No. 13-462

IN THE

Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY;
CITGO PETROLEUM CORPORATION;
CITGO EAST COAST OIL CORPORATION,
Petitioners,

v.

FRESCATI SHIPPING COMPANY, LTD.;
TSAKOS SHIPPING AND TRADING, S.S.;
AND UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PLAINS PRODUCTS TERMINALS LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amicus Curiae, Plains Products Terminals, LLC ["Plains"], is the owner and operator of the "Paulsboro Terminal," a marine terminal located on the Delaware River in Paulsboro, New Jersey.[1] It is authorized to operate the Paulsboro Terminal pursuant to a permit issued by the Army Corps of Engineers ["ACOE"] under the authority of 33 USC § 403.

The Petition for Writ of Certiorari raises a question of exceptional importance to Plains and other marine terminal operators, namely the nature and extent of the terminal operator's duty under the general maritime law as "wharfinger" to provide a safe berth and safe approach thereto at its terminal.

Plains believes the Third Circuit's decision imposes unprecedented tort liability on a marine terminal operator, and unfairly makes the terminal operator responsible to maintain federal navigation channels and federal anchorages. The Third Circuit's decision unreasonably expands the terminal operator's responsibilities as wharfinger beyond that which has been previously required of a wharfinger under the general maritime law and beyond that which is required by the ACOE permit authorizing the operation of a marine terminal. The Third Circuit's decision is contrary to longstanding judicial precedent regarding the wharfinger's duty, and is contrary to the statutory and regulatory scheme imposed on the

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[1] Pursuant to S.Ct. R. 37.6, this is to certify that no counsel for any party authored this brief, in whole or in part, and no person or entity other than amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to S.Ct. R 37.2(a), counsel of record for all parties received timely notice of *Amicus Curiae*'s intention to file this brief, and each has given written consent to the filing of this brief.

federal government for the operation and maintenance of federal waterways.

Plains further believes the Third Circuit's decision imposes an unfair financial burden on the marine terminal operator, requiring the terminal operator to perform the tasks of dredging, surveying and maintaining federal ship navigation channels and anchorages which lie outside the boundaries of the terminal. Plains is greatly concerned the Third Circuit's decision requires marine terminal operators to assume responsibility for channel maintenance of federal waterways, notwithstanding that the federal government is responsible to maintain those waterways.

Therefore, Plains Products Terminals LLC submits it has a vital interest in the issue raised by Petitioners and that its views can assist the Court in deciding whether certiorari should be granted.

STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petition for a Writ of Certiorari presents the question whether a wharfinger's duty under the general maritime law to provide a safe berth and safe approach thereto extends into federally created, regulated and maintained navigation channels and anchorages, which waters are outside the permit boundaries of the wharfinger's terminal over which the wharfinger does not exercise (and is not authorized to exercise) dominion and control, and which waters by statute and regulation, the federal government is responsible.

There are compelling reasons which warrant the granting of a writ of certiorari to review the Third Circuit's decision in this case:

(1) The Third Circuit's decision is in conflict with the decision of the U.S. Supreme Court in *Smith v. Burnett* [2], and is in conflict with the decisions of the several federal circuit courts and district courts that have construed the Supreme Court's opinion, all of whom have refused to extend a wharfinger's duty to provide a safe berth and approach thereto into federally regulated navigation channels and anchorages over which the wharfinger does not exercise dominion and control.

(2) The Third Circuit's decision has so far departed from the longstanding and accepted rulings of the federal circuit courts and district courts, regarding the nature and extent of the wharfinger's duty to provide a safe berth and safe approach, as to warrant the exercise of the Supreme Court's supervisory power.

(3) The Third Circuit's decision is contrary to the federal statutory and regulatory scheme regarding the operation and maintenance of federal waterways as to warrant the exercise of the Supreme Court's supervisory power.

(4) The Third Circuit's decision imposes unprecedented tort liability on the marine terminal operator—making the wharfinger the "guarantor" of the absence of underwater hazards and obstructions in federally created, controlled and maintained navigation channels

[2] 173 US 430, 19 S.Ct. 442, 43 L.Ed. 756 (1899).

and anchorages—which has not been recognized by any other court, such that the exercise of the Supreme Court's supervisory power is warranted.

