



16713/5/2
August 31, 2017

Jonathan K. Waldron, Esq.
1825 Eye Street, NW
Washington, DC 20006

Dear Mr. Waldron:

I am writing in response to your letter of August 18, 2017. You wrote on behalf of your client, Dakota Creek Industries, Inc. (DCI) to request what you described as "an initial expedited determination that construction of a 262-foot, 3,600 ton Amendment 80 catcher processor, named AMERICA'S FINEST, Official Number 1276760 (the 'Vessel'), with cold-formed plates installed as part of the hull shell will not adversely affect the coastwise eligibility of the Vessel."

The cold-forming of those plates was, of course, performed overseas. Since your request for a "threshold determination", as you have also described it, is certainly not a traditional request for a U.S. built determination pursuant to 46 C.F.R. § 67.97, it is worth adding some additional context.

The Vessel is currently in the final stages of construction at the facilities of DCI in Anacortes, Washington. On March 20, 2017, the National Vessel Documentation Center (NVDC) received an Application for Initial Documentation (CG-1258) seeking documentation of the Vessel with fishery and coastwise endorsements, both of which require that the vessel seeking those endorsements must be built in the United States (U.S.) as a condition of eligibility. An official number was assigned to the Vessel and that application is still pending.

However, it was not until the NVDC received an internal request to review an early draft of the current Coast Guard Authorization Act that it came to our attention that there might be an issue as to whether or not the Vessel would qualify as having been built in the U.S. That draft contained - and as of this writing (to our knowledge) - still contains a provision which would waive the U.S. build requirements of both 46 U.S.C. §§ 12112 and 12113 for this Vessel.

Shortly thereafter, on June 14, 2017, the NVDC was asked to brief certain Congressional staff concerning that provision and this Vessel. In connection with that request, we received a copy of a Briefing Sheet prepared by your firm (copy attached as Exhibit A), which concerns this Vessel and supports the effort on its behalf and on behalf of DCI to secure a legislative waiver from established U.S. build requirements. That Briefing Sheet, dated May 16, 2017, concludes, in pertinent part, that though "the mistake by DCI was unintentional and inadvertent", DCI was

nevertheless mistaken in its belief that the installation of these foreign-sourced cold-formed compound curvature plates in the hull of the Vessel would not have to be accounted for as part of the regulatory limitation (1.5% of the Vessel's steel weight) on the incorporation of foreign fabricated components in the hull of a vessel deemed built in the U.S.

It was not until August 8, 2017, however, that you and a representative of DCI, together with a representative of Fisherman's Finest Inc., the manager of the Vessel's owner, and their counsel, met with the NVDC staff (and other Coast Guard representatives) at our office to discuss your proposed way forward for the documentation of this Vessel in light of that mistake and the proposed and pending legislative waiver.

Among other matters discussed at that meeting, you stated your intent at that time to submit an application for a U.S. build determination for the Vessel pursuant to 46 C.F.R. § 67.97. Your primary purpose for proposing to do so and to seek an expedited response was to establish that all administrative remedies had been exhausted as an element in support of DCI's pursuit of a legislative waiver. Your letter of August 18, 2017, to which I am now responding and in which you have asked that we make the "initial expedited determination" described above, constitutes the application referred to at that meeting.

Because of the unique posture of this application, having been submitted without specific weights and percentages, I have chosen not to refer it to the Coast Guard's Naval Architecture Division for preliminary review and fact-finding as we would customarily do. Rather, I view your application as more in the nature of a request for a declaratory ruling on a particular issue - the outcome of which, it appears that you recognize, will be dispositive as to the larger issue of whether this Vessel will or will not be deemed U.S. built.

As you know, it has been a well-established principal in these matters that foreign-sourced materials, such as steel, may be used without limitation in the hull and superstructure of vessels still deemed to be built in the U.S.; provided, that those materials are received by the shipyard in standard mill-produced sizes and shapes and that they have not undergone any fabrication overseas, such as by drilling, punching, cutting, bending, or otherwise. In other words, foreign-sourced steel in standard mill-produced shapes and sizes is not prohibited or limited in any way but foreign fabrication of that steel is limited and must be accounted for.

It appears to me that the Briefing Sheet referred to, coupled with the fact that a legislative waiver is now being sought for this Vessel, constitute recognition of the impact of this established principal on this Vessel's prospects. It has, in general, formed a part of numerous past determinations, including some that you have sought and received on behalf of other applicants.

