No. 13-462

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF SOUTH JERSEY PORT CORPORATION, GLOUCESTER TERMINALS, LLC, GREENWICH TERMINALS, LLC, DELAWARE RIVER STEVEDORES, INC., PENN TERMINALS, INC., PENN WAREHOUSING & DISTRIBUTION, INC., HORIZON STEVEDORING, INC., KINDER MORGAN ENERGY PARTNERS L.P., THE PHILADELPHIA REGIONAL PORT AUTHORITY, THE INTERNATIONAL LIQUID TERMINALS ASSOCIATION, THE AMERICAN FUELS & PETROCHEMICAL MANUFACTURERS ASSOCIATION, THE AMERICAN ASSOCIATION OF PORT AUTHORITIES, NUSTAR ASPHALT LLC., THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, AND THE LAKE CHARLES HARBOR & TERMINAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GEORGE R. ZACHARKOW*
MATTIONI, LTD.
399 Market Street, Suite 200
Philadelphia, PA 19106
(215) 629-1600
GZacharkow@mattioni.com
Counsel for Amici Curiae

**Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICI CURIAE* [1]

This brief is submitted on behalf of two related categories of *Amici Curiae*; terminal owners whose facilities are located along the Delaware River, and associations whose members own terminals throughout the United States (Terminal *Amici*). The following *Amici* have a direct and substantial interest in the issues before the Court and the outcome of this litigation:

South Jersey Port Corporation, Gloucester Terminals, LLC, Greenwich Terminals, LLC, Delaware River Stevedores, Inc., Penn Terminals, Inc., Penn Warehousing & Distribution, Inc., Horizon Stevedoring, Inc., and The Philadelphia Regional Port Authority own and/or operate marine terminals in New Jersey or Pennsylvania.

Kinder Morgan Energy Partners, L.P. owns and operates approximately 180 terminals. Locally, it has terminals in Fairless Hills, Pennsylvania and Camden, New Jersey.

The International Liquid Terminals Association is composed of 83 companies that own and/or operate about 800 bulk liquid storage terminals. Local

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party has authored this brief in whole or in part. Furthermore, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the *Amici Curiae*, its members, or counsel contributed money that was intended to fund preparing or submitting this brief. Furthermore, pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *Amici Curiae*'s intent to file this brief and each has given written consent to the filing of this brief. Copies of all written consents have been submitted along with this brief to the Clerk.

member companies include Gulf Oil L.P., Hess Corporation, Kinder Morgan Energy Partners, L.P., Sunoco Logistics Partners, L.P., Westway Terminals Co., Inc., and NuStar Energy, L.P.[2]

The American Fuels & Petrochemical Manufacturers Association is a national trade association composed of 400 companies, including virtually all refiners and petrochemical manufacturers in the United States, many of whom operate marine terminals.

The American Association of Port Authorities represents more than 130 deep draft public port authorities. Locally, its members include the Philadelphia Regional Port Authority, the South Jersey Port Corporation, and the Port of Wilmington - Diamond State Port Corporation.

NuStar Asphalt LLC owns refineries in Paulsboro, New Jersey and Savannah, Georgia, which operate as terminals, and it also operates eight leased terminals.

The Board of Commissioners of the Port of New Orleans owns various wharves along the Mississippi River, which it leases to marine terminal operators.

The Lake Charles Harbor & Terminal District owns and operates terminal facilities situated along the Calcasieu Ship Channel in Lake Charles.

The Terminal *Amici* believe that the Third Circuit's decision is contrary to the leading and controlling decision of the U.S. Supreme Court in *Smith v. Burnett*, 173 U.S. 436 (1899), and the decisions of the various courts throughout the Circuits that have followed this precedent for more than 100 years.

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[2] In 2008, NuStar purchased the CARCO Terminal.

The Terminal *Amici* also believe that the decision of the Third Circuit was not reasonably necessary for the resolution of the case, which properly had been decided by the District Court. The circumstances did not warrant the creation of a dramatically expanded scope of responsibility for terminal owners, making them responsible for the condition of navigable waters, including Federal Project Waters,[3] beyond the delineated boundaries of the waterfront facilities which they maintain and control.