The Third Circuit's decision involves a question of exceptional importance to the maritime industry because it creates unprecedented tort liability on marine terminal operators not recognized in the other federal circuits. The wharfinger's standard of care has been increased to that of "guarantor," and the wharfinger's duty to provide a safe berth and approach has been extended into federally regulated and maintained navigation channels and anchorages beyond the boundaries of the wharfinger's federal permit issued under 33 USC § 403, over which waters the wharfinger does not exercise (and is not authorized to exercise) dominion or control. The Third Circuit's decision imposes an unfair financial burden on marine terminal operators to perform and absorb the costs of channel maintenance in federal navigation channels and federal anchorages, notwithstanding that federal statutes and regulations provide that the federal government is responsible for such channel maintenance functions.

Amicus Curiae submits the Third Circuit's decision so far departs from the accepted and usual course of judicial proceedings regarding the nature and extent of the wharfinger's duty, and is so contrary to the federal statutory and regulatory scheme for the operation of federal waterways, as to call for the exercise of the Supreme Court's supervisory power in this case. Therefore, Amicus Curiae supports the Petition for a Writ of Certiorari to review the Third Circuit's decision.

SUMMARY OF ARGUMENT

Amicus Curiae submits the Third Circuit's decision regarding what constitutes an "approach" to a berth is an unprecedented, unreasonable and unworkable expansion of the wharfinger's duty under the general maritime law to provide a safe berth, not previously recognized by this or any other court. The Third Circuit's decision is contrary to the Supreme Court's decision in *Smith v. Burnett*[3] and is contrary to established precedent among the various federal circuit and district courts. The Third Circuit decision is based on a fundamental misunderstanding regarding the purpose of the terminal operator's ACOE permit and a fundamental misunderstanding of the federal statutory and regulatory scheme for the operation and maintenance of federal waterways. The Third Circuit's decision subjects the terminal operator to unprecedented tort liability exposure, making the terminal operator the "guarantor" of the safety of federal navigation channels and anchorages near its terminal, and requiring the terminal operator to assume the responsibilities of the federal government to dredge and survey those federally controlled waters.

The Third Circuit's decision imposes unprecedented tort liability exposure on the marine terminal operator not heretofore recognized by the courts. The Third Circuit's decision increases the wharfinger's standard of care from one of "reasonable diligence" to that of "guarantor," and expands the terminal operator's responsibility to include channel maintenance functions outside the geographic boundaries of the terminal and in federally created, regulated and maintained ship navigation channels and anchorages.

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[3] 173 US 430, 19 S.Ct. 442, 43 L. Ed. 756 (1899).

The Third Circuit's decision ignores the federal statutory and regulatory scheme regarding the operation of federal navigation channels and anchorages, and places an unfair financial burden on terminal operators in the conduct of their terminal operations, requiring them to dredge, survey and maintain federal ship navigation channels and federal anchorages, simply because those waters might be in the "vicinity" of the terminal, and therefore may or may not constitute an "approach" to the terminal's berth for purposes of triggering the wharfinger's duty.

ARGUMENT

1. The Third Circuit's decision is contrary to the Supreme Court's decision in *Smith v. Burnett*, and is contrary to the decisions of the federal circuit courts and district courts regarding the wharfinger's duty under the general maritime law.

As first set forth by the Supreme Court in *Smith v. Burnett*[4] , and until now, as consistently followed by the decisions of the federal circuit courts and district courts, the wharfinger's duty under the general maritime law to provide a safe berth comprises the following components: (1) the wharfinger does not guarantee or insure the safety of ships coming to its wharf; (2) the wharfinger is under a duty to exercise reasonable care to furnish a safe berth, which includes the duty to ascertain the conditions at its berth and to warn the ship of any hidden hazard known, or which in exercise of reasonable care and inspection, should have been known to the wharfinger; (3) the wharfinger's duty extends only to the berth and the immediate approach to the berth; and (4) there is no duty to

