13 August 2009

68

US Customs and Border Protection
Office of International Trade
Regulations and Rulings
Trade and Commercial Regulations Branch
799 9th Street NW, Mint Annex
Washington, DC 20229
United States of America

For the attention of Sandra L Bell

Dear Ms Bell,

"Proposed modification and revocation of ruling letters relating to the customs position on the application of the Jones Act to the transportation of certain merchandise and equipment between coastwise points." published by US Customs and Border Protection (CBP) in its Customs Bulletin and Decisions, Vol. 43, No. 28, 17 July 2009

The undersigned organizations represent a large part of the offshore oil & gas industry of the United States of America.

Our organizations/members are separately submitting detailed comments on the proposed modifications.

This submission is to highlight that, together, we believe that the proposed modifications would be harmful in many ways and we oppose this precipitous action sweeping away decades of precedent without adequate opportunity for industry to assess the changes and their impacts. As a minimum, we request further time is given to debate this matter fully with all parties in government and industry.

Yours sincerely,

ADCI
Phil Newsum
Executive Director

API
Doug Morris
Group Director,
Upstream and Industry Affairs

IADC
Alan Spackman
Vice-President, Offshore
Technical & Regulatory Affairs

IAGC
Chip Gill
President

IMCA
Hugh Williams
Chief Executive

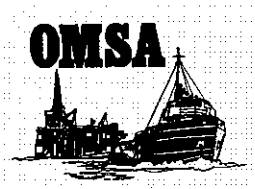
OGP
Charles Bowen
Executive Director

OOC
Allen J Verret
Executive Director

US Chamber of Commerce
Ann Beauchesne
Vice President – National Security
& Emergency Preparedness Dept

cc: Secretary Janet Napolitano – US Department of Homeland Security, Washington, DC 20528, USA

ADCI	**Association of Diving Contractors International** Represents organizations that provide diving or other underwater technology services	www.adc-int.org
API	**American Petroleum Institute** The only national trade association that represents all aspects of America's oil and natural gas industry	www.api.org
IADC	**International Association of Drilling Contractors** Representing the worldwide oil and gas drilling industry	www.iadc.org
IAGC	**International Association of Geophysical Contractors** Represents the industry that provides geophysical services to the oil and gas industry	www.iagc.org
IMCA	**International Marine Contractors Association** Representing offshore, marine and underwater engineering companies	www.imca-int.com
OGP	**International Association of Oil & Gas Producers** Encompassing most of the world's leading publicly-traded, private and state-owned oil & gas companies, industry associations and major upstream service companies	www.ogp.org.uk
OOC	**Offshore Operators Committee** Representing 67 operating and 63 service company members engaged in drilling and producing hydrocarbon resources in the Gulf of Mexico.	www.offshoreoperators.com
USCC	**US Chamber of Commerce** Representing American businesses	www.uschamber.com



69

August 14, 2009

Office of International Trade, Regulations and Rulings
United States Customs and Border Protection
ATTENTION: *Trade and Commercial Regulations Branch Staff*
799 9th Street N.W. – The Mint Annex
Washington, D.C. 20229

Dear Sir or Madam:

On behalf of the Offshore Marine Service Association (OMSA), please find attached our comments on the Customs and Border Protection Notice of Modification and Revocation of Ruling Letters, published in the Customs Bulletin on July 17th. OMSA is the national trade association representing the owners and operators of U.S. flag vessels that support the offshore oil and gas industry. We request that this letter and our attached comments be included in the record of this proceeding.

The history of the offshore supply industry is intertwined with, and a cornerstone of, the history of offshore energy exploration and production activities in the United States. Nearly 60 years ago, working in concert with the then-fledgling offshore energy exploration and production industry, OMSA member companies designed and built the vessels, and first applied the techniques employed offshore, that allowed the offshore energy exploration and production industry to evolve. As that industry has continued to develop technologically, the workboat sector in turn has modernized its fleet and otherwise adapted to meet the industry's needs, and will continue to do so in the future. Within that context, the modification proposed by CBP is of great importance to OMSA's membership, as we believe it will encourage further involvement by OMSA members in the construction of modern offshore vessels to support complex, deepwater needs of the oil and gas industry.

The U.S. cabotage laws, specifically the Jones Act in the context of this proceeding, run as a consistent thread though our nation's history, and Congress has repeatedly expressed its support for those laws. Among the Act's purposes is to ensure "the United States shall have a merchant marine of the best equipped and most suitable types of vessels" by requiring that vessels involved in transportation subject to those laws be built in America, owned by Americans and crewed by Americans. Any administrative action or interpretation that veers from the fundamental objective and original intent of the Act runs the risk of becoming a touchstone for further erosion of the Jones Act.

In recent years, the offshore industry has developed a practice of submitting letter ruling requests to CBP, and referencing prior letter rulings and applying them to very different sets of circumstances in order to justify the use of foreign vessels. CBP, perhaps viewing only individual trees and not seeing the collective forest, has often responded to foreign vessel interests with favorable determinations that have permitted the use of foreign vessels in specific circumstances, the cumulative effect of which has been very much to the detriment of the U.S. offshore supply industry. This point cannot be overstated: CBP Jones Act rulings, on a number of matters and over a number of years, have had significant, negative impacts on U.S. vessel operators and all of the ancillary U.S. industries associated with the building, equipping and operating of U.S. offshore supply vessels. Prior interpretations by CBP, some of which are now proposed to be revoked in this proceeding as inconsistent with the Congressional intent behind the Jones Act, have stymied the ability of U.S. vessel operators to substantially invest in the construction of new vessels. This comes at a time when offshore development continues to advance, but more and more, U.S. companies are being excluded from the ability to secure that work. Technological advances in offshore energy exploration and development require the construction, deployment and operation of the most sophisticated vessels in the world. U.S. companies can continue to meet that need if the Jones Act is properly enforced.

Complicating this matter, the interpretation and administration of the Jones Act by CBP over the past several years has injected an increasing level of uncertainty into offshore operations, which is detrimental to offshore leaseholders and the U.S. merchant marine alike. Both U.S. owners and energy companies lack clear guidance on how the Jones Act applies to the vast amount of cargo being transported for offshore installation. Customers, who seek clear rules above all, have not known how to interpret an array of rulings. In such a climate, U.S. vessel owners have been less likely to make the significant investments necessary to meet developing needs of their customers. Additionally, CBP personnel in the field have found it difficult to apply their own interpretations of the law to dynamic situations, which has impeded their ability to properly interpret the law pursue potential violations. The winners have been opportunistic foreign vessel owners at the expense of U.S. national interests.

The CBP process of interpretive guidance is one that should only be based on the original intent of the Jones Act as it relates to offshore activities and the law's application to current-day practices. That said, those opposed to the present CBP modification have tried to influence the process with a series of claims that are neither focused on the law, nor in some cases, the truth. Our comments submitted herewith are based on the legal issues involved in this proposed modification, but we believe it is important that we also address some of the more provocative claims that have been made, and that we expect will be made by those opposed to CBP's recent Notice.

One claim is that the CBP modifications "could shut down most activities in the deepwater Gulf of Mexico for extended periods of time" and that foreign vessels will be unable to perform work in the future. That is simply not the case. The Notice and the modifications it proposes deal

with the requirement that cargo be *transported* on U.S. flag vessels, since of course, the Jones Act only applies to *transportation* of merchandise. The fact is that most offshore energy companies currently do use U.S. vessels to transport their cargo, in full compliance with the law, and these companies have indicated that the ruling will have minimal impact on their operations. They too wish for clarity in the law in order for them to be compliant with it.

The claim of significant disruption in offshore operations raises two issues: first, the number of foreign vessels that are currently doing specialized work in the Gulf of Mexico, and second, whether there are U.S. vessels available to transport cargo and perhaps install it. OMSA routinely tracks foreign vessel activities in an effort to ensure their compliance with the Jones Act. There are currently 42 foreign vessels in the Gulf of Mexico. Of these, the majority are involved in activities that would be unaffected by this ruling, such as seismic vessels or heavy lift vessels that do not normally carry cargo. Therefore, the issue is whether there are sufficient vessels in the U.S. fleet to transport and potentially install merchandise. The answer is an emphatic "yes". U.S. vessels are available now, and with the current recession facing our Nation, it is more important than ever that American workers and companies are at work.

These proposed modifications will encourage investment by U.S. companies to construct additional vessels to meet the demand, as was the case at the inception of the offshore industry. If in the unlikely event a U.S. vessel is not available to perform a particular task, there is a well-established process for seeking a waiver to the Jones Act, and a Memorandum of Understanding in place between CBP, the Maritime Administration and the Department of Energy to facilitate such a waiver as it relates to the energy sector.

Finally, the opponents of the CBP proposed modification have also tried to claim that this would have "highly damaging" effects on the nation's economy and national security. This utterance is without merit and insulting to the very intent of the U.S. cabotage laws. The question of economic harm really hangs on whether there is value in allowing foreign boats to come into U.S. waters and replace American vessels that are built in American shipyards, pay American taxes and hire American crewmembers. It is worth noting that the first thing that a foreign boat owner often does on entering the Gulf of Mexico is obtain a waiver of U.S. manning laws that allows it to use foreign workers, rather than hiring American citizens.

OMSA believes, emphatically, that correct interpretation of the Jones Act will have a direct and positive impact on our national economic interests and security. It is important to note that these interests are precisely the ones Congress intended to advance in the Jones Act, as evidenced by its preamble stating:

> It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens

> of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this Act, the Secretary of Transportation shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained."

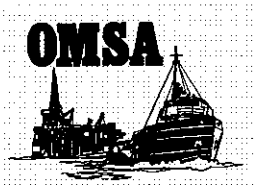
On the question of national security, we simply quote the first seven words of the above preamble – "It is necessary for the national defense." As to the operation of foreign vessels specifically in the offshore energy sector, we further reference a recent letter signed by twenty Members of the U.S. House and Senate to the Secretary of the Department of Homeland Security urging greater scrutiny of foreign vessels in the offshore energy sector. It stated that "this lack of information on foreign vessels presents a serious threat to our offshore energy infrastructure."

We appreciate the opportunity to comment on this necessary and valuable modification to Customs rulings on the Jones Act. Our specific comments on the legal issues it raises are attached herewith.

Sincerely,

Kenneth R Wells

Ken Wells
President



COMMENTS OF THE OFFSHORE MARINE SERVICE ASSOCIATION ON PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS RELATING TO THE CUSTOMS POSITION ON THE APPLICATION OF THE JONES ACT TO THE TRANSPORTATION OF CERTAIN MERCHANDISE AND EQUIPMENT BETWEEN COASTWISE POINTS

INTRODUCTION

This comment is submitted by Offshore Marine Service Association ("OMSA"), an organization which has one hundred twelve members who own vessels, most of whom are involved in the construction and/or ownership and operation of vessels engaged in the various activities necessary to support the offshore petroleum industry. We and our members are strong supporters of the Jones Act and the livelihood of our members depends upon its correct interpretation and enforcement. We, more than any other Jones Act operators, are affected by the above-referenced Notice of Modification and Revocation of Ruling Letters, since the issues involved arise almost exclusively in the offshore industry. 43 Cust. B & Dec. 54-118 (July 17, 2009) (hereinafter "*Notice*").

OMSA members range from family businesses that own one boat to large publicly-traded corporations that compete internationally. The Jones

Act-qualified offshore marine industry that makes up the OMSA membership has met the needs of the oil and gas industry since the inception of offshore exploration more than fifty years ago. The industry is currently in the midst of a significant new build program as it prepares to meet the new challenges posed by offshore projects that are being developed in deeper and deeper water and farther from shore.

Turning to the specific matter at hand, OMSA strongly supports the proposals made in the Notice. In particular, we think that the willingness it shows to review recent rulings to ensure that they are consistent with the original application of the Jones Act by CBP and its predecessors and, more importantly, the intent of the Jones Act itself is commendable. The Jones Act's purpose is, for reasons of economic and national security, to reserve the coastwise trade of the United States to qualified U.S-flag vessels, subject only to the limited exceptions thereto enacted into law. In OMSA's view, too often CBP has administered the Jones Act as though the narrow exceptions to it were the touchstone for the analysis, rather than the purpose of the Act itself. Such an application is inconsistent with the very purposes for which the Act was established, and directly contrary to the instructions by Congress in the Jones Act that the administration of shipping laws will be in furtherance of a domestic merchant marine of the "best equipped and most suitable types of vessels."

In this connection, a proceeding of this type from time to time is essential. While, strictly speaking, interpretive rulings apply only to the facts described in the individual request, their reasoning is often applied in subsequent rulings. This practice has, of late, resulted in the erosion of the Jones Act, rather than supporting its original intent. Moreover, the requestors of rulings are overwhelmingly foreign-flag interests. Any system in which the description of the facts and legal arguments are presented to the decider by one side only will have a tendency to favor that side. It is therefore appropriate that on important matters, CBP conduct proceedings, such as this one, that allow for all points of view to be expressed. The touchstone should always be the text of the statute itself.

In addition, this sort of proceeding is useful in giving guidance to the Customs personnel in the field who are tasked with enforcing the Jones Act. Individual rulings are sometimes contradictory (or at least can be read that way) and it requires a legalistic argument to reach a conclusion as to what is the proper application of the Jones Act to a specific set of facts. Given that ruling letters apply to specific facts, field units frequently find themselves trying to apply twenty to thirty-year old rulings to changed transportation circumstances. The field personnel are simply not equipped to do that, as OMSA has found through its own efforts in recent years to obtain enforcement against Jones Act violations. To the extent that CBP sets forth

its interpretations clearly, and with specific reference to prior rulings which are modified or revoked, as here, the law is much clearer and will be easier to apply in the field. For example, if CBP had simply revoked the one ruling, HQ H046137, that was not subject to notice and comment because revocation was within sixty days, the other similar rulings that have had the effect of incrementally undermining the Jones Act over the years would still be in effect. This type of proceeding is inherently more likely to result in uniformity and clarity than a ruling-only administration of the Jones Act.

I. GENERAL STATEMENT

We turn now to the specific content of the Notice. Its fundamental conclusion is to reaffirm the continuing validity of the enunciation of the governing principles set for in T.D. 78-387 (Oct. 7, 1976). The most important principle, and the one that gave rise to this proceeding, is that foreign vessels may no longer transport merchandise from one coastwise point to another simply because it is installed from the transporting vessel. ("CBP recognizes that allowing foreign-flagged vessels to transport merchandise from one U.S. point and install that merchandise at another point of the OCS on the condition that it merely be accomplished 'on or from that vessel' would be contrary to the legislative intent of 46 U.S.C. §55102") *Notice* at 59. The Notice makes clear that this applies to items such as wellhead assemblies, machinery, and production equipment such as

jumpers, risers and related umbilicals. *Notice* at 58-59. The interpretations to the contrary, which are to be revoked under the proposal, clearly misapplied the Jones Act.

Further, we welcome the clarification that the "equipment" of the vessel is limited to articles "necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board." *Notice* at 59. Other articles that do not come under this definition that are necessary "to accomplish an activity for which that vessel would be engaged" are not equipment. *Notice* at 61. The statements in some rulings that the pipe on a pipelaying vessel is part of its equipment are rejected, as are statements to the same effect as to risers, oilfield equipment or other structural components. *Notice* at 61. These items are clearly merchandise under the unambiguous meaning of the Jones Act.

We do note, however, that the concept of "operations" should be broad enough to encompass the carriage by foreign vessels of the items necessary to the operations in which they are engaged as long as the transportation of those items from one coastwise point to another is not a fundamental part of that mission. We address that further in "Specialized Equipment". See, *infra*, Part III.

We also support the confirmation of the rule that the transportation of pipe between coastwise points must be performed by a Jones Act vessel. *Notice* at 57.

The clarification of what articles can be transported in the coastwise trade by a foreign vessel incident to its repair operations is useful. It is now clear that such articles can be transported only if (1) they are of *de minimus* value; (2) the repairs were unforeseen; and (3) the articles are part of the normal supplies of the vessel. *Notice* at 57-58.

CBP states, with approval, its long-standing interpretation that a foreign-vessel can transport and install merchandise on an OCS coastwise site if that activity is "incidental" to an activity permitted to the vessel. *Notice* at 58-59. OMSA has no disagreement with this view, if properly applied. However, the concept of what is incidental to a permitted activity has, over time, been expanded by CBP beyond what was originally intended by the Jones Act, to the detriment of U.S. vessel owners. We address that further in our comments.