This principal was specifically applied to the cold-forming, or bending and shaping into compound curves, of hull plating in an NVDC determination issued on February 14, 2003, which treated that cold-forming as the fabrication of components of the hull that had to be accounted for under the 1.5% standard. That determination was appealed by the applicant and a Decision on

Appeal dated December 30, 2003 (copy attached as Exhibit B) was issued that affirmed the NVDC determination and was deemed to constitute final agency action on the matter.

It is my position that the attached Decision on Appeal, which directly addresses the type of foreign fabrication at issue here, represents controlling authority on point and, as such, governs and compels the determination that I make in response to your application.

You have advanced several arguments in favor of your position contrary to that Decision on Appeal. However, not only are those arguments misdirected to the NVDC in light of that controlling authority, they all appear to be arguments of a type which could be prefaced with the phrase "if only". In other words, the thrust of those arguments appears to be that the Vessel would be, and therefore should be, deemed built in the U.S., notwithstanding the use of these foreign fabricated components ---

if only,

the 1.5% limitation were, let's say, 10%; or

if only,

the standard were tied to the monetary value of the work done rather than to its steel weight; or

if only,

the Coast Guard would interpret the Jones Act, and promulgate regulations accordingly, designed to assist in the evolution of the U.S. shipbuilding industry by not counting the kind of foreign fabrication done here as long as it is done for the creation of "generic" shapes for the construction of a generally standardized series or type of vessels (although, as to this particular line of argument and its logical extension, it is difficult to see how a greater allowance for such foreign fabricated components would, as you have argued, promote a more robust and evolved American shipbuilding industry as opposed to, perhaps, a more robust and evolved shell of an increasingly hollowed out ship assembly industry or how, at the end of the day, that would be consistent with the purpose of the Jones Act); or, finally,

if only,

DCI had realized its error.

These are arguments which might, or might not, gather more traction on appeal. You have asked for an expedited determination by the NVDC and it is my intention here to accommodate that request to the extent possible.

For all of the foregoing reasons, and on the basis of the information you submitted and the other information before us which has been made a part of this determination, I find that the foreign

16713/5/2
August 31, 2017

fabricated cold-formed plates used in this Vessel must, and will, count toward the 1.5% major component standard. Consequently, I also find that the Vessel will not be eligible to be issued a Certificate of Documentation with fishery or coastwise endorsements upon completion of construction.

If you wish to pursue an appeal of this determination I refer you to 46 C.F.R. § 67.12 and the subpart referred to therein.

Sincerely,



Christina G. Washburn
Director

Enclosures: Exhibits A and B



May 16, 2017

DAKOTA CREEK INDUSTRIES, INC., THE FISHERMEN'S FINEST TRAWLER, AND U.S. BUILD REQUIREMENTS

The following summary is provided regarding a recently identified problem concerning the construction of Fishermen's Finest, Inc.'s ("FFI") state-of-the-art 264 foot, 3,600 ton Amendment 80 catcher processor (named "*America's Finest*") in the Dakota Creek Industries, Inc.'s ("DCI") shipyard in Anacortes, Washington that requires Congressional action to ensure the vessel receives coastwise and fisheries privileges. The *America's Finest* is the first large, 200+ foot Jones Act catcher processor fishing vessel constructed in the United States in almost thirty years.

Background on Dakota Creek and Fishermen's Finest

- DCI specializes in the construction and repair of steel and aluminum vessels up to 400 feet. It has previously delivered 62 commercial Jones Act and U.S. Navy vessels and is a critical part of the national shipbuilding infrastructure. It is privately owned by local residents and has been in business since 1975. DCI employs between 275-450 highly skilled shipyard tradesmen. Dakota Creek is building the *America's Finest* with the newest shipbuilding technology. The *America's Finest* is 86% complete and is scheduled to be delivered in early November 2017.
- Based in Anacortes and Kirkland, Washington, FFI is a privately-owned fishing company that has been operating for over 40 years and manages a fleet of two 40+ year old catcher/processor vessels in the fisheries of the North Pacific and Bering Sea. FFI is the 3rd largest woman owned business in the Pacific Northwest and employs 230+ people, mostly Washington State residents living in Island, King, and Pierce counties. FFI has already paid \$62M of the \$75M total contract price for the *America's Finest*. FFI has funded this shipbuilding project without any governmental assistance.