[4] 173 US 430, 433, 19 SCt 442, 443, 43 L. Ed. 756 (1899).

provide a berth with safe surroundings, other than an entrance and an exit, nor is there a duty to warn that hazards exist in the surrounding vicinity of the wharf.[5]

The wharfinger's standard of care is that of "reasonable diligence," and tort liability is premised on a finding of negligence. The marine terminal operator is not subject to strict liability as a wharfinger, and the terminal operator is not the guarantor of the ship's safety or the guarantor of the absence of hazards and obstructions in waters which pass by the terminal.[6]

The wharfinger's duty extends only to its dock and the immediate area around its dock over which it exercises dominion and control.[7] That "immediate area"

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[5] *In Re Complaint of Nautilus Motor Tanker Co. Ltd*., 862 F.Supp 1260, 1275-76 (D.N.J. 1994), aff'd 85 F.3d 105, 114-15 (3rd Cir. 1996); *Trade Banner Line, Inc. v. Caribbean Steamship Co*., 521 F.2d 229, 230 (5th Cir. 1975); *Western Bulk Carriers v. United States*, 1999 AMC 2818, 2826,1999 WL 1427719; *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977); *Sonat Marine, Inc. v. Belcher Oil Co*., 629 F.Supp. 1319 (D.N.J. 1985), aff'd 787 F.2d 583 (3rd Cir. 1986); *Pan-American Grain Manuf. Co. v. Puerto Rico Ports Auth*.,121 F.Supp.2d. 710, 716 (D.P.R. 1999), aff'd 295 F.3d 108, 114-15 (1st Cir. 2002); *Bouchard Transp Co. v. Tug Gillen Brothers*, 389 F.Supp. 77, 82-83(S.D.N.Y. 1975); *Berwin-White Coal Co Mining Co v. New York*, 135 F2d 443, 445-46 (2d Cir. 1943); *Orduna S.A. v. Zen-Noh Grain Corp*., 913 F2d 1149,1152 (5th Cir. 1990).

[6] *Id.*

[7] See *Trade Banner Line, Inc. v*. Caribbean Steamship Co., 521 F.2d 229, 230 (5th Cir. 1975); *Western Bulk Carriers v. United States*, 1999 AMC 2818, 2826,1999 WL 1427719*7 (E.D.Cal 1999) ; *In re Complaint of Nautilus Motor Tanker Co., Ltd*. 862 F.Supp. 1260, 1275-76 (D.N.J. 1994), aff'd 85 F.3d 105, 116 (3rd Cir. 1996) ; *Bouchard Transp Co.v. Tug Gillen Brothers*, 389 F. Supp. at 82-83; *Osprey Ship Manu. Inc. v. Jackson County Port Auth*., 2007 WL 4287701, *10-11 (S.D.Miss. 2007), aff'd 387 Fed. Appx. 425, 2010 WL 2725236 (5th Cir. 2010).

for which the wharfinger is responsible is and must be confined to the area within the geographic boundaries delineated in the ACOE permit.

Until now, no court has held the wharfinger responsible for hazards to navigation in waters over which the wharfinger does not exercise dominion or control, and certainly no court has imposed on the wharfinger the duty to dredge, survey, inspect or maintain the navigable waterways over which the federal government exercises regulatory dominion and control, such as the Delaware River Navigation Project and Federal Anchorage No. 9. Until now, no court has held the wharfinger responsible to maintain the safety of the waterways beyond the boundaries of its terminal permit.[8]

Ignoring longstanding judicial precedent, the Third Circuit in this case has now fundamentally changed the wharfinger's duty to provide a safe berth. The Third Circuit has increased the wharfinger's standard of care from "reasonable diligence" to that of "guarantor," and has extended the reach of the wharfinger's new duty to include responsibility to maintain federal navigation channels and federal anchorages which lie outside the geographic boundaries of the terminal, notwithstanding that the terminal operator does not and cannot exercise dominion or control over those waters. The Third Circuit's decision makes the terminal operator the

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[8] *Id*. However, where the terminal operator did exercise dominion and control outside the area of its ACOE permit, the terminal operator has been held responsible for the consequences. See *Sonat Marine, Inc. v. Belcher Oil Co*., 629 F.Supp. 1319, 1326-27 (D.N.J. 1985), aff'd 787 F.2d 583(3rd Cir. 1986); *Bouchard Transp. Co v. Tug Gillen Bros*. 289 F.Supp. 77, 82-83 (SDNY 1975).