Finally, we note that the Notice reiterates the long-standing position of CBP that "[t]he paying out of pipe, cable, flowlines, and umbilicals is permissible because there is no landing of merchandise and therefore, no engagement in coastwise trade." *Notice* at 61. Prior to the Notice, there were two stated justifications for CBP's position that such activities are not

the transportation of merchandise, the one reiterated therein and the assertion that pipe was "equipment" of the pipelaying vessel. Consistent with its determination to return to the original definition of vessel "equipment," CBP now states in the Notice that pipe and cable are not the equipment of the vessel. *Notice* at 61. OMSA agrees fully. Thus, the sole basis now available for the position that pipelaying and similar activities are not coastwise trade is the notion that there is no "landing" of the pipe as merchandise.

OMSA wholly disagrees with CBP's interpretation and administration of the Jones Act in this context. We do not see how the movement by vessel of goods, by whatever means, from one coastwise point to another, can be anything other than the transportation of merchandise in the coastwise trade. The closest we have found to a rationale to support CBP's interpretation is the statement, without further explanation, that "the cable is not landed but is merely paid out in the cable laying operation. . . ." E.g., HQ 113711 (Nov. 26, 1996). Although this is not the subject of the Notice, it is an important issue and must be revisited.

In sum, this is an excellent job. None of our comments that challenge any portion of the Notice detract from the overall support we have for its statements and for the underlying procedures that permit all concerned to express their views before an action becomes final. The fact that CBP was

willing to re-examine interpretations based on the original intent of the Jones Act is clearly a significant and encouraging development.

We now turn to how the approach laid out in the Notice may be properly applied to offshore operations and to additional rulings that should be modified or revoked to conform to it.

II. ENGAGEMENT IN THE COASTWISE TRADE INCIDENTAL TO AN ACTIVITY PERMITTED TO FOREIGN VESSELS

Paragraph (4) of T.D. 78-387, cited with approval in the Notice, states that the transportation in the coastwise trade of "pipeline connectors" is not prohibited by the Jones Act if it is "incidental" to the pipelaying operations of the barge. T.D. 78-387 (Oct. 7, 1976). This ruling has constituted the sole basis for all subsequent applications of the "incidental" line of reasoning. CBP should re-examine the concept of what is "incidental" with a view to refining it in a way that will make its application more certain and systematic. See discussion concerning "Transportation of Risers to Be Installed From a Pipelaying Vessel" Part IV.A., infra.

There is no suggestion in the Jones Act or any Congressional statements relating thereto that sanctions any incursions into the Act by foreign vessels for operations "incidental" to what is permitted to them. If the article is merchandise and it is transported between coastwise points, it must be carried by a Jones Act-qualified vessel. Thus, any concept of

incidental operations in the Jones Act trade by foreign vessels must be very circumscribed and limited to what is essential to the performance of the permitted function.

It is particularly appropriate to revisit CBP's interpretation of "incidental" now because the concept of incidental operations had been expanded *sub silentio* by virtue of the rulings that are being revoked by the Notice. Until this Notice, it did not matter whether the installation was incidental to an activity permitted to foreign vessels since CBP was essentially allowing foreign vessels to engage in the transportation of virtually any merchandise to a coastwise point if it was installed at that point from the vessel. HQ H046137 (Feb. 20, 2009) (now withdrawn). Now, the "incidental doctrine", as currently applied by CBP, is the only basis for permitting a foreign vessel to transport merchandise to a coastwise point as long as it installs it. It is clearly time to re-evaluate this doctrine in light of the fundamental purpose of the Jones Act, consistent with what CBP is doing in this proposal. A doctrine that applies the Jones Act differently to the transportation of the same item depending on what activity the vessel is engaged in addition to that transportation is clearly ripe for reconsideration, particularly in light of the fact that there is no basis in the statute for any exceptions except those recognized explicitly. 46 U.S.C. §§15103 – 15121 (2006).

There is no support in the Jones Act for the proposition that foreign vessels can engage in the coastwise trade incidental to non-Jones Act activities. CBP's interpretation of what constitutes incidental movement by foreign crane barges in connection with the permitted activities of loading or unloading cargo onto or from an OCS structure, or constructing or dismantling such a structure, is instructive. In that scenario, CBP has required that all movement must be effected by the crane except for movement that is necessary or *incidental* to the operation of the crane. HQ 116225 (May 6, 2004). CBP has ruled that the only movement by the barge that is incidental to the movement of merchandise by the crane is a turning movement where the central point of the vessel remains in place, as distinct from a swinging movement where the only part of the barge that remains in place is a corner. HQ 116423 (March 25, 2005). There is no accommodation in these rulings to what would be convenient to the operation or whether the movement at issue is insignificant in comparison with the total movement of the merchandise. The governing principle is that the movement of merchandise between coastwise points *is specifically prohibited by a vessel* unless that vessel is owned by citizens of the United States and carries a coastwise qualification.

Similarly, the concept of permitted incidental activity exists in the import duty regime administered by CBP. Articles that are assembled

abroad from components manufactured in the United States can be imported duty free as long as they have not been advanced in value abroad except, *inter alia*, "by operations *incidental* to the assembly process such as cleaning, lubricating and painting." 9802.00.80 of the Harmonized Tariff Schedule of the United States (italics supplied). Authorization for incidental increase in value is limited to activities that are essential to completion of the assembled product, not further assembly, no matter how minor.

Another reason to take a limited view of incidental operations is the effect that rulings are given by CBP and the way they are utilized by those who obtain the vast majority of the rulings, the foreign-flag operators or their customers. An individual ruling will be based on specific facts set forth in the ruling request, such as a particular method of installing risers by a pipelaying vessel. However, once such a ruling has been obtained, it will be construed (incorrectly) as giving protection at a practical level, for example, to the installation of risers by pipelaying vessels in all circumstances. Thus, the granting of limited exceptions for incidental operations can become a means for the development of much broader exceptions in practice.

In sum, CBP's rulings that a foreign vessel can engage in the transportation of merchandise in the coastwise trade as long as it is incidental to a permitted activity should be re-examined. In order to be

permitted incidental transportation, the merchandise should be a small component, the installation of which by the vessel is fully integrated with the permitted activity and is accomplished using the same technique as in the permitted activity.

III. SPECIALIZED EQUIPMENT OF A VESSEL

OMSA has no objection to the transportation between coastwise points of items that are properly viewed as the equipment of vessel. In HQ 115536, (cited with approval in proposed HQ H061992, Attachment N), CBP ruled that generating equipment that is placed on a power barge at one coastwise point and unloaded at another is the equipment of the vessel. HQ 115536 (May 22, 2001). Similarly, in proposed HQ H061935, Attachment M (modifying HQ 113841 (Feb. 28, 1997)), CBP rules that an ROV is the equipment of a cable-laying vessel because "[i]n order for the vessel to operate as cable-laying vessel, the operation for which is was designed, an ROV is necessary to monitor the placement of the cable being laid by the vessel." OMSA supports these rulings.

More generally, in our view, any item that is placed on board a vessel for use by that vessel during its voyage in accomplishment of its mission should be deemed its equipment, *i.e.*, necessary for its "operation", as long as the transportation of the item from one point to another is not necessary to the accomplishment of that mission. By way of example, the outfitting of a

barge with a crane or with pipelaying equipment at one coastwise point, which it uses while performing that function, and the unloading of that equipment at a second coastwise point should be permissible. By contrast, the transportation of an item from one coastwise point to another (an OCS site on the seabed) where it is left to perform its intended function would not be permitted because the transportation between one coastwise point to another is essential to the mission. The distinction is that an item that is carried offshore to perform a specific task or function while on the vessel, but is never offloaded onto the seabed or an OCS facility as a part of that function, is equipment of the vessel. To use the generator example, when it stays on the barge to help power it during the entire mission, it is equipment of the vessel. HQ 115536. If it is placed on an OCS platform to provide electricity for repairs, it is merchandise.

Similarly, in this connection, we note with approval that CBP has not stated any intention to revoke or modify HQ 113838, which held that "the transportation by [diving support vessels] of equipment, supplies and materials used on or from such vessels in effecting services such as inspections of, and/or repairs to, offshore or subsea structures, including the laying and repair of pipelines, and marine coring, does not constitute a use of the vessel in the coastwise trade, provided such articles are necessary for the accomplishment of the vessel's mission, and are usually carried on board as

a matter of course." HQ 113838 (Feb. 25, 1997). However, to the extent that such vessels are utilized to carry items that will be installed or incorporated into an offshore or subsea structure or pipeline, the transportation of such items must be on Jones Act qualified vessels.

IV. REVOCATIONS OR MODIFICATIONS OF SPECIFIC RULINGS

(a) Transportation of Risers by a Pipelaying Vessel

In HQ 115311, as modified by proposed HQ H061700 (Attachment K), CBP ruled that a foreign-flag vessel that engages in laying flowlines between wellheads and the seabed beneath a production platform may also transport and install risers that connect the flowlines to the platform.[1] HQ 115311 (May 10, 2001). The ruling cites T.D. 78-387(4), which held that a foreign-flag vessel could transport and install "pipeline connectors" "incidental to [its] pipe-laying operations." T.D. 78-387(4) (Oct. 7, 1976). It analogizes the risers to pipeline connectors because "the risers are used as a connection between the subsea wellheads and the [platform]." There is nothing in the ruling that describes the process by which the risers are installed. In OMSA's view this ruling is based on insufficient information and should be withdrawn at least until further information is supplied.

[1] As stated in the General Statement, *supra*, we do not agree that pipe and cable laying is not subject to the Jones Act. For purposes of our comments herein, where we treat specific rulings involving pipelaying, we do not challenge them on that basis. We specifically reserve our right to do so in the proper context.

CBP's rulings which collectively permit the transportation of pipeline connectors by foreign vessels are based on the technology that existed in 1978. At that time there was no drilling in waters over one thousand feet. Under sea installation was generally done by divers using welding processes. Each wellhead had its own platform which was connected to a transportation pipeline by a simple device (a "pipeline connector").

The modern age of deepwater production began in 1979, when the Shell Cognac production facility became the first installed in more than one thousand feet of water. Today, in deep water, ROVs have replaced the old diver/welding operations. The processes that were used in the 1970's have been superseded.

The installation of a modern riser is in no way analogous to installing an old pipeline connector. Multiple wellheads are often connected to a single platform by flowlines that culminate in risers that connect the flowlines to the platform. Various types of methods of installation of the risers are used. A pipelaying barge may not be able to perform this type of installation with the equipment on board for laying pipe. In such cases, the installation is in no sense incidental to pipelaying, but rather is a second function performed from the same vessel as the first.

Similarly, CBP appears to view "jumper pipe" as pipeline connectors for purposes of determining whether the transportation of merchandise is

"incidental" to a permitted activity. Proposed HQ H061697, Attachment I, revoking HQ 115185 (Nov. 20, 2000). In fact, under current technology in deep waters, it is seldom true that the jumper pipe is installed at the time of the laying of the flowlines. After the well is drilled and capped, the flowlines and umbilicals are laid, and the production platform is installed and connected to the flowlines by the risers and their associated umbilicials. The jumper pipe, which connects the wellhead to the pipeline end termination (PLET) that is welded onto the end of the flowline, is generally installed last. It has to be because it has to be built to specifications generated by the exact locations of the PLET and the wellhead. It is therefore seldom transported on the same voyage during which the flowlines are laid. Thus, under the requirement of the Jones Act, the transportation of a jumper pipe is coastwise trade.

More generally, the rulings, now revoked, that an article could be transported by a pipelaying vessel in the coastwise trade as long as it was installed from the transporting vessel made the exact limitations of the "incidental doctrine" irrelevant since transportation/installation was permitted to foreign vessels, even absent application of that doctrine. Since that is no longer true, it now matters whether the transportation and installation are in fact incidental to a function permitted to foreign vessels. As we have demonstrated, old concepts such as "pipeline connectors" have

limited use in determining what is incidental. A more fact-based analysis is called for within the strict limits mandated by the Jones Act. This is true whether or not CBP adopts our view of the limits of the "incidental doctrine", set forth in Engagement in the Coastwise Trade Incidental to an Activity Permitted to Foreign Vessels, *supra*, II.

In sum, OMSA suggests that CBP require that the applicant in HQ 115311 and each other company submitting a ruling request in the future based on the "incidental" interpretation describe in detail the operation permitted to the foreign vessel and how this operation relates in time, location and function to the transportation and installation in the coastwise trade of the merchandise that it seeks to be covered by that doctrine. The request should also identify any additional equipment that will necessarily be on board the vessel to install the item that is transported. This will permit CBP to make an informed decision.

(b) Transportation of Merchandise to a Pipeline

CBP confirms in the Notice that the transportation of pipe or other items by any vessel between coastwise points must be performed by a coastwise-qualified vessel. *Notice* at 57. The Notice further states that CBP intends to modify or revoke rulings in addition to those specified therein if they conflict with the principles stated therein.

Though not exhaustive, OMSA is aware of two such rulings involving the transportation of merchandise to pipelines. In HQ 115531, CBP ruled that the movement by a foreign-flag vessel of concrete mats to an existing pipeline on the OCS and the installation thereof by the transporting vessel on the pipeline was permissible. HQ 115531 (Dec. 3, 2001). There was no analysis, but the underlying assumption must have either been that there was no violation of the Jones Act if the items were installed from the transporting vessel (a view now abandoned by CBP) or that the pipeline was not a coastwise point.

A pipeline is clearly a coastwise point. Section 4(a) of the Outer Continental Shelf Lands Act provides that "[t]he Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to . . . any . . . installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."[2] Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(1)(1953). Section 4(a) of the Act applies, *inter alia,* to "any . . . installation, or other device if . . . its presence on the OCS is to transport resources from the OCS." *Demette*

[2] The full text is quoted in *Notice* at 57, footnote 1.

v. Falcon Drilling Co., Inc., 280 F.3d 492, 497 (5th Cir. 2002). Since a pipeline is a coastwise point, HQ 115531 must be revoked.

Second, in HQ 111126, CBP ruled (the second of four issues) that a foreign-flag vessel could transport personnel and equipment from the U.S. to a barge engaged in laying pipe on the OCS. HQ 111126 (Aug. 16, 1990). The stated reason was that since the barge (which clearly was attached to a pipeline under construction) was not engaged in "'exploring for, developing, or producing resources' from the OCS, it is not considered 'attached' to the seabed as that term is used in OCSLA and therefore is not a coastwise point." This statement is incorrect. As demonstrated, OCSLA clearly makes an installation for the purpose of transporting mineral resources a coastwise point, just as it does facilities that engage in exploration, development and production of such resources. A pipeline is such an installation. A vessel attached to a coastwise point is itself a point. HQ 109833 (Nov. 30, 1988). The second ruling in HQ 111126 should be revoked.

(c) Repair Operations

The Notice correctly recites the narrow exception to the Jones Act set forth in T.D. 78-387(6) that permits foreign vessels to transport merchandise between coastwise points in connection with conducting repair operations. T.D. 78-387(6) (Oct. 7, 1976). Under this standard, the articles transported

must be of *de minimus* value, be required to accomplish repairs that are unforeseen and usually carried aboard the vessel as supplies. *Notice* at 57-58. Unforeseen repairs do not include the installation of preventive materials designed to avoid future repairs. 78 T.D. 387(3) (Oct. 7, 1976). Moreover, contrary to certain prior rulings, it is not relevant to the analysis whether the merchandise is left at the destination point for installation or installed on it from the transporting vessel. *Notice* at 59.

Ten years after T.D. 78-387, the CBP issued HQ 108442 which, *inter alia*, involved repairs of drilling rigs. There is no mention of T.D. 78-387. HQ 108442 (Aug. 13, 1986). The ruling concludes that the transportation of repair and even structural materials to an oil well on the OCS would violate the coastwise laws, but if the repair work was performed from the vessel (a liftboat) there would be no violation.

HQ 108442 should first be modified to incorporate the requirements of T.D. 78-387(6). Second, consistent with the basic holding of the proposal that it is irrelevant whether installation is effected from the transporting vessel, the last sentence of Paragraph 2 ("If the construction or repair work was performed from or on the liftboat, the coastwise laws would not be violated") should be removed.[3]

[3] The ruling also states that the transport of pipeline connectors to the site would not violate the coastwise laws if the connection operation was performed from the vessel. This too clearly is inconsistent with the Notice and should be revoked. *See* (d)(ii) *infra.*

In a subsequent ruling on repair operations, HQ 115771 (which is referred to in the Notice at 59), CBP states that the carriage of equipment, supplies and materials to be used from the vessel in the repair of pipelines (and therefore, to some extent, installed on the pipeline) is not coastwise trade if the articles transported and installed are necessary for the vessel's mission and usually carried on board. HQ 115771 (Aug. 19, 2002). There is no indication that the articles transported were *de minimus* in value. The ruling should be modified to state the correct standard for repair operations, which would include the requirement that the repair operation must be unforeseen and the materials *de minimus* in value.