Given the far reaching scope of the Third Circuit's decision and the established maritime law and commercial practices that it undermines, the Terminal *Amici* believe that it would be helpful for the Court to have the benefit of their views regarding the impact of the decision on the industry, when it considers the Petition.

INTRODUCTION

Petitioners effectively have set forth in their Statement of the Case, the factual background of this matter and the legal issues that warrant granting of their Petition.

Since the formation of this Nation, the Federal (Government) has had exclusive authority over the U.S. navigational waters, pursuant to its power to regulate interstate and foreign commerce under the Commerce Clause of the United States Constitution. *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Daniel Ball*, 77 U.S. 557 (1871). Littoral and riparian land owners, such as Petitioners, only have limited rights (and

[3] This term refers to the channels and anchorages that Congress has authorized and directed the Army Corps of Engineers (ACOE) to develop and maintain as part of the marine transportation system (MTS).

obligations) with regard to adjacent navigable waters, and they are subordinate to the Government's navigational servitude, which is paramount. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The Rivers and Harbors Act of 1899 was designed to provide a mechanism for controlling development along the navigable waters of the United States. 33 U.S.C. § 401, *et seq*. The Act prohibits the unauthorized obstruction of any body of navigable water and provides that authorization must be obtained from ACOE for conducting activities on, under, or above navigable waters. 33 U.S.C. § 403. *Alexander Hamilton Life Ins. Co. v. Government of Virgin Islands*, 757 F.2d 534, (3d Cir. V.I. 1985) (dredging and construction of jetties); *United States v. Sexton Cove Estates, Inc*., 526 F.2d 1293, (5th Cir. Fla. 1976)(dredging and development of canals); *Texas E. Transmission Corp. v. Tug Captain Dann*, 898 F. Supp. 198, (S.D.N.Y. 1995) (underwater pipeline); *In re Complaint of Waterstand Marine, Ltd*., 1988 U.S. Dist. LEXIS 6150 (E.D. Pa. June 23, 1988)(towers and overhead transmission lines).

ACOE approved plans and issued a permit for the construction of the berthing facilities at Petitioners' terminal. ACOE also approved the scope of the dredging activities that may be conducted with regard to the facilities. The permit for Petitioners' terminal shows that dredging was authorized up to the adjacent boundary line of Federal Anchorage No. 9. That is where the responsibility for the condition of the waters shifted from Petitioners to the Government under the common law as it existed at the time of the incident.

In February 2003, ACOE issued a blanket permit to Weeks Marine to perform maintenance dredging of the "berthing and access areas" at various Delaware River

terminals in accordance with the project plans for the facilities. This establishes a clear line of demarcation between waters where the Government has exclusive jurisdiction and responsibility, and the waters where terminal owners have responsibility. Terminal owners understand that they are responsible for maintaining their berths and the designated access areas around their berths so vessels may safely enter the berths and dock at their terminals.

The Government exercises exclusive dominion and control over the navigable waters beyond the designated access areas, especially the Federal Project Waters. It operates primarily through ACOE, the Coast Guard, and NOAA to develop, maintain, and monitor these waters, pursuant to Congressional authorization. The ACOE Philadelphia to the Sea Federal Navigation Project officially started in 1910 and since 1958 the authorized channel depth has been forty feet. There are sixteen designated anchorages; four of the six manmade anchorages, including Federal Anchorage No. 9, are maintained at the channel depth of forty feet.

