



U.S. Department
of Transportation

**Maritime
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

JUN 25 2001

Mr. Walter T. Pereyra
Chairman, Arctic Storm, Inc.
400 North 34th Street, Suite 306
Seattle, Washington 98103

Re: Docket Number MARAD-2000-8558 - Ruling of the Chief Counsel Regarding the Applicability of the Ownership and Control Requirements for a Fishery Endorsement to the Owners of the Vessels ARCTIC STORM - Official Number 903511, SEA STORM - Official Number 628959, ARCTIC FJORD - Official Number 940866, and NEAHKAHNIE - Official Number 599534.

Dear Mr Pereyra:

You filed a consolidated petition with the Maritime Administration ("MARAD") dated October 19, 2000, in which you requested a ruling from the Chief Counsel of MARAD that the U.S. Citizen ownership and control requirements of the American Fisheries Act of 1998, Public Law 105-277, Division C, Title II, Subtitle I ("AFA"), and MARAD's implementing regulations at 46 C.F.R. Part 356 do not apply to the owners of the vessels ARCTIC STORM (Official No. 903511) and SEA STORM (Official No. 628959) and the manager of the vessels ARCTIC FJORD (Official No. 940866) and NEAHKAHNIE (Official No. 599534). The petition was filed pursuant to §213(g) of the AFA and 46 C.F.R. §356.53 on the basis that a conflict exists between the Treaty of Friendship, Commerce and Navigation between the United States of America and Korea, signed at Seoul November 28, 1956, and entered into force November 7, 1957 ("Korea FCN"), 8 UST 2217; TIAS 3947; 302 UNTS 281, and both the AFA and 46 C.F.R. Part 356.

The petition states that the ARCTIC STORM is 100% owned and managed by Arctic Storm, Inc., which in turn is owned 50% by Arctic Storm Partnership (whose owners are all U.S. Citizens) and 50% by Oyang Corporation ("Oyang"), a company organized under the laws of the Republic of Korea. The SEA STORM is 100% owned by Sea Storm, Inc., a wholly owned subsidiary of Arctic Storm, Inc., and its fishing rights are owned by Sea Storm LP, a partnership that is 49% owned by Oyang and 51% owned by U.S. Citizens. The ARCTIC FJORD and NEAHKAHNIE are managed by Arctic Storm, Inc.

Your petition was published in the Federal Register for public comment on December 26, 2000, (65 *Fed. Reg.* 81563) as Docket No. MARAD-2000-8558. No comments were submitted in response to the notice. As required by MARAD's regulations, I have consulted with other departments and agencies within the Federal government that have responsibility or expertise related to interpretation or application of international investment agreements. I have considered



advice provided to MARAD by the Department of State, the Department of Treasury, Office of the United States Trade Representative, and United States Coast Guard in reaching the ruling set forth below.

One element of relief sought in your petition is a ruling pursuant to §213(g) of the AFA¹ and 46 C.F.R. §356.53,² that a conflict exists between the Korea FCN and the restrictions of the AFA on the ability of Arctic Storm, Inc., a Non-Citizen,³ to enter into contracts to manage the vessels NEAHKAHNIE and ARCTIC FJORD. Section 202(a) of the AFA amends 46 U.S.C. §12102(c)(1) and requires, as a condition precedent to documenting a vessel with a fishery endorsement, that the vessel be owned by an entity in which at least 75% of the interest in such entity, at each tier of ownership and in the aggregate, is owned and controlled by citizens of the United States. If Non-Citizen investors have ownership or control interests in a vessel-owning entity that exceed 25% at any tier of ownership or in the aggregate, they must divest their interests to a level at which the Non-Citizen ownership and control in the vessel-owning entity does not

¹Section 213(g) of the AFA states in its entirety:

In the event that any provision of section 12102(c) or section 31322(a) of title 46, United States Code, as amended by [the AFA], is determined to be inconsistent with an international agreement related to foreign investment to which the United States is a party with respect to the owner or mortgagee on October 1, 2001 of a vessel with a fishery endorsement, such provision shall not apply to that owner or mortgagee with respect to such vessel to the extent of any such inconsistency. The provisions of section 12102(c) and section 31322(a) of title 46, United States Code, as amended by [the AFA], shall apply to all subsequent owners and mortgagees of such vessel, and shall apply, notwithstanding [the language of this section], to the owner on October 1, 2001 of such vessel if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity after such date. (emphasis added).