(d) Transportation of Merchandise Installed from the Vessel

(i) HQ 115522

CBP states that it intends to modify HQ 115522 (Dec. 3, 2001), stating that it appears to be correct on its facts but does not apply the correct holding in T.D. 78-387. The holding in that ruling addressed two issues: (1) whether the installation of flexible flowlines on the OCS was permitted to a foreign vessel; and (2) whether the installation of riser pipe and umbilical tie-ins between wells, pipelines, manifolds and platforms by the same vessel or another vessel is also permitted. Both were determined to be permissible. Under the Notice, the second activity would be permitted under the "incidental doctrine", if at all, only if performed by that vessel on the same

voyage. Attachment I, HQ H061697; Attachment J, HQ H061698. ("[T]ransportation and installation of a pipeline connector by a pipe-laying vessel is not an engagement in coastwise trade *if it is accomplished incidental to the pipe-laying activity of that same vessel.*") (italics supplied). Since it is clear that the installation of the riser pipe and tie-ins are not part of the voyage on which the flexible flowlines were laid on the OCS, this activity is coastwise trade. The second component of the ruling should be revoked.

(ii) HQ 108442

HQ 108442 held, in Paragraph 5 thereof, that a foreign-flag liftboat could transport "pipeline connectors" "if the work was done from the liftboat . . . ." HQ 108442 (Aug. 13, 1986). The ruling described the liftboat as being engaged in a joint operation with a pipelaying crane barge. The liftboat's function was not to lay pipe but rather to provide a platform to support the pipelaying operation. There is no suggestion in the ruling that the installation of the pipeline connectors was "incidental" to the pipelaying, and there could not be since the liftboat was not engaged in pipelaying. Under the authority of HQ 061697, Paragraph 5 of HQ 108442 should be revoked.

CONCLUSION

CBP is to be commended for an excellent job. The Notice is comprehensive and well-reasoned, and will be useful in the future administration of the Jones Act.

energy API

Doug Morris
Group Director

Upstream and Industry Operations
1220 L Street, NW
Washington, DC 20005-4070
USA

Telephone: 202-682-8089
Fax: 202-682-8426
Email: morrisd@api.org
www.api.org

70
#2

Ms. Sandra L. Bell
U.S. Customs and Border Protection
Office of International Trade
Regulations and Rulings
Attention: Trade and Commercial Regulations Branch
799 9th Street, N.W., Mint Annex
Washington, D.C. 20001

Re: Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points

Dear Ms. Bell:

The American Petroleum Institute ("API") represents nearly 400 companies involved in all aspects of the oil and gas industry (Exploration and Production, Refining, Marketing and Transportation). Furthermore, API member companies are engaged in all aspects of the exploration, development and production of offshore oil and natural gas resources. API member companies are active as owners and operators of offshore leases, as companies involved in the development and maintenance of offshore infrastructure, and as service and supply companies that perform a great variety of work in offshore areas. On behalf of its members, API has a direct and substantial interest in any ruling that affects oil and gas operations in offshore areas, including the Outer Continental Shelf ("OCS"). We appreciate the opportunity to provide input on the Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points published on July 17, 2009 (the "Notice").

U.S. Customs and Border Protection ("CBP") has proposed to overturn more than 30 years of precedent upon which industry has relied by investing billions of dollars in the necessary resources to conduct oil and gas operations in the OCS. API believes this proposal will have far reaching implications on the offshore industry (safety issues, disruption of operations, technology gaps, litigation disputes, etc.) and urges CBP to take our comments into serious consideration before issuing a final decision. API and other industry members requested an extension of time from the 30 days allowed by CBP, which is the minimum number of days CBP is required by statute to allow for public comment; these requests have all been rejected. Disappointingly, CBP has rejected API's and its member companies' attempts to meet with CBP in order to gain clarity on the proposed rulings. Such extensions and/or meetings are clearly justified in this situation because of the potentially significant and widespread impacts that could

result if CBP's proposal were to be adopted "as is." Accordingly, careful consideration of these comments by CBP is all the more warranted and expected.

SUMMARY OF COMMENTS

1. CBP should grant additional time for the regulated community to comment on this rulemaking. While CBP has already denied requests for an extension in the comment deadline, the complexity and significance of this action clearly support additional time for the regulated community to consider the action and provide comments. CBP should thus provide a supplemental notice that provides for an additional year to submit comments, which would allow time for CBP to write proposed modifications to rulings identified but not published, publish them, and for industry to review them after publication, which is authorized by statute.

2. CBP should retract its proposal and retain its current precedent, which correctly recognizes the need for flexibility in evaluating the technology necessary to conduct oil and gas exploration and development in the OCS under the Jones Act. In any event, CBP should take a more reasonable approach that recognizes the global nature of the offshore industry, the evolving technologies associated with offshore operations, the demands on the industry in the face of catastrophic events, and the need for flexibility to address each of these concerns.

3. Security, safety, and economic considerations warrant retention of the current precedent.

4. If, despite industry comments, CBP insists on proceeding with a final notice, CBP should include a transitional period or a phased-in enforcement compliance period in its final decision so that companies have adequate time to implement any resulting changes. Due to the significant lead time and tremendous investments involved in the retention and scheduling of contractors, API recommends that the rule include a transitional period and/or a delayed enforcement compliance time line, which CBP has the authority under law to do.

5. If, despite industry comments, CBP insists on proceeding with a final notice, CBP should include an allowance in the rule for the engagement of vessels currently committed, permitting such vessels to be "grandfathered." API specifically requests CBP allow companies to continue to utilize vessels that are currently committed until the end date of the commitment and to consider the use of those vessels to be in full compliance with the law. Otherwise, CBP would be engaging in a retroactive rulemaking.

6. Alternatively, CBP should withdraw the rule and engage in a formal, negotiated rulemaking so that there is an open and transparent process for determining whether to, and how to, make any changes to CBP's interpretation under current ruling letters.

7. CBP should not require the regulated community to identify any rulings and decisions

that have not been identified in the Notice and that are inconsistent with the Notice. CBP should also not require the regulated community to identify substantially identical transactions. Such a request demonstrates the enormity of the changes CBP proposes to impose on the offshore community. CBP should engage in public notice and comment rulemaking on modification or revocation of any rulings that are not specifically addressed by this proposal, if it decides to revoke or modify any rulings that are not specifically addressed. CBP should publish a notice in the Federal Register and seek comments and conduct a thorough cost-benefit analysis in accordance with the Administrative Procedure Act ("APA") and applicable Executive Order requirements.

BACKGROUND

The Offshore Oil and Gas Industry

The U.S. offshore oil and natural gas industry is a critical component of America's economy, creating millions of jobs, raising billions of dollars in revenues for federal, state and local governments, contributing positively to gross domestic product, and reducing U.S. reliance on foreign energy imports.

In 2008, offshore production of crude oil in federal and state waters totaled more than 540 million barrels, which represents over 30 percent of total U.S. crude oil production, according to the Energy Information Administration ("EIA").[1] In 2007 (latest available annual statistics), the EIA statistics showed offshore natural gas production in federal and state waters at roughly 3.5 trillion cubic feet, or over 14 percent of the total domestic gas production.

The Gulf of Mexico Outer Continental Shelf ("GOM OCS") represents the offshore area with the greatest oil and natural gas activity. According to the Minerals Management Service's ("MMS") Gulf of Mexico regional office, which maintains records on leases and producing wells in the region, there are currently more than 7,000 GOM OCS oil and gas leases, with over 5,800 producing wells on the leases (defined as those wells with production in 2008 or 2009).[2] According to MMS, over 100 operators are active in the Gulf of Mexico.[3]

The offshore industry provides tremendous revenues to the federal, state and local governments. According to MMS, revenues from bonus bids, rents, and royalties flowing from federal offshore production amounted to over 17 billion dollars in fiscal year 2008. In the same year, states received over 100 million dollars in revenues flowing from federal offshore leases. Over the latest 10-year period (1997-2008), for federal oil and natural gas offshore leases, bonus bid revenues from federal offshore oil and gas leases have totaled 15 billion dollars, while revenues from royalties have totaled over 50 billion dollars.

States also receive significant revenues from oil and natural gas production in offshore

---

[1] *See* Department of Energy, Energy Information Administration Website.
[2] *See* MMS Gulf of Mexico Region, Planning Areas and Active Leases (June 17, 2009) report, *at* http://gomr.mms.gov/homepg/pubinfo/freeasci/freedesc.html.
[3] *See* http://www.gomr.mms.gov/homepg/pubinfo/freeasci/leasing/freeleas.html.

waters that are exclusively under state jurisdiction for leasing purposes. And federal, state and local economies are helped by reaping the benefits of tax income from both the direct and indirect impacts of offshore oil and natural gas leasing.

A 2006 report completed by Global Insight for the American Petroleum Institute analyzes what would happen if at-risk oil and gas production from deep water GOM leases issued in the years 1996 through 2000 were lost.[4] Because the analysis focuses on a portion of GOM leases, it provides only a snapshot of the impacts that could accrue from lost offshore production. Still, the results are compelling, showing that a 50 percent drop in production from these leases would result in 320,000 jobs lost for the peak year, and a 0.2 percent loss in gross domestic product during the peak. If all the production from these leases were lost, job loss would peak at 691,000 and the loss in GDP would peak at 0.5 percent.

Companies active in offshore oil and gas operations spend billions of dollars each year to obtain leases and to develop, produce, and transport oil and natural gas from offshore areas. The discussion above outlines the substantial investments required to simply obtain federal oil and natural gas properties. In addition, companies engage in long-term strategic planning and spend billions of dollars over time to develop, produce and transport oil and natural gas from offshore sites. More and more, companies are using state-of-the-art technologies to move operations to even deeper waters, where the risks and challenges are extreme. It can take a company approximately 10 years from the time it purchases a deep water lease to first production. During this time, plans are in place to explore, develop, produce and transport oil and natural gas. Marine seismic surveys can cost upwards of $200,000 per day. Exploratory wells can range from $25 million to more than $100 million for some deepwater prospects. If a company finds commercial quantities of oil or natural gas, subsequent design and installation costs for a deepwater production facility may exceed $2 billion. Millions more dollars are spent building and developing the infrastructure necessary to transport the resources to market.

The use of vessels is critical to every one of these stages of development. Companies enter into long-term contracts to line up vessels, based upon carefully developed long-range plans to develop offshore oil and natural gas resources. The offshore vessel support industry is a global one. Attached is a report completed by Ecology and Environment, Inc. for API that shows that of the 5,532 offshore support vessels of the world, 1,078, or 17.2 percent of the world total, are U.S.-flag vessels. The report estimates about 550 vessels support offshore U.S. OCS operations, with an estimated 40 to 50 of those vessels being foreign-flag support vessels.

This demonstrates that a great majority of the vessels working in the U.S. OCS are U.S.-flag vessels. Still, because the offshore oil and gas operations are carried out on a global basis, companies need the flexibility to retain foreign-flag vessels on occasion to complete specialized work, as well as other work that does not involve the transportation of merchandise. The use of these foreign-flag vessels is critical to the development and continued viability of offshore operations.

---

[4] The Global Insight report is attached to these comments as Attachment A.

In this time of economic downturn, CBP must give careful consideration before rushing into actions that may disrupt an industry that has historically been a pillar of support to the domestic economy and to federal, state and local revenues. The oil and natural gas industry is a global one, and companies seek to invest in opportunities in the most stable environments, from both a financial and regulatory standpoint. Drastic changes in the regulation of offshore support vessels could create significant uncertainty for companies active in the U.S. OCS, thereby making the U.S. a less attractive choice for investments. Given the extraordinary benefits flowing from America's offshore oil and gas operations, CBP should take care to apply the Jones Act correctly. Any potentially dramatic changes to prior interpretations must take into account the potential devastating consequences on the U.S. economy that could result if operations and production slow down or even shut down.

The Jones Act

The Merchant Marine Act of 1920, recodified in relevant part at 46 U.S.C. § 55102 and commonly known as the "Jones Act," prohibits foreign-flag vessels from transporting "merchandise" between United States ports or points embraced within the U.S. coastwise laws (*i.e.* a "coastwise point"). Pursuant to the Jones Act, the transportation of merchandise between coastwise points must be accomplished by U.S. built, U.S.-documented vessels that are at least 75% owned by U.S. citizens. 46 U.S.C. §§ 12103, 12112, 55102, 50501; 19 C.F.R. § 4.08. The coastwise laws generally apply to the territorial sea and inland waters (*i.e.*, generally the waters within three nautical miles of the coastline). CBP has ruled that the coastwise laws were extended to the OCS by section 4(a) of the Outer Continental Shelf Lands Act of 1953, which extended the political jurisdiction of the United States to the OCS and any permanent or temporary installations therein.[5]

Under the Jones Act and CBP precedent, "merchandise" has been interpreted as including goods, wares, and chattels of every description, including valueless material. In a 1939 Treasury Decision (the "1939 Ruling"), CBP carved out the term "equipment" of the vessel from the definition of merchandise. The 1939 Ruling states that "equipment" is not "merchandise" and constitutes portable articles necessary for the navigation, operation, or maintenance of the vessel and for the comfort and safety of the persons on board.[6]

---

[5] "The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. 1333.

[6] "The term 'equipment' ... includes portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board. It does not comprehend consumable supplies either for the vessel and its appurtenances or for the passengers and the crew. The following articles, for example, have been held to constitute equipment: rope, sail, table linens, bedding, china, table silverware, cutlery, bolts and nuts." T.D. 49815(4) (March 13, 1939) (*quoted from an abstract of the unpublished decision*). The 1939 Ruling intended the list to be illustrative rather than comprehensive.

The Christmas Tree Ruling and Revocation

On February 20, 2009, CBP issued a ruling related to the installation of a large piece of equipment on the seabed, which further expanded on the precedent established in 1939. *See former* HQ 046137. This ruling, in part, held that a "fully-manufactured and integrated assembly of valves, spools, pressure gauges and chokes (generally called a "Christmas Tree") to be installed on the seabed by the transporting vessel was the equipment of the vessel and not merchandise.

In March 2009, the Offshore Marine Service Association ("OMSA") asked CBP to revoke the February 2009 Christmas Tree Ruling. In its request, OMSA argued that CBP had erred in treating the Christmas Tree as equipment of the vessel rather than as merchandise. While OMSA's request was expressly and specifically limited to seeking revocation of the Christmas Tree Ruling, it suggested, without providing sufficient analysis, that OMSA had concerns with other CBP rulings concerning vessel equipment.

Apparently based solely on this one OMSA letter, CBP not only decided to revoke the Christmas Tree Ruling, but went far beyond what OMSA requested and proposed to revoke or modify eight rulings now and at least 12 rulings later, all of which were issued over a span of more than 30 years and to re-interpret the 1939 Ruling, which otherwise has been consistently interpreted by CBP for over 70 years. API reserves the right to comment on the 12 rulings to be revised in the future, which CBP should publish in it proposed form for the public to provide comments, before taking any further action on these rulings.

Evolving Technology and Reliance on CBP Rulings

Due to the dynamic nature of the offshore oil and gas industry, it has become standard practice for owners and operators to seek rulings from CBP to confirm that contemplated operations are consistent with the Jones Act. This avoids the potential for severe penalties that could be assessed should CBP make a determination, after the fact, that a particular operation was prohibited by the Jones Act. Over the years, CBP has issued a significant number of coastwise trade rulings, which constitute a sophisticated body of precedent on which industry has relied for decades.

This is particularly true with regard to the offshore industry, which has seen tremendous advances in the equipment, vessels, and technology that facilitate OCS activities, many originating from international sources. In fact, deepwater OCS activities – including the subsea technology, floating facilities, and other sophisticated equipment and methods needed to advance offshore development – were not even contemplated at the time of the original 1939 Ruling. Over the years, CBP has correctly recognized and accommodated these developments and the evolving nature of deepwater activities by refining the definition of vessel equipment and the types of permissible operations in which these more sophisticated vessels could engage.