ACOE periodically dredges and performs hydrographic surveys of the Delaware River channel and the associated anchorages. The last time that Federal Anchorage No. 9 was dredged in its entirety prior to the incident was in 1986 by Norfolk Dredging. In July 1997, the northern section of the anchorage was dredged by Weeks Marine. During the seven years prior to the incident, ACOE performed surveys of the entire area of Federal Anchorage No. 9 in July 1997, October 1998, August 2000, March 2001, August 2002, June 2003, and June 2004; intervals of 15, 22, 7, 17, 10, and 12 months, respectively. Apparently none of ACOE's surveys prior to the incident revealed a

bottom anomaly significant enough for investigation or indicated that there was inadequate water depth in the area of the abandoned anchor, although the parties have stipulated that it was in the anchorage since at least August 2001, and there were three subsequent surveys.[4]

While the Government disavows any responsibility for monitoring Federal Project Waters for obstructions and hazards, its conduct belies its position. It is not disputed that ACOE and NOAA regularly conduct hydrographic surveys of both the channels and the anchorages. Such surveys are intended to determine not only water depth, but also to develop a portrait of the bottom and determine if there are any submerged hazards. *See Limar Shipping, Ltd. v. United States*, 324 F.3d 1 (1st Cir. Mass. 2003); *United Cook Inlet Drift Assoc. v. Trinidad Corp.*, 71 F.3d 1447 (9th Cir. 1995). Both ACOE and NOAA have survey vessels equipped with single and multi-beam sonar systems, as well as other sophisticated technology, whose purpose is to detect underwater objects.

ACOE publicly acknowledges that part of its

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[4] If the anchor was lost during the 1986 dredging operation, there would have been in excess of twelve ACOE surveys conducted that did not determine its existence or conclude that it presented a hazard to navigation. Moreover, there would have been eighteen years of vessel traffic using the anchorage and calling at Petitioners' terminal that was unaffected by the presence of the anchor. Based on information from the Philadelphia Maritime Exchange, it is estimated that more than 2,000 vessels used the anchorage and more than 1,000 vessels called at the terminal during this period. This strongly suggests that the incident was attributable to poor voyage planning and bridge management on the part of the navigators aboard the ATHOS I with regard to under keel clearance (UKC), since the anchor was not a hazard for other vessels.

mission is to search for obstructions that could interfere with safe navigation. Indeed, the Third Circuit itself has recognized that the Government is responsible for performing this role. *Japan Line, Ltd. v. United States*, 1976 AMC 355, 364 (E.D. Pa. 1975), affirmed 547 F.2d 1161 (3d Cir. 1976)("Congress has charged the Secretary of the Army and the Chief of Engineers with the responsibility of seeing the navigable waterways remain unobstructed and safe for navigation.") In addition, ACOE, NOAA, and the Coast Guard promulgate information about the depth, condition, and safety of U.S. waters which they expect commercial vessels to rely upon in planning their transits. Vessels calling at U.S. ports are required to maintain current copies of publications containing this information on board for reference. 33 CFR § 164.33.

The Third Circuit's decision to disregard controlling precedent and impose new responsibilities on terminal owners for locations that are not within their control and are part of the public domain was unnecessary for the determination of this case. A responsible party already existed with regard to the abandoned anchor. The fact that the vessel owner did not identify or locate this party does not warrant the creation of a new rule to impose liability on Petitioners, who breached no existing duty. Under the applicable law, remedies are available in these circumstances.[5] There was no need to shift away from the bright line standard that clearly

[5] To the extent that the identity of the party who abandoned the anchor is unknown, there is a legal mechanism in place under the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq*., to recover from the Fund where the solely responsible party is an unknown entity. 33 U.S.C. § 2703(a)(3). *See*, *e.g.*, *Gatlin Oil Co. v. United States*, 169 F.3d 207 (4th Cir. 1999).

established the boundary of responsibility for terminal owners, based on their area of control.

The Third Circuit's decision to make terminal owners responsible for the condition of the waters located in whatever path a vessel decides to follow from the channel to the berth should not be let to stand because it is wrong legally and from a policy standpoint. The Third Circuit posited that a vessel is on an "approach" when it "transitions from its general voyage to a final, direct path to its destination." Pet. App. 45a. In recognition that this definition is unhelpful and that the new boundary of responsibility is uncertain, the Third Circuit went on to state that "in most instances the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal. This analysis will necessarily vary on the characteristics of a particular port, and there will be close and difficult cases." *Id*. There was no such uncertainty under the existing system; the scope of a terminal owner's responsibility was clear and constant. The Third Circuit's decision displaces this.

