

MARITIME CABOTAGE



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BEFORE THE
UNITED STATES CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.

Date: August 14, 2009

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**Customs Proposed Modification and Revocation of Ruling Letters
Relating to the Customs Position on the Application of the Jones Act to
the Transportation of Certain Merchandise and Equipment
Between Coastwise Points**

**COMMENTS OF THE
MARITIME CABOTAGE TASK FORCE**

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INTRODUCTION

The Maritime Cabotage Task Force (“MCTF”) is pleased to offer comments on the U.S. Customs and Border Protection (“CBP”) July 17, 2009 notice described above. The MCTF strongly supports CBP’s proposal, which will help ensure that our coastwise laws are properly applied with respect to the transportation of certain merchandise between U.S. points.

The MCTF is the most broad-based coalition representing the U.S. maritime industry. Comprised of more than 400 American companies, associations, shipyards, labor organizations, defense groups, and others interested in maintaining America’s strong domestic maritime industry, the MCTF is a leading advocate for the preservation of U.S. maritime cabotage laws. Proper application of U.S. coastwise laws is critical, as such laws are vital to the nation’s economic, national, and homeland security. In fact, for generations every Administration – including President Obama’s – has supported America’s coastwise laws because of the important benefits they provide to our economy, military, commerce, environment and national security.

As the agency is well aware, U.S. coastwise laws help support and maintain sectors of our domestic economy that are vital to U.S. national security interests, such as ship building, ship repair, seafaring, and related sectors. These sectors of our economy also support thousands of U.S. jobs in communities throughout the country. CBP’s proposed action would not only interpret and apply the coastwise laws as Congress intended, as described below, but it would also help to ensure that these crucial sectors of the U.S. maritime industry are able to operate without being unfairly disadvantaged through the use of foreign-built, foreign-crewed, and foreign-flagged vessels that are not required to abide by many U.S. laws, including tax, labor, and environmental laws.

1. Treatment of Ruling Letters

As a threshold matter, MCTF supports CBP’s use of the process set forth at 19 U.S.C. § 1625(c) to deal with ruling letters that are inconsistent with the coastwise laws and earlier CBP rulings that properly applied those laws. In § 1625(c), Congress provided CBP with a fair but efficient process to review its ruling letters when necessary to insure consistency in the application of the law. As CBP has noted, reliance on the agency’s ruling letters is a “qualified right” and the delayed effective date and notice and comment procedures provided by § 1625(c) “reflect the full extent to which Congress believes these principles [of fairness, equity, reliance and estoppel] should apply to Customs rulings.” 67 Fed. Reg. 53483, 53486 (Aug. 16, 2002). Courts have upheld use of the § 1625(c) process even where it adversely affects a party who relied on CBP’s initial ruling letter to its detriment. *See Heartland By-Products, Inc. v. U.S.*, 264 F.3d 1126, 1136 (Fed. Cir. 2001) (upholding CBP’s revocation of a ruling letter through the § 1625(c) process where the effect was to cause the interested party to pay higher duties), *cert. denied*, 537 U.S. 812 (2002). Indeed, it is CBP’s statutory mandate to enforce the coastwise laws, and the potential economic consequences of its enforcement actions are not part of the § 1625(c) process. If anything, lack of proper enforcement of the coastwise laws can have significant negative economic impacts to the U.S.-flag coastwise qualified fleet.

2. Transportation of Merchandise under the Coastwise Laws

Under the coastwise laws, only a vessel that is built in the U.S., owned by U.S. citizens, documented under U.S. registry, and crewed by U.S. seafarers may “provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply.” 46 U.S.C. § 55102. The U.S. has reserved the domestic trades for U.S. vessels since the Navigation Act of 1817,¹ and has had other laws in place to promote a U.S.-flag fleet since 1789.² These laws are a cornerstone of our maritime heritage and policy and have fostered the historical importance of our maritime industries. Many other nations, including U.S. trading partners, have similar laws.

Congress has broadly defined the term “merchandise” for purposes of the coastwise laws. Merchandise includes “goods, wares, and chattels of every description,” 19 U.S.C. § 1401(c), and includes government-owned cargoes, valueless materials, dredge spoils and hazardous wastes, among other types of cargoes. *See* 46 U.S.C. §§ 55102, 55105, 55110. In accordance with the express intent of Congress that the coastwise laws broadly apply, CBP has taken an expansive view of what constitutes merchandise under the coastwise laws that must be transported on U.S. coastwise qualified vessels.

In its proposed action regarding certain ruling letters, CBP reinforces that view. The proposal focuses largely on correcting the incremental misapplication of a key 1976 decision in which CBP evaluated a range of activities undertaken by a pipeline repair vessel on the outer continental shelf (“OCS”).³ T.D. 78-387 (Oct. 7, 1976) (referred to herein as the “1976 decision”). An essential premise of the decision was that the basic vessel operation at issue, i.e., pipelaying, was not a coastwise activity because it did not involve the landing of the pipe at a coastwise point, but rather only the “paying out” of the pipe as it was laid along a continuous path. From that starting point, Customs reasoned that a vessel that repaired the pipeline was no different than one that laid the pipeline and hence it too was not engaged in a coastwise activity, provided certain factors were present. Specifically, CBP determined that equipment or supplies carried or used by the pipelaying vessel or the pipeline repair vessel, incidental to the pipelaying or similar activity do not constitute merchandise where: a) their use is unforeseen; b) they are of *de minimis* value; c) they are usually carried aboard the vessel as supplies; and d) their installation is performed on or from the vessel. *See id.*

Over the years, however, these factors underlying the 1976 decision have been cited out of context, eroding the fundamental analysis with the result that non-coastwise qualified vessels were allowed to engage in a host of activities that are properly reserved for U.S. coastwise qualified vessels.