In addition, today's vessels may be configured in multiple ways to achieve their objectives. A specific vessel may be contracted to perform a number of specialized functions in

support of an OCS development. Each function may require tools and equipment to allow for performance of that objective, and this performance-specific equipment may or may not be aboard the vessel at all times. For example, a derrick (crane) vessel may be engaged to install driven piles into the seafloor for the future attachment of mooring lines to a floating OCS facility. The derrick vessel may require use of a hydraulic hammer and other lifting aids in order to suspend and drive the piles into the seafloor. After the completion of these activities, the hammer and other lifting aids may or may not be removed from the barge before it goes on to its next mission. As a second activity, the same derrick vessel could be configured with special structures that allow it to perform pipelay operations on the same OCS development. These structures and special fittings may be of such size or position that they allow pipelay operations to be conducted, but may interfere with other vessel functions, and therefore must be removed at the completion of the pipelay activity, or they may be left on the vessel. Next, the derrick vessel could be used in the installation of the floating OCS facility and the lifting and placement of deck structures and modules onto that OCS facility. To complete this objective, the same derrick vessel may be reconfigured with slings and rigging and other installation aids to be able to perform the required lifting activities. At any point during these various activities, the derrick vessel may travel off location, carrying its tools and equipment with it before being used on a subsequent job. Although each mission of this same vessel requires different types of tools and equipment (hammer, special structures, rigging, lifting aids, etc.), which may or may not be unladen at a coastwise point different from where laden, such tools and equipment are integral to the vessel in the performance of its mission. This equipment has been and should continue to be defined as vessel equipment because it is used in the "operation" of the vessel's function, or mission.

The purpose of the equipment's existence aboard the vessel, even temporarily or while moving from one job to the next, is in the performance of offshore services rather than for the purpose of transporting merchandise for delivery to another place. *See* HQ H036016 (Aug. 29, 2008) for an example of a non-coastwise-qualified barge that was transformed "semi-permanently" into a drilling rig, with all the reconfiguration considered vessel equipment. In that case, CBP correctly held that the materials affixed to the vessel were integral to the operation of the vessel as a drilling barge, and that modification of the deck barge to carry out that function under a long term charter resulted in the materials not being considered merchandise.

In short, the Jones Act should be administered by CBP to further the mission of the Act, which is to promote the use of U.S.-flag vessels to transport goods, products and commodities between U.S. ports, while not impeding the deployment of equipment in association with oil and gas operations on the OCS.

COMMENTS

1. CBP should provide an extension to the deadline for submitting comments.

While CBP has already denied requests for an extension in the comment deadline, the complexity and significance of this action clearly support additional time for the regulated community to consider the impact and provide comments. CBP should thus consider economic

and other impacts in accordance with applicable Executive Orders, and provide for notice and comment in the Federal Register in accordance with the APA, as discussed in more detail below. In addition, CBP should provide for at least an additional year to provide comments related to this issue, which is not prohibited by law. In fact, CBP's organic statute provides for a comment period of "*not less than* the 30-day period after the date of such publication." 19 U.S.C. §1625(c).

The concept of shared responsibility and informed compliance are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. This Notice does exactly the opposite - it raises more questions and creates more uncertainty than the offshore industry has faced in decades.

In this Notice, CBP specifically refers to the revocation and modification of 20 Headquarters Ruling Letters (''HQ''), yet less than half of the proposed modifications have been supplied for review. If the purpose of this proposal was to comply with the informed compliance requirements as set out, how is industry supposed to analyze the impact of the proposal if so few of the modified rulings are provided for examination? A review of the CBP online database of prior rulings (CROSS) system also gives no clue as to the modification CBP plans to accord to the other rulings. Before taking any further action on these additional rulings, all modified rulings should be published by CBP for public comment.

Industry has been given 30 days to respond to CBP's proposal that overturns decades of precedent. It is unreasonable and short-sighted to require industry to analyze and respond to a proposal for which less than half the applicable data is available.

2. CBP should retract its proposal and retain its current precedent.

In revoking decades of cumulative precedent, CBP has not enunciated a clear rationale, legal or otherwise, for doing so. CBP states in its proposal that informed compliance is the ultimate goal of the amended rulings. The change of 30 years' precedent, however, requires that CBP address the multitude of questions that are created by the proposal. From a legal perspective, the awkward interpretation CBP has chosen to force upon a 1939 Treasury Decision ignores the plain meaning of the decision's language; CBP compounds the legal error by revisiting a decades-old ruling that properly allowed for transport and installation flexibility as the 1939 Ruling intended. From a practical perspective, CBP is compelling an economic sea change within the offshore industry, the impacts of which may take years to resolve or even to grasp. Should the proposed CBP rulings go into effect, API believes that a sufficient number of coastwise qualified vessels will not be available to perform both the necessary "transportation of merchandise" and the specialist work offshore that is required for hydrocarbon production in the OCS to continue unabated. In addition, the many potential safety, security, and economic ramifications argue in favor of CBP's retraction of the proposed rulings.

a. The 1939 and 1976 Rulings Appropriately Distinguished "Operation" of the Vessel

As discussed above, the 1939 Ruling states that the "term equipment ... includes portable articles necessary and appropriate for the navigation, *operation* or maintenance of the vessel...." (emphasis added). The 1939 Ruling clearly intended to distinguish the operation of a vessel from its navigation and maintenance; as a result, the decision recognized that the equipment of a vessel must include those articles that are necessary and appropriate for the "operation" (*i.e.*, function or mission) of the vessel.

The CBP proposal would have the practical effect of erroneously including "operation" within the other terms navigation and maintenance. Such a reading would make the word "operation" redundant, and result in an improper construction in which all words would not be accorded separate meanings. In this case, "operation" should be read as a vessel's function, objective, mission, or purpose, separate and apart from its underway transit ("navigation") or upkeep ("maintenance"). This position is supported by the fact that the word "operate" means "to perform a function ... or to carry on a[n] action or mission."[3] "Navigation," on the other hand, means "the art or practice of getting ships ... from place to place"[4] or "the art ... of setting a safe course for a ship ... from one place to another by means of ... instruments."[5] These are the meanings that CBP has used correctly for 70 years and should continue using because they are clear, afford both words their appropriate meaning, and provide certainty to the offshore industry. Put another way, the equipment of a vessel includes the articles that are necessary and appropriate for the *operation* (*i.e.*, function or mission) of the vessel. Similarly, there is certain equipment that is necessary to *navigate* a vessel from point A to point B, but this equipment is different than the equipment necessary for the vessel's *operation*. CBP also misquotes the 1939 Ruling by replacing "or" with "and," arguably requiring the presence of all three elements for each piece of equipment, thereby disqualifying virtually all items from such a stringent definition of vessel equipment.

The 1939 Ruling clearly exempted from the Jones Act definition of "merchandise" any equipment that was used in the furtherance of the operation or the mission of the vessel, or its navigation or maintenance. At the time of the 1939 Ruling, no one could have predicted the vast changes in technology that would evolve with deepwater development. In turn, as recognized in subsequent CBP rulings, the definition and applicability of the term "equipment of the vessel" has also evolved. CBP should continue to accord deference to the 1939 Ruling and its progeny and reject alternatives straying from the 1939 Ruling's plain meaning and refrain from inserting new words such as "itself" in the definition.

One of the examples cited in the modified rulings, HQ 115356 (May 22, 2001), involves a power barge with generating equipment carried aboard. CBP states that the generator is necessary to operate a power barge, and thus the generator is equipment of the barge. This is contrasted with HQ H061994 (June 5, 2008), involving an exhibit hall welded to a deck barge, whereby CBP proposes to modify that ruling, stating that CBP incorrectly determined just last

[3] Merriam Webster Dictionary (2009).
[4] *Id.*
[5] The Marine Encyclopedic Dictionary (1996).

year that the exhibit hall was equipment of the vessel. Both barges changed their fundamental design from deck barges to either a demonstration barge or a power barge. They did not install the exhibit hall or generators to be unladen at another coastwise point; they installed them for their new operations as converted vessels. Installing articles on a barge, such as a generator, as opposed to loading them for transport, changes the barge from a deck barge to a power barge – and its mission/operation is that of a power barge.[6] Similarly, installing an exhibit hall on a deck barge, as opposed to loading it for transport, changes the barge from a deck barge to an exhibit hall barge. Once such articles have been affixed to a vessel, whether permanently or for a period of time, the vessel has been converted to that type of vessel, and thus it becomes the new mission or operation of that vessel. In neither case is the objective or mission to "transport" the generator or exhibit hall from point A to point B. The movement of these items between points is incidental to the operation of the vessel – as such, both the generator and exhibit hall are legitimately equipment of the vessel, and the exhibit hall ruling should not be modified as proposed by CBP.[7]

In summary, "operation" means "to perform a function…or carry on a mission." This is compared to one of the meanings of the term "navigation" which means "the travel by vessels, especially commercial shipping." These are the meanings that CBP has used correctly for 70 years and should continue using because they are clear, afford both words their appropriate meaning, and provide certainty to the offshore industry.

b. The 1976 Ruling

The 1976 Ruling, which related to a diving support work barge, is the key ruling upon which the CBP has relied heavily when ruling on offshore deepwater development projects. In the 1976 Ruling, the CBP held, among other things, that materials and tools necessary for the accomplishment of the mission of the vessel were not considered merchandise, and thus their transportation did not implicate the coastwise laws because lading/unlading these items was incidental to the vessel's *operation*. To qualify for this treatment, such materials needed to be: (1) either of *de minimus* value *or* (2) necessary to accomplish unforeseen repairs and usually carried aboard the vessel as supplies. The 1976 Ruling also held that for the purpose of the coastwise laws there is no distinction to be made between repairing pipe and the laying of new pipe.

For more than 30 years following the 1976 Ruling, CBP held on numerous occasions that non-coastwise qualified vessels could carry articles between coastwise points as long as those articles were "fundamental to the vessel's operation,"[7] because the articles would be considered

[6] Although it is not entirely clear, it appears that the "power barge" was previously used in another service because the ruling indicates it was "retrofitted." This is analogous to the exhibit hall being installed on a deck barge.

[7] It is noteworthy that the power barge ruling was cited in the recent August 29, 2008 ruling (HQ H036016), which is not included in one of the rulings CBP intends to revoke or modify, as a basis for finding that the equipment was integral to the operation of the vessel as a power barge.

[7] This specific rationale was used on HQ 115938 (April 1, 2003); however, CBP has also used rationales such as "in furtherance of the primary mission of the vessel," (HQ 110402, Aug. 18, 1989) "essential to the mission of the vessel," (HQ 113841, Feb. 28, 1997) "necessary for the accomplishment of the mission of the vessel," (HQ 114435, Aug. 6, 1998) and "used by a vessel in the course of it's [sic] business" (HQ 116078, Feb. 11, 2004).

equipment of the vessel. At the same time, industry has relied on this precedent and invested hundreds of millions of dollars in equipment and vessels in order to accomplish the offshore work. Materials incidental to the primary work or operation of the vessel have also been considered vessel equipment, as vessels needed those extra fittings, connectors, and larger articles to complete their work. This precedent also made sense from an economic and safety perspective, as the use of numerous unnecessary vessels to perform one job would be inefficient and unsafe.

Unfortunately, in proposing its new rulings, CBP has misstated the *de minimis* doctrine espoused in the 1976 Ruling. In particular, subparagraph (6) of the 1976 Ruling states that "a vessel engaging in the inspection and repair of offshore or subsea structures may carry with it repair materials of *de minimus* value *or* materials necessary to accomplish unforeseen repairs, provided that such materials are usually carried aboard the vessel as supplies." (emphasis added). In both the Notice and the proposed ruling, HQ H061992, CBP again changed the "*or*" to an "*and*" thereby making the test inclusive and significantly more prohibitive. In conjunction with the application of the correct *de minimis* test, CBP should be cognizant of the fact that the 1976 Ruling clearly held that the sole use of a vessel in effecting underwater repairs to offshore or subsea structures is not considered a use in coastwise trade. Therefore, CBP should correctly reinstate the *de minimis*/repair test, with the continued use of "or," as to whether materials transported by and installed from a foreign flag vessel are considered merchandise or equipment. CBP should also clarify that *de minimis* goods on a vessel supporting a multi-billion dollar offshore project may well amount to at least tens of thousands of dollars.

c. The Potential Impact of the CBP Proposal on Vessels

CBP should state whether its proposal would have a profound effect on the entire offshore industry by limiting the use of a foreign-flag vessel offshore to a single purpose. Most of the foreign-flag vessels used offshore are multi-purpose vessels, and CBP should recognize this when it finalizes its policy. For example, CBP should clarify that a vessel may lay pipe, which is not a use in the coastwise trade, without having to be specifically classified or designated for one purpose as a pipelaying vessel.

Multi-purpose vessels should be able to lay pipe on the OCS. There are currently no coastwise-qualified vessels classified as pipelaying vessels and there are only a few foreign-flag pipelaying vessels, which generally do not operate in the United States. The vessels that do conduct pipelaying operations are typically classified as construction vessels, multi-purpose subsea construction vessels, and derrick barges. These vessels are commonly outfitted with the equipment necessary to conduct pipelaying operations, and they also carry out other functions at the same time, such as construction activities.[8]

---

[8] In conjunction, CBP should clarify that "incidental to the pipelaying operations of that vessel" does not merely include operations that occur at exactly the same time but includes operations that work in concert with the requirements of pipelaying, either coincident with or subsequent to the pipelaying operation itself and regardless whether one or two vessels are used. Using a different vessel does not make such installation any less incidental to

Under the proposed new rulings, these vessels would not be prohibited from conducting pipelaying operations, unless a tortured reading is made that the pipelaying articles used aboard the vessel could arguably be considered merchandise because the vessel is not a dedicated pipelay vessel. Pipelaying operations on the OCS may be conducted by multi-purpose foreign flagged vessels and some operations require "tandem" vessels in conjunction with operations incidental to pipelaying. Again, the vagaries of CBP's proposed modifications raise concerns over the potential impact on other vessels and projects. Currently, CBP seems to be indicating a belief that vessels cannot be modified once built. Rather, the mission/function of a vessel, and therefore the applicability of the Jones Act, should be performed on a voyage-by-voyage basis. The outfitting of a vessel for a particular voyage should determine its operations.

Rulings since 1976 have also become more important for clarification of light construction or intervention operations that use vessels that are considerably smaller and more mobile in and out of coastwise ports. These light construction vessels may be tagged as Multi-Purpose Support Vessels ("MSVs"), Dive Support Vessels, Subsea Constructors, or Intervention/Repair & Maintenance Vessels. This class of vessel is universally supported by one or two on-board ROVs, a lifting crane and/or winch with capability of lowering payloads to the seabed, a sophisticated dynamic positioning system as well as support equipment specific to the mission at hand. Should CBP's proposal go into effect, MSVs may require shadowing by supply vessels for transport of equipment for installations and tools for repair. Furthermore, work could be delayed significantly as offshore conditions for safe lifts from supply boats to MSVs are far less frequent than the conditions required for executing the work.

Inherent to the safe and efficient operation of these vessels is the performance of many dockside system tests which involve equipment for installation and vessel installation tools (both mission-specific tools and standard tools). Usually these tools are integrated with the ROV at dockside and during transit to site. Integration includes function testing and calibration activities, performed by technicians who work at dockside only, along with other technicians who will transit offshore with the equipment. Often, it is possible to perform dockside work in parallel to the loading of the equipment for the mission.

In other circumstances, equipment such as jumpers is loaded on the MSV at dockside in a ready-to-install configuration. Many operators prefer to prepare jumpers for installation on board the MSV as it makes it possible to safely perform the offshore installation in more challenging wind and sea conditions with a smaller crane and vessel than would be required if the jumper were to be lifted from the deck of another vessel. Currently, the same MSV that could handle a jumper installation one week, might become engaged in dislodging a hydrate blockage in a flowline the next week. Following the hydrate remediation, the MSV could load a carousel with steel flying leads and install them with the temporarily deck mounted carousel and specially-configured ROV. In each of the three examples, the MSV would need equipment that requires a dockside mobilization of specialty tools and equipment to be installed.

Another example involves the use of drilling vessels and Mobile Offshore Drilling Units

---

the overall operation. *See* HQ 115218 (November 3, 2000).

("MODUs"). Currently, these vessels carry various articles related to drilling operations on deck when transiting between shore and drilling sites or between drilling sites as equipment of the drilling vessel or MODU. CBP's proposed ruling (HQ H061934) recognizes that certain items are "equipment essential to its intended operation" yet deems those items merchandise. The original ruling (HQ 111889) should be reaffirmed. Articles carried by a drill rig in furtherance of that rig's drilling operations should be considered equipment of that drill rig.