The Third Circuit's talismanic reference to the term "approach" has undermined rational analysis. Conceptually, a vessel is approaching its destination as soon as it departs the load port. From that point forward, it is subject to the perils of the sea. It is well understood that it makes no sense to hold terminal owners such as Petitioners liable for hazardous conditions encountered by the vessel when it is sailing the ocean, entering Delaware Bay, or transiting the Federal channel of the Delaware River, because they have no control over these areas. The same is true for all waters beyond the immediate access to Petitioners'

berth, including the adjacent Federal Anchorage No. 9. Accordingly, for the same reason, no liability should be imposed for hazards encountered in the Federal anchorage, which was under the control of parties other than Petitioners

The Terminal *Amici* maintain that making terminal owners responsible for the condition of the waters in amorphous areas beyond their control, whose shape and boundaries are created spontaneously, as the vessel transits from the channel to the access area for the berth, simply creates confusion and invites litigation. This particularly is true when these Federal Project Waters already are controlled by and the responsibility of governmental agencies. The Third Circuit's apparent belief that something changes when a vessel moves from the channel to an anchorage makes no sense; both are Federal Project Waters designed and intended to receive vessels of the same size and draft.

If the ACOE dredging contractor had abandoned the anchor in the channel as opposed to the anchorage, the same incident could have occurred, and if the Third Circuit's new liability regime were applicable, Petitioners would not be liable because the vessel would not yet have turned from the channel to start its "approach". Similarly, if Petitioners' berth were occupied and the ATHOS I was going to wait in the anchorage before going to the berth, the same incident could have occurred, and since the vessel would not have been on its "approach", Petitioners would not be liable. Alternatively, if a vessel bound for another terminal used the anchorage to turn around, the same incident could have occurred. Under the Third Circuit's broad new standard, it is likely that either the vessel or the intended terminal would pursue

Petitioners, on the theory that they were responsible for the condition of the waters beyond their terminal and should have discovered the anchor and had warnings issued for the benefit of all vessels on the River. Such an expansion of liability makes no practical or legal sense.

By imposing a new scope of responsibility on terminal owners that is dependent on an expanded concept of the term approach, the Third Circuit has introduced uncertainty and confusion into the operation of the MTS where there was none before. This has an adverse and disparate impact on terminal owners within the Third Circuit, and creates economic inequality. The Third Circuit's improvident decision will have an unsettling effect on maritime commerce and the efficient functioning of the MTS. This includes not only commercial shipping operations, but also the numerous marina operators along the Delaware River, New Jersey Shore and Chesapeake Bay. They too have had their responsibilities pushed to the waters beyond their facilities by this unnecessary and expansive decision.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Is Contrary To Supreme Court Precedent.

Although the Third Circuit gave passing recognition to the Supreme Court case of *Smith v. Burnett*, 173 U.S. 436 (1899), in describing the limited scope of the common law duty that a wharfinger owes to a vessel docking at its facility[6], it misconstrued the holding and

[6] "Although a wharfinger **does not guarantee the safety of vessels coming to his wharves**, he is bound to exercise reasonable diligence in ascertaining the condition **of the berths**

improperly expanded the duty beyond the context of the case. In *Smith*, the vessel was damaged by "a ridge of rock **in the berth**…". *Id.* at 437. (Emphasis added.) The evidence revealed that the wharfinger "knew of the existence of the rock, and its dangerous nature" and knew that another vessel previously had grounded in the berth. *Id.* at 438. The Supreme Court held that the wharfinger failed to exercise due diligence by either removing the obstruction or warning the vessel of its presence in the berth.

