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May 20, 2005

Jonathan K. Waldron, Esq.
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Washington, D.C. 20037

Dear Mr. Waldron:

We refer to your letter of March 11, 2005 and its enclosures, as well as to your follow up e-mail of March 25, 2005 with attached drawings, by which you have sought a preliminary rebuild determination as to the SEABULK CHALLENGE, O.N. 642152, and SEABULK TRADER, O.N. 638899 (together, the "Vessels"). Specifically, as revealed in greater detail by the drawings accompanying your letter, you are considering two separate options to convert the Vessels from their current configuration of a double bottom and single side to a configuration that will fully meet the technical double hull specifications of the Oil Pollution Act of 1990, P.L. 101-380 ("OPA 90"). You have requested a preliminary determination in accordance with 46 C.F.R. § 177(g) that the coastwise eligibility of the Vessels will not be adversely affected if such work, in accordance with either option, is accomplished in a foreign shipyard.

Governing Principles

You have correctly identified two separate circumstances which, if found to be applicable in this case, could result in the loss of coastwise privileges for the Vessels as a consequence of the accomplishment of the proposed work in a foreign shipyard.

First, in accordance with the second proviso of 46 App. U.S.C. § 883, any vessel that has acquired the lawful right to engage in the coastwise trade by virtue of having been built in or documented under the laws of the United States, and that is later rebuilt outside of the United States, permanently loses its coastwise trading privileges. The test to determine whether a vessel has been rebuilt is set forth at 46 C.F.R. § 67.177 which provides, in general, that a vessel is deemed rebuilt (1) when relevant work (that is, work performed on its hull or superstructure) constitutes a "considerable part" of the hull or superstructure or (2) when a major component of the hull or superstructure, not built in the United States, is added to the vessel.

With regard to the former test, percentage limitations have been established at 46 C.F.R. § 177(b) to ascertain the meaning of "considerable part" as it would apply to vessels of various materials of construction. With regard to vessels the hull and superstructure of which is constructed of steel, the following thresholds have been established:

- (i) A vessel is *deemed* rebuilt if the relevant work constitutes more than 10% of the vessel's steelweight prior to the work;
- (ii) A vessel *may be* considered rebuilt if the relevant work constitutes more than 7.5% but not more than 10% of the vessel's steelweight prior to the work; and

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- (iii) A vessel *is not* considered rebuilt if the relevant work constitutes 7.5% or less of the vessel's steelweight prior to the work.

With regard to the latter test, if a major component of the hull or superstructure, not built in the United States is added to the vessel, it will be determined to have been rebuilt regardless of the material of construction.

Second, in accordance with 46 U.S.C. § 3704, a vessel also loses its right to engage in the coastwise trade if a required segregated ballast tank is installed outside of the United States.

Rebuild Determination

Part of the Hull

We turn first to the argument you have advanced which would have us conclude that the work to be performed to these Vessels is not "relevant work", for purposes of a rebuild determination, as it is not work performed to the hull (or superstructure) of the Vessels. By asserting a narrow definition of "hull", equating it solely with the "watertight envelope", or "flotation envelope", of the vessel you have argued that all items of work not strictly necessary to the creation of that envelope, such as the new watertight boundary or protective space now mandated by OPA 90 and to be created by the work you have proposed, are necessarily excluded from the definition of "hull" and are, thus, not relevant work for purposes of a rebuild determination. You support this argument by your reference to the various items referred to in the preamble to the proposed rule that established the rebuild standard (60 Fed. Reg. 17290 (April 5, 1995)) with the implicit suggestion that the work proposed in this instance is of a like kind or category as those items. For the reasons set for the below we do not accept this argument.

The definition of "hull" at 46 C.F.R. § 67.3 does, indeed, refer to the "shell, or outer casing...which provides...the flotation integrity of the vessel". Viewed in that narrowest of contexts, it could be plausibly argued that the work proposed is not technically necessary to the mere creation or maintenance of a flotation envelope. Double hull construction only having become the standard for vessels of this type relatively recently, it is certainly the case that a flotation envelope can be created which does not incorporate that redundancy.

However, the definition also refers to "the internal structure below the main deck which provides...the...structural integrity of the vessel". Moreover, as you have also observed by your reference to the preamble to the proposed rule, the core of the definition of that which is, or is not, part of the hull is whether or not it "affects the structural and watertight integrity of the vessel". Thus, by our reading, the definition of "hull" must encompass more within its scope than the mere flotation envelope of the vessel and cannot exclude work designed and intended to directly affect that watertight integrity by the construction of an "inner" hull, creating a further watertight protective space between the cargo and the existing, or "outer", hull of the vessel.