"guarantor" of the safety of the waters outside the terminal's geographic boundaries, and makes the terminal operator guarantee the safety of ships as they transit through federal waterways on their way to the terminal operator's dock.

It is important to note that no negligence was found on the part of CARCO as terminal operator in this case. The abandoned anchor was located some 900 feet from the CARCO dock inside Federal Anchorage No. 9. The evidence established, the District Court found, and the Third Circuit did not dispute, that CARCO had nothing whatsoever to do with the presence of the submerged anchor on the riverbed of Federal Anchorage No. 9. and that CARCO did not know and had no reason to know that the anchor was there or that it presented a hazard to navigation. No negligence on the part of CARCO was found. Nevertheless, the Third Circuit held that the terminal operator was responsible for the presence of the anchor and for failing to issue warnings about it, in effect imposing strict liability on the terminal operator and making the terminal operator the "guarantor" of the safety of the federal navigation channels and federal anchorages, notwithstanding those waters were outside the terminal's dominion and control, and more important, notwithstanding that the federal government had responsibility for those waters.

The Third Circuit's action is unprecedented and finds no support in the case law. No court has ever recognized the wharfinger's duty to be anything more than the exercise of "reasonable diligence," and no court has ever extended the wharfinger's duty beyond the boundaries of its terminal out into federally controlled and maintained waters. No court has ever required the wharfinger to guarantee the absence of

underwater hazards and obstructions, at its dock, or near its dock, or anywhere else.

Therefore, *Amicus Curiae* submits the Third Circuit's alteration and expansion of the wharfinger's duty to provide a safe berth is unprecedented and contrary to established general maritime law, warranting the granting of a writ of certiorari.

2. The Third Circuit's decision is contrary to the federal regulatory scheme for the operation of federal waterways and is based on a fundamental misunderstanding as to the purpose of the terminal operator's ACOE permit.

The Third Circuit's decision not only conflicts with the decisions of the Supreme Court and federal circuit and district courts, the Third Circuit's decision is also contrary to the federal statutory and regulatory scheme Congress has created for the operation and safety of this nation's waterways. In a series of statutes, Congress has outlined a plan for the creation, regulation, preservation and safety of navigable waterways throughout the United States. Congress has charged the Army Corp of Engineers, Coast Guard and the National Oceanic and Atmospheric Administration with joint and overlapping responsibility to create, regulate and maintain federal ship navigation channels and federal anchorages.[9] These federal agencies have in turn promulgated regulations to carry out their responsibilities, including regulations

[9] *See* 33 USC § 1; 33 USC §§403, 404, 407, 409, 414 &415; 33 USC §§ 471-472; 33 USC §§ 540 et seq; 33 USC §§ 1221-1251; 33 USC §§ 1951-1958.

pertaining to the dredging, surveying and inspection of those federal waterways.[10]

None of these statutes and regulations impose on the terminal operator responsibility to dredge, survey or maintain federal waterways outside the boundaries of its terminal. Responsibility to dredge federal waterways rests with the ACOE, responsibility for surveying federal waterways rests with NOAA, and overall responsibility for the safety of federal waters rests with the Coast Guard and ACOE.[11] These statutes and regulations impose the obligation to maintain the safety of federal ship channels and federal anchorages on these three federal agencies, and not on private marine terminals located along the banks of those waterways.

The Delaware River Navigation Project is one such federal waterway created and regulated by these statutes.[12] The Delaware River Navigation Project consists of a dredged navigation channel from Camden, New Jersey to the river's mouth, and includes some sixteen federal anchorages created, regulated and maintained by the federal government. Federal Anchorage No. 9 is one of those federal anchorages.[13]

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[10] See 33 CFR pts 109-110; 33 CFR pt 165; 33 CFR pt 207; 33 CFR pt 245; 33 CFR pts 320, 322 & 330.