It is undisputed that the ATHOS I struck the abandoned anchor in Federal Anchorage No. 9, at a location more than 900 feet from Petitioners' dock, and even closer to the boundary of the Federal Channel itself; the anchor was **not in the berth**, or the defined access area, as in *Smith*. The District Court correctly applied the binding legal precedent and held that under the common law, Petitioners were not responsible for the condition of the waters beyond their berth and access area. Acknowledging the Government's "claim" that it was not responsible for the condition of the Federal anchorage despite the fact that it periodically surveyed the area and contracted to have it dredged, the District Court reasoned that even if this were true (which was not conceded), it could not operate to create a common law duty on Petitioners under the prevailing law. Undeterred by binding legal precedent, the Third Circuit decided to blaze new territory and expand the duty of Petitioners beyond the waters within their control, to make them responsible for the presence of the abandoned anchor in the Federal anchorage.

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thereat, and if there is any dangerous obstruction to remove it, or to give notice of its existence to vessels about to use the berths." *Smith* at 433. (Emphasis added.)

To reach its destination, the Third Circuit navigated around its own decision, *In re Nautilus Motor Tanker Co.*, 85 F. 3d 105, 116 (3d Cir. 1996), wherein it invoked *Trade Banner Line, Inc. v. Caribbean S.S. Co., S.A.*, 521 F.2d 229, 230 (5th Cir. 1975), for the proposition that a wharfinger has "no duty to ensure safe surroundings or warn of hazards merely in the vicinity."[7] Pet. App. 41a – 42a. In *Trade Banner*, the Fifth Circuit held that the wharfinger owed no duty with regard to the area outside of the berth. It stated that the wharfinger satisfied its duty **by providing the vessel with a hazard-free berth, and the ability to safely enter and exit the berth**.

Considering that a berth is by definition, the "place where a ship lies secured to a wharf, pier or quay and can be loaded or unloaded of its cargo," the duty of a terminal owner is limited. *Dictionary of International Trade*, Edward G. Hinkelman (7th Ed. 2006). In logic, in practice, and in law, the reference to entering or exiting the berth can only refer to an area in close proximity to the wharf or pier, where the vessel moves into or out of the berth. For terminal owners like Petitioners, this is the access area over which they have control, as defined by the permitted dredging area. It is plain that the waters being transited to get to this point of entry, even if defined as an "approach" do not meet the required criteria; i.e., the vessel is not in the process of entering the berth.

The Trial Court correctly concluded that this circumscribed area adjacent to the berth represented

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[7] In *Nautilus*, a barge grounded in a shallow area that was depicted on the navigational charts, and was outside the terminal berth by 125' and outside the channel by 25'. The trial court entered judgment for the terminal and the Third Circuit affirmed the decision, relying upon *Smith v. Burnett*, *supra*.

the proper limit of responsibility for Petitioners, relying on *Western Bulk Carriers v. United States*, 1999 U.S. Dist. LEXIS 22371 (E.D. Ca. 1999). In *Western Bulk*, the vessel had departed the berth and was only several hundred feet away when it grounded on a shoal in the navigational channel that was created and maintained by ACOE. The vessel argued that it was in the "so-called 'approach' to the Port's berths", but the three cases that it cited were found not to support this position, and the court granted summary judgment for the Port. *Id.* at *20.

It respectfully is submitted that in construing the cases addressing the duty of a wharfinger, the Third Circuit has failed to appreciate their context and the limited scope of responsibility that reasonably was assigned to wharfingers by the Supreme Court. Namely, a wharfinger must exercise reasonable care with regard to the condition of its berth and the immediate entry to and exit from it. All of the referenced cases wherein the wharfinger was found liable involved facts where the hazard was located within the berth itself or in an area over which the wharfinger otherwise exercised dominion and control. None of the cases imposed a common law duty on the wharfinger to affirmatively inspect or survey the channel or navigable waters beyond the berth and adjacent access area over which it exercised control. The Third Circuit's decision to disregard binding precedent and create an unnecessary new legal duty must be reviewed, and reversed.

II. The Third Circuit's Decision Is Wrong From a Policy Standpoint Because It Unnecessarily and Unjustifiably Reallocates Risks in an Uneconomic Manner, Creates Uncertainty, and Undermines Uniformity.

