

# Donor & Energy Transfer Port Funding: Frequently Asked Questions (FAQs)

**Question 1:** What is the overall authorized amount available to Donor Ports and Energy Transfer Ports?

**Answer:** The non-HMTF funding authorization in 33 USC 2238c for these ports ranges from \$58 million in FY24 to \$70 million in FY30. The funding authorization in Section 102 of WRDA 2020 is 12% of annual appropriations for harbor operations and maintenance (which typically is appropriated from the HMTF), which for FY24 would be \$332.5 million based on the House and Senate's identical amounts of appropriations from the HMTF. How much is actually provided for FY24 will depend on the final FY24 HMTF appropriation and any specific instructions the Congress provides on the donor port and energy transfer port allocation. Future FY authorization levels for Section 102 of WRDA 2020 funding for these ports is expected to be 12% of the total of prior year HMTF revenue plus an increasing amount of the remaining balance in the HMTF, but will depend on how much the Congress actually appropriates for this purpose. The memo does not attempt to project future amounts of HMTF funding.

**Question 2:** Section 102 of WRDA 2020 authorizes 12% “of such funds” for expanded uses carried out at donor ports and energy transfer ports. Does “such funds” mean all O&M costs assigned to commercial navigation, including the Harbor Maintenance Trust Fund (HMTF)? Or does it mean just the HMTF funding made available for that fiscal year?

**Answer:** While the statute authorizes the 12% to be applied to both HMTF appropriations and non-HMTF general fund appropriations for harbor operations and maintenance, in practice the Congress no longer appropriates non-HMTF funding for harbor maintenance since the HMTF was created. The non-HMTF funding for donor ports and energy transfer ports is for expanded uses, not harbor maintenance, so it is not included in this calculation.

**Question 3:** Section 102 directs the Secretary to make certain expenditures with caveats such as “to the extent practicable, unless otherwise directed in an Act making

appropriations for the Corps of Engineers” and “to the extent there are identifiable operations and maintenance needs”. If an appropriations bill/report provides a portion of the authorized funding in a funding pot but is silent otherwise and the eligible ports can sufficiently show there are identifiable O&M needs, is the Corps obligated to provide the authorized level for Donor Ports and Energy Transfer Ports?

**Answer:** The inclusion of the phrase “to the extent practicable” in the statute allows the Corps to determine that providing 12% of annual HMTF appropriations to donor ports and energy transfer ports is “not practicable,” but the basis for making such a determination should be explained in a Corps guidance document. The Congress may direct the Corps through appropriations acts to provide this 12% allocation regardless of the statute’s “to the extent practicable” phrase.

#### **Question 4:**

(A) Does the Authorization of Appropriations clause in Section 104 limit the amount of funding that can be provided directly to a port to the amounts in that provision (e.g. \$56M in FY23)?

(B) If that is the case, is the reasonable assumption that the 12% for expanded uses in Section 102 (or the balance if a payment to a port included expanded uses) would be executed by the Corps as a part of their O&M work?

(C) Is the 2238c appropriation provided directly to ports for expanded uses and environmental remediation?

#### **Answer:**

(A) Yes. While the Congress sometimes appropriates more funding for a program than is authorized in statute, in this case the statute also limits the authority to provide only up to the authorized amount of funds directly to eligible ports.

(B) While Section 102(a)(1) of WRDA 2020 begins by referencing the Corps carrying out 33 USC 2238 and expending annual appropriations provided for “operation and maintenance costs of the harbors and inland harbors”, which the Corps would typically execute contracts to perform, Section 102(a)(1)(C) authorizes the 12% of annual harbor operations and maintenance appropriations allocated for donor ports and energy transfer ports to be provided “to” those ports for expanded uses, which is a similar construct as the 33 USC 2238c authorization for how the Corps provides non-HMTF funding directly to those eligible ports.

(C) Yes. While the authorized use of 33 USC 2238c authorized funding (non-HMTF) to provide payments to importers entering cargo through that port, as calculated by the Secretary according to the value of discretionary cargo, is executed by Customs and Border Protection in coordination with the eligible port, funding for the other two uses is provided directly to eligible ports.

**Question 5:** Does the Authorization of Appropriations clause in Section 104 limit the amount available for payments to importers or environmental remediation to the amounts in that provision since the 12% in Section 102 only provides for “expanded uses”?

**Answer:** While funding provided to donor ports and energy transfer ports through 33 USC 2238c (non-HMTF) may continue to be used for payments to importers, expanded uses, and environmental remediation, funding provided to eligible ports through Section 102(a) of WRDA 2020 may only be used for expanded uses. It is our understanding that this was intended by Congress to limit uses of donor port and energy transfer port HMTF allocations to those uses that are most similar to other uses of HMTF funds, as uses of Harbor Maintenance Tax revenue are subject to international trade agreements regarding the taxation of imports.