It is important to note that CBP has consistently stated that determining whether or not a particular transport is subject to the Jones Act is fact-specific. As such, it must make this determination on the specific voyage and commitment. What a vessel did last week or next year should not determine what it can do this week. How a vessel was configured at launching should not control its configuration for its entire service life. If the mission of a vessel is pipelay or pipeline repair, then the rules regarding pipelay operations apply. The mission/function of a vessel is crucial and determinative in assessing what is or is not vessel equipment. For a pipelay vessel, CBP has ruled that a pipeline burial tool is vessel equipment – because it is a tool essential to the accomplishment of the operations. If the mission/function of a vessel is well stimulation, then the chemicals carried offshore and consumed in the well stimulation operation are vessel equipment and have been ruled as Jones Act exempt from the merchandise definition.

In summary, there is concern that many of the operations currently carried out in support of OCS activities may be reinterpreted as no longer allowed or, at minimum, may give rise to significant uncertainty. CBP should not constrain the definition of vessel equipment to limit the installation of special tools, equipment and fittings; such an action will preclude the use of a single vessel to perform multiple functions in support of OCS development.

d. CBP Should Take a More Reasonable Approach, Above all Else

In any event, CBP should take a more reasonable approach that recognizes the global nature of the offshore industry, the evolving technologies associated with offshore operations, the demands on the industry in the face of catastrophic events, and the need for flexibility to address each of these concerns.

Before taking any action that could have devastating impacts on the offshore oil and natural gas industry, CBP should take a step back and ensure that its actions are consistent with the spirit and intent of the Jones Act. In other words, CBP should ensure that it is applying Jones Act restrictions to vessels and operations that are genuinely for the purpose of transporting merchandise between coastwise points. There are a great variety of activities occurring in the offshore industry that fall outside of the area of transportation of merchandise between coastwise points. API is concerned that CBP is moving in a direction whereby an over-expansive interpretation could swallow many vessels and activities that are not transporting merchandise between coastwise points. CBP should take care to limit its revised interpretations under this rulemaking to those situations that truly fall under the Jones Act restrictions. In doing so, it can provide clarity and certainty to the offshore industry so the regulated community can move forward with confidence in the applying CBP's rules to planning, transactions and operations.

As proposed, CBP's revisions do not provide instruction for, or present an appreciation of, the many real-world situations that exist in offshore operations. CBP should acknowledge the diversity in operations and recognize that rough, deepwater offshore activities are significantly different from calm harbor activities. There are numerous examples where CBP should not equate offshore operations with territorial sea operations. The factual and legal differences in the two areas must be recognized and practical solutions adopted.

3. Security, safety and economic considerations warrant retention of the current precedent.

Should the CBP proposal be finalized "as is," a sufficient number of coastwise qualified vessels may not be available to perform both the necessary "transportation of merchandise" and the specialist work required for oil and gas production in the OCS to continue unabated. Such a situation is likely to result in serious security, safety and economic consequences that CBP should, and must, take into account in finalizing its proposal.

An independent study commissioned by API[9] reveals that, out of the world complement of offshore support vessels, merely 10% of the world's multi-purpose support vessels, or five actual coastwise-qualified ships, will be allowed to both transport and install repair equipment in the OCS in many instances. Absent the proper support vessels and resources necessary to repair offshore platforms, natural disaster recovery efforts will be severely hampered, oil and gas supplies may be hindered, and the United States may be forced to rely even further on foreign sources of energy.

Safety concerns may also arise as a result of the proposed rulings, which may in many cases require companies to "double up" with shadow vessels in the OCS. Coastwise-qualified vessels may transport the materials to the OCS, where they would be transferred on the open sea to a foreign-flag vessel for installation. Such ship-to-ship open sea transfers create a higher risk of incidents to the ships and their crews, including increased environmental concerns, than do harbor or dockside lifts and transfers. The Department of the Interior and the Department of Transportation have provided mandates to industry to improve the safety performance and reduce the incidences of such "lifts."[10] Implementation of the proposed rulings would result in more lifts in open waters, thus countermanding the safety guidance that industry has received from those agencies. One major operator estimates that, for its operations alone, there will be about 1,500 additional offshore lifts per year needed to transfer articles between Jones Act vessels transporting equipment and materials, and foreign-flag construction vessels conducting installations and repairs. As a result, there is an increased potential for dropped objects, harm to vessels and crews, and an increased chance of vessel collisions. Additionally, crowded seas near the platforms may increase the likelihood of allision, collision and/or damage.

---

[9] *See* Attachment B to these comments, *An Analysis of Vessels Supporting the Offshore Oil and Gas Exploration and Production Industry in the United States and Worldwide*, prepared by Ecology and Environment, Inc. (February 2009).

[10] *See* Attachment C to these comments, *Letter from the Minerals Management Service to the Offshore Operators Committee, American Petroleum Institute, and the International Association of Drilling Contractors* (April 22, 2009), expressing "significant concerns about the safety of Outer Continental Shelf (OCS) lifting operations." Industry has demonstrated the ability to perform such lifts.

The economic consequences may also be severe, for the United States and American workers as well as for individual corporations. Under existing law as currently interpreted by CBP, CBP shall render a final decision within 30 days of the comment period after publication; the rulings shall go into effect in 60 days following the final decision. The penalties for a Jones Act violation are severe - forfeiture of the merchandise illegally transported or, in the discretion of CBP, forfeiture of a monetary amount of the value of the merchandise, or the actual cost of transportation, whichever is greater, and the penalty may be recovered from any person transporting the merchandise or causing it to be transported. CBP's decision to reject all requests for an extension of the comment period makes this timeframe even more onerous.

In its request for reversal of the Christmas Tree ruling, OMSA stated that coastwise-qualified vessels were sitting idle, and insinuated that lax implementation of the Jones Act is the cause. In fact, the economic downturn has affected work in the OCS just as it has in the rest of the country. On the other hand, more vessels are employed in good times; these same potential restrictions in booming economic conditions will increase the likelihood of shortages. Additional economic impacts include the increased government bureaucracy and workloads necessary to implement and enforce these proposed rulings. Such unintended consequences will place greater stress on the offshore regulatory framework. For example, CBP likely will face a sizeable increase in ruling requests that might overwhelm the current staff. In addition, the proposed rulings will increase suspension of operations and suspension of production requests that the MMS must act upon. The proposed changes will significantly impact the timeline for offshore installation, construction, and repair work. These delays will impact development programs approved by the MMS. CBP's failure to inform MMS of a change that will delay offshore energy development is a serious one. CBP should have proposed these modifications in close coordination with other federal agencies.

The limited timeframe, the uncertainty inherent in this proposal, and the onerous penalties for Jones Act violations together place oil and gas corporations and their contractors in an untenable position. As with all large corporations, the oil and gas companies working in the OCS plan resources and contract for work years into the future. There is now great uncertainty with regard to multi-million dollar, long-term contracts. The possible, and likely, elimination of many non-coastwise qualified vessels to conduct OCS operations may (i) reduce the diversity of offshore operational options that can safely and competently be accomplished; and (ii) create a situation where fewer vessels are available to safely and competently perform projects. The elimination of non-coastwise qualified vessels to exercise OCS operational processes may reduce competition for that operational process. This uncertainty could lead to a severe disruption in the retention of OCS contractors, with a potential to greatly hamper OCS operations and the production of oil and gas. This could further adversely impact oil and gas supplies necessary for domestic energy security, and upset the substantial, overall economic benefits that accrue from offshore production as discussed above.

4. If CBP does implement its proposal, CBP should include a transitional period.

If, despite industry comments, CBP nonetheless modifies 30 years of precedent through these proposed rulings, CBP should include a transitional period in the final rule so that

companies have adequate time to implement any resulting changes. Contracts are entered into for vessels serving domestic and international markets well in advance and short notice implementation would have severe economic implications related to contract cancellation or rescheduling. In addition, OCS facilities are designed and constructed with the expectation/planning for the use of certain known installation methods and types of vessels. The design and construction begins years in advance of the actual conduct of the field activity on the OCS. Due to the significant lead time and tremendous investments involved in the retention and scheduling of contractors, API recommends that the rule include a transitional period of four years. With more time for dialogue, the key stakeholders and CBP, through public comment and meetings, could work toward interpretations of the rulings that are in harmony with the Jones Act, CBP precedent, and the realities of offshore oil and gas operations in the 21st century.

CBP has legal authority to include such a transitional period, as 19 C.F.R. 177.10(e) provides that "[e]xcept as otherwise provided in § 177.12(e) *or in the ruling itself*, all rulings published under the provisions of this part will be applied immediately." (emphasis added) The language "or in the ruling itself" reveals that CBP has discretion to specify an alternative effective date for its rulings, notwithstanding the 60-day effective date otherwise specified in section 177.12(e). CBP may, if it so chooses, extend the date upon which the rulings go final.

In substantially similar situations, courts have supported this result. For example, the D.C. Circuit has held that in specifying effective dates, Congress is often addressing legal effectiveness, as opposed to results or full compliance. *American Water Works Ass'n v. EPA,* 40 F.3d 1266, 1271-72 (D.C. Cir. 1994); *NRDC v. EPA*, 22 F.3d 1125, 1137-39 (D.C. Cir. 1994). *See also Boehner v. Anderson*, 30 F.3d 156, 161-62 (D.C. Cir. 1994). In *American Water Works*, the court reviewed EPA's interpretation of the requirement of the Safe Drinking Water Act that a National Primary Drinking Water Regulation "shall take effect 18 months after the date of promulgation." The court upheld EPA's interpretation that "take effect" does not mean fully implemented and enforced. 40 F.3d at 1271-72.

In *NRDC*, the issue was the meaning of the Clean Air Act's requirement that state enhanced vehicle inspection and maintenance ("I/M") programs must "take effect" no later than two years after enactment of the 1990 Amendments. EPA had provided that states would meet this requirement if they adopted all necessary statutory and regulatory authority by the deadline, but allowed two to three years for full implementation of the I/M programs. According to the court, EPA argued that this implementation schedule was "quite abbreviated given the substantial challenge of constructing stations and implementing new high-technology testing." 22 F.3d at 1138.

The court rejected NRDC's argument that the meaning of "take effect" is plain. *Id.* Instead, the court found that "'[t]ake effect' is a phrase whose meaning varies considerably with context" and observed that "'[e]ffectiveness language is frequently used by Congress to connote legal effectiveness, not results." *Id.* Having found the term ambiguous, the court upheld EPA's construction as reasonable in light of the statutory scheme. *Id.* As a result, it is clear that in analogous situations an agency's action has been upheld in extending the date for regulatory implementation.

Not only does CBP have authority under the law to extend the effective date and provide a transition period, legislative history supports this result. The legislative history of the Customs Modernization Act (which revised section 1625 and added the effective date language) makes it clear that the entire process of publication and notice and comment was intended to benefit parties subject to the Customs laws. The Commissioner of Customs testified before a subcommittee of the House Ways and Means Committee that:

> Importers have the right to be informed about Customs rules and regulations, and its interpretive rulings and directives, and to expect certainty that the ground rules would not be unilaterally changed by Customs without providing importers with the proper notice and opportunity to respond.

Customs Modernization And Informed Compliance Act: Hearing Before the Subcommittee on Trade of the Commission on Ways and Means, House of Representatives, 102d Cong., 2d Sess. 97 (1992). CBP itself has argued in litigation that:

> [T]here is no dispute that the purpose of 19 U.S.C. § 1625 is to provide predictability for importers in structuring their business while also retaining flexibility for Customs in the exercise of its administrative authority.

California Indus. Prods., Inc. v. United States, 350 F. Supp. 2d 1135, 1146 (C.I.T. 2004) (quoting defendant's cross-motion for summary judgment), *aff'd,* 436 F.3d 1341 (Fed. Cir. 2006).

In promulgating its regulations pursuant to the Customs Modernization Act, CBP has already interpreted the 60-day effective date language of 19 U.S.C. § 1625(c) less than literally, stating that the statute was intended to benefit regulated parties. It is the case that CBP's regulations provide for an effective date of 60 days after publication *or earlier at the option of a regulated party.* 19 C.F.R. § 177.12(e). Yet read literally, the statute calls for an effective date exactly 60 days after publication – neither earlier nor later.

CBP acknowledged that its provision of an option "is not specifically addressed in the delayed effective date language of the statute." 66 Fed. Reg. 37370, 37376 (July 17, 2001). CBP justified its departure from the literal language of the statute, however, on CBP's findings that "Congress intended to protect importers and other persons who deal directly with Customs from the effect of unilateral decisions taken by Customs without prior notice," and "by leaving the choice to the importer or other interested party who is always the best judge of what is in his interest, it would preserve the basic purpose behind the statutory delayed effective date provision." *Id.* In the present situation, there could be no better example of an entire industry that requires, and deserves, protection from CBP's revised rulings by way of a more flexible transition period that is allowable by law and encouraged by legislative history.

5. If CBP does implement its proposal, common law requires the grandfathering of contracts.

If CBP chooses to implement the proposed rulings, it must include an exception in the rule for the engagement of vessels currently committed, allowing such vessels to be "grandfathered." API specifically requests CBP to allow companies to continue to utilize vessels that are currently committed until the end date of their contracts and commitments and to consider the use of those vessels to be in full compliance of the law. Otherwise, CBP would be engaging in a retroactive rulemaking.

The case law on retroactive rulemaking makes it clear that government agencies cannot promulgate a rule with retroactive effect. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.") Such precedent also clarifies that retroactive rulemaking includes "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268-69 (1994) (*citing 2 Gall. 105*, 22 F. Cas. 756 (No. 13,156) (CC NH 1814)); *see also Miller v. Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") (*quoting Weaver v. Graham*, 450 U.S. 24, 31 (1981)). By its terms this definition includes any impacts on existing contractual obligations between private parties.

CBP, therefore, may not amend its rulings in a way that makes existing contracts illegal under the Jones Act. At a minimum, CBP must provide for grandfathering of the current contracts.

6. As an alternative to the proposal, CBP should allow negotiated rulemaking.

As an option to moving forward with the proposed changes, CBP should withdraw the Notice and engage in a formal, negotiated rulemaking so that there is an open and transparent process for determining whether to, and how to, make any changes to CBP's interpretations under current ruling letters. The Negotiated Rulemaking Act, 5 U.S.C. 561 et. seq., provides that "[a]n agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest." Based upon the significant impacts that this rulemaking is expected to have on various sectors of the economy, and potentially on the economy as a whole, a negotiated rulemaking would certainly fit within the intent of the Negotiated Rulemaking Act.

7. If CBP does implement the proposal, CBP must follow procedural due process in its rulemaking.

   a. Failure to Identify other Rulings and Decisions not Listed in the Notice

CBP should not require the regulated community to identify any rulings and decisions

that have not been identified in the Notice and that are inconsistent with the Notice. CBP should also not require the regulated community to identify substantially identical transactions. Neither the statute nor the enabling regulations place this burden on the regulated community. CBP is the agency with authority over such rulings, decisions, and transactions, and the burden of identifying such actions should be squarely within the jurisdiction of the CBP. The reverse flies in the face of due process.

b. Failure to Adhere to the Administrative Procedure Act

CBP does not have the authority to modify or revoke its longstanding precedent related to coastwise trade under 19 U.S.C. § 1625(c). The procedures under this section are inapplicable for two fundamental reasons.

First, this section is limited to interpretative rulings with respect to "customs transactions." A customs transaction in this context is a transaction involving prior determinations regarding the dutiability of imported merchandise and other similar import or export transactions. An interpretative rule related to coastwise trade clearly does not fit into the category of a customs transaction. Rather, coastwise trade relates to the transportation of merchandise or passengers between coastwise points and is entirely different.

Second, the CBP proposal to modify or revoke 30 years of precedent as espoused in a multitude of rulings represents a sea change in the process and procedures related to how the energy industry operates offshore and thus this action clearly is subject to the notice and comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. CBP's proposed changes are so substantial that the only means by which CBP may make such changes is through a full rulemaking, with notice and comment in the Federal Register.

Indeed, an agency's discretion to change the rules of the game is not unlimited. Industry operators that are regulated by an administrative agency are entitled to "know the rules by which the game will be played." In a case involving a change by the Federal Aviation Administration ("FAA") to a longstanding interpretation of its regulations, the D.C. Court of Appeals stated that the agency's previous advice had "become an authoritative departmental interpretation, an administrative common law." *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration*, 177 F. 3d 1030, 1035 (D.C. Cir. 1999). In that case, the FAA had disregarded thirty years of previous interpretations (much like CBP's decades of previous coastwise trade interpretations). The Court stated that the FAA's "current doubts about the wisdom of the regulatory system followed...for more than thirty years do[] not justify disregarding the requisite procedures for changing that system." Likewise, CBP's change to its interpretation of the coastwise laws necessitates adherence to the notice and comment procedure under the APA, including publication in the Federal Register.