Background on U.S. Build Requirements

- The coastwise laws (*i.e.* 46 U.S.C. §§12112 and 12113) mandate that a vessel must "built in the United States" in order to commercially fish in U.S. waters including the U.S. Exclusive Economic Zone ("EEZ") and to carry merchandise between coastwise points. U.S. build laws require that all major components of the hull be fabricated and the vessel be assembled entirely in the United States.
- Under Coast Guard interpretations, basic hull materials of foreign origin, such as steel sheets, plates, beams, and bars, may be used in a vessel constructed in the United States without affecting its U.S.-build status. These basic materials, however, may become disqualifying "fabricated major components" if they are subjected to any drilling, cutting, shaping, forming, or processing, no matter how minor, before coming to the United States and regardless of whether the plates are subject to further processing at a U.S. Shipyard. For example, a foreign worker drilling a single hole, or making a single bend on a 2-ton steel plate will automatically disqualify the entire weight of that plate, regardless of how much additional U.S. processing related work is done on that same steel plate.

May 16, 2017

- The Coast Guard has established a standard that if the sum total of this disqualified steel weight *exceeds 1.5% of a vessel's total steel weight* then the vessel is not deemed "built in the United States," and therefore ineligible for coastwise or fishery trades.

Status of Construction and Situation

- DCI purchased and installed some hull shell plating that was subject to bending and cutting at a facility in Holland in order to take advantage of the most advanced technology (i.e. cold forming technology) currently not available in the United States. It was shipped to Seattle along with other untouched steel, where Seaport Steel (a Washington family owned business) and DCI processed it all to the point where it was suitable for installation on shaped bow and stern sections of *America's Finest*.
- The value of the foreign work on the steel was approximately \$275,000.00, approximately 0.4% of the \$75M cost of the entire project. However, because the foreign work was done on many different plates, all those plates are disqualified (even though the cumulative amount of the foreign steel weight is limited to less than 7% of the steel weight of the entire vessel), so the disqualified steel weight exceeds the 1.5% Coast Guard limit. This means the *America's Finest* will not be deemed to be U.S. built and will not be eligible for the U.S. coastwise or fisheries trades.
- DCI believed that the installation of these steel plates would be acceptable because a great deal of additional cutting, bending, fitting, beveling and welding was necessarily performed by Seaport and DCI in order to make the plate suitable for use on the ship. Unfortunately, DCI's belief was incorrect.
- The available options are (1) a Congressional waiver from the U.S. build law for *America's Finest* to ensure the vessel can operate in the coastwise and fisheries trades, or (2) selling this state of the art vessel foreign at a considerable loss, a result likely to remove DCI and FFI from the U.S. shipbuilding and fishing industries, respectively.

Justification Supporting Congressional Waiver

- The mistake by DCI was unintentional and inadvertent. It was not made with the intention to evade U.S. law nor was it made with any profit motive. It is a one-time technical misunderstanding of the Coast Guard's steel rules. It will not be repeated.
- The vessel meets all other U.S. build requirements as it has been assembled entirely in Anacortes, Washington. The project has thus far provided direct jobs for more than 375 DCI employees for the last three years, and indirect jobs to roughly 1,200 more in the local area and around the United States.
- If the *America's Finest* is unable to acquire a coastwise/fisheries endorsement, it will likely be sold into a foreign fishery (most likely the Russian catcher/processor fleet), with resulting financial losses falling on DCI and FFI so draconian that neither company may survive. Such a result would eliminate two Washington companies, more than 500 highly paid and skilled trade jobs directly and between 2,000-3,000 jobs indirectly through multiplier effects.

May 16, 2017

- A legislative waiver will bring the newest technology to the U.S. fishing fleet. *America's Finest's* new technology is a massive leap forward in fishing vessel safety, bycatch reduction, full utilization of the catch with fish meal and reduction in greenhouse gas emissions by an expected 80%. In addition, this will allow DCI to complete a commitment made with Seaport Steel to set up cold forming technology in the United States to ensure its future benefit to the U.S. shipbuilding industry.

Request for Assistance

- Accordingly, DCI requests your support for a Congressional waiver of the U.S. build requirements for the *America's Finest* that will authorize the Coast Guard to issue a certificate of documentation with a coastwise and fisheries endorsements so that the vessel will be able to engage in the fisheries trade in the North Pacific and Bering Sea that will ultimately benefit the overall U.S. shipyard and fishing interests of the United States.