[11] See 33 USC § 1; 33 USC §§403, 404, 407, 409, 414 & 415; 33 USC §§ 471-472; 33 USC §§ 540 et seq; 33 USC §§ 1221-1251; 33 USC §§ 1951-1958; 33 CFR pts 109-110; 33 CFR pt 165; 33 CFR pt 207; 33 CFR pt 245; 33 CFR pts 320, 322 & 330.

[12] See 33 USC §§ 540 et seq; 33 CFR pt 207.100; 33 CFR pt 165.510-.511; 33 CFR pt 110.157.

[13] The boundaries of Federal Anchorage No. 9 are authorized under 33 USC § 1 and 33 USC §§ 471-472 and are set forth in Coast Guard regulation 33 CFR pt. 110.157 (a)(10).

Federal Anchorage No. 9 is not and cannot be an "approach" to the CARCO terminal or to any other terminal on the Delaware River. Federal Anchorage No. 9 and the other fifteen federal anchorages are designated as "anchorages" pursuant to statute and regulation.[14] Nowhere in the statute or regulation does the ACOE or Coast Guard designate Federal Anchorage No. 9 or any other anchorages on the Delaware River as an "approach" or "turning basin."

Nowhere in the federal statutory and regulatory scheme has either Congress or ACOE or Coast Guard or NOAA charged private marine terminals or other private users of federal navigation channels and anchorages, such as the Delaware River Navigation Project, with the responsibility to dredge, survey or maintain those channels and anchorages. Nowhere in the federal statutory or regulatory scheme has any federal agency deferred or transferred its regulatory authority over these navigation channels and anchorages to a private marine terminal. The federal statutory and regulatory scheme is quite clear that the maintenance of federal navigation projects, such as the Delaware River Navigation Project (and the federal anchorages contained therein), is the responsibility of the federal government and not that of private commercial interests.

The Third Circuit's decision is also based on a fundamental misunderstanding as to the purpose of the terminal operator's ACOE permit. In holding CARCO responsible as wharfinger for the waterfront area outside the boundaries of its terminal permit, the Third Circuit stated that the permit area was a "self-described area of responsibility" by CARCO derived

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[14] See 33 USC §§471-472, 33 CFR pt 110.157(a)(1-17).

from CARCO's terminal predecessor's request to the ACOE for approval of a maintenance dredging permit. The Third Circuit rejected CARCO's argument that it should not be required to dredge and survey federal waters outside the boundaries of its ACOE permit because it did not exercise dominion and control over those waters.

However, it is the ACOE permit that authorizes the construction and continued operation of the terminal along the shoreline of a federal waterway such as the Delaware River. The presence and operation of the marine terminal is subject to and governed by the requirements set forth in the ACOE permit.

The federal government has a navigation servitude over the navigable waters of the United States which extends the entire reach of the navigable waterway from riverbank to riverbank.[15] The rights of any riparian land owner, such as a marine terminal operator, is subject to the federal government's navigation servitude over the waters which pass the terminal.[16]

Congress has charged the ACOE with the regulatory responsibility over ensuring that navigable waterways remain unobstructed and safe for navigation, and with regulatory authority over such projects as navigational improvements to and maintenance of federal navigation channels and anchorages, such as those on the Delaware River.[17] The ACOE is also

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[15] *Kaiser Aetna v. United States*, 44 US 164, 100 S.Ct., 62 L. Ed. 2d. 332, 383 (1979). See 33 USC § 1.

[16] *Id.*

[17] *Japan Line Ltd. v. United States* 1979, AMC 355 (E.D.Pa. 1975) aff'd 547 F.2d 1161 (3rd Cir. 1976); *United States v. Stoeco Homes Inc.* 498 F.2d 597 (3rd Cir. 1974). See 33 USC § 1; 33 USC

charged with the regulatory responsibility for the construction of marine terminals and other facilities along the navigable waters of the United States.[18]

33 USC § 403 prohibits the construction or creation of any obstruction (such as a marine terminal) on the navigable waters of the United States unless authorized by a permit issued by the ACOE. The ACOE permit authorizes the construction and operation of a marine terminal on navigable waters.