¹ 3 Stat. 351 (Mar. 1, 1817).

² *See* Act of Sept. 1, 1789, ch. xi, §1, 1 Stat. 55.

³ The coastwise laws apply to the territorial sea and internal waters, and also to certain points beyond the territorial sea under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*, and other laws.

For example, in HQ 115185 (Nov. 20, 2000), CBP determined that a non-coastwise qualified vessel could transport pipeline connectors from a coastwise point to the installation site without violating the coastwise laws as long as the installation work was done from the vessel. This ruling, like others, failed to take account of all of the specific factors enumerated in the 1976 decision, namely that the materials must be incidental to pipelaying operations, usually carried aboard the vessel as supplies, of *de minimis* value, and that their use be unforeseen. In fact, the pipeline connectors at issue in HQ 115185 were specifically loaded aboard the vessel for the purpose of installing them after the pipelaying work was completed (i.e., not incidental to *pipelaying* or pipeline repair operations from the same vessel), their use was thus foreseen, they were not usually carried aboard the vessel as supplies, and they were not likely of *de minimis* value. Accordingly, the pipeline connectors would not have met the key factors enumerated in the 1976 decision necessary to take them out of the purview of the coastwise laws, and therefore should have been transported aboard a U.S. coastwise qualified vessel. Allowing a non-coastwise qualified vessel to lade merchandise at a coastwise point and to transport that merchandise to another coastwise point, where not incidental to pipelaying operations, is a clear violation of the coastwise laws.

In its proposed action, CBP has proposed to correct or eliminate several rulings that similarly failed to take due account of all the factors set forth in the 1976 decision and permitted transportation of merchandise onboard non-coastwise qualified vessels. Permitting non-coastwise qualified vessels to engage in such transportation violates the coastwise laws. MCTF therefore concurs with CBP's proposed treatment of such ruling letters that erroneously permitted merchandise to be transported between coastwise points aboard non-coastwise qualified vessels.

3. Vessel Equipment

CBP has recognized that certain limited categories of materials and supplies carried aboard a vessel constitute "vessel equipment" and not merchandise subject to the coastwise laws. In T.D. 49815(4) (Feb. 16, 1939), CBP determined that vessel equipment constitutes only those articles "necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of persons onboard" citing as examples of such vessel equipment "rope, sail, table linens, bedding, china, table silverware, cutlery, bolts and nuts."

In discussing vessel equipment in the 1976 decision, however, CBP referred to such equipment as "materials and tools as are necessary for the accomplishment of the mission of the vessel" which are transported "incidental to the vessel's operations." As noted above, the 1976 decision involved a pipelaying vessel and CBP recognized that certain materials can be transported on a non-coastwise qualified vessel if incidental to pipelaying operations. CBP's characterization of vessel equipment in the 1976 decision as materials and tools "necessary for the accomplishment of the mission of the vessel" is therefore only relevant in the context of pipelaying operations or other non-coastwise operations. The 1976 ruling was explicit that were the operation to shift to a coastwise mission, i.e., not pipelaying or pipeline repair, but rather the transportation of pieces of pipe from a coastwise point to the offshore production platform, for subsequent installation by another vessel, then those pieces would be considered merchandise and the transporting vessel would have to be coastwise qualified.

In subsequent rulings, however, CBP applied the “mission of the vessel” language outside the context of non-coastwise pipelaying operations, thereby effectively adopting a new definition of the term “vessel equipment” completely divorced from that previously applied. *See, e.g.*, HQ 110402 (Aug. 18, 1989) (vessel equipment is that “in furtherance of the primary mission of the vessel”). The effect was to create a rule under which the scope of “vessel equipment” turned entirely upon the stated mission of the vessel, such that the coastwise laws could be avoided simply by describing the function of a vessel to include use of the merchandise it carried. *See, e.g.*, H.Q. 115938 (Apr. 1, 2003) (finding that non-coastwise qualified liftboats could transport compressors, generators, pumps, and pre-fabricated structural components from a U.S. port to a coastwise point on the OCS without violating the coastwise laws since such equipment was “fundamental to the mission of the vessel” to support oil and gas well drilling, construction and repair). A close reading of the 1976 decision and T.D. 49815(4) makes clear that CBP never intended the definition of vessel equipment to depend solely on the mission of the vessel or to change dramatically from one vessel to the next.

The MCTF supports CBP’s proposal to reinforce the standard expressed in T.D. 49815(4) to determine what constitutes vessel equipment under the coastwise laws. As CBP proposes, vessel equipment should be limited to articles necessary and appropriate for the navigation, operation, and maintenance of, or comfort and safety of persons onboard, the vessel itself, and not what might be necessary and appropriate for an activity in which the vessel is engaged. Permitting non-coastwise qualified vessels to carry equipment, supplies, or other articles that are not needed to navigate, operate, or maintain the vessel undermines the coastwise laws because it permits transportation that should be reserved for U.S. coastwise qualified vessels.

CONCLUSION

The MCTF appreciates this opportunity to comment and commends CBP for reevaluating its prior rulings, reconciling inconsistencies, and treating them in a manner that is consistent with the intent behind our nation’s coastwise laws. Proper application of U.S. coastwise laws is important to the U.S. maritime industry and the MCTF urges the agency to move forward with the implementation of its proposed ruling modifications. If you have questions, please contact our counsel, William N. Myhre, Esq. at (202) 661-6222.

Respectfully submitted,

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