carrying oil, based on the recommendations of a 2009 report from the Coast Guard's National Pollution Funds Center. The assumptions and methodology used in this report are questionable and bear further scrutiny before its recommendations are adopted in legislation or regulation.

Conclusion

We urge Congress to focus its legislative response to the *Deepwater Horizon* on reducing the risks associated with deepwater oil exploration and production, and not do harm to economically essential maritime transportation by enacting sweeping changes to prevention, response and liability requirements for tank and non-tank vessels. The impact of the proposed changes is at best not fully understood, and at worst, could have severe negative impacts on a critical sector of the U.S. transportation system at a time of high unemployment and continuing weakness in the U.S. economy.

Thank you for your consideration.

Sincerely,

Jennifer A. Carpenter