This Court has long recognized that "liability should fall upon the party best situated to adopt preventative measures and thereby to reduce the likelihood of injury." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964).

Relying on the aforementioned premise, a District Court in the Eastern District of California found that a wharfinger did not breach its common law duty because it "failed to discover, remove and/or warn of the existence of a shoal located within a federally-maintained waterway" that led to its terminal. *Western Bulk Carriers v. United States*, *supra*. In *Western Bulk*, the party in the best position to implement preventative measures was ACOE, who was named as a defendant, but was found to have immunity. *See also Japan Line*, *supra*. (ACOE liable for failure to warn of shoaling condition in Federal channel of Delaware River).

Consistent with this analysis, the Supreme Court has found that a terminal owner should be responsible for the conditions in its berth, because it is the party in control of that area and in the best position to adopt preventative measures. *See Smith v. Burnett, supra.*

The Third Circuit has chosen to ignore these principles and impose liability on Petitioners for an area that they do not control. The Third Circuit's newly created duty wrongfully places responsibility on terminal owners for broad areas of the Federal Project

Waters over which they exercise no control and for which they are not the ones best situated to adopt preventative measures.

Analysis dictates that there must be clear lines of responsibility so parties may predictably and reasonably regulate their conduct, and this means that terminal owners cannot be held responsible for locations (and operations) that they do not control. *See Western Bulk*, *supra*. The available information indicates that the abandoned anchor was used either by ACOE or dredging contractors hired by ACOE, for the purpose of securing dredging equipment during hydraulic dredging operations performed in the anchorage and/or the adjacent channel. *See John Huston, Hydraulic Dredging* (1986) p. 139-143. It either was intentionally abandoned (cut loose), or was lost and then abandoned, in Federal Anchorage No. 9 during such operations. In this circumstance, the dredging contractor was in the best position to prevent the incident by not losing the anchor in the first case, or by retrieving it. ACOE was in the next best position to prevent the incident, because as the contracting party, it could insist that such objects be accounted for and retrieved.

ACOE has used the following standard provision in its dredging contracts since at least 1991:

> OBSTRUCTION OF NAVIGABLE WATERWAYS. (DEC 1991)
>
> (a) The Contractor shall –
>
> (1) Promptly recover and remove any material, plant, machinery, or appliance which the contractor loses, dumps, throws overboard, sinks, or misplaces, and which, in the opinion of the Contracting Officer,

> may be dangerous to or obstruct navigation;
>
> (2) Give immediate notice, with description and locations of any such obstructions, to the Contracting Officer; and
>
> (3) When required by the Contracting Officer, mark or buoy such obstructions until the same are removed.
>
> (b) The Contracting Officer may –
>
> (1) Remove the obstructions by contract or otherwise should the Contractor refuse, neglect, or delay compliance with paragraph (a) of this clause; and
>
> (2) Deduct the cost of removal from any monies due or to become due to the Contractor; or
>
> (3) Recover the cost of removal under the Contractor's bond.
>
> (c) The Contractor's liability for the removal of a vessel wrecked or sunk without fault or negligence is limited to that provided in sections 15, 19, and 20 of the River and Harbor Act of March 3, 1899 (33 U.S.C. 410 *et. seq*.).

Under this provision, the dredging contractor had an obligation to notify ACOE that the anchor had been lost and to locate, mark, and remove it, if in the opinion of the Contracting Officer, it may be dangerous to or obstruct navigation.[8] It appears that we may

[8] Additionally, pursuant to the Ports and Waterways Safety Act (PWSA) of 1972, there is a regulatory requirement to report the loss of the anchor to the Coast Guard and to ACOE. 33 U.S.C. § 1221, *et. seq.*; specifically, § 1232b.

never know what transpired between ACOE and its dredging contractor in this regard, either a failure to report the loss of the anchor, or a determination by the Contracting Officer that it did not pose a hazard to navigation. The latter may well be the case considering the number of vessels that have transited the anchorage area without incident prior to the ATHOS I. Regardless, what is clear is that there is a system in place to manage such a loss event. There is no need to make terminal owners responsible for a bad decision on the part of the dredging contractor and/or ACOE to let the anchor remain where it was lost. The responsible parties should be held responsible.