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2100 Second street, SW
Washington, DC 20593-0001
Staff Symbol: G-MO
Phone: (202) 267-1412
Fax: (202) 267-4839

16713/5-3

DEC 3 0 2003

Lawrence G. Cohen, Esq.
Vandeventer Black LLP
500 World Trade Center
Norfolk, VA 23510-1699

Re: Appeal of National Vessel Documentation Center Letter Ruling Dated February 14, 2003
Your Ref. No.: 05713-0001

Dear Mr. Cohen:

We refer to your letter of March 12, 2003 which constitutes your formal appeal, pursuant to 46 CFR Sections 1.03-45 and 1.03-15(c), of the decision of the National Vessel Documentation Center ("NVDC") by letter ruling dated February 14, 2003 concluding that the cold form bending outside of the U. S. of steel plates to be incorporated into the hulls of vessels to be built in the U. S. would preclude the vessels' use in the coastwise trade. We also refer to the previous correspondence and their attachments on this issue culminating in your formal appeal; including, your letter of October 1, 2002, the response thereto from the NVDC dated October 3, 2002 and your Request for Reconsideration dated October 29, 2002.

The Commandant has delegated final appeal authority in regard to the documentation of vessels under 46 CFR Part 67 to the Director of Field Operations (Commandant G-MO).

We summarize the factual contentions with regard to the steel plate at issue, as set forth in your formal appeal and the preceding correspondence, as follows:

Your client proposes to build one or more container cargo vessels to be employed in the U.S. coastwise trade. Those vessels would be built in a U. S. shipyard in accordance with a Dutch design that incorporates a smooth hull curvature with no hard chines. Though the hull plate material will be steel milled in the U.S., and other fabrication of such plates will also be done in the U.S., the hull curvature design will require the cold forming, or bending and shaping, of certain of the plates by a process which you contend, and for purposes hereof we do not contest, is not available in the U.S. With respect to each of the proposed vessels, 169 of the plates, which would constitute, collectively, approximately 14% of the steel weight of the vessel (150 MT of plates in a vessel with a total steel weight of 1,050 MT) would be sent to Holland for bending. You contend, however, that such an assessment of the relative magnitude of the work to be done foreign is misleading on several bases; namely, (i) with respect to cost, that the bending service represents 1.6% of the cost of construction of the vessel, (ii) with respect to man hours, that the bending service represents less than 2% of the man hours required to construct the vessel, and (iii) with respect to weight, that (1) viewed individually (as you contend they should be), the heaviest of the plates is 2.7 MT, or 0.23% of the light (by which we assume you to mean steel) weight of the vessel, and that (2) in any event, the actual bending will occur to only a percentage

of each plate sent to Holland thus, by this contention, further reducing the weight (in total and as a percentage of the steel weight of the vessel) of material to be subjected to the process of bending outside of the U.S., whether the plates are considered individually or collectively.

The applicable regulatory requirement is found at 46 CFR Section 67.97 and provides as follows:

"To be considered built in the United States, a vessel must meet both of the following criteria:

- (a) All major components of its hull and superstructure are fabricated in the United States; and
- (b) The vessel is assembled entirely in the United States."

For purposes of this appeal it is the former criterion, subsection (a) of 46 CFR Section 67.97, which is at issue.

At the outset we address certain issues that have been raised in the correspondence that constitutes the record in this matter and that, being peripheral to the fundamental issue, may serve only to cloud later discussion.

First, it has long been held that the requirement for fabrication of major components in the U.S. does not mean that foreign materials may not be used. The material of construction, steel in this case, is not considered to be a major "component" of the vessel and, thus, there is no prohibition against the use of steel of foreign manufacture provided that it is supplied in standard mill shapes. Conversely, however, the fact that domestically produced steel may be used in this case is neither determinative of the outcome nor even a mitigating factor.

Further, it has also long been held that if the steel is cut in accordance with detailed instructions, or if it is drilled, punched, formed, or otherwise processed so as to permit assembly, it will be deemed to have been fabricated. Thus the process of cold forming the plates to the precise curvature requirements required by the vessel's hull design falls clearly within the understood definition of "fabrication".

Further still, there is no precedent for the application of the cost of the process, or the consumption of man hours in its performance, relative to the overall cost or consumption of man hours in the construction of the vessel, as mitigating factors that should or need be taken into account in this determination.