Marine terminal operators and other wharfingers exercise dominion and control over their berths pursuant to the terms of the terminal permit issued by the ACOE under 33 USC § 403. The ACOE permit sets forth the geographic boundaries of the area in which the terminal operator can construct and operate its terminal. The ACOE permit sets forth the agreement between the ACOE and the terminal operator regarding the area for which the terminal operator will exercise dominion and control and be held responsible.

The ACOE permit is issued with the expectation by both the ACOE and the terminal operator that the terminal operator will be responsible for maintaining the waterway inside the geographic boundary limit in the permit, but with no expectation by either the ACOE or the terminal operator that the operator will be required to dredge, survey or maintain the waters outside of its designated permit area. The ACOE permit is issued with no expectation by either the ACOE or any other federal agency that the terminal

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§§ 403, 404 & 414; 33 USC §§ 471-72; 33 USC § 540 et seq.; 33 CFR pts 320, 322; 33 CFR pts 109 & 110.

[18] 33 USC §§ 403 & 404; 33 CFR pts 320, 322 & 330. *See* 33 USC § 1.

operator will be required to dredge, survey and maintain the waters within a federal navigation project, such as the Delaware River Navigation Project and Federal Anchorage No. 9.

The terminal operator's responsibilities and obligations are confined to that designated "permit area" because that is precisely the area in which the ACOE has authorized the terminal operator to exercise dominion and control. The terminal operator has no authority, and consequently no duty or responsibility, outside the boundaries of the terminal area indicated in the ACOE permit. The waters outside the permit are and remain exclusively under the regulatory authority and responsibility of the federal government.

Contrary to the Third Circuit's view, the "area of responsibility" exercised by terminal operators at their terminal is not a voluntary assumption of duty or a self-imposed restriction on the exercise of duty. Although the original ACOE permit is based on an application filed by the original terminal owner, the Third Circuit was mistaken in its belief the wharfinger voluntarily limits the geographic scope of its authority and responsibility at its terminal in its permit application. The boundaries of the terminal area delineated in the original permit, and therefore, the limits of the terminal operator's authority over the waterfront of its facility, are based on the agreement by the ACOE and other federal agencies as to those boundaries. The geographic scope of the terminal operator's responsibility is delineated by the ACOE in the original ACOE permit only after the ACOE and other federal agencies have agreed the construction and presence of the terminal will not obstruct or restrict safe navigation. Neither CARCO nor any

other terminal operator can legally extend or expand the geographic area of responsibility at their terminal without obtaining a new permit or amending the original permit.[19]

Nowhere in the original ACOE permit does it authorize or require terminal operators to exercise dominion and control outside the permit area, and nowhere in the permit does it authorize the terminal operator to take any action or perform any project outside the permit area. Any new construction, any new extension of dock facilities—any action by the terminal operator outside the permit area—requires the terminal operator to obtain a new or amended permit, and that is because the area outside the permit area is under the federal government's exclusive control.

Therefore, the area of dominion and control exercised by any terminal operator at its terminal is restricted to the area set forth in the ACOE permit. Requiring the terminal operator to dredge, survey and maintain the waters outside the permit area, which is exactly what the Third Circuit has done in this case, constitutes a violation of the terminal's ACOE permit. The terminal operator is simply not authorized by the ACOE permit to conduct the sort of maintenance activities over federal waters which the Third Circuit would now impose on the terminal operator, and it is for that reason the Third Circuit's decision cannot stand.

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[19] 33 USC § 404, See 33 CFR pts 320, 322 & 330; 33 CFR pt 322.3(a).

3. The Third Circuit's decision is unworkable and imposes an unfair financial burden on marine terminal operators to perform the channel maintenance functions required of the federal government.