Petitioners are strangers to the dredging operation, and it does not make sense to hold them responsible for the faults of the contracting parties on the basis that they did not survey, find, warn about, and remove an abandoned anchor that they had no reason to know existed, in an area where they had no operational authority or control. There is no need to alter an established system of allocated responsibilities that has operated without problems for a century because a failure on the part of one of the participants in its realm of responsibility led to an unfortunate occurrence. This is particularly so where the imposition of responsibility on terminal owners for the condition of Federal Project waters will not serve to remedy the type of failure that occurred.

The focus should be on eliminating the abandonment of obstructions to navigation in the first instance, not in holding terminal owners responsible for failing to find them when they are abandoned by others. This can be done through better enforcement by ACOE and the Coast Guard, by requiring the dredging contractor to maintain a proper inventory of

equipment and to conduct appropriate surveys of the dredged area following completion of the work to demonstrate that the field is clean. It is only right that the dredging contractor, who is being paid by the Government, should have this responsibility, since it is the one conducting the operation to restore the depth of the Federal Project Waters and make them safe for navigation.

The Third Circuit's imposition of an expanded scope of responsibility on Petitioners, effectively makes them responsible for the misconduct of the third party dredging contractor and ACOE, which is contrary to fundamental legal principles, since they have no special relationship with either party. The Third Circuit is making Petitioners' a "guarantor" of the safety of vessels coming to their terminal, which is contrary to established Supreme Court precedent. *Smith*, *supra*.

The elimination of the existing bright line standard enforced by the District Court, and its replacement with a fuzzy new standard, needlessly creates confusion regarding the scope of responsibility for terminal owners. The Third Circuit's effort to define the expanded scope of geographical responsibility that it seeks to impose on terminal owners by referencing the maneuvers of vessels going to their terminals is not effective as a practical matter and demonstrates a lack of understanding regarding vessel operations. It provides neither certainty nor predictability, and it will needlessly spawn litigation.

Vessels calling at terminals on the Delaware River normally take a docking pilot on board more than a mile before the terminal. The docking pilot then will initiate speed adjustments and course maneuvers in preparation for docking and will order assist tugs into

position alongside the vessel. In some instances, he will take the vessel past the terminal and then turn it around in the Federal channel and/or anchorage, which may be offshore of another terminal. Under the Third Circuit's rule, vessel owners will maintain that the vessel's transit has ended and that it is in the "final phase of its journey" throughout this entire preparatory phase for docking. Pet. App. 46a. Under the Third Circuit's approach, terminal owners will be charged with overlapping responsibility for the condition of extended sections of Federal Project Waters. Vessels destined for different terminals will be transiting the same waters, and some vessels may call at more than one terminal. Since the Third Circuit's assigned scope of responsibility is for a geographical area beyond the terminal owner's control, the exposure will be with regard to all vessels transiting those waters, not just vessels entering or leaving the immediate access area to the berth.

Moreover, the compliance cost for terminal owners who undertake to try to protect themselves from exposure will be substantial. They will need to monitor dredging activity and other vessel activity to verify that nothing is abandoned; or if so, where. They perpetually will need to have sonar and side scan surveys conducted and interpreted, and will need to engage divers to ensure bottom conditions. Such surveys will need to be performed immediately prior to each vessel call.[9] Petitioners receive an average of

[9] The Third Circuit's new rule also exposes terminal owners to liability for the failures of those responsible for the navigation and management of vessels. If a vessel fails to have a proper voyage plan, or sufficient UKC, or mistimes the tide, the terminal owner will be blamed, as here, and years of costly litigation will ensue.

56 vessels per year; more than twice that number anchor in Federal Anchorage No. 9, and it is unknown how many others utilize the anchorage for maneuvers. Under the Third Circuit's new rule, Petitioners would be required to have surveys of an uncircumscribed area of the anchorage conducted on at least a weekly basis in an effort to avoid exposure to liability for the conduct of others. The cost to Petitioners will be prohibitive, and the cost to the industry will be exorbitant.