²MARAD's implementing regulations at 46 C.F.R. §356.53(a) state that:

(a) If the owner or Mortgagee of a Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel believes that there is a conflict between the AFA or 46 CFR part 356 and any international treaty or agreement to which the United States is a party on October 1, 2001, and to which the United States is currently a party, the owner or Mortgagee may petition the Chief Counsel of the Maritime Administration at any time after July 19, 2000 to request a ruling that all or part of the requirements of this part 356 do not apply to that particular owner or particular Mortgagee with respect to a specific vessel; provided, the petitioner had an ownership interest in the Fishing Vessel, Fish Processing Vessel, or Fish Tender Vessel, or a mortgage on the vessel in the case of a Mortgagee, on October 1, 2001, and is covered by the international agreement. Petitions may be filed prior to October 1, 2001 by owners or Mortgagees with respect to international treaties or agreements in effect at the time of the petition which are not scheduled to expire prior to October 1, 2001. (emphasis added).

³The term "Non-Citizen" as used herein refers to a person that does not qualify as a U.S. Citizen under §2(c) of the Shipping Act, 1916, as amended, 46 App. U.S.C. §802(c). With respect to the vessel management agreement, Arctic Storm, Inc., the vessel manager, is a corporation in which Oyang owns more than 25% of the interest and therefore is not considered a U.S. Citizen under §2(c) of the Shipping Act, 1916, as required by §202(a) of the AFA.

exceed 25%, or the vessel-owning entity will not be deemed eligible under §202(a) of the AFA to document the vessel with a fishery endorsement.

Subject to the exception afforded by §213(g), the AFA clearly intended to prohibit Non-Citizen control over vessels and vessel-owning entities in the fishing industry after October 1, 2001. In determining whether at least 75% of the interest in a vessel-owning entity is owned and controlled by U.S. Citizens, we are required under 46 U.S.C. §12102(c)(2), as amended, to apply the restrictions on controlling interest in §2(c) of the Shipping Act, 1916, as amended, 46 App. U.S.C. 802(c). In addition, §202(a) of AFA specifies other factors that shall be included in determining whether control has been vested in U.S. Citizens, including whether “the right to direct the transfer, operation or manning of a vessel with a fishery endorsement” is vested in U.S. Citizens. 46 U.S.C. §12102(c)(2)(A)(iii). To the extent that a contract to manage the vessels ARCTIC FJORD and NEAHKAHNIE conveys such control to Arctic Storm, Inc., the management contract would be prohibited by the AFA.

Section 213(g) of the AFA provides that where the AFA is inconsistent with an international investment agreement with respect to the rights of an owner or mortgagee of the vessel, the AFA will not apply to that owner or mortgagee to the extent of the conflict with respect the specific vessel. MARAD’s implementing regulations at 46 C.F.R. §356.53 set forth a process in which a vessel owner or mortgagee may petition the Chief Counsel for a ruling that the AFA and MARAD’s implementing regulations are inconsistent with an international investment agreement and thus do not apply to the extent of the inconsistency. The relief provided by §213(g) of the AFA is limited to inconsistencies related to the rights of vessel owners and mortgagees. Accordingly, MARAD’s implementing rules at 46 C.F.R. §356.53 also limit the parties that can file a §213(g) petition to vessel owners and mortgagees. Therefore, neither §213(g) of the AFA nor MARAD’s implementing regulations at 46 C.F.R. §356.53(a) provide authority or a mechanism for me to make a determination that the requirements of the AFA do not apply to Arctic Storm, Inc., in its sole capacity as a vessel manager.

In the petition, you also noted that the National Marine Fisheries Service (“NMFS”) has issued an opinion permitting the vessels SEA STORM and NEAHKAHNIE to lease their harvest quota shares under a co-op arrangement to the ARCTIC STORM and the ARCTIC FJORD. Additionally, you pointed out that both the SEA STORM and NEAHKAHNIE are explicitly named in §208(b) of the AFA as catcher vessels delivering to catcher/processors eligible to participate in a fishery cooperative. You cite to the NMFS opinion, the provisions of §208(b) of the AFA, and the requirement of §203(b)⁴ of the AFA that MARAD minimize disruptions “to the

⁴Section 203(b) of the AFA states in relevant part:

...The regulations to implement this subtitle shall prohibit impermissible transfers of ownership or control, specify any transactions which require prior approval of an implementing agency, identify transactions which do not require prior agency approval, and to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such

(continued...)

commercial fishing industry and to the opportunity to form fishery cooperatives” as evidence that Congress intended that existing contractual relationships for vessels, such as the management agreements in question, should not be disrupted and should be allowed to remain in force. (Petition at 16, note 46).

First, it is important to note that the identification of vessels in §208(b) of the AFA was not intended to allow the vessel circumvent the increased threshold for ownership and control established by §202(a) of the AFA. Section 208(h)(i)(3) of the AFA makes it clear that identification of a vessel under §208 as eligible to participate in the directed fishing allowance does not “waive any provision of law otherwise applicable to such catcher vessel, catcher/processor, mothership, or shoreside processor.”