It is noteworthy that CBP recently published a proposed interpretation of its regulations *in the Federal Register* concerning non-coastwise qualified vessels under the Passenger Vessel Services Act ("PVSA"). *See* 72 Fed. Reg. 224 (November 21, 2007). The current set of proposed rulings, which arguably have a much greater impact on the offshore industry, should

have received the same treatment. Accordingly, CBP's use of 19 U.S.C. § 1625 violates the due process rights of all who are impacted by the proposed rulings; in order to comply with the APA and its own regulations, CBP must publish the proposed rulings in the Federal Register and provide a sufficient notice and comment period thereafter.

c. Failure to Adhere to Executive Order 12866

Regardless of whether CBP uses the procedures under 19 U.S.C. § 1625 or the notice and comment procedures under the APA, it must conduct a thorough cost-benefit analysis in conjunction with this proposal as required by Executive Order ("E.O.") 12866. The apparent failure of CBP to conduct such analysis directly contravenes fundamental principles of agency action.

As CBP's action is clearly a "significant regulatory action" under Executive Order 12866, CBP may not lawfully implement its proposal until it completes the cost/benefit assessment required.[11] Under E.O. 12866, CBP must assess (1) the benefits anticipated from the regulatory action , (2) the costs to businesses and others in complying with the regulation and any adverse effects on the efficient functioning of the economy and private markets, including employment and competitiveness, as well as any adverse impacts on health, safety, and the environment, and (3) a quantification of these costs as well as feasible alternatives.[12] To API's knowledge, CBP has attempted none of these assessments.

CBP has also incorrectly chosen to disregard E.O. 12866 in the past. In an August 13, 2008 letter to the Department of Homeland Security, the Office of Management and Budget rejected CBP's reinterpretation of the PVSA (discussed above) for failure to meet the basic requirements of the order. Specifically, OMB stated that the CBP proposal "presents no market failure or compelling public need, omits a statement of the costs and benefits of the rulemaking, and does not include a discussion and analysis of regulatory alternatives, significant distributive impacts or uncertainties."

The principles of E.O. 12866 are intended for application to actions other than notice and comment rulemaking under the APA and therefore would apply to actions taken under 19 U.S.C. § 1625. Section 1 of the Executive Order states that "Federal Agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need...." In turn, 'regulation' or 'rule' is defined as "an agency statement of general applicability and future effect, which the agency intends to have the force and effect

---

[11] Executive Order 12866 states in relevant part: " 'Significant regulatory action' means any regulatory action that is likely to result in a regulation that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

[12] *See* E.O. 12866 at Section 6(a)(3)(C).

of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." Accordingly, regardless of whether CBP views modification of these rulings as subject to the notice and comment requirements of 5 U.S.C. §553 or 19 U.S.C. § 1625, E.O. 12866 dictates that due process requires careful consideration of such aspects in accordance with E.O. 12866. In summary, CBP's failure to incorporate any type of cost-benefit analysis violates E.O. 12866 and raises serious due process concerns.

d. Failure to Adhere to the Regulatory Flexibility Act

Finally, as a rulemaking activity, Section 602 of the Regulatory Flexibility Act, 5 U.S.C. § 604, requires CBP to publish an initial regulatory flexibility analysis on the impact to small entities.[13] Where the regulatory impact is likely to be "significant" and affecting a "substantial number" of such entities, CBP is required to seek less burdensome alternatives. CBP has failed to take this action and must do so before finalizing any decision.

CONCLUSION

There is no legally sound reason for the CBP to change the precedent upon which the offshore community has relied for over 30 years. The offshore oil and gas industry has worked closely with CBP and offshore service industries to help ensure that operations are consistent with the Jones Act, as evidenced by the multitude of CBP rulings related to offshore work. API strongly believes that CBP's decisions over that time have implemented the intent of Congress with respect to the Jones Act. For all the reasons discussed herein, API urges CBP to retract the new rulings that further restrict foreign-flag vessel operations in the Outer Continental Shelf as being outside the plain language of CBP precedent.

Furthermore, due to the significance of this action and the cascading, adverse impacts that could result, API requests the following:

- In lieu of the proposed changes, CBP should grant additional time for the regulated community to comment on this Notice.
- In lieu of the current proceedings, CBP should proceed with notice and comment in the Federal Register and conduct a thorough cost-benefit analysis in accordance with the APA and E.O. 12866.
- If CBP makes the proposed changes, then it should include a transitional period in the final rule so that companies have adequate time to implement any resulting changes.

[13] The Small Business Administration states that the "applicable size standard shall be $28.0 million [in annual receipts] for firms furnishing specific transportation services to concerns engaged in offshore oil and/or natural gas exploration, drilling production, or marine research." *See* 13 C.F.R. §§ 121.101 *et al.*

- If CBP makes the proposed changes, then it should include an exception in the rule for the engagement of vessels currently under contract, allowing such vessels to be "grandfathered."

- In lieu of the proposed changes, CBP should consider withdrawing the Notice and engaging in a formal, negotiated rulemaking.

- If CBP makes the proposed changes, it should not require the regulated community to identify any rulings and decisions that have not been identified in the Notice and that are inconsistent with the Notice.

We appreciate the opportunity to provide these comments. If you have any questions or need clarification, please do not hesitate to contact API at the contact information listed above.

Sincerely,

Doug Morris

cc: Secretary, Department of Homeland Security
Commandant, United States Coast Guard
Secretary, Department of the Interior
Director, Minerals Management Service

Attachment A

Global Insight

The Economic Impact of Changing the Deep Water Royalty Relief Act

June 2006

Summary of Results

The Deep Water Royalty Relief Act was enacted to encourage the exploitation of the sizeable, but costly to develop, oil and gas resources in deep water federal offshore areas. Changes to the prevailing royalty relief provisions for deep water areas that were leased between 1996 and 2000 may put the production from these leases at-risk. To understand the impact on the U.S. economy of the loss of the total at-risk production, the American Petroleum Institute (API) commissioned Global Insight to conduct an analysis using its U.S. Macroeconomic Model. In addition, an assessment of the economic impact of losing half of the at-risk production was also performed. API provided Global Insight with the at-risk production volumes, based on projections supplied by MMS. The simulations were performed assuming the oil and gas price projections from EIA's *Annual Energy Outlook 2006*.

Global Insight determined that loss of the total at-risk production would:

- reduce real GDP, on average, by 0.5% between 2010 and 2015,
- employment losses would reach 487,000 jobs by 2010 and 690,000 jobs by 2015.

Background and Key Assumptions

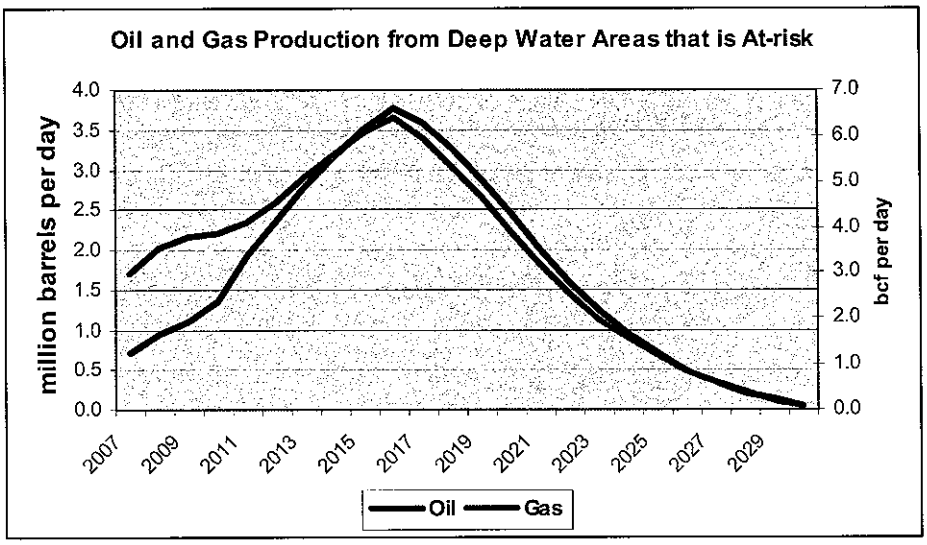
Deep water areas of the Gulf of Mexico contain sizable oil and natural gas resources, but they present some of the greatest challenges in terms of cost and technology that face the 21st Century oil and gas industry. Exploration for deep water prospects presents increased geologic complexity and hence increased uncertainty relative to oil deposits in the shallower Gulf waters. A sizable effort is required to even begin to evaluate the economic viability of resource development in this environment. Platforms and operating techniques in deep waters require technologically advanced and specialized designs that are generally more expensive than those used in shallow waters. Aggregate capital costs for exploration and development of some deep water oil and natural gas projects can exceed $1 billion, over a period of as much as seven years before production first occurs.

In order to encourage the exploitation of these resources, the federal government exempts some of the oil and gas produced in deep water federal offshore areas from royalty payments. This royalty relief is subject to various limitations based on level of output, vintage of lease, and/or prevailing oil and gas price levels. Some of these limitations have been the subject of debate, including discontinuation of royalty relief.

The American Petroleum Institute (API) has commissioned Global Insight to analyze the economic implications of changing royalty provisions for deep water areas that were leased

between 1996 and 2000. Global Insight analyzed the potential economic impacts of two alternative sets of supply assumptions, reflecting, respectively, removal of all and half of the crude oil and natural gas volumes considered to be at-risk from changes to prevailing policy. The at-risk volume assumptions used in this study are from the Minerals Management Service (MMS).

The assessment of the economic impacts were based on a simulation of Global Insight's U.S. Macroeconomic Model that incorporated the Department of Energy's Energy Information Administration's outlook for crude oil and natural gas prices published in the *Annual Energy Outlook 2006.*



Source: Minerals Management Service

Global Insight's U.S. Energy Model was used to measure the shift between domestic production and imports. Outputs of the Energy Model were then input to Global Insight's U.S. Macroeconomic Model to assess the impacts on economic performance of the two alternative regulatory regimes.

For this analysis, Global Insight only measured the impact of the potential loss in oil and gas production. The production losses, however, are large, and if these volumes were shut-in, the impact on global oil prices and domestic natural gas prices would be very significant. Thus, the measured economic impacts are conservative as they do not include any price impacts.

Impacts on the U.S. Economy

The loss of deep water oil and gas production would raise the U.S. import bill for energy and would place a drag on U.S. economic growth. The direct effects of the loss of activity in the oil and gas sector are compounded by second-round "multiplier" effects as the foregone incomes in the energy sector are not available to spend on other goods and services.

In the 100% production loss case, the value of the lost oil and gas production builds up gradually from 0.2% of baseline GDP in 2007 to a peak of 0.4% of GDP in the years 2015 and 2016. The loss then gradually diminishes over the period from 2016 to 2030.

The accompanying tables illustrate the effects on real activity in the U.S. economy. By the year 2015, the reduction in real GDP reaches a peak of 0.5%. The largest percentage reduction (1.1%) in the spending components of GDP is in non-residential fixed investment, both because investment in the energy sector is down and because business investment spending is highly sensitive to the growth of overall demand in the economy, which is slower.

It is worth noting that real GDP is still 0.2% below baseline in 2030. The loss of investment spending during the preceding years means that the economy's productive capacity – and therefore its potential level of real GDP – is permanently lower.

Consumer spending growth slides gradually below the baseline, reaching 0.3% below baseline in 2015, and remains below the baseline thereafter. Exports gradually rise above the baseline, because reduced levels of activity in the U.S. economy keep inflation below its baseline path, producing a gain in competitiveness. This does not mean that reduced domestic oil and gas production are in some sense positive for U.S. competitiveness. It does mean that the reduction in inflation resulting from the lower level of activity provides a mechanism whereby the economy can make up some of the jobs that are lost due to the effects of the energy production losses.

There is a similar partial offset on the import side. Although total imports rise, they do not rise as much as oil and gas imports alone. The reduction in U.S. activity levels leads to a loss of import demand in non-energy categories, so the U.S. in effect passes on some of its loss in activity to foreign economies by reducing demand for their exports.

The employment losses associated with the reductions in GDP mount to a peak of 691,000 in 2015, when the oil and gas production losses are at their peak, before easing thereafter as the production loss becomes smaller.

The economic impacts of the 50% production loss case are qualitatively the same as in the 100% case, only the magnitudes are roughly half as big. The GDP loss peaks at 0.2% from 2011 to 2018, while the loss of jobs peaks at 320,000 in 2015.

Table 1. Economic Impacts of the Loss of All of the At-risk Oil and Gas Production (Percent Difference from Baseline)

	2007	2010	2015	2020	2025	2030
Economic Activity						
Real GDP	-0.3%	-0.4%	-0.5%	-0.2%	-0.2%	-0.2%
Components of Real GDP						
Consumption Expenditures	-0.1%	-0.2%	-0.3%	-0.2%	-0.3%	-0.4%
Non-Residential Fixed Investment	-0.5%	-0.7%	-1.1%	-0.5%	-0.4%	-0.3%
Residential Investment	0.0%	-0.2%	0.0%	0.0%	-0.3%	-0.4%
Government	0.0%	-0.2%	-0.3%	-0.2%	-0.1%	0.0%
Net Exports						
Exports	0.0%	0.2%	0.7%	1.0%	0.6%	0.3%
Imports	0.5%	0.5%	0.9%	0.5%	-0.4%	-0.6%
Petroleum Imports	4.3%	7.8%	18.9%	13.1%	2.7%	-2.7%
Payroll Employment *(difference in millions)*	-0.248	-0.487	-0.691	-0.171	-0.030	-0.063

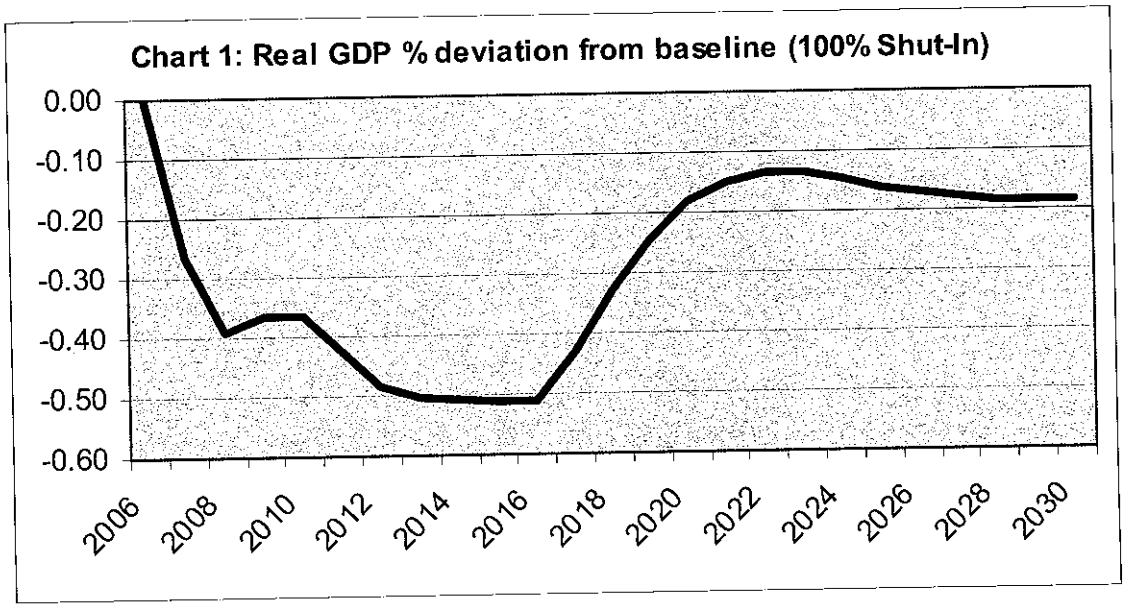


Chart 1: Real GDP % deviation from baseline (100% Shut-In)
0.00
-0.10
-0.20
-0.30
-0.40
-0.50
-0.60
2006
2008
2010
2012
2014
2016
2018
2020
2022
2024
2026
2028
2030