The Third Circuit's test for what constitutes an "approach" for purposes of triggering the wharfinger's duty is unworkable, unrealistic, and it is unfair. It is unworkable and unrealistic because it is based on the flawed premise that there is a "usual path" the ships take in docking at a particular wharf. The problem is that the so-called "usual path" simply does not exist. It is unfair because it imposes a severe financial burden on terminal operators to perform the channel maintenance tasks in federal waterways for which the federal government is responsible.

The Third Circuit applied an expansive definition of "approach" to enlarge the geographic scope of the wharfinger's duty. The Third Circuit held that the "approach" occurs "when the ship transitions from its general voyage to a final direct path to its destination" and "in most instances would begin when the ship makes its last significant turn from the channel towards its appointed destination following the usual path of ships docking at that terminal."

Although seemingly logical and simple, the Third Circuit's test for "approach" is unworkable and unrealistic, as it fails to understand the many factors which influence the decision how a particular docking pilot approaches and docks a ship at a particular wharf. The "path" chosen to a particular wharf is a decision made by the ship's local docking pilot, and will vary from ship to ship—and from pilot to pilot—and will turn on many factors, including: (1) prevailing

whether conditions, (2) whether it is "high" river or "low" river or high tide or low tide, (3) the stage and strength of the river current, (4) river depth, (5) vessel traffic in the area, (6) wharf configuration and layout, (7) size, configuration, and draft of the vessel, (8) necessity for and the number of assisting harbor tugs, (9) in the case of tankers, the location, configuration and layout of the ship's cargo manifolds, (10) whether the ship will moor portside or starboard side to the dock to facilitate cargo loading or discharge operations, and (11) such other factors within the sole province of the ship's docking pilot. There may even be times when a docking pilot will go past the wharf and turn the ship around and dock the ship "headed downriver" in order to accommodate the ship's loading or discharging at the terminal.

The terminal operator has very little to do (if anything) with determining how a ship chooses to approach its dock. The terminal simply has no ability to predict or control the navigational decisions of the vessel, and by defining "approach" in terms of the navigational choices made by each arriving or departing ship, rather than on a known geographic area, the Third Circuit leaves the definition of "approach" not to the terminal operator who has the duty to provide a safe berth, but to the ship's pilot. There is simply no "usual path" to a particular wharf, and the terminal has no means of predicting the decision-making of each individual pilot and ship that calls at its terminal. Imposing on a wharfinger the responsibility to maintain waters outside its dominion and control in order to anticipate each and every pilot's decision on how to "approach" its dock, simply leads to confusion, uncertainty, and certainly higher operating costs. The Third Circuit's definition of what

constitutes an "approach" is simply unworkable and unrealistic.

The Third Circuit's decision raises many questions. There are some 31 marine terminals operating on the banks of the Delaware River. Under the Third Circuit's decision, where does each terminal operator's responsibility to dredge, survey and maintain waters at or near its terminal dock start and where does that responsibility end? If the terminal operator's responsibility includes federal waterways away from and outside the terminal's boundaries, then "where" does the terminal operators responsibility start and where does it end? How far out from the terminal into the river and how far upriver or downriver from the terminal does the terminal operator's responsibility reach?

How much of the federal navigation channel and federal anchorage will the terminal operator be responsible? In this case the abandoned anchor was located some 900 feet from the terminal dock and inside the federal anchorage, but what if the anchor was found 2000 feet from the dock? What about a situation where the abandoned anchor was located on the western side (Philadelphia side) of the river but still in the anchorage or in the navigation channel? Does the terminal operator's responsibility continue out into the channel simply because vessels transit the channel when proceeding to or from the terminal's berth or to berths upriver or downriver or across from the terminal? The fact that the ship struck the anchor when the ship happened to be some 900 feet from the terminal's dock is hardly sufficient to impose responsibility or liability on the terminal operator. The distance itself cannot be used as a determining factor because otherwise, whenever and wherever a

vessel struck an object, the vessel would claim the terminal operator closest to the casualty was at fault.