Finally, we find no merit in your contention with regard to assessment of the weight of the plates to be formed, whether that is done individually or collectively, that one must take into account only that portion of each plate that will actually be bent. Putting aside for the moment that the record does not offer any basis by which we could make that assessment (nor does it appear that anyone has attempted to do so), the fact remains that the entirety of each plate will be subjected to this process even if only some fraction of the surface area of each plate may ultimately be changed in shape, depending upon the design requirements for that particular plate. We presume

that plates that will not need to be bent or shaped at all have not been included among the 169 plates that will be sent to Holland to be fabricated in this way. And we further presume that each plate that will be sent will be bent or shaped at least in some respect. Moreover, we would not (and could not) confine our analysis as to weight in other situations to just that portion of a plate that might have been subjected to some other process of fabrication, such as cutting or drilling. The impossibility of assessing the weight of only that portion of a plate that may have actually been "drilled", for example, we think is self-evident.

That brings us to what we believe to be the crux of your contention in this case; specifically, that in applying the general rule of thumb that has been applied in the past by the Coast Guard, that "components" that comprise less than 1.5% of the vessel's steel weight are not "major", one must make that determination in this case on the basis of the individual, rather than collective, weights of each of the 169 plates. Our review of the record as it pertains to this issue convinces us that there is little to be gained by continuation of the semantic discussion as to the dictionary definitions of "parts", "pieces" and "components", "major" or otherwise, which has marked the record to this point. To do so might well lead to a decision that is consistent with the legislative and regulatory purpose at stake here but it is certainly less likely to do so as directly as by simply addressing the issue head on, which we choose instead to do.

Past rulings that have applied the 1.5% guideline have uniformly done so in the context of the consideration of single, usually large and certainly discrete components which were intended to become part of, or attached to in some manner, either the hull or superstructure. What has not been addressed, however, is the application of that guideline to situations, such as is presented here, in which the parts at issue, far from being single, large and discrete, instead consist of hundreds or thousands of relatively small and substantially similar (almost interchangeable --- even if not perfectly so) pieces of what is itself clearly a "major component" of the vessel's hull; namely, its entire outer skin. To apply that guideline in this very distinguishable situation to each individual plate, as you would have us do, would grossly expand the 1.5% guideline in this and possible future instances and would in so doing, we believe, subvert the regulatory and legislative intent. In fact, to decide otherwise would arguably permit each individual piece of steel comprising a finished vessel to be fabricated in full overseas and subsequently brought to this country only for final assembly. And as long as no single piece amounted to more than 1.5% of the assembled vessel's total steel weight, the regulatory prohibition would not apply. We do not accept that this theoretically possible outcome is justified by the unabashedly protectionist purposes of the Jones Act and we elect not to accept your invitation to advance down that path in this case.

In support of your contention concerning the 1.5% guideline you cite past rulings on the subject, referring in particular to a ruling dated March 29, 2002 addressed to NQEA Australia Pty Ltd. and authored by Ms. Patricia Williams. That ruling actually provides a good example of the application of the guideline to single large and discrete components; specifically, the forward and aft hull fairings of the vessel, the lightest of which would have (and was found to have) surpassed the guideline. Thus, in that instance there was no need to rule on either (i) the heavier fairings or (ii) the issue of the individual, as opposed to the collective, weight of the fairings. As the guideline was surpassed in the case of the lightest individual piece there was no need to rule on other issues. Consequently, we do not find support in that ruling for your present contention.

Finally, referring us to *Chisholm v. Defense Logistics Agency*, 656 F. 2d 42 (3rd Cir. 1981) you caution us that an administrative agency acting in a quasi-judicial status must not act arbitrarily or capriciously and "(they) have an obligation to either follow, distinguish or overrule their own precedent." We contend that, not only is our reasoning in support of the outcome in this case neither arbitrary nor capricious, it does, indeed, follow, or distinguish on a reasoned basis, prior rulings on point. In any event, however, we refer you to *Hatch v. Federal Energy Regulatory Commission*, 654 F. 2d 825, 834 (D.C. Cir. 1981), wherein it is provided as follows:

"As a general matter, an agency is free to alter its past rulings and practices even in an adjudicatory setting (citation omitted). However, it is equally settled that an agency must provide a reasoned explanation for any failure to adhere to its own precedents (citations omitted)."

For the reasons set forth herein we affirm the Director's decision embodied in the letter ruling of February 14, 2003 and deny your request that such decision be set aside. You may consider this ruling to be a final agency action with respect to the subject matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "J.P. Brusseau", with a long horizontal flourish extending to the right.

J.P. BRUSSEAU
Captain, U.S. Coast Guard
Director of Field Activities