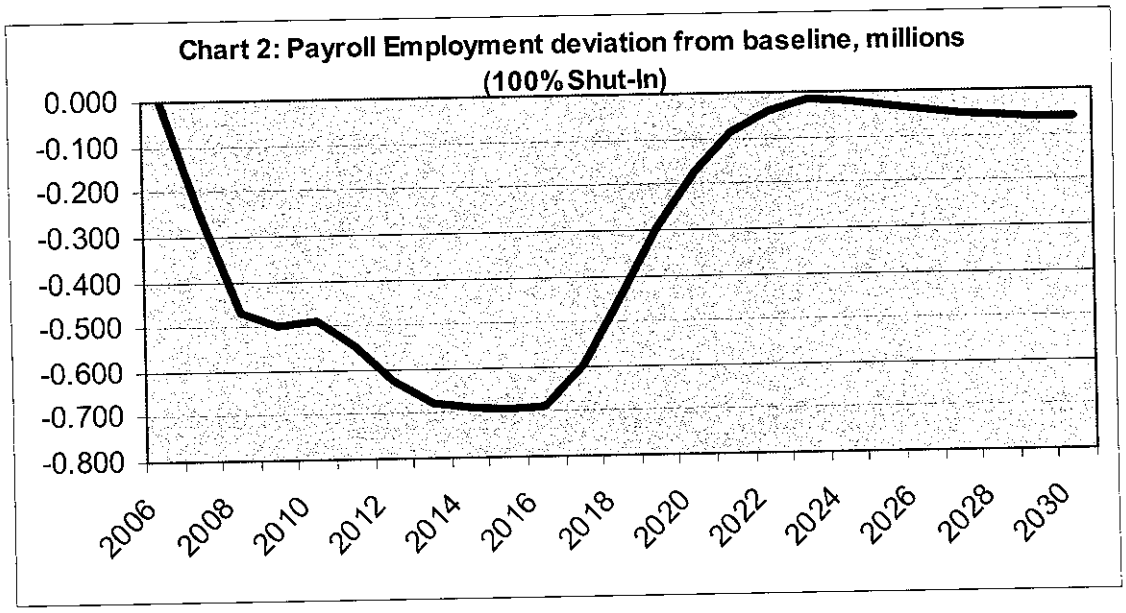
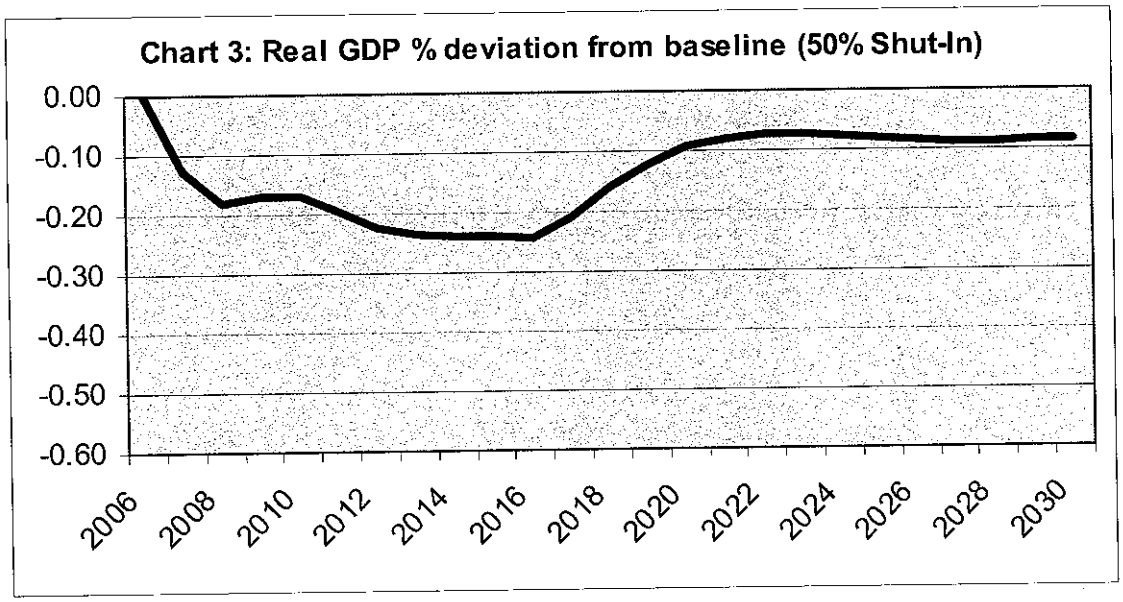
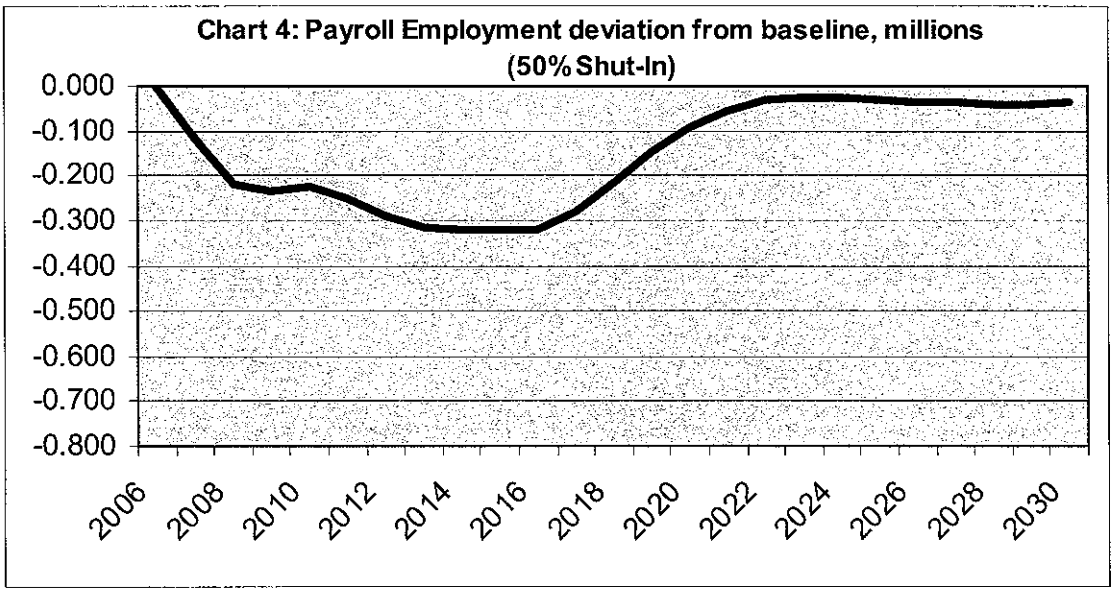


Chart 2: Payroll Employment deviation from baseline, millions (100% Shut-In)
0.000
-0.100
-0.200
-0.300
-0.400
-0.500
-0.600
-0.700
-0.800
2006
2008
2010
2012
2014
2016
2018
2020
2022
2024
2026
2028
2030

Table 2. Economic Impacts of the Loss of Half of the At-risk Oil and Gas Production (Percent Difference from Baseline)

	2007	2010	2015	2020	2025	2030
Economic Activity						
Real GDP	-0.1%	-0.2%	-0.2%	-0.1%	-0.1%	-0.1%
Components of Real GDP						
Consumption Expenditures	-0.1%	-0.1%	-0.1%	-0.1%	-0.2%	-0.2%
Non-Residential Fixed Investment	-0.2%	-0.3%	-0.5%	-0.2%	-0.2%	-0.1%
Residential Investment	0.0%	-0.1%	0.0%	0.0%	-0.2%	-0.2%
Government	0.0%	-0.1%	-0.1%	-0.1%	0.0%	0.0%
Net Exports						
Exports	0.0%	0.1%	0.3%	0.4%	0.2%	0.1%
Imports	0.2%	0.2%	0.4%	0.2%	-0.2%	-0.3%
Petroleum Imports	1.9%	3.3%	8.1%	5.2%	0.1%	-3.0%
Payroll Employment *(difference in millions)*	-0.120	-0.230	-0.320	-0.090	-0.030	-0.040





Impact on the State Economies

Changes to the prevailing royalty relief provisions for deep water oil and gas production in the Gulf of Mexico have considerable economic implications for most of the states. Due to their proximity to the deep water oil and gas drilling operation the Gulf States including Texas, Louisiana, Mississippi and Alabama, will have a direct and immediate impact in terms of employment and income forgone. This direct impact is, however, limited to a few surrounding states, is relatively small in size and is short lived. The major and lasting impact on state economies comes through the national macroeconomic changes and changes in the energy market environment in the US. As we have seen in an earlier section, reduced domestic production of oil and gas, and increased import bill seems to have sizeable impact on the US economy. This changing macroeconomic environment is relevant to each state's economy. The state economies are linked to the US macro economy in a regional sense, some more responsive to changes in the national economy and some are less sensitive depending on their economic structure and resource base. The states which have stronger link to the national economy will tend to show stronger impact in response to changes in macro economy of the US. Furthermore, the states which have rapidly growing economies are expected to be affected relatively more.

Global Insight maintains econometric models for each of the 50 states and Washington DC. These models use national macro economic variables as drivers along with several state specific indicators. We used these state models to perform the simulation using the same two scenarios that were used for the national economy, namely, Scenario I: 100% Production Loss, and Scenario II: 50% production Loss. We have summarized the results for key macro variables for each state in the form of charts which are prepared for the beginning year of the production loss, that is 2007, and also for 2010 and 2015 to be able to comprehend the long term dynamics of the regional economic impacts.

Impact on Employment

It can be seen from the charts that impact of a loss in deep water oil & gas production becomes stronger over time. For the year 2007 in 100% production loss case the impact on states range from a decline of 0.08% to 0.3%, the impact becomes stronger in 2010 ranging from a decline of 0.13% to0.68%. By 2015 the impact of 100% production loss case has become even stronger and ranges from a decline of 0.1% to 1.1%. This pattern is consistent with the US macro simulation results. We observe a similar pattern in case of 50% production loss case. There is great deal of similarity in terms of relative effect on various states in 100% production loss case (Scenario I) and in 50% production loss case (Scenario II). The over all impact in 50% production loss case is not exactly half but quite close, and only few states have a noticeable change in their ranking.

It is interesting to see that Texas has the largest impact on total employment in 2007 but it moves to 5th position by 2010 and to 14th position by 2015. This is due to the fact that initially direct loss of employment and its overall impact is significant for Texas economy, whereas in the later year other states suffer more due to changes in national macroeconomic environment. Total employment in Texas is 0.3% lower than the baseline forecast in 2007 under scenario I. This impact on Texas employment becomes larger in 2010 showing a decline of close to 0.4% and in 2015 by 0.46 %. Among the Gulf States, Louisiana stands second to Texas, showing a decline of 0.21% in 2007, 0.32% in 2010 and 0.43% in 2015. In Mississippi and Alabama the impact is relatively smaller; however, they manage to get a place among the top 20 most impacted states in 2007. Their rank however declined over time.

Among all the states Nevada has shown relatively much stronger impact on its employment. This effect on Nevada is consistent to its recent growth pattern. Nevada's economy has registered an average annual growth rate of 4.3% in total establishment employment over the past 10 years. This growth is outstanding compared to a US average of 1.3%. Nevada also has a high degree of responsiveness to changes in overall national economy and macroeconomic environment in the country. Nevada's economy initially depended on tourism and entertainment; however, most of the recent growth is linked to its proximity to California and availability of labor force. Since most states lie within a narrow range in terms of percentage decline a slight variation can change their relative position. However, most states which are among the bottom 20 in their ranks in terms of percentage decline in total employment remain among the bottom 20 with some changes in their relative position. Similarly, most states which were in top 20 during 2010 stay among the top 20.

Impact on Real Gross State Product

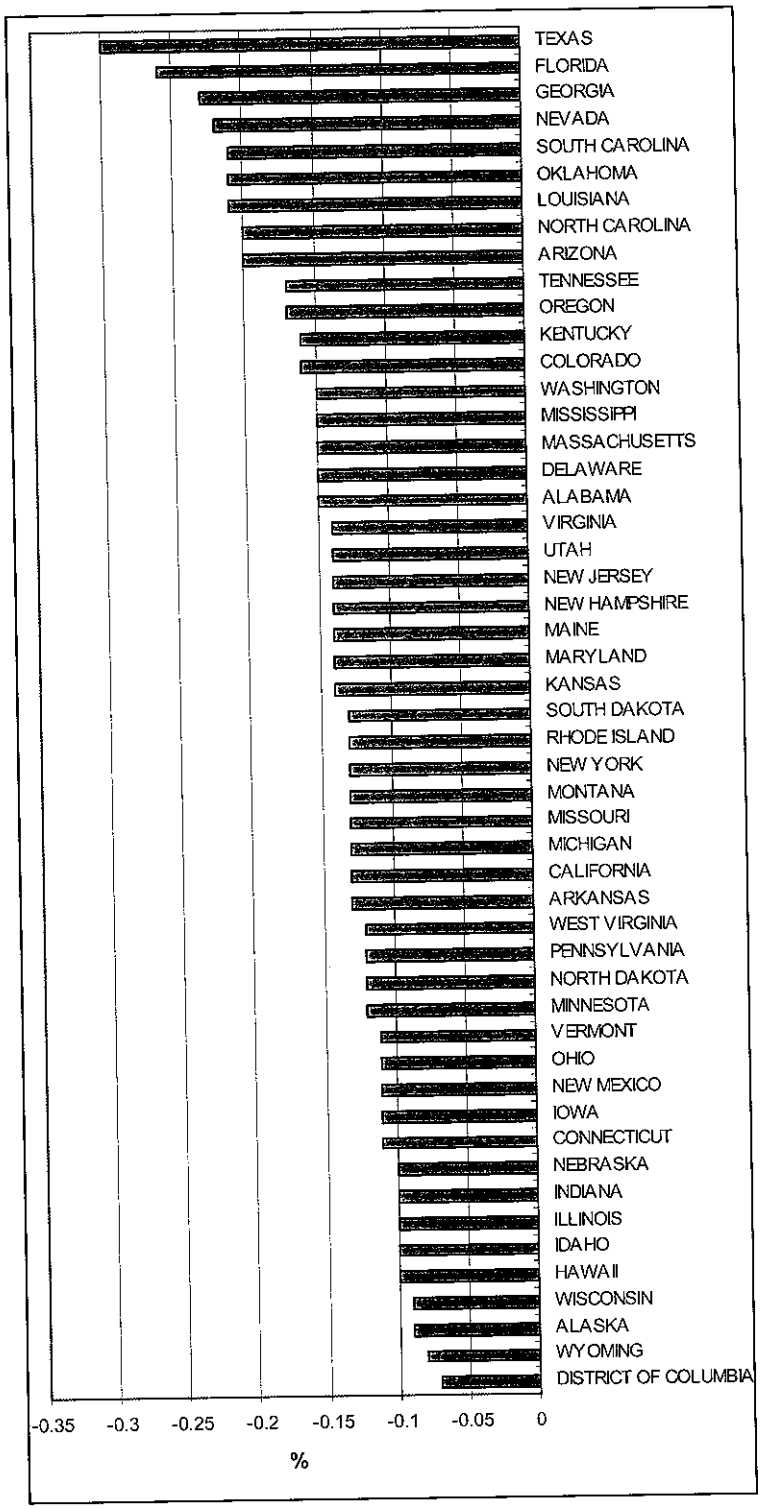
The similarity of the pattern of impacts that we saw between 100% production loss cases and 50% production loss cases for employment also exist in case of real GSP and other concepts at state level. Therefore, we will just discuss the 100% production loss case here. The impact on real GSP in terms of percentage decline from the baseline solution falls within a narrow range similar to what we saw in case of employment impact. Real GSP impacts in most part are very similar to employment impacts. But there are some differences. These differences are due to the productivity differential across states and across various sectors in the state economy and are also based on how the productivity in a sector relates to the national economy. Less diversified State economies relying on high growth and high productivity in just a few sectors are found to be more vulnerable and suffer greater percentage loss in real GSP in response to adverse macroeconomic circumstances. The actual magnitude of losses to these states may be smaller than some bigger, diversified and more developed state economies.

In 2007 real GSP in Texas appears to have been impacted the most (a 0.42% decline from baseline) and that is due to a direct effect on the state's economy, however in the later years when the effect of national macro environment becomes more pronounced Texas moves to 6th place in 2010 (0.44% decline) and 19th place in 2015 (0.60% decline). Louisiana is the second most impacted state on the Gulf Coast, compared to the baseline forecast of the real GSP in Louisiana declined by 0.33% in 2007, 0.38% in 2010 and 0.60% in 2015. Alabama and Mississippi registered relatively smaller impact in a fashion similar to the impact on their employment. In 2007 Alabama has an impact of 0.24% and Mississippi of 0.23%, in 2010 the impact is measured at 0.32% for Alabama and 0.30% for Mississippi. In 2015 the impact on real GSP in Alabama is estimated at 0.47% decline from the baseline and in Mississippi at 0.44% decline from the baseline.