Second, while MARAD has sought to minimize disruptions to the fishing industry in implementing the AFA, it is inevitable that some disruptions will be caused by the necessary changes in contractual relationships that will be required in order for many vessel owners and mortgagees to comply with the new ownership and control requirements. Allowing the continuation of existing contractual arrangements that transfer control to Non-Citizens over a vessel or vessel-owning entity is contradictory to the mandate of §202(a) of the AFA that the ownership and control over vessels documented with a fishery endorsement and the vessel-owning enterprises be vested in U.S. Citizens. Accordingly, we have determined that control over a vessel or vessel-owning entity is not vested in U.S. Citizens where a management contract with a Non-Citizen transfers control over the management of the vessel to a Non-Citizen. The disruption of certain business and contractual arrangements is not inconsistent with the requirements of the AFA that MARAD minimize disruptions to the fishing industry and the ability to form fishery cooperatives as this requirement in §203(b) of the AFA is qualified by the clause “to the extent practicable.” Furthermore, there is no evidence that requiring that the ARCTIC FJORD and NEAHKAHNIE to be owned and controlled by U.S. Citizens and thus prohibiting Non-Citizens from managing the vessels would proscribe in any way the formation of a fishery cooperative. Consequently, the requirements of the AFA and MARAD’s implementing regulations will apply to Arctic Storm, Inc. with respect to the management of the ARCTIC FJORD and NEAHKAHNIE.

With respect to the ownership of the ARCTIC STORM and the SEA STORM (hereinafter referred to as the “Vessels”), you have asserted in your petition that several provisions of the Korea FCN, including Article VI(3), are in conflict with the AFA and the implementing regulations. Article VI(3) of the Korea FCN provides that:

⁴(...continued)

industry, and to the opportunity to form fishery cooperatives. (emphasis added).

Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied.

The Department of State has advised that Article VI(3) of the Korea FCN protects nationals and companies of one Party (here, Korea) with respect to their legally acquired rights or interests in the territory of the other Party (here, the United States) in enterprises "which they have established," and that the intent of Article VI(3) is to protect against retroactive impairment of vested rights if the acquisition of such rights was lawful. As a Korean company, Oyang is a "compan[y] of the other Party" within the meaning of Article VI(3) and the interests at issue are "within the territories" of the United States. Arctic Storm, Inc., Sea Storm, Inc., and Sea Storm LP are "enterprises" that Oyang has, with its U.S. co-investors, "established" and in which Oyang has invested its "capital." The petition asserts, and we do not have any evidence to the contrary, that Oyang's ownership interests were acquired legally, in accordance with U.S. laws applicable at the time of acquisition.

The ownership interest that Oyang has in the vessel-owning entities exceeds the 25% maximum aggregate limit for Non-Citizen ownership and control provided for in §202(a) of the AFA. In order for Arctic Storm, Inc. and Sea Storm, Inc. to be eligible to document the ARCTIC STORM and SEA STORM, respectively, with a fishery endorsement in compliance with the citizenship requirements of the AFA, Oyang would be required to divest itself of ownership and control interest that it holds in the Vessels through Arctic Storm, Inc., Sea Storm, Inc., and Sea Storm LP.

As applied to Oyang's existing ownership interest, the Department of State has advised that this differentiation between foreign investors and U.S. Citizen investors contained in §202(a) of the AFA, 46 U.S.C. §12102(c)(1), which would require that Oyang partially divest itself of ownership interests that were legally acquired prior to the change in the law is "discriminatory" within the meaning of Article VI(3) of the Korea FCN. The Department of State has further advised that, in the circumstances of this petition, it considers the requirement under the AFA to elect between divestment of shares in a vessel-owning enterprise, on the one hand, and the loss of the fishery endorsements (a prerequisite for continued economic viability of the Vessels that the enterprises partially own) on the other hand, to constitute an impairment of vested rights or interests in an enterprise and in ownership capital. Therefore, I have concluded that the increased ownership restrictions of §202(a) of the AFA, 46 U.S.C. §12102(c)(1), and MARAD's implementing regulations are inconsistent with the Korea FCN with respect to Petitioner's existing ownership interest in the Vessels and the vessel-owning entities. Accordingly, the new ownership requirements of 46 App. U.S.C. §12102(c)(1), as amended by §202(a) of the AFA, and MARAD's implementing regulations at 46 C.F.R. Part 356 will not be applied to the owners of the ARCTIC STORM and the SEA STORM to the extent of the conflict.

