BEFORE
UNITED STATES CUSTOMS AND BORDER PROTECTION

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51 Customs Bulletin & Decisions No. 6, p. 22 (February 6, 2017)

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

COMMENTS OF THE
AMERICAN MARITIME PARTNERSHIP

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INTRODUCTION

The American Maritime Partnership ("AMP") is pleased to offer comments on the U.S. Customs and Border Protection ("CBP" or "Customs") January 18, 2017 notice described above (the "Notice"). AMP 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.

AMP is the voice of the U.S. domestic maritime industry, a pillar of our nation's economic, national, and homeland security. More than 40,000 American vessels built in American shipyards, crewed by American mariners, and owned by American companies, operate in our waters 24/7, and this commerce sustains nearly 500,000 American jobs, and generates $29 billion in labor compensation, $11 billion in taxes, and more than $100 billion in annual economic output.

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 sustain hundreds of 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 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.

DISCUSSION

1. Treatment of Ruling Letters

As a threshold matter, AMP 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. In section 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 section 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).

Pursuant to section 1625(c), CBP now properly proposes in this Notice (1) to modify a 1976 ruling and its progeny addressing operation of a non-coastwise qualified pipe-laying vessel and certain related activities to make it more consistent with federal statutes that were amended after the original ruling was issued, and (2) to revise rulings which have incorrectly determined that certain articles transported between coastwise points are vessel equipment, rather than merchandise, pursuant to the long-standing definition of equipment as promulgated in an interpretation of that term as used in the Tariff Act of 1930, and because those letter rulings are inconsistent with the Jones Act.

As a part of this process it is important to recognize, as CBP does in the Notice, that CBP's practice of issuing rulings under 19 C.F.R. § 177.1(a)(1) "… is in the interest of the sound administration of the Customs and related laws such that persons engaging in any transaction affected by those laws fully understand the consequences of the transaction prior to its consummation" and the ruling process provides that opportunity. But equally important is the fact that each ruling is limited to the facts of the particular transaction and the regulations make clear that "no other person should rely on the ruling letter[s] or assume that the principles of [those] ruling[s] will be applied in connection with any transactions other than the one[s] described in [those] letter[s]." 19 C.F.R. § 177.9(c).

Courts have upheld use of the section 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. United States*, 264 F.3d 1126, 1136 (Fed. Cir. 2001) (upholding CBP's revocation of a ruling letter through the section 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 section 1625(c) process.[1] If anything, lack of proper enforcement of the coastwise laws can have significant negative economic impacts to the U.S.-flag coastwise qualified fleet.

This statutory and regulatory framework together with the judicial precedent are essential factors as CBP evaluates comments it may receive in response to the Notice from those who claim economic harm in reliance on the rulings to be revoked or modified. Nor can commenters claim lack of notice as all of the rulings to be revoked are more than a decade old and reflect specific transactions that were long ago completed. Moreover, the industry has long been aware that the rationale underlying these rulings was under review by CBP.[2]

[1] Nonetheless, in an effort to have CBP consider the economic consequences of the Notice, the American Petroleum Institute ("API") commissioned a study of the economic impacts of the proposed ruling modifications and revocations that was released on April 4, 2017 (the "Calash Report"). http://www.api.org/news-policy-and-issues/news/2017/04/04/new-report-forecasts-damage-to-american. Notwthstanding CBP's methodical identification of the 24 affected rulings, the Calash Report assumes a far greater scope of affected vessels which in turn demonstrably overstates the purported economic impact on the industry. The Report includes pipelaying and heavy lift vessels, for which there are numerous rulings well known to CBP and the industry, and which were expressly excluded from the CBP Notice. The Report goes on to expand the scope even further by stating, without support, that "depending on the interpretation of the proposed modifications and revocations, a wide variety of vessels including mobile offshore drilling rigs, shallow and deepwater crane and lay vessels and well stimulation vessels may also be affected." The Calash authors include this expanded base of affected vessels in projecting the adverse impacts, while simultaneously admitting that their own calculation of the impacts "could be imprecise…for a variety of reasons" and "will be highly dependent on CBP's interpretation and enforcement." In addition, as noted by other commenters, even the methodology used in developing the calculated impacts overstates the projected economic consequences.