Notably, the costs will not impact all terminal owners the same. For most of the terminals situated on the Pennsylvania side of the Delaware River, the Federal channel abuts to the permitted access areas; accordingly, calling vessels turn directly from the channel into the berth, so no costs will need to be incurred to survey and monitor the so called "approach" as now defined by the Third Circuit. This is not the case on the New Jersey side as the Third Circuit has decided to make a distinction and characterize a vessel transiting through an anchorage as making an "approach" to the terminal. Thus, based on the new definition, Petitioners, and many terminal owners on the New Jersey side, will be compelled to incur the aforementioned costs for surveying and monitoring the waters beyond their permitted areas, because while they abut a Federal anchorage, they do not directly abut the Federal channel.

The Third Circuit's decision has adversely impacted the ability of terminal owners to compete because it arbitrarily has imposed economic burdens on some terminal owners and not on others. This is the case for terminals both within a State, and for terminals in different States, across the river from each other. Moreover, terminal owners throughout the rest of the

country will not be exposed to such increased operating costs, unpredictability, and uncertainty, as they will continue to operate under the clear standard established by the Supreme Court in *Smith*, *supra*.

The Third Circuit improperly has shifted responsibility for the condition of the Federal Project Waters from the Government to terminal owners. The Government is and should be the party responsible for the safety of the MTS, as it is the one that regulates it and promotes maritime commerce. Notably, Respondents' *Amici* below agree with this position. In their papers they reference an INTERTANKO Study which states in pertinent part as follows:

> In the United States the Federal Government has the fundamental responsibility for dredging in Federally maintained channels, and for hydrography in all waters as displayed on charts, coast pilots, and tide and current tables. Similarly, the Coast Guard has the Federal responsibility for the quality and reliability of navigational aids. Adequate and reliable performance by the Federal government in these roles is a vital part of the risk sharing principal which Intertanko feels is needed to provide the maximum level of safety in all waterways.

Intertanko's US Ports and Terminal Safety Study (PTS) 1996 Study, p. 15. INTERTANKO went on to state that:

> responsibility for the water depth information at each berthing area must be the responsibility of the terminal operator, **but that water depths in the approaches between Federally maintained channels and terminal berths must remain the responsibility of the Federal**

> **government, to be carried out by Army Engineers, and made public in NOAA publications**.

Id. at p. 16. (Emphasis added.)

The incident occurred in Federal Anchorage No. 9, an area that was maintained by the Government and outside of Petitioners' zone of responsibility. Respondents' own *Amici* are in agreement with the District Court's decision that under these circumstances, Petitioners are not liable. The Third Circuit's creation of a new rule to hold otherwise should not be sanctioned.

CONCLUSION

For all of the foregoing reasons, the Terminal *Amici* respectfully urge this Honorable Court to grant certiorari to protect the marine transportation system from the Third Circuit's decision, and thereby preserve legal predictability, commercial certainty, and national uniformity for terminal owners.

Respectfully submitted,

GEORGE R. ZACHARKOW*
MATTIONI, LTD.
399 Market Street
Suite 200
Philadelphia, PA 19106
(215) 629-1600
GZacharkow@mattioni.com

Counsel for Amici Curiae South Jersey Port Corporation, Gloucester Terminals, LLC, Greenwich Terminals, LLC, Delaware River Stevedores, Inc., Penn Terminals, Inc., Penn Warehousing & Distribution, Inc., Horizon Stevedoring, Inc., Kinder Morgan Energy Partners, L.P., The Philadelphia Regional Port Authority, The International Liquid Terminals Association, The American Fuels & Petrochemical Manufacturers Association, The American Association of Port Authorities, NuStar Asphalt, LLC., The Board of Commissioners of the Port of New Orleans, and The Lake Charles Harbor & Terminal District

**Counsel of Record*

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