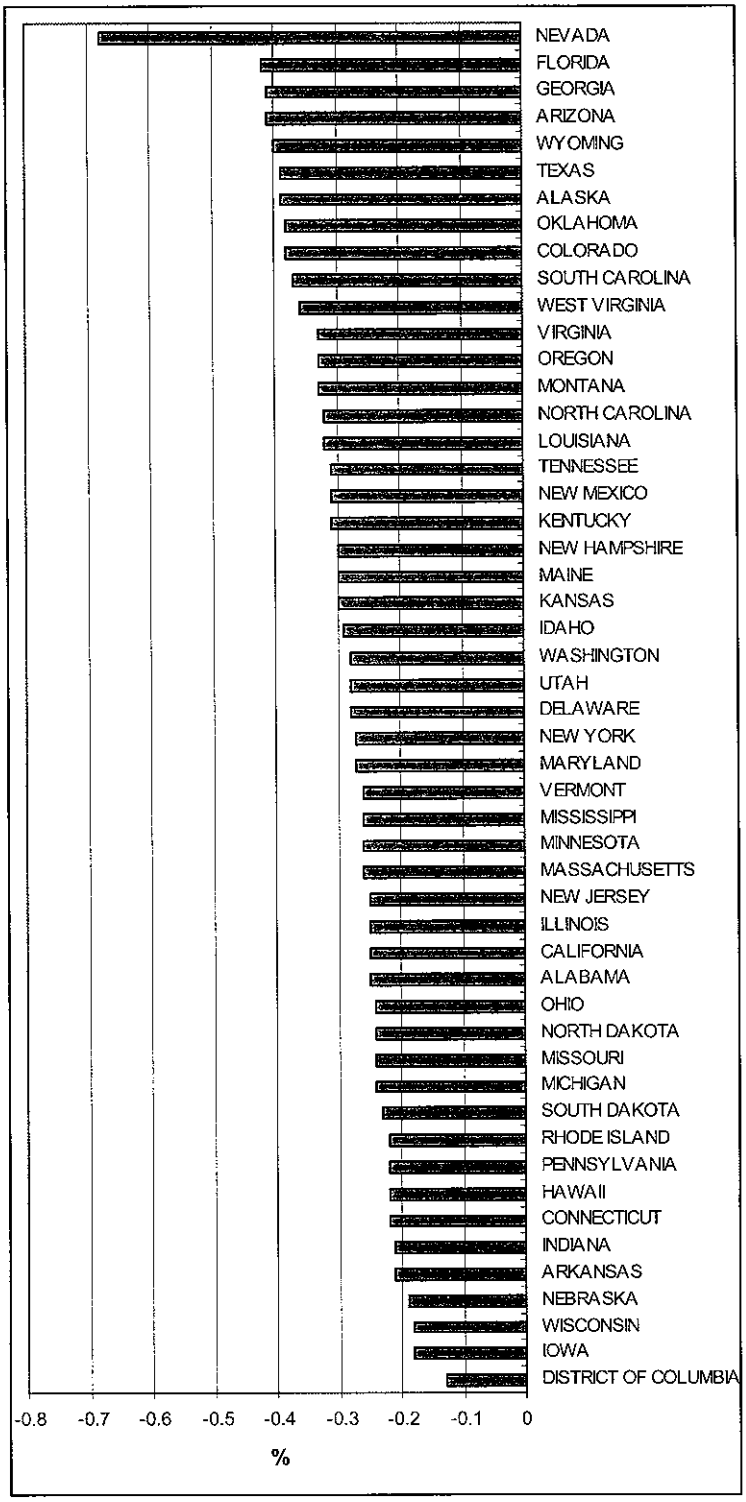
Impact on Income

The most striking results of the impact of 100% production loss on the state's real personal incomes is for Washington DC topping the list in 2007. The explanation lies in the fact that wages, productivity and per capita incomes are significantly higher in the DC area then the national average. A smaller loss in employment translates into much bigger loss in total wage incomes. Average annual wages in DC area are about 62% higher than the national average. In percentage terms real personal incomes in DC area declines by less than 0.5% in 2007 and about 0.6% in 2010 and slightly higher in 2015.However, in the years after 2007, several other state responded relatively more strongly and their economies appear more vulnerable to adverse trend in the national economy. That includes Wyoming, West Virginia, Wisconsin, Washington and Vermont (as seen in the impact for 2010 and 2015). The impact on real personal income have become much stronger by 2015, all the states except Alaska and Wyoming fall in the range of decline from 0.5% to 1.2% compared to their baseline forecast. Among the Gulf States, real personal income in Texas appeared to have the largest impact with a 0.38% decline in 2007, 0.62% in 2010 and 1.05% decline from baseline forecast in 2015. Louisiana on the other hand revealed relatively much weaker impact on its real personal income in 2007 and 2010, even smaller than Mississippi and Alabama. Impact on real personal income in Alabama remained at 0.53% in 2010 and 2015. For Mississippi these impact rose from 0.46% decline in 2010 to 0.81% decline from the baseline and for Louisiana from 0.36% in 2010 to 0.73% in 2015.

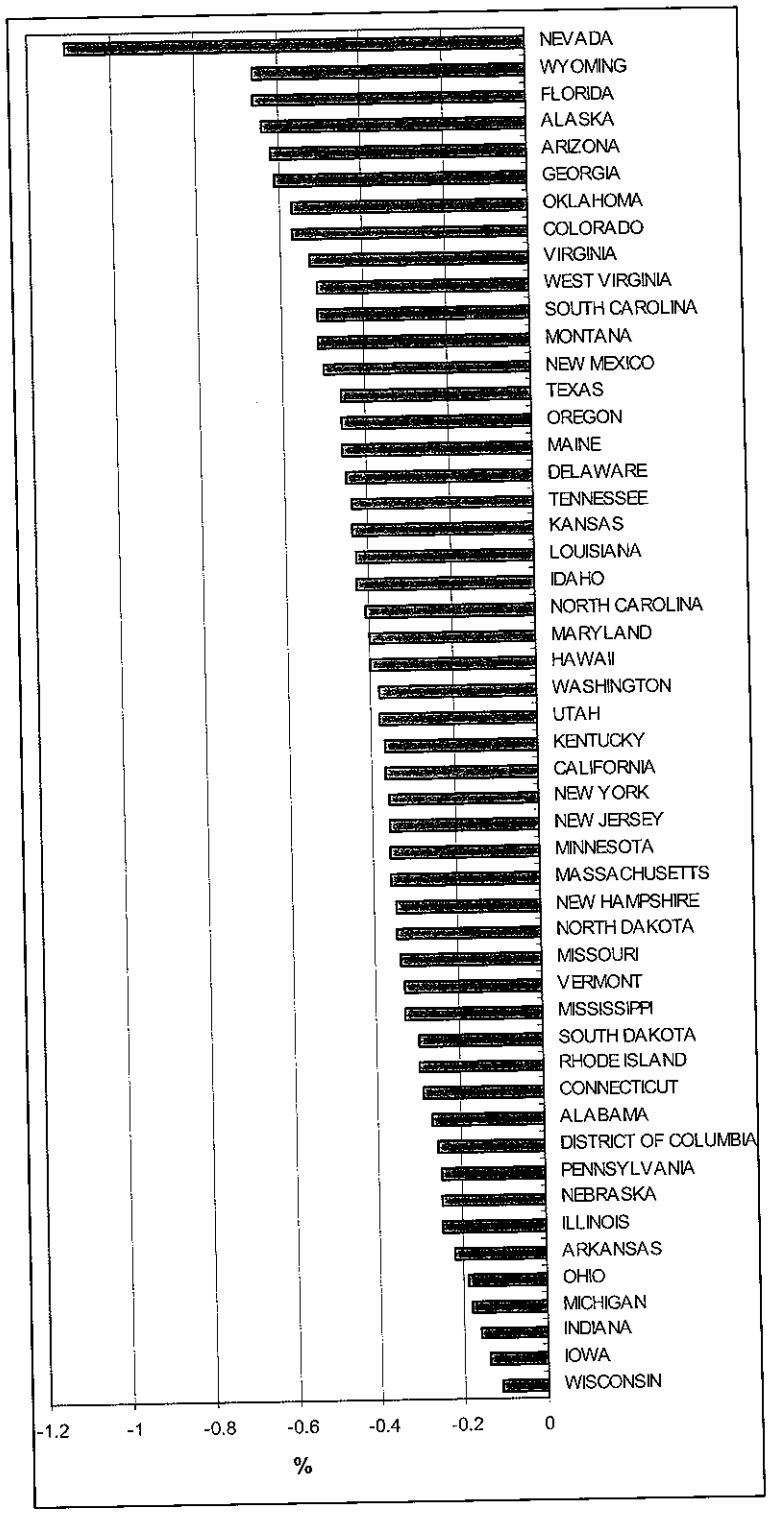
Total Employment (100% Production Loss Case)
Percentage Difference from Baseline in 2007



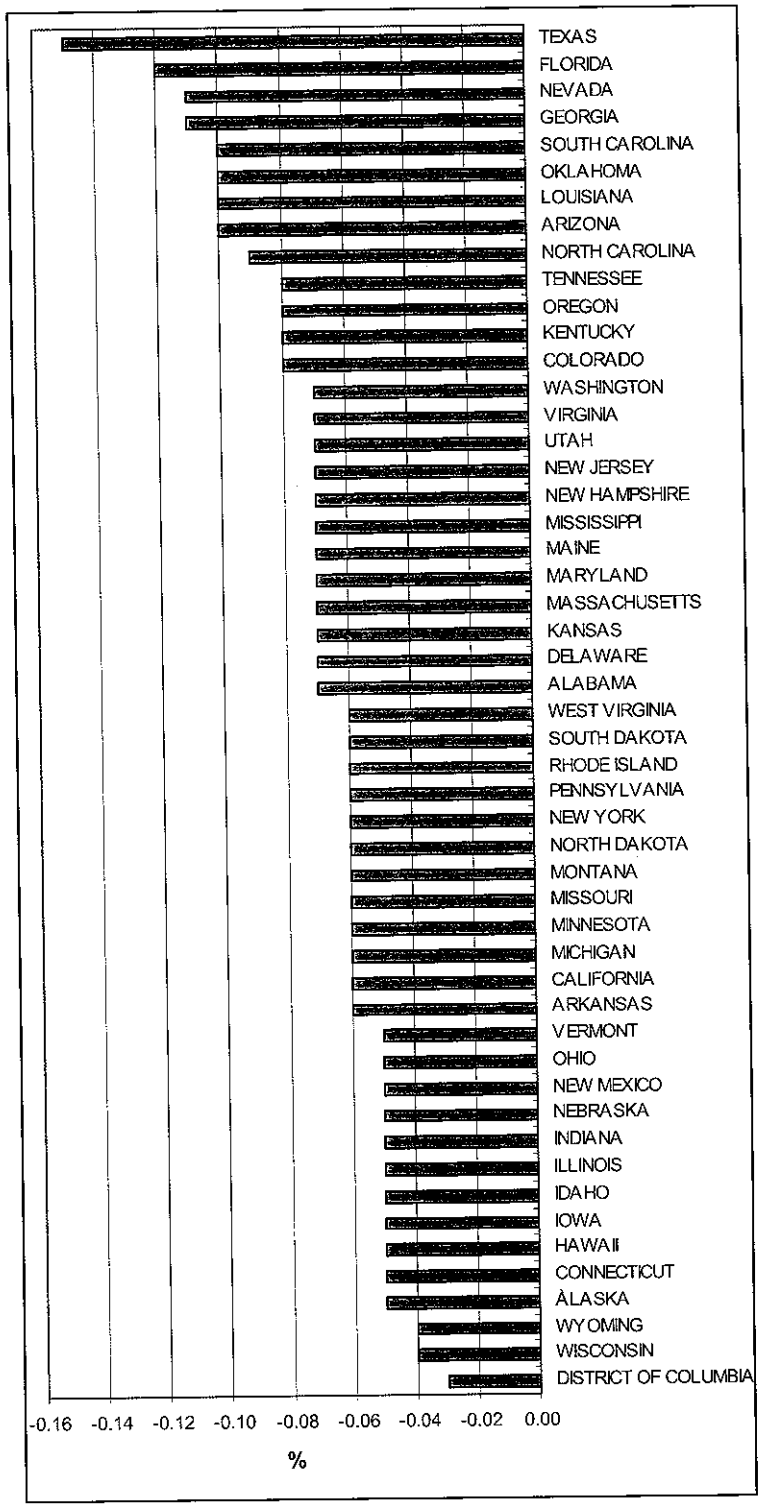
Total Employment (100% Production Loss Case)
Percentage Difference from Baseline in 2010



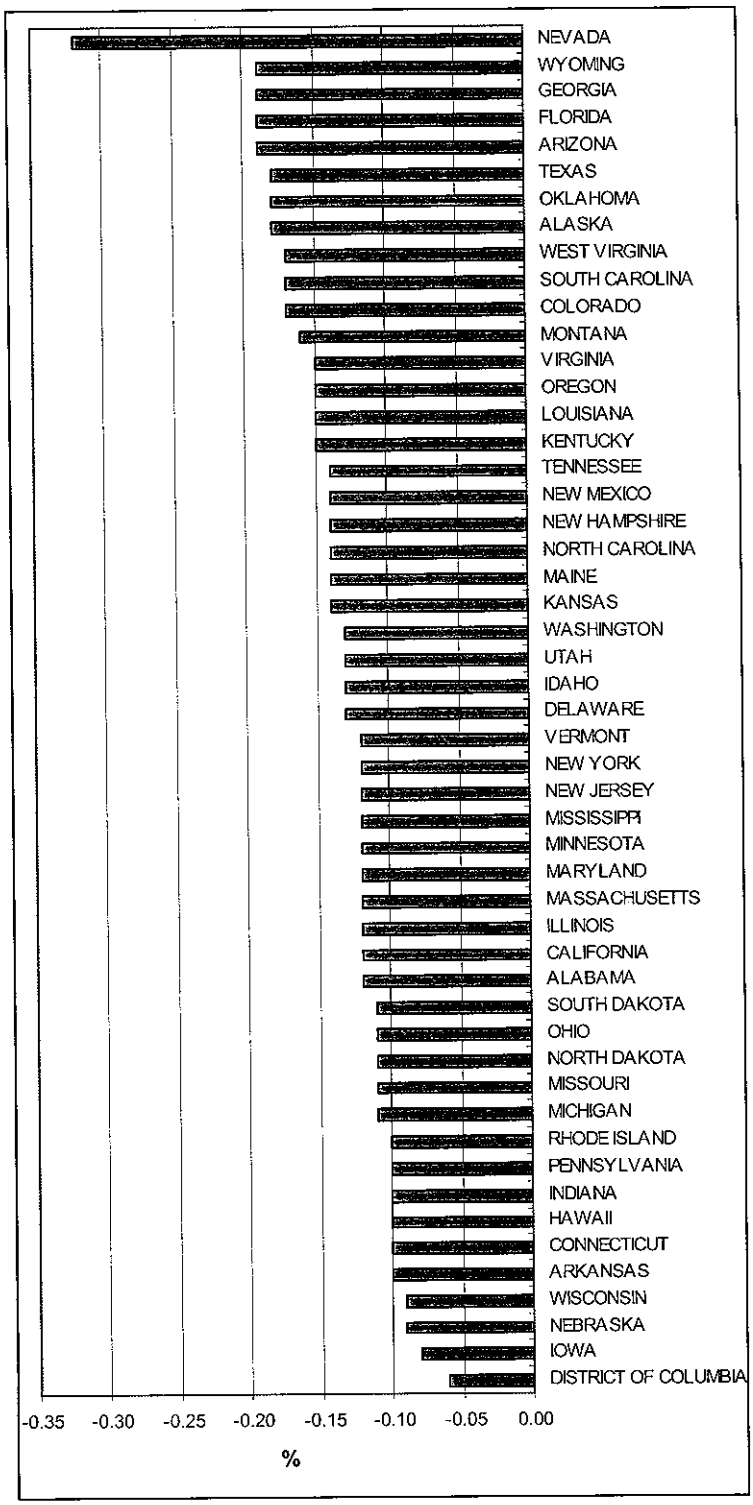
Total Employment (100% Production Loss Case)
Percentage Difference from Baseline in 2015