The work you have proposed is being undertaken so that the vessels will fully meet the double hull specifications of OPA 90 and its implementing regulations. That legislation, enacted in the aftermath of the EXXON VALDEZ oil spill disaster in the environmentally sensitive Prince William Sound, raised the requirement for the structural integrity of the watertight barrier that separates the hazardous cargo of oil-bearing vessels from the environmentally sensitive seas. It elevated the standard in vessel construction to mandate the creation of a watertight barrier that would, with greater reliability, not only keep the water out but, at the same time, keep potentially hazardous cargoes in. We note, in fact, that the terms "double bottom", "double hull" and

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“double sides” are all defined, at 33 CFR § 157.03, by reference to the “watertight protective spaces” they are designed and intended to create, separating the bottoms, sides and ends of the cargo tanks from the outer skin of the vessel. We also note that, of the numerous items of work referred to in the preamble cited above as being unrelated to the hull, none seem to share this characteristic or to be of the same or similar kind or function.

In light of the foregoing, we cannot concur with a conclusion that would find that the work required to create a double hull is somehow separable from, and not intrinsic to the very nature of, the watertight integrity of a vessel that is required by law to incorporate that feature. It is our view, instead, that the standard for what constitutes watertight integrity has simply been legislatively enhanced for such vessels by a mandated redundancy to acceptable hull construction. We conclude, therefore, that the “inner” hull formed by this work, as mandated by that Act and its regulations, is no less a part of the hull than is the “outer” hull. It is inseparable from and a part of “the internal structure below the main deck which provides *both* the flotation envelope *and* structural integrity of the vessel in its normal operations.” (46 CFR § 67.3) (emphasis added)

Major Component of the Hull

Having determined that the watertight boundary to be created by the proposed work is intrinsic to the hull itself, we decline to characterize it as a separable component that will be added to the Vessels similar, for example, to a bulbous bow or additional decks added to the superstructure. Instead, we will assess whether or not the proposed work would constitute a “considerable part” of the hull in accordance with the percentage thresholds set forth above.

Considerable Part of the Hull

We accept the steelweight calculations offered by your letter and its enclosures and find that, under your Option A, the added steelweight percentage would be 8.57% and, under your Option B, the added steelweight percentage would be 7.97%. In both cases, therefore, the added steelweight percentages fall within the threshold of work by which the Vessels *may, but need not*, be considered rebuilt. However, because the percentage in each case falls closer to the lower end than to the upper end of that range, and because we find no compelling reason to require a contrary determination in this case, we find that the vessels would not be considered rebuilt in the case of either Option A or Option B.

Installation of Required Segregated Ballast Tanks

With regard to the installation of required segregated ballast tanks, 46 U.S.C. § 3704 provides as follows:

“A segregated ballast tank, a crude oil washing system, or an inert gas system, required by this chapter or a regulation prescribed under this chapter, on a vessel entitled to engage in the coastwise trade under section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. § 883), shall be installed in the United States (except the trust territories). A vessel failing to comply with this section may not engage in the coastwise trade.”

As your letter acknowledges, in conjunction with Option A, a reconfiguration of the port and starboard segregated ballast tanks will occur as a result of building a tank boundary. However, we concur that this reconfiguration, which would be undertaken on a voluntary basis in connection with other unrelated modifications, does not constitute the *installation of required* segregated ballast tanks as contemplated by that provision.

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Conclusion

In light of all of the above, we find that, though the proposed work contemplated by Options A and B does implicate the hull of the Vessels and is subject to the rebuild parameters of 46 C.F.R. § 67.177, in neither case will the work to be performed constitute a considerable part of the hull. As such, the proposed work would not result in a determination that the Vessels had been rebuilt foreign.

Furthermore, we find that the segregated ballast tank reconfiguration in a foreign shipyard under Option A is not prohibited by 46 U.S.C. § 3704.

Consequently, we determine that the work contemplated by either Option A or Option B would not adversely affect the coastwise eligibility of the Vessels.

You are cautioned that this is a preliminary determination based upon the estimates provided as to each of the two options. If the steel work performed with respect to either option exceeds the estimate for the higher of the two, your Option A, it is possible that our exercise of discretion in determining that the work to be performed does not constitute a considerable part of the hull could be affected. If at the conclusion of the project, as to either of the Vessels, the steel work performed exceeds 752 long tons, which represents 8.57% of the steelweight prior to the work having been performed, it will be necessary to submit an application for a final determination in accordance with the provisions of 46 C.F.R. § 67.177(e).

Sincerely,


PATRICIA J. WILLIAMS
Acting