[2] *See* 43 Cust. B. & Dec. No.28, p. 54 (July 17, 2009) in which CBP initiated a similar process of revocation and modification involving the identical rulings and although that Notice was temporarily withdrawn for further consideration CBP made clear at the time that no final determination had been reached. *See* 43 Cust. B. & Dec. No. 40, pp. 1–3 (October 1, 2009) ("A new notice which will set forth CBP's proposed action relating to its interpretation of T.D. 78-387 and T.D. 49815(4) will be published in the *Customs Bulletin* in the near future.").

2. Transportation of Merchandise Under the Coastwise Laws

Under the coastwise laws, only a vessel that is built in the United States, 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 United States has reserved the domestic trades for U.S. vessels since the Navigation Act of 1817,[3] and has had other laws in place to promote a U.S.-flag fleet since 1789.[4] 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 a 1976 ruling in which CBP evaluated a range of activities undertaken by a pipeline repair vessel on the outer continental shelf ("OCS").[5] T.D. 78-387 (Oct. 7, 1976) (referred to herein as the "1976 Ruling"). 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.

Part of the analysis in this ruling is no longer applicable because of amendments to the coastwise laws (46 U.S.C. § 55102), the Outer Continental Shelf Lands Act (43 U.S.C. § 1333), and Customs regulations (19 C.F.R. § 4.80b(a)), which highlighted the clear inconsistency with 46 U.S.C. § 55102. CBP has proposed to modify the 1976 Ruling in several key respects as clearly spelled out in the draft ruling accompanying the Notice as Attachment B. Moreover, eight specific rulings are revoked to the extent they are contrary to the guidance set forth in the Notice and the Attachment and to the extent that the transactions are past and concluded. This is almost certain to be the case since the most recent of the eight rulings was issued nearly fifteen years ago and two were issued thirty years ago. AMP strongly supports CBP's proposed

[3] 3 Stat. 351 (Mar. 1, 1817).
[4] *See* Act of Sept. 1, 1789, ch. xi, § 1, 1 Stat. 55.
[5] 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.

treatment of these rulings that erroneously permitted merchandise to be transported between coastwise points aboard non-coastwise qualified vessels.

3. Vessel Equipment

CBP has long 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 reliance on Section 309 of the Tariff Act of 1930, CBP determined in T.D. 49815(4) (Feb. 16, 1939) 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 Ruling CBP broadly referred to such equipment as materials and tools that "are necessary for the accomplishment of the mission of the vessel" which are transported "incidental to the vessel's operations." In subsequent rulings, however, the "mission of the vessel" language was applied 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.*, HQ 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). As a careful reading of the 1976 Ruling and T.D. 49815(4) makes clear, 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.

AMP supports CBP's proposal to reinforce the original 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. CBP proposes to revoke eleven specific rulings on the same grounds noted earlier, i.e., to the extent they are contrary to the guidance set forth in the Notice and to the extent that the transactions are past and concluded. And here again, these rulings are likely to involve past transactions as the most recent was issued over a decade ago, and the others as long as thirty-five years ago. 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 long reserved for U.S. coastwise qualified vessels.

CONCLUSION

AMP appreciates this opportunity to comment on the Notice and commends CBP for reviewing its prior rulings in light of changes in the law, the need to reconcile inconsistencies, and to treat rulings in a manner that is consistent with the intent behind our nation's coastwise laws. Proper application of U.S. coastwise laws is vitally important to our nation‘s economic, national, and homeland security and AMP urges the agency to move forward with the implementation of the Notice.

Respectfully submitted,

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