Although it is not stated in the petition, I have been advised by the Coast Guard's National Vessel Documentation Center that the ARCTIC STORM is a "grandfathered" vessel under the savings

clause of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 (“Anti-Reflagging Act”), Public Law 100-239, 46 U.S.C. §12102 note (1998).⁵ Vessels “grandfathered” under the savings clause of the Anti-Reflagging Act were only required to be owned by a documentation citizen⁶ in order to be eligible for documentation with a fishery endorsement and therefore were not required to comply with the increased ownership and control provisions of §2(b) of the Shipping Act, 1916, 46 App. U.S.C. §802(b), to which most vessels were subject after the enactment of the Anti-Reflagging Act. As I have determined that the ownership restrictions of the AFA and MARAD’s implementing regulations are inconsistent with the Korea FCN with respect to the petitioner’s existing ownership interest in the ARCTIC STORM, the owner of the ARCTIC STORM will be subject to the documentation citizen standard, the standard to which it had been “grandfathered,”⁷ and with which it was required to comply prior to the passage of the AFA. The owner of the SEA STORM will be required to comply with the requirements of §2(b) of the Shipping Act, 1916, the standard to which it was subject prior to the enactment of the AFA.

The maximum amount of Non-Citizen ownership permitted in the Vessels will be established on October 1, 2001. Section 213(g) of the AFA provides in part:

... The provisions of section 12102(c) and section 31322(a) of title 46, United States Code, as amended by [the AFA], shall apply to all subsequent owners and mortgagees of such vessel, and shall apply, notwithstanding [the language of this section], to the owner on October 1, 2001 of such vessel if any ownership interest in that owner is transferred to or otherwise acquired by a foreign individual or entity after such date.

⁵The Anti-Reflagging Act increased the citizenship requirement for the owner of a vessel with a fishery endorsement from the standard of a documentation citizen to the requirement that the vessel owner comply with the controlling interest requirements of §2(b) of the Shipping Act, 1916, as amended, 46 App. U.S.C. §802(b). However, section 7(b) of the Anti-Reflagging Act provided that the increased citizenship requirement would not apply if, prior to July 28, 1987, the vessel (1) was documented and operating as a fishing, fish tender or fish processing vessel in the U.S. Exclusive Economic Zone (EEZ) or (2) was contracted for purchase for use as a fishing, fish tender, or fish processing vessel in the navigable waters of the U.S. EEZ and the purchase was shown by the contract or similarly reliable evidence acceptable to the Secretary to have been made for the purpose of using the vessel in the fisheries.

⁶The term “documentation citizen” refers to an entity that meets the requirements of 46 U.S.C. §12102(a) for the documentation of a vessel. A corporation is deemed a documentation citizen able to document a vessel if: (1) it is established under the laws of the United States or of a State; (2) the chief executive officer, by whatever title, and the chairman of its board of directors are U.S. Citizens; and (3) no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum.

⁷The “grandfather” provision of the Anti-Reflagging Act was deemed by the Coast Guard to run with the vessel; however, the grandfather provisions of the Anti-Reflagging Act have been repealed by §204 of the AFA, effective October 1, 2001. Therefore, the “grandfathered” right of a vessel to be documented with a fishery endorsement, provided that the vessel owner qualifies as a documentation citizen, no longer runs with the vessel, and any subsequent owner will be required to meet the citizenship requirements of the AFA.

Consequently, if any transfer of ownership interest in the vessel-owning entity for either of the Vessels is made after October 1, 2001, and the vessel-owning entity has a Non-Citizen ownership interest in excess of 25% at any tier or in the aggregate, the transfer must be to U.S. Citizens. If, after October 1, 2001, any ownership interest in either of the vessel-owning entities is transferred to a Non-Citizen before such time as the particular vessel-owning entity complies with 46 U.S.C. §12102(c), as amended, the vessel-owning entity will be deemed ineligible to document the Vessel with a fishery endorsement and the Vessel's fishery endorsement will be invalidated pursuant to §213(g) of the AFA and 46 C.F.R. §356.53(g).

Finally, this determination applies to the existing ownership structure of the Vessels. If any ownership interest in either of the Vessels is transferred to Non-Citizens prior to October 1, 2001, the owner of the Vessel will be required to submit a separate petition under 46 C.F.R. §356.53 with respect to the new ownership structure of the Vessel.⁸ Furthermore, in order to confirm that no interest in the vessel-owning entities is transferred to a Non-Citizen after October 1, 2001, Arctic Storm, Inc. and Sea Storm, Inc. are required to submit on an annual basis to MARAD's Citizenship Approval Officer relevant ownership information as required by 46 C.F.R. §356.53(f), as well as an Affidavit of Citizenship to demonstrate that each vessel owner meets the requisite citizenship requirements specified in this determination.

Sincerely,


J. Patrick Wiese
Acting Chief Counsel

⁸As part of this petition, the Petitioner submitted the certification required by 46 C.F.R. §356.53(b)(5) stating that it does not intend to transfer any direct or indirect interest of a Non-Citizen in the vessel to another Non-Citizen prior to October 1, 2001.