TO: Mr. David Kavanaugh, Ways & Means Trade Subcommittee
FROM: James E. Rich, Jr. – Senior Washington Counsel
RE: Harbor Maintenance Tax (HMT) and Drawback

In response to the House Ways and Means Trade Subcommittee's request for written comments on miscellaneous trade and tariff legislation dated May 3, 2002, Shell Oil Company (Shell) submits the following comment in support of H.R. 1756 (TR-9), introduced by Representative Sam Johnson of Texas and co-sponsored by Representative Bill Jefferson of Louisiana.[1] Shell endorses H.R. 1756, and the Senate companion bill S. 2121, which clarifies 19 U.S.C. § 1313(j) to provide that any and all Federal duties, taxes and fees imposed on imports are eligible for drawback. Currently, U.S. Customs does not allow drawback for all such Federal duties, taxes and fees.

A. Section 1313(j) and Congressional Intent

The establishment of the duty drawback and the legislative policy underlying the program is to ensure the competitiveness of U.S. industry in the global market when competing against lower-priced exports from our trading partners. Under Section 1313 of the drawback law, Subsection (j) grants drawback of *any* Federal taxes, duties and fees imposed upon merchandise when imported, and when similar or commercially interchangeable merchandise is later exported. Drawback under this section was intended by Congress to include claims for all Federal and Internal Revenue taxes, Customs duties, and Federal fees, such as the Merchandise Processing Fee (MPF) and the Harbor Maintenance Tax (HMT).

B. Current Application of 1313(j) is Contrary to Congressional Intent

Drawback under Subsection (j) is based on the fact that the Federal duty, tax or fee is imposed on imported merchandise that is later exported or is substituted for by merchandise that is exported. Drawback is based solely on the issue of whether the duty, tax or fee was levied upon importation of the merchandise. The proposed technical correction will re-establish Congressional intent that Sec. 1313(j) allow drawback on *any* Federal taxes, duties and fees, including the HMT. Further, the proposed legislation will correct the existing ambiguity created by the Court of Appeals for the Federal Circuit and the U.S. Customs Service which have interpreted this provision of law differently that the Court of International Trade, supported by the findings of the U.S. Supreme Court in U.S. vs. United States Shoe Corp. (U.S. Shoe).

The U.S. Supreme Court in U.S. Shoe , explicitly recognized the following key points of fact with respect to the assessment or levying of the HMT on imports:

1. "Congress [in 26 U.S.C. Sec. 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of [administration, enforcement and] jurisdiction. Such duties, by their very nature, provide for revenue from imports . . ." (See U.S. Shoe, No. 97-372, Page 5 (March 31, 1998), *quoting* the Court of International Trade).

[1]Senator John Breaux introduced and Senator Mary Landrieu cosponsored a companion bill in the Senate, S. 2121.

2. Congress codified the HMT as a Federal tax under the Internal Revenue Code under 26 U.S.C. Sec. 4461(a). (See U.S. Shoe, Bench Opinion, Syllabus, Page 2 (October Term 1997)).
3. The HMT is not a user fee but a tax [imposed on foreign imports]. (See U.S. Shoe, No. 97-372, Page 3 (March 31, 1998)).

The U.S. Court of International Trade (CIT) in the case of Texport Oil Company v. United States, Slip Op. 98-21, Page 27 (March 5, 1998) (Texport) recognized that the HMT is imposed under Federal law on merchandise because the merchandise is imported and in order to raise revenue from imports. In addition, the U.S. Supreme Court and the CIT have stated that "Congress [in 26 U.S.C. Sec. 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of [administration, enforcement and] jurisdiction. Such duties, by their very nature, provide for revenue from imports . . ." (See U.S. Shoe, No. 97-372, Page 5 (March 31, 1998), *quoting* the Court of International Trade). It is clear that the HMT is specifically categorized as a tax on imports.

Conversely, the Court of Appeals for the Federal Circuit (CAFC) interpretation of the language of § 313(j)(1) and (2) of the Tariff Act of 1930 in Texport (Slip Op. No. 98-1352, 1353, 1373 (July 27, 1999)) held that the statutory language does not allow drawback to be collected on payment of the HMT and other nondiscriminatory taxes, because such taxes are generalized Federal fees. The CAFC held that the statute only allows the importer to recover drawback for the payment of duties, fees and taxes in which there is a substantial nexus between the assessed fees and the act of importation. In stating that the HMT is a generalized fee and is payable regardless of whether a good is imported, the CAFC stated that no substantial nexus existed between the payment of the HMT and the act of importation of the merchandise, and, therefore, drawback for HMT cannot be claimed. Congress, however, made no distinction between or among the "type" of Federal duties, taxes or fees that are subject to drawback, stating instead that any Federal duty, tax or fee is subject to claims filed under the program.

The U.S. Customs Service, in its March 5, 1998 Final Rule concerning drawback stated that the HMT is not subject to drawback inasmuch as the HMT is imposed in connection with port use. (See 63 Fed. Reg. 10970, 10974 (March 8, 1998)). However, this final rule was issued immediately prior to the U.S. Supreme Court's March 31, 1998 opinion in U.S. Shoe and to date has not been modified.

Due the CAFC's ruling in Texport, clarification by Congress is necessary concerning whether the HMT is subject to drawback under 1313(j) as *any* duty, tax or fee imposed under Federal law because of the merchandise's importation, and specifically as a Customs duty or Internal Revenue Tax for which drawback is granted. This clarification would allow for the full implementation of the legislative intent behind this provision of law and allows for the continued competitiveness of U.S. industry in an increasing global marketplace.

C. The Changes Made by H.R. 1756 Would provide Substantial Benefits to U.S. Petroleum Refiners

The drawback laws are outdated and are not as effective as they should be in helping U.S. petroleum companies and workers to remain competitive when competing for sales of petroleum products in the U.S. and global markets. The changes made by H.R. 1756 and S. 2121 would allow U.S. petroleum companies to claim drawback of all Federal duties, taxes and fees under § 1313(j) as was Congress's intent when the statute was drafted. The

additional revenue, although not significant in the context of the drawback program, but substantial to the refining industry, would make it even more economical, particularly in the long term, to produce gasoline and petrochemicals for export, and would provide a greater incentive to expand production operations and increase capacity utilization at U.S. refineries. The additional revenue would encourage additional facility and environmental upgrades, resulting in an increase in employment, directly or indirectly, through projects relating to any such expansion and the greater export quantities for crude oil and other petroleum products. The changes also would make U.S. petroleum companies and refineries more competitive in the global market, which is the goal and intent of the drawback laws.