

**DEPARTMENT OF TRANSPORTATION****Maritime Administration**

[Docket No. MARAD-2007-0012]

RIN 2133-AB69

**Determination of Foreign Reconstruction or Rebuilding of U.S.-Built Vessels That Participate in the Capital Construction Fund and Cargo Preference Programs****AGENCY:** Maritime Administration, Department of Transportation.**ACTION:** Notice of Withdrawal.

**SUMMARY:** The Maritime Administration (MARAD) is withdrawing and terminating its notice published in the *Federal Register* on November 14, 2007, at 72 FR 64109, which requested comments on what standards MARAD should apply concerning determinations of foreign reconstruction of U.S.-built vessels that participate in the Capital Construction Fund (CCF) program and foreign rebuilding of U.S.-built vessels that participate in the cargo preference program. Initially, when the notice was published, it was considered useful to obtain public comment on whether MARAD should issue regulations on standards applicable to determination of rebuilding or reconstruction. At the time the notice was published, the Coast Guard's approach to rebuilding was an unsettled area of law and a particular issue had arisen with regard to MARAD's method of determination in a foreign rebuild context. That matter was resolved and in December 2009, the Coast Guard's method of carrying out rebuilding determinations was affirmed by the United States Court of Appeals for the Fourth Circuit. Likewise, MARAD's approach to such determinations had been affirmed by the United States Court of Appeals for the Second Circuit. Even though the standards are different as applied regarding the cargo preference program, the two approaches would only rarely produce a different result. Furthermore, because they are generally applied in different circumstances, they even more rarely produce inconsistent results regarding the same vessel. MARAD has been requested to make a determination only twice in the last fifteen years. Therefore, a new rule is not required.

**DATES:** The notice published at 72 FR 64109 (November 14, 2007) is withdrawn and terminated on November 4, 2010.

*Docket:* For access to the docket to read background documents, please go to <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Background**

Three maritime promotional statutes mandate use of U.S.-built vessels and generally provide that a U.S.-built vessel becomes ineligible to carry preference cargo if the vessel is determined to have been reconstructed or rebuilt in a foreign country.

Section 12132(b) of title 46, United States Code, provides that a vessel eligible to engage in the U.S. coastwise trade and later rebuilt outside the United States may no longer engage in the coastwise trade. This statute is administered by the U.S. Coast Guard. The Coast Guard's regulations that implement the statute are set forth in 46 CFR part 67. In determining whether a vessel has been rebuilt, the Coast Guard examines the amount of steel replaced on a vessel. The Coast Guard's interpretation of its regulations regarding rebuilding was affirmed in *Shipbuilders Council of America, Inc. v. United States Coast Guard*, 578 F.3d 234 (4th Cir. 2009) and followed in the more recent case decided December 3, 2009, in *Shipbuilders Council of America v. United States Dept. of Homeland Security*, 673 F.Supp.2d 438 (E.D.Va. 2009).

Chapter 535 of title 46, United States Code, established the Capital Construction Fund (CCF) program, whereby a U.S. citizen owner of an eligible vessel may defer Federal income taxes on income derived from the operation of an eligible vessel to the extent that income is deposited into a fund to be used solely for the acquisition, construction or reconstruction of qualified vessels. The statutory definitions of both eligible and qualified vessels, as pertaining to the CCF program, require such vessels, if reconstructed, to be reconstructed in the United States. MARAD administers the CCF program (except for the CCF applicable to fishery vessels and administered by the National Oceanic and Atmospheric Administration) under regulations located at 46 CFR part 390. To evaluate reconstruction under the CCF program, MARAD follows determinations made by the Coast Guard for Jones Act purposes. Under the CCF, because most vessels are Jones Act vessels and must meet Coast Guard

limitations for rebuilding, it is appropriate for CCF vessels to meet only the single test for Coast Guard and MARAD.

Chapter 553 of title 46, United States Code, provides that preference be given in the carriage of U.S. Government-impelled cargoes to privately-owned commercial vessels of the United States. The statute excludes any vessel rebuilt in a foreign country, unless the vessel shall have been documented under U.S. registry for at least three years prior to seeking preference cargoes. MARAD regulations at 46 CFR part 381 govern shipment of preference cargoes. To assess rebuilding under cargo preference rules, MARAD examines the extent of shipyard work and whether vessel type has been or would be changed, and how the changes to the vessel would affect trade, U.S. shipyards, and purposes and policy of the Merchant Marine Act. MARAD's authority to apply a standard to rebuilding determinations, different from the Coast Guard's, was affirmed in *Aquarius Marine Co. v. Pena*, 64 F.3d 82 (2nd Cir. 1995). This case was followed by MARAD's final opinions in *Barge Connor*, Docket No. A-198 (Oct. 26, 2005) and *Matson Navigation Company*, MARAD Docket No. A-199 (Dec. 9, 2008).

**II. Summary of the Notice**

On November 14, 2007, MARAD published a notice requesting comments. It was published at 72 FR 64109. The notice requested comments as to how MARAD should administer the programs assigned to it and sought answers to four questions. MARAD received 21 comments from 10 commenters. Commenters included U.S. shippers, individuals, and shipping associations. A discussion of the comments follows.

**III. Discussion of Comments**

The notice requested comments on four topics pertaining to foreign rebuild and reconstruction standards as applied to the CCF program and cargo preference. The questions included: (1) What substantive standards should MARAD apply to determine whether a CCF vessel has been reconstructed or a cargo preference vessel has been rebuilt; (2) what procedures should the MARAD adopt to investigate whether a CCF vessel has been reconstructed or a cargo preference vessel has been rebuilt; (3) what role, if any, should unrelated third parties, such as competitors or shipyards, play in developing a record of decision on whether a CCF vessel has been reconstructed or a cargo preference vessel has been rebuilt; and (4) what public disclosure criteria should apply

to the record of decision on whether a CCF vessel has been reconstructed or a cargo preference vessel has been rebuilt. In response to question one as to which substantive standards MARAD should apply to determine whether a CCF vessel has been reconstructed or a cargo preference vessel has been rebuilt, the majority of commenters responded that there were already established precedents in the *Aquarius Marine Co.* case and MARAD's determinations in *Golden Monarch and Barge Connor*; two others suggested that MARAD adopt the Coast Guard's standard for rebuild/reconstruction determinations. MARAD will maintain the status quo by adhering to the established precedents. As to question number two regarding what procedures MARAD should adopt to inquire into whether a CCF vessel has been reconstructed or a cargo preference vessel has been rebuilt, a majority of the commenters felt participants in the CCF and cargo preference programs should seek advisory opinions from MARAD prior to having work performed outside the United States. One commenter suggested that MARAD enter into a Memorandum of Understanding with the Coast Guard to be notified of all applications for rebuild determinations and then make an independent determination based upon the application submitted to the Coast Guard. MARAD noted in its decision in *Barge Connor* that it would have provided an advisory decision to Moby Marine Corporation if asked prior to work having been performed in Colombia. MARAD is willing to provide advisory opinions and will do so when asked. Such advisory opinions will be published in the **Federal Register**.

As to the third question posed in the notice regarding what role, if any, that unrelated third parties should play in developing a record of decision on whether a CCF vessel has been reconstructed or a cargo preference vessel has been rebuilt, all commenters felt third parties should play a substantial role in developing the record.

A variety of comments were received in response to question four regarding public disclosure of records of decision. There was general consensus that MARAD should publish its final rulings in the **Federal Register**. MARAD currently does not publish its rulings in the **Federal Register**. Instead, previous final opinions and orders may be found on MARAD's Web site at <http://www.marad.dot.gov> in its Electronic Reading Room. However, MARAD will publish final decisions and orders relating to the rebuilding of vessels, as

it pertains to programs administered by MARAD, in the future.

#### IV. Reason for Withdrawal

MARAD's procedures on foreign rebuilding for cargo preference purposes were affirmed in *Aquarius Marine Co.* in 1995 and reaffirmed in the *Barge Connor* (2005) and *Matson* (2008) decisions. This is a settled area of law. Also, MARAD received no objections to its practice that CCF reconstruction follow Coast Guard guidance. MARAD and the Coast Guard have different standards for rebuilding as discussed herein, but those standards have a very slight chance of overlapping or producing conflicting results. This is so because the differing standards address diverse segments of the vessel market. Thus, there is no need for a new rule or to amend the cargo preference regulations or the CCF regulations with respect to rebuild or reconstruction determination standards.

By Order of the Maritime Administrator.

Dated: October 25, 2010.

**Christine Gurland,**

*Secretary, Maritime Administration.*

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 35439]

#### **Watco Holdings, Inc., Watco Companies, Inc., and Watco Transportation Services, Inc.—Corporate Family Transaction Exemption**

Watco Holdings, Inc. (Holdings), Watco Companies, Inc. (Watco), Watco Transportation Services, Inc. (Transportation Services), and the rail carrier subsidiaries have jointly filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a corporate family transaction. Watco, a noncarrier, is a Kansas corporation that controls Transportation Services, also a noncarrier and a Kansas corporation. Watco indirectly controls 22 Class III railroads (the Watco Railroads): South Kansas and Oklahoma Railroad Company (SKO); Palouse River & Coulee City Railroad, Inc.; Timber Rock Railroad, Inc.; Stillwater Central Railroad, Inc.; Eastern Idaho Railroad, Inc.; Kansas & Oklahoma Railroad, Inc.; Pennsylvania Southwestern Railroad, Inc.; Great Northwest Railroad, Inc.; Kaw River Railroad, Inc.; Mission Mountain Railroad, Inc.; Mississippi Southern Railroad, Inc.; Yellowstone

Valley Railroad, Inc.; Louisiana Southern Railroad, Inc.; Arkansas Southern Railroad, Inc.; Alabama Southern Railroad, Inc.; Vicksburg Southern Railroad, Inc.; Austin Western Railroad, Inc.; Baton Rouge Southern Railroad, LLC (BRSR); Pacific Sun Railroad, LLC (PSRR); Grand Elk Railroad; Alabama Warrior Railway, LLC (AWR); and Boise Valley Railroad, Inc.

Under the proposed transaction, all but 4 of the Watco Railroads, SKO, PSRR, AWR, and BRSR, will reorganize. Holdings, which is a new Kansas noncarrier holding company, will indirectly control all of the Watco Railroads. There are several steps to the proposed transaction. The existing stockholders of Watco will form Holdings, and Holdings will become the parent to Watco and thus will indirectly control the 22 Watco Railroads. In addition, Watco will convert from a Kansas corporation to a Delaware limited liability company and will continue to control Transportation Services. In turn, Transportation Services will convert from a Kansas corporation to a Kansas limited liability company and will continue to directly control 21 of the Watco Railroads: all but BRSR.<sup>1</sup> Further, each of the Watco Railroads except SKO, PSRR, AWR, and BRSR will be converted to either a limited liability company or a C corporation, depending on applicable State law. Each of the Watco Railroads will remain incorporated in the same state of its incorporation today.

The transaction is scheduled to be consummated on or after November 18, 2010, the effective date of the exemption (30 days after the notice was filed). The purpose of this transaction is to facilitate Watco's ability to obtain financing.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). The parties state that the transaction will not result in adverse changes in service levels, significant operational changes, or any change in the competitive balance with carriers outside the Watco corporate family.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail

<sup>1</sup> The parties state that BRSR will continue to be controlled by separate, wholly owned subsidiaries of Watco.