

PUBLICATION

D.C. Appeals Court: Coast Guard May Impose Non-Financial Conditions for Departure Clearance in "Magic Pipe" Case

December 31, 2015

In *Watervale Marine Co. v. U.S. Dep't of Homeland Sec.*, the U.S. Court of Appeals for the District of Columbia Circuit recently affirmed a district court ruling allowing the Secretary of the Department of Homeland Security – acting through the Coast Guard – to impose certain conditions (non-financial in nature) upon the release of ships suspected of violating the Act to Prevent Pollution from Ships.

In general, the Act is a federal statute implementing various environmental obligations the United States assumed when it entered into the International Convention for the Prevention of Pollution from Ships. The Act seeks to eliminate the intentional pollution of the oceans by oil and other harmful substances, as well as minimize accidental discharge of such substances.

Specifically at issue in *Watervale Marine Co.* is a provision of the Act dealing with the enforcement of the Convention:

If any ship subject to the [Convention] ... is liable for a fine or civil penalty under this section, or if reasonable cause exists to believe that the ship, its owner, operator, or person in charge may be subject to a fine or civil penalty under this section, the Secretary of the Treasury [now DHS], upon request of the Secretary [of DHS], *shall refuse or revoke the clearance* required by section 60105 of Title 46. Clearance may be granted upon the filing of a bond *or other surety satisfactory* to the Secretary [of DHS].

In the case, the appellants own and operate two foreign-flagged vessels whose crewmembers were accused by whistleblowers of falsifying their oil record books, which are required of all vessels when traveling over international waters and docking at U.S. ports.

The management associated with the vessels pled guilty in related criminal proceedings and admitted to intentionally bypassing mandatory anti-pollution equipment on board and discharging oil waste directly into the waterways, acts which were then hidden from the mandatory oil records books. Upon initial investigation stemming from the whistleblower complaints and continuing its trend of aggressively prosecuting oceangoing polluters in so-called "magic pipe" cases, the Coast Guard determined that it had reasonable cause to believe the vessels' operators had committed violations of the Act, and ordered Customs to withhold departure clearance. The vessels were eventually released, but not until the appellants had both posted a bond and executed a "Security Agreement," which were required by the Coast Guard as a condition of release of the vessels and were designed to allow the government to later prosecute its case if merited. The agreements included several terms above and beyond the posting of a typical financial bond: to require the vessel owners and operators to pay wages, housing and transportation costs to crew members who remain in the jurisdiction, as well as facilitate their travel to court appearances; to encourage crew members to cooperate with the government's investigation; to help the government serve subpoenas on foreign crew members located outside of the United States; to waive objections to both *in personam* and *in rem* jurisdiction, and to enter an appearance in federal district court.

The vessel owners launched failed administrative appeals, then judicial review of the non-financial Security Agreements that the Coast Guard demanded before granting departure clearance. In ruling in favor of the

Coast Guard, the district court found compelling the language in the Act stating that "clearance may be granted upon the filing of a bond or *other surety satisfactory to the Secretary*," which the court opined gave the Coast Guard unreviewable discretion. The Appellate Court agreed, although it relied on different language contained in the Act:

We find it unnecessary to decide the scope of the term "bond or other surety" because the first sentence of section 1908(e) gives the Coast Guard the requisite authority. It states that "[i]f any ship subject to the [Convention] ... is liable for a fine or civil penalty ... or if reasonable cause exists to believe that the ship ... may be subject to a fine or civil penalty [Customs] ... upon request of the Secretary [the Coast Guard] ... shall refuse ... clearance," and as such it clearly provides authority in the Coast Guard to simply hold the ship in port until legal proceedings are completed.

The Appellate Court further reasoned that a "financial bond, given its limited use, is ordinarily not satisfactory, so the Coast Guard need not accept bonds without accompanying non-financial conditions."

As of this date, the appellants have not sought review from the Supreme Court. We will keep you posted on any further developments on this issue.