And if there is a terminal located across the river, which of those two terminals have the responsibility to dredge, survey and maintain the federal navigation channel and federal anchorage that lies between them? What about neighboring terminals - does the path of a ship to a neighboring terminal require the terminal operator to dredge and survey federal waters downriver or upriver or across from it simply because the path of the ship to the neighboring terminal crosses or transits the path to its terminal? Does the "approach" to one terminal overlap or intrude onto the approach of a neighboring terminal's area of responsibility or a terminal upriver or downriver from that terminal?

Why should terminal operators be forced to increase their dredging and surveying budgets to include such operations in waters that are outside their ACOE permit boundaries and are in waters in which the federal government has exclusive regulatory responsibility? Both the vessel and the terminal operator should be able to rely on the federal government to perform its responsibilities for dredging, surveying and maintaining federal navigation channels and anchorages, but yet under the Third Circuit's decision, when and where does this occur? If the terminal operator is responsible to dredge outside the geographic limits of its permit, then when and where will the federal government take on its statutory responsibilities to dredge, survey and maintain federal waterways? Terminal operators should be able to rely on the fact that the federal agencies charged with responsibility for the safety of the federal waterways will perform their statutorily

imposed duties. The unreasonableness of the Third Circuit's decision in expanding the definition of "approach" is obvious.

The Third Circuit's test for what constitutes an "approach" is also extremely unfair. The Third Circuit's decision imposes an unfair financial burden on the terminal operator in that it requires the terminal to perform and absorb the cost of channel maintenance functions in federal channels and anchorages, notwithstanding that the federal government is charged with the responsibility to perform those functions. The effect of the Third Circuit's decision then is to substantially increase the terminal operator's operating costs to monitor and maintain navigable waterways outside the boundaries of its ACOE permit, waterways which the terminal operator does not exercise and is not authorized to exercise dominion and control, and waterways for which the federal government has regulatory responsibility.

The economic impact of the Third Circuit's decision will have far reaching ramifications to marine terminals if the decision is allowed to stand. If a terminal operator is going to be compelled to dredge, survey and maintain federal navigation channels and federal anchorages simply because a particular pilot chooses to steer a particular vessel to a particular wharf in such a manner that it may or may not cross or transit those waters in its "path" to the dock, then the terminal operator's operating costs and liability exposure will skyrocket. The terminal operator simply cannot base its operating budget on whether or not the federal government chooses to exercise its regulatory authority to dredge, survey and maintain federal navigation channels and anchorages.

This is simply an unfair financial burden to impose on a private marine terminal. Dredging, surveying, maintaining and monitoring federal waterways is, always has been and should always remain the responsibility of the federal government, and not private industry. Only the federal government has the financial resources to undertake the task of dredging, surveying and inspecting federal waterways, and since the federal government is charged by statute and regulation with the responsibility for those tasks, it should be the federal government (and not private industry) that is required to perform them.

CONCLUSION

The effect of the Third Circuit's decision is to render terminal operators "guarantors" of the federal waters outside their permit area, which is contrary to the Supreme Court's rule in *Smith v. Burnett* and contrary to the many decisions of the federal circuit and district courts construing and applying that ruling. The Third Circuit decision is also contrary to the federal statutory and regulatory scheme which imposes responsibility on the federal government to maintain federal ship channels and anchorages, and the Third Circuit's decision conflicts with the requirements in the ACOE permit for the construction and operation of a marine terminal on federal waterways.

The Third Circuit's decision constitutes an unprecedented expansion of the wharfinger's duty under the general maritime law to provide a safe berth. The Third Circuit's decision makes the terminal operator guarantee the safety of the ship as it "approaches" its dock, even when the ship is outside the geographic boundaries of the terminal and still inside federally controlled and maintained waters. No

court has ever recognized such a high standard of care or expanded area of responsibility on the part of the terminal operator.

The decision of the Third Circuit unfairly requires marine terminal operators to assume the federal government's responsibility to dredge, survey and maintain federal navigation channels and anchorages. Terminal operators like Plains should be able to rely on the federal agencies charged with responsibility to operate and maintain federal waterways to fully perform and discharge that responsibility. Accordingly, *Amicus Curiae* submits the circumstances of this case compel the granting of a writ of certiorari.

Respectfully submitted,

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