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**SHIPBUILDERS COUNCIL OF AMERICA, et al., Plaintiffs, v. UNITED STATES
DEPARTMENT OF HOMELAND SECURITY, et al., Defendants, SEABULK
ENERGY TRANSPORT, INC., et al., Intervenor Defendants.**

1:07cv665 (LMB/TRJ)

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
VIRGINIA, ALEXANDRIA DIVISION**

2008 U.S. Dist. LEXIS 33835

**April 24, 2008, Decided
April 24, 2008, Filed**

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For United States Department of Homeland Security, United States Coast Guard, National Vessel Documentation Center, Defendants: Monika L. Moore, US Attorney's Office, Alexandria, VA.

For Seabulk Petroleum Transport, Inc., Seabulk Energy Transport, Inc., Intervenor Defendants: Patrick O'Neil Cavanaugh, LEAD ATTORNEY, Blank Rome LLP, Washington, DC.

For US Shipping Partners LLP, Intervenor Defendant: Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC.

JUDGES: Leonie M. Brinkema, United States District Judge.

OPINION BY: Leonie M. Brinkema

OPINION

MEMORANDUM OPINION

Plaintiffs Shipbuilders Council of America, Crowley Maritime Corporation, and Overseas Shipholding Group, Inc. (collectively "plaintiffs"), have filed this action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, challenging a decision by the United States Coast Guard's [*2] National Vessel Documentation Center¹ ("Coast Guard") to issue a coastwise endorsement to the oil tanker *Seabulk Trader* after work was completed on the vessel in a foreign shipyard.² The owners of the vessel - Seabulk Energy Transport, Inc., and Seabulk Petroleum Transport, Inc. (collectively "Seabulk") - have intervened as defendants in this action. The Coast Guard has filed a motion to dismiss or, in the alternative, for summary judgment. Plaintiffs and Seabulk have filed cross motions for summary judgment.

1 The United States Department of Homeland Security, which oversees the Coast Guard, is also a named defendant in this action.

2 The Coast Guard's decision involved two vessels - the *Seabulk Trader* and the *Seabulk Challenger*. AR 28. Only the *Seabulk Trader* is at issue in this litigation.

For the reasons stated in this memorandum opinion, plaintiffs' motion will be granted, the Coast Guard's motion will be denied, and Seabulk's motion will be denied.

Background

I. Statutory Framework

The Coast Guard's decision implicates several federal statutes. Under the Merchant Marine Act of 1920, commonly known as the Jones Act, only vessels that maintain a "coastwise endorsement" may engage in [*3] coastwise trade - *i.e.*, trade "between points in the United States." ³ 46 U.S.C. § 55102(b). This litigation concerns the Second Proviso to the Jones Act, which permanently disqualifies an otherwise eligible vessel that is "later rebuilt outside the United States" from engaging in coastwise trade. § 12132(b). Furthermore, "a vessel is deemed to have been rebuilt in the United States only if the entire rebuilding, including the construction of any major component of the hull or superstructure, was done in the United States." § 12101(a).

3 Congress enacted the Jones Act "in an attempt to protect the American shipping industry against foreign competition." *OSG Bulk Ships, Inc. v. United States*, 328 U.S. App. D.C. 107, 132 F.3d 808, 809 (D.C. Cir. 1998); *see also Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 703 (2d. Cir. 1970) ("Like all maritime nations of the world, the United States treats its coastwise shipping trade as a jealously guarded preserve.").

The terminology in the Second Proviso is not defined. *See Am. Haw. Cruises v. Skinner*, 713 F. Supp. 452, 464 (D.D.C. 1989) ("At no time did Congress attempt to draw a line articulating how much foreign rebuilding would violate the second proviso, nor did it [*4] list the specific components that it considered to be 'major.'"). Rather, the task of clarifying these terms was left to the supervising agency - first the Secretary of the Treasury, and now the Coast Guard. *Id.*

In 1996, the Coast Guard issued regulations for determining when a vessel is "rebuilt" outside of the United States:

A vessel is deemed rebuilt foreign when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States. In determining whether a vessel is rebuilt foreign, the following parameters apply:

(a) Regardless of its material of construction, a vessel is deemed rebuilt

when a major component of the hull or superstructure not built in the United States is added to the vessel.

(b) For a vessel of which the hull and superstructure is constructed of steel or aluminum -

(1) A vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight, prior to the work, also known as discounted lightship weight.

(2) A vessel may be considered rebuilt when work performed on its hull or superstructure constitutes more than 7.5 percent but not more than 10 percent [*5] of the vessel's steelweight prior to the work.

(3) A vessel is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work.

46 C.F.R. § 67.177(a)-(b).

The Port and Tanker Safety Act of 1978 requires that certain tank and product vessels be equipped with segregated ballast tanks. *See* 46 U.S.C. §§ 3705, 3706. The statute was enacted to protect against the discharge of oil-contaminated ballast water by permanently allocating certain tanks to carry only ballast water. For those vessels engaged in coastwise trade, "[a] segregated ballast tank . . . required by this chapter . . . shall be installed in the United States." § 3704.

In response to the *Exxon Valdez* oil spill in Prince William Sound, Alaska, Congress passed the Oil Pollution Act of 1990, 46 U.S.C. § 3703a, which mandates that certain tankers be equipped with double hulls. *See Maritrans Inc. v. United States*, 342 F.3d 1344, 1348 (Fed. Cir. 2003). Existing single-hull vessels had to be retrofitted with double hulls to remain qualified to operate on waters subject to United States jurisdiction. *See* 46 U.S.C. § 3703a(c); *see generally Maritrans*, 342 F.3d at 1348 [*6] ("A double hull design provides a reinforced hull in order to minimize the impact of

punctures and hull damage."). Single-hull vessels that did not undergo a retrofit would be phased out pursuant to the retirement schedule in the statute.⁴

4 The oil tanker at issue in this case, the *Seabulk Trader*, was built in 1981. Absent a retrofit of its hull, the vessel would have been forced to retire in 2011.

II. The Present Dispute

On March 11, 2005, Seabulk requested a preliminary determination from the Coast Guard that proposed work in a Chinese shipyard on the *Seabulk Trader* would not result in a determination (1) that the vessel was "rebuilt" foreign under the Second Proviso to the Jones Act and 46 C.F.R. § 67.177, and (2) that the vessel had its segregated ballast tanks installed outside of the United States under 46 U.S.C. § 3704. AR 5-11. The proposed work involved the installation of internal bulkheads, or an "inner hull," throughout the vessel's cargo block and a reconfiguration of the vessel's existing ballast tank system. AR 5-6. Seabulk's submission included estimates of the quantity of steel that would be added to the *Seabulk Trader* and technical drawings of the new internal bulkheads. [*7] AR 6, 12, 18, 26.

In a four-page letter dated May 20, 2005, the Coast Guard issued a preliminary determination that the proposed work would constitute neither a foreign rebuild nor a foreign installation of segregated ballast tanks. AR 28-31. Although the Coast Guard concluded that the addition of a new inner hull would constitute work on the vessel's hull, thereby triggering the applicability of the Second Proviso and 46 C.F.R. § 67.177, it determined that the project did not constitute the addition of a "major component" of the hull under § 67.177(a). AR 29-30. It further concluded that the added steelweight percentage would fall between 7.97% and 8.57%, and that this would not constitute a rebuild under § 67.177(b). AR 30. The Coast Guard also determined that the reconfiguration of the vessel's existing ballast tank system, "which would be undertaken on a voluntary basis in connection with other unrelated modifications, [did] not constitute the installation of required segregated ballast tanks as contemplated by [46 U.S.C. § 3704]." *Id.* (emphasis in original).

After completion of the project, Seabulk wrote the Coast Guard on May 8, 2007, advising the agency that the final weight of [*8] the components added to the

Seabulk Trader constituted 8.15% of the vessel's pre-work steelweight. AR 44-45. Seabulk also disclosed that the new bulkheads did not extend into the fore-most and aft-most wing cargo tanks as originally planned. AR 45. Those cargo tanks had instead been converted into the vessel's ballast tanks. *Id.* In that letter, Seabulk requested that the Coast Guard issue a certificate of documentation with a coastwise endorsement. The next day, May 9, 2007, the Coast Guard issued the certificate. AR 47.

In this litigation, plaintiffs contend that the Coast Guard's rebuild determinations with respect to the *Seabulk Trader* were arbitrary, capricious, an abuse of discretion, and contrary to law under 5 U.S.C. § 706(2)(A). They request that the Court remand the matter to the Coast Guard with instructions to revoke the vessel's coastwise endorsement.

Threshold Issues

I. Subject Matter Jurisdiction

The Coast Guard argues that there is no subject matter jurisdiction over plaintiffs' claim that the Coast Guard misapplied the Second Proviso to the Jones Act because the term "rebuilt" is so broad as to preclude any meaningful judicial review of its decision that the *Seabulk Trader* [*9] was not rebuilt foreign. The argument lacks merit. There is a "strong presumption that Congress intends judicial review of administrative action." *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 346 (4th Cir. 2001) (citation omitted). That presumption is further amplified in this case given the legislative history of the Second Proviso. Although Congress delegated regulatory authority to the supervising agency to administer the Jones Act, it also clearly intended that the courts would retain some role in ensuring compliance with the statute. *See* S. Rep. 84-2395, 84th Cong. 2d Sess. 2-3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3162 ("[T]he bill does not define the term 'rebuilt,' leaving the interpretation to the courts. As the Treasury Department report memorandum . . . notes, the Supreme Court had adopted a definition of the term . . .") (emphasis added).

Furthermore, under 5 U.S.C. § 701(a), agency action is committed to agency discretion by law only in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)

(internal quotations and citation omitted). [*10] Here, there is some law to apply. Although terms such as "rebuilt" and "major component" in the Second Proviso are broad, they are common easily-understood terms and, therefore, are not so capacious as to preclude judicial review. The Coast Guard's determinations must be reasonable and within the wide boundaries of the statute. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (Scalia, J., concurring) ("[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."); *Menkes v. Dep't of Homeland Sec.*, 376 U.S. App. D.C. 187, 486 F.3d 1307, 1313 (D.C. Cir. 2007) ("[T]he Director might be entitled to a good deal of deference . . . , but that does not mean the Director could make such decisions unreasonably.").

It is also important to recognize that Congress crafted the Second Proviso using language from a nineteenth century judicial opinion out of this district. *See Am. Haw. Cruises*, 713 F. Supp. at 462 (reviewing legislative history of Second Proviso); *The Grace Meade*, 25 F. Cas. 1387, 1389, F. Cas. No. 15243, Treas. Dec. 22421 (E.D. Va. 1876) ("[I]f any considerable part of the hull and skeleton of an old vessel in its intact [*11] condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt . . ."). As the statutory language originated with the judiciary, there is no reason to find that the judiciary could not reasonably review an agency's interpretation of that statutory language. *Cf. New Bedford Dry Dock Co.*, 258 U.S. 96, 100, 42 S. Ct. 243, 66 L. Ed. 482 (1922) (describing the *Grace Meade* definition as "both sound and helpful").

Finally, the Coast Guard's own regulations provide a meaningful source for judicial review.⁵ *See Inova Alexandria Hosp.*, 244 F.3d at 346 ("[R]egulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review.") (citation omitted). Using the provisions of 46 C.F.R. § 67.177 as a measure, the Court can readily evaluate whether the Coast Guard's reasoning and calculations were arbitrary, capricious, or an abuse of discretion under 5 U.S.C. § 706.

⁵ The Coast Guard suggests that its regulations lack meaningful standards on what constitutes a

"major component," how to calculate a vessel's steelweight, or what information must be collected. The Court disagrees. Although the terms in 46 C.F.R. § 67.177 grant [*12] the Coast Guard wide discretion, they establish outer boundaries. For instance, the Coast Guard presumably could not classify a minor rigging as a "major" component of the vessel. Nor could the Coast Guard calculate a vessel's steelweight without citation to measurements in the record.

As the agency's own pleadings concede, the Coast Guard's conclusions must be "a rational choice and . . . within the parameters of sound administration of a vague statute." Def. Mem. in Support [117], at 20. Accordingly, the Coast Guard's jurisdictional argument fails.

II. Statute of Limitations

Focusing on one allegation in plaintiffs' complaint, that the agency "failed to consider whether work necessary to complete the project would be performed both in foreign and United States shipyards," the Coast Guard contends that plaintiffs are really raising a facial challenge to 46 C.F.R. § 67.177, which allows some percentage of work on a vessel's hull or superstructure to be completed outside the United States. Such a challenge would be foreclosed by the APA's six year statute of limitations. *See 28 U.S.C. § 2401(a)*.

As plaintiffs argue, the Coast Guard misconstrues the complaint as a facial challenge. Rather, [*13] plaintiffs are contesting the Coast Guard's specific application of the Jones Act and § 67.177 to the *Seabulk Trader*. Under 5 U.S.C. § 706(2)(A), plaintiffs are free to argue that the Coast Guard's determinations with respect to that vessel were arbitrary, capricious, and without evidentiary support.

Standard of Review

Having rejected the Coast Guard's preliminary arguments, the merits of the summary judgment motions will be considered. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985). In ruling on a motion for summary judgment, a court should accept the evidence of the nonmovant, and all justifiable inferences must be drawn in its favor.⁶ *See*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

6 On November 9, 2007, the magistrate judge assigned to this case granted plaintiffs' request for limited discovery beyond the administrative record. The Coast Guard now objects to any consideration of this extra record material. The Court does not need to resolve this disagreement because it can decide the [*14] summary judgment motions solely on the basis of the administrative record.

Discussion

At issue in this litigation are three Coast Guard findings that Seabulk's work project (1) did not constitute a "major component of the hull" under the Second Proviso to the Jones Act and 46 C.F.R. § 67.177(a); (2) did not exceed the prohibited steelweight thresholds set out in 46 C.F.R. § 67.177(b); and (3) did not constitute the foreign installation of segregated ballast tanks under 46 U.S.C. § 3704. Plaintiffs attack all three findings, which formed the basis of the Coast Guard's decision to grant a coastwise endorsement to the *Seabulk Trader*, as arbitrary, capricious, an abuse of discretion, and contrary to law.

I. Major Component of the Hull

As discussed above, the Second Proviso to the Jones Act prohibits "the [foreign] construction of any major component of the hull or superstructure" on a vessel engaged in coastwise trade. 46 U.S.C. § 12101(a). The implementing regulation tracks this definition. See 46 C.F.R. § 67.177(a) ("[A] vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel.").

In its application to the Coast Guard, [*15] Seabulk first argued that the installation of the inner hull did not trigger the Jones Act because the inner hull is not part of "the hull." ⁷ The Coast Guard firmly rejected this argument:

[W]e 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. . . . [T]he "inner" hull formed by this work . . . 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."

AR 30 (citing 46 C.F.R. § 67.3) (emphasis added).

7 See AR 8 ("The new [inner hull], which would not affect the structural integrity of the vessel, would merely serve to contain the cargo of the Vessels if necessary in the event the hull (*i.e.* the watertight envelope) is compromised by creating a watertight protective space between the cargo and the hull of the vessel. Therefore, they are not part of the hull . . .").

Based on these unchallenged agency [*16] findings, the inner hull and the outer hull each constitute a "component of the hull," and the installation of an inner hull involves *a fortiori* the addition of a "component of the hull" to the vessel under the Second Proviso. See *Oxford English Dictionary* (2d ed. 1989) (defining "component" as "[a] constituent element or part"). The only remaining question for the Coast Guard was whether the *Seabulk Trader's* inner hull qualified as a "major" component of the hull. If so, the inner hull could not be installed in China.

The Coast Guard next concluded that the *Seabulk Trader's* inner hull would not constitute a major component of the hull because the inner hull was not *separable* from 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.

Id. (emphasis added). Plaintiffs challenge this analysis.

A. Agency Deference

The Court concludes that the Coast Guard's

separable/inseparable distinction is not worthy of *Chevron* deference. First, and foremost, the [*17] formulation is not present in the Second Proviso or in any existing agency regulations, nor was it adopted pursuant to formal rulemaking or another procedure bearing the indicia of a "legislative-type determination." ⁸ *A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 166 (4th Cir. 2006). Moreover, the formulation was adopted in an opinion letter without any citation to a statutory or regulatory provision. Such opinion letters do not warrant *Chevron-style* deference. See *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).

8 An agency's interpretation of its own regulations is entitled to deference. See *Auer v. Robbins*, 519 U.S. 452, 462, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). However, *Auer* deference is not warranted here. As discussed above, the governing regulation for the "major component" determination, 46 C.F.R. § 67.177(a), merely restates the operative language from the Second Proviso to the Jones Act. Either *Chevron* or *Skidmore* deference must be used.

The agency's interpretation may still garner "respect" only to the extent it has the "power to persuade." *Id.* To determine whether the Coast Guard's interpretation has such persuasive force, the Court must examine "the thoroughness evident in its consideration, [*18] the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

B. A Permissible Construction of the Jones Act

Without any discussion or analysis of the language in the Jones Act, the Coast Guard's letter of May 20, 2005 declined to characterize the inner hull as a "major component" because, unlike a bulbous bow or deck, it was not a separable component that would be added to the hull. To further illuminate this distinction, the Coast Guard, in its pleadings, observes that the inner hull is not a separable component because it was constructed "by adding steel, which was then built upon steel piece-by-piece." Def. Opposition [30], at 19. By comparison, a bulbous bow or a deck is a separable component because it is "a large and discrete singular component that would be added to the vessel." ⁹ *Id.*

9 See also Int. Mem. in Support, at 20 ("The

major-component test applies only when a module, section, or other such component is constructed or fabricated outside the U.S. apart from the vessel and then 'added to' the vessel.").

This position is not persuasive. The separable/inseparable distinction has no foundation [*19] in statute or regulation. The language of the Second Proviso does not hint at such a test. Congress broadly intended to prohibit the foreign construction of "any major component of the hull or superstructure" on a vessel engaged in coastwise trade. 46 U.S.C. § 12101(a). Because the statute does not define "major," the Coast Guard has the authority to develop a metric for determining whether a component of the hull or superstructure is "major." However, such a metric must be reasonable. A reasonable assessment might focus on the physical size, cost, or function of the component, or its importance to the vessel's seaworthiness. However, the manner in which the component is added to the vessel - piece-by-piece or wholesale - is irrelevant to whether the component is "major."

The Coast Guard justifies its separable/inseparable characterization by referencing Congress' stated purpose for the Second Proviso:

[T]he legislative history of the Second Proviso indicates that the reason Congress . . . add[ed] the major component language was because shipowners were circumventing the requirements of the statute by engaging foreign shipyards to build complete sections of hulls, known as midbodies, [*20] and then having U.S. shipyards install the midbodies. Thus, this language was intended to prevent the insertion of a full component into a vessel, rather than to address[] the construction of part of a vessel by building upon the hull, piece by piece, as was the case here.

Def. Mem. in Support [117], at 26. The Coast Guard correctly summarizes the history behind the Second Proviso. Congress was concerned about the ease with which shipowners were circumventing the Jones Act by having large sections of hulls and superstructures constructed abroad, towing those sections to the United States, and installing them wholesale into the vessel. See S. Rep. 86-1279, 86th Cong., 2d Sess. 2-3 (1960); H.

Rep. 86-1887, 86th Cong., 2d. Sess. 2-3 (1960). After domestic shipbuilders cried fowl, Congress amended the statute to its present-day form.

However, the Coast Guard's reliance on the legislative history for its separable/inseparable distinction is misguided. First, although the Second Proviso was drafted in response to the midbody problem, Congress clearly intended that the scope of the Second Proviso extend beyond that circumstance:

The major components of hull or superstructure cited in the bill [*21] would certainly apply to vessel sections capable of floating and being towed *but*, in the context of S. 318 9, your committee feels that this interpretation *should be expanded to include any component which relates to, or changes, the configuration of the vessel.*

S. Rep. 86-1279, at 3 (emphasis added). The record in this case unambiguously establishes that the addition of an inner hull "relates to" and "changes" the configuration of the *Seabulk Trader*.

Second, the Coast Guard fails to explain why the instant circumstance is any less pernicious than the one addressed by Congress in the Second Proviso. Specifically, how does a piecemeal addition of a foreign-built hull or deck onto the vessel materially differ from a wholesale addition of a pre-constructed foreign-built hull or deck onto a vessel? In either scenario, the shipowner would be securing the foreign construction of a major component of the vessel - the very result that the Jones Act aims to prohibit. *See* S. Rep. 86-1279, at 2 (noting that the Jones Act "gave renewed expression to a national policy dating back to the early days of the Republic when it laid down strict qualifications as to . . . construction in U.S. shipyards . . . [*22] . . . regarding vessels permitted to engage in the Nation's coastwise trade.").

Third, the separable/inseparable distinction will lead to arbitrary applications of the Jones Act. Although a deck or a component of the hull can be added to a vessel as one discrete pre-constructed structure, it surely can be added piece-by-piece, beam-by-beam, and rivet-by-rivet. Shipowners could easily frustrate the entire operation of the Second Proviso simply by dictating the manner of

installation.

The Coast Guard's reliance on a separable/inseparable distinction bears a striking resemblance to its previous use of a structural/non-structural distinction, which was soundly rejected in *American Hawaii Cruises*. In that case, the plaintiff challenged a particular distinction - "structural component" versus "non-structural component" - used by the Coast Guard to determine whether a foreign construction project fell within the Jones Act's vessel rebuild classification. *713 F. Supp. at 465*. The district court found that the distinction was not consistent with the Second Proviso, its legislative history, or relevant agency regulations, *id. at 467*, and was so vague as to frustrate the court's "limited role of [*23] saying whether the agency has made a rational connection between the facts found and the choice made." *Id. at 468* (internal quotations and citation omitted). The Coast Guard's vague separable/inseparable distinction, which it used to grant a certificate of coastwise eligibility to the *Seabulk Trader*, is likewise unfaithful to the text, history, and purpose of the Second Proviso. For these reasons, the Coast Guard's decision is invalid and must be remanded to the agency for further proceedings.

II. Steelweight Percentage Calculation

The Court's determination on the "major components" element of the Second Proviso is alone sufficient to remand the Coast Guard's decision. However, in the interest of providing guidance to the agency on remand, plaintiffs' two other main challenges to the Coast Guard's decision will be addressed.

After deciding that the proposed construction of the inner hull did not involve the addition of a "major component of the hull," the Coast Guard assessed the percentage of work that was to be performed on the *Seabulk Trader* relative to its entire steelweight under *46 C.F.R. § 67.177(b)*, and concluded that the proposed amount of foreign steel work on the vessel would [*24] not constitute a "considerable part" of the hull. AR 30. Plaintiffs challenge that conclusion on grounds that the Coast Guard did not properly calculate all the relevant steel work performed on the vessel, and failed to offer an adequate explanation for its decision.

A. Agency Deference

The Coast Guard's decision to award coastwise

certification based on steelweight calculation is a creature of 46 C.F.R. § 67.177(b). The agency's method of calculating a vessel's steelweight is therefore "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotations and citation omitted).

Under the APA's arbitrary-and-capricious standard, 5 U.S.C. § 706(2)(A), the Court must also determine whether the Coast Guard's final decision "was based on a consideration of the relevant factors" and ask "whether there has been a clear error of judgment." *Ohio River Valley Env'tl Coalition, Inc. v. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006) (citation omitted). "Although the scope of review is narrow, the agency must nevertheless explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *Id.* at 102-03 [*25] (internal quotation and citation omitted).

B. A Proper Application of 46 C.F.R. § 67.177(b)

1. Steelweight Calculation

The Coast Guard looked only to the amount of steel that was to be added to the *Seabulk Trader*, ignoring both the amount of steel removed from the vessel and the modification of existing structures on the vessel. Plaintiffs challenge this approach, arguing that if all the work is aggregated, the total steel work performed in China amounts to at least 9.44% of the vessel's steelweight.

Plaintiffs' argument is not persuasive. The regulation at issue, 46 C.F.R. § 67.177(b), does not specify the manner in which the Coast Guard is to calculate the amount of steelweight impacted by a project. Under longstanding practice, the Coast Guard "does not consider a 'net effect' of the work performed, but [uses] the greater of the totals of either the removal or installation work in its determination." AR 71. The agency followed that approach in this case, looking only to the amount of steelweight to be added to the *Seabulk Trader*. This approach is not "plainly inconsistent" with § 67.177(b).

2. Adequacy of Agency Explanation

To explain its decision that the proposed steel work did not [*26] involve a foreign rebuild, the Coast Guard stated:

[U]nder 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.

AR 30 (emphasis in original).

Plaintiffs attack this reasoning as inadequate. The Court agrees. Under 46 C.F.R. § 67.177(b)(2), "[a] vessel *may* be considered rebuilt" when the work performed on its hull is between 7.5% and 10% of the vessel's steelweight. (Emphasis added). Within that range, the Coast Guard may not rely simply on the steelweight calculation. The regulation plainly contemplates the use of other factors to guide the decision. The Coast Guard's analysis is inconsistent with this regulation because it fails to identify, much less [*27] discuss any factor other than steelweight.

In fact, the Coast Guard has a history of regularly approving, without any analysis, foreign work projects that involve between 7.5% and 10% of a vessel's steelweight.¹⁰ The administrative record does not contain a single instance where the agency determined that a vessel was rebuilt foreign when its steel work fell within that range. If the Coast Guard wants to adopt a bright-line 10% steelweight threshold, it must use established notice-and-comment rulemaking procedures, not informal - and confidential - decision letters.

¹⁰ See AR 73 (8.23% of steelweight); AR 75 (7.83% of steelweight); AR 100 (8.31% of steelweight); AR 109 (9.40% of steelweight); AR 113 (8.11% of steelweight).

The Coast Guard's explanation also violates the APA's prohibition on arbitrary and capricious decision making. When the steelweight calculation falls within the

7.5% to 10% range, the Coast Guard has considerable discretion to determine on a case-by-case basis whether the work constitutes a rebuild. It still must exercise that discretion reasonably. In this case, the Coast Guard's explanation is devoid of any analysis. Having failed to identify the relevant factors, [*28] the agency's assertion that were "no compelling reasons to require a contrary determination" is a meaningless statement. Accordingly, the Court cannot conclude that the agency has reached a rational, non-arbitrary conclusion.

III. Segregated Ballast Tank Determination

As a final matter, the Coast Guard concluded that the reconfiguration of the *Seabulk Trader's* segregated ballast tanks would not violate the Port and Tanker Safety Act of 1978, 46 U.S.C. § 3704:

[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 will 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 [46 U.S.C. § 3704].

AR 30 (emphasis in original).

A. Agency Deference

The Coast Guard explained its segregated ballast tank determination in its May 20, 2005 opinion letter. There is no indication that the agency used any formal procedures, nor did its reasoning, which was stated in two sentences, contain thorough analysis or other indicia of a legislative-type determination. Accordingly, [*29] *Chevron* deference is not appropriate. *See A.T. Massey Coal, 472 F.3d at 166.* The Coast Guard's interpretation of 46 U.S.C. § 3704 receives only *Skidmore* deference based on its "power to persuade."

B. A Permissible Construction of the Port and Tanker Safety Act

Under the Port and Tanker Safety Act, 46 U.S.C. § 3705(a)(1), new crude oil tankers must be equipped with segregated ballast tanks. For those vessels engaged in coastwise trade, the Act mandates that the tanks be

installed in the United States:

A segregated ballast tank, a crude 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 chapter 551 of this title shall be installed in the United States (except trust territories). A vessel failing to comply with this section may not engage in the coastwise trade.

46 U.S.C. § 3704.

All parties agree that the *Seabulk Trader* must, as a matter of law, be equipped with segregated ballast tanks. The Coast Guard asserts, however, that § 3704 applies only to the *original* installation of a vessel's segregated ballast tanks because only that installation was "required" by the Port [*30] and Tanker Safety Act. It next contends that the work in China on the *Seabulk Trader* involved a mere "reconfiguration" of the vessel's ballast system, as opposed to an installation. Neither position is persuasive.

1. A "required" ballast tank

The Coast Guard first argues that § 3704 has no applicability to the *Seabulk Trader* because its original segregated ballast system was installed in the United States in 1981. This argument is based on a tortured interpretation of the statute. Neither the statutory language nor the legislative history of § 3704 contains the adjective "original" or suggests such a limitation.

Rather, the statutory language, as codified, is pellucidly clear: "[a] segregated ballast tank . . . required by this chapter or a regulation prescribed under this chapter . . . shall be installed in the United States." The adjective "required" clearly modifies "segregated ballast tank," not the installation of the tank as argued by the Coast Guard.¹¹ Therefore, if a segregated ballast tank is "required" by law for the vessel, that tank "shall be installed" in the United States in order for that vessel to engage in coastwise trade.

¹¹ *Seabulk* invokes the original language of the [*31] Port and Tanker Safety Act to buttress the Coast Guard's position. *See* Port & Tanker Safety Act of 1978, P.L. 95-474, 92 Stat. 1471, 1486 (1978) ("[T]he installation of segregated ballast

tanks . . . required by regulations issued hereunder, on a vessel which is entitled to engage in coastwise trade . . . shall be effected within the United States."). That language is admittedly ambiguous as to what the word "required" modifies - "the installation . . . required by regulations" or the "segregated ballast tanks . . . required by regulations." However, the codification of the Port and Tanker Safety Act resolves the ambiguity. *Cf. Carolina, Clinchfield & Ohio Ry. v. ICC*, 193 U.S. App. D.C. 151, 593 F.2d 1305, 1310 (D.C. Cir. 1979) ("[P]articularly because the codified language admits of little doubt, if any, we do not find the mere ambiguity in the earlier language of much help.").

Moreover, the legislative history of the Port and Tanker Safety Act supports the conclusion that any installation of a required ballast tank must be performed in the United States. *See* H.R. Rep. 95-1384(1), 95th Cong., 2d Sess. 22 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3270, 3291 ("[T]he Committee has included a requirement that *any* [*32] installation of segregated ballast tanks, crude oil washing systems, or inert gas systems shall be accomplished, for U.S. vessels in the coastwise trade, within the United States, its territories, or possessions.") (emphasis added).

Finally, the Court's construction of § 3704 is consistent with the congressional purpose behind the statute, which was to place the installation of segregated ballast tanks in the same league as a vessel rebuild under the Second Proviso to the Jones Act. *See id.* ("While . . . it can be argued that these changes may not constitute major conversions or rebuilding, they are sufficiently similar to justify the same requirement."). The Coast Guard has failed to offer any rational justification for why Congress would want only the original installation of a required ballast tank, as opposed to the second or third installation, to be performed in the United States.

The *Seabulk Trader* must, as a matter of law, be equipped with segregated ballast tanks. *Section 3704* therefore mandates that those segregated ballast tanks be installed in the United States. The Coast Guard's contrary interpretation was erroneous.

2. An "installation"

The Coast Guard next characterizes [*33] the work done on the *Seabulk Trader*, not as an installation, but

rather as a "reconfiguration" of the vessel's ballast tanks. The problem with that approach is that the term "reconfiguration" does not appear in the statute.

Section 3704 requires that ballast tanks be "installed" in the United States. The plain meaning of the word "installed" is well established - "To place (an apparatus . . .) in a position for service or use." *Oxford English Dictionary* (2d ed. 1989). Whether or not a ballast tank has been "installed" on a vessel requires the factfinder to collect specific information about the work performed on that tank to place it in a position for service.

The administrative record contains very little information about the work performed on the *Seabulk Trader's* ballast tanks. Before entering the Chinese shipyard, the vessel had two segregated ballast tanks located midship - one to port and one to starboard ("No. 4a wing tanks"). Upon leaving the shipyard, those wing tanks had been converted into cargo use. In addition, four cargo tanks - two fore and two aft - had been converted into ballast tanks ("No. 1 tanks" and "No. 6 tanks"). Finally, eight narrow ballast tanks, four on each [*34] side of the vessel, were constructed between the outer hull and the new inner hull.

Simply knowing the locations of the *Seabulk Trader's* former and current ballast tanks has no relevance in determining whether those current tanks were "installed" in the Chinese shipyard. First, the agency did not determine the amount of ballast capacity required by law for the *Seabulk Trader*, thereby frustrating any identification of which of the vessel's ballast tanks were "required."¹² Second, the record is silent as to the nature and quantity of work needed to convert the *Seabulk Trader's* cargo tanks into ballast service. Accordingly, the Coast Guard's determination that the *Seabulk Trader's* segregated ballast tanks had not been "installed" foreign lacked any evidentiary foundation and, therefore, violated the APA's prohibition against arbitrary and capricious decision making.

¹² According to Seabulk, the eight narrow tanks added ballast capacity in *excess* of that required by law and, therefore, are not "required" by the Port and Tanker Safety Act. *See* Int. Reply [131], at 8 n.6.

Conclusion

For these reasons, plaintiffs' Motion for Summary

Judgment will be granted, the Coast Guard's Motion to Dismiss [*35] or, in the Alternative, Summary Judgment will be denied, and Seabulk's Motion for Summary Judgment will be denied.

Because the existing record does not support the Coast Guard's issuance of the coastwise endorsement for the *Seabulk Trader*, the Court will remand this matter to the Coast Guard with instructions to revoke the coastwise endorsement. The agency, in its discretion, may initiate further proceedings with respect to the *Seabulk Trader* so long as those proceedings are consistent with this opinion.

A separate order consistent with this Memorandum Opinion will be issued.

Entered this 24th day of April, 2008.

Alexandria, Virginia

/s/ Leonie M. Brinkema

Leonie M. Brinkema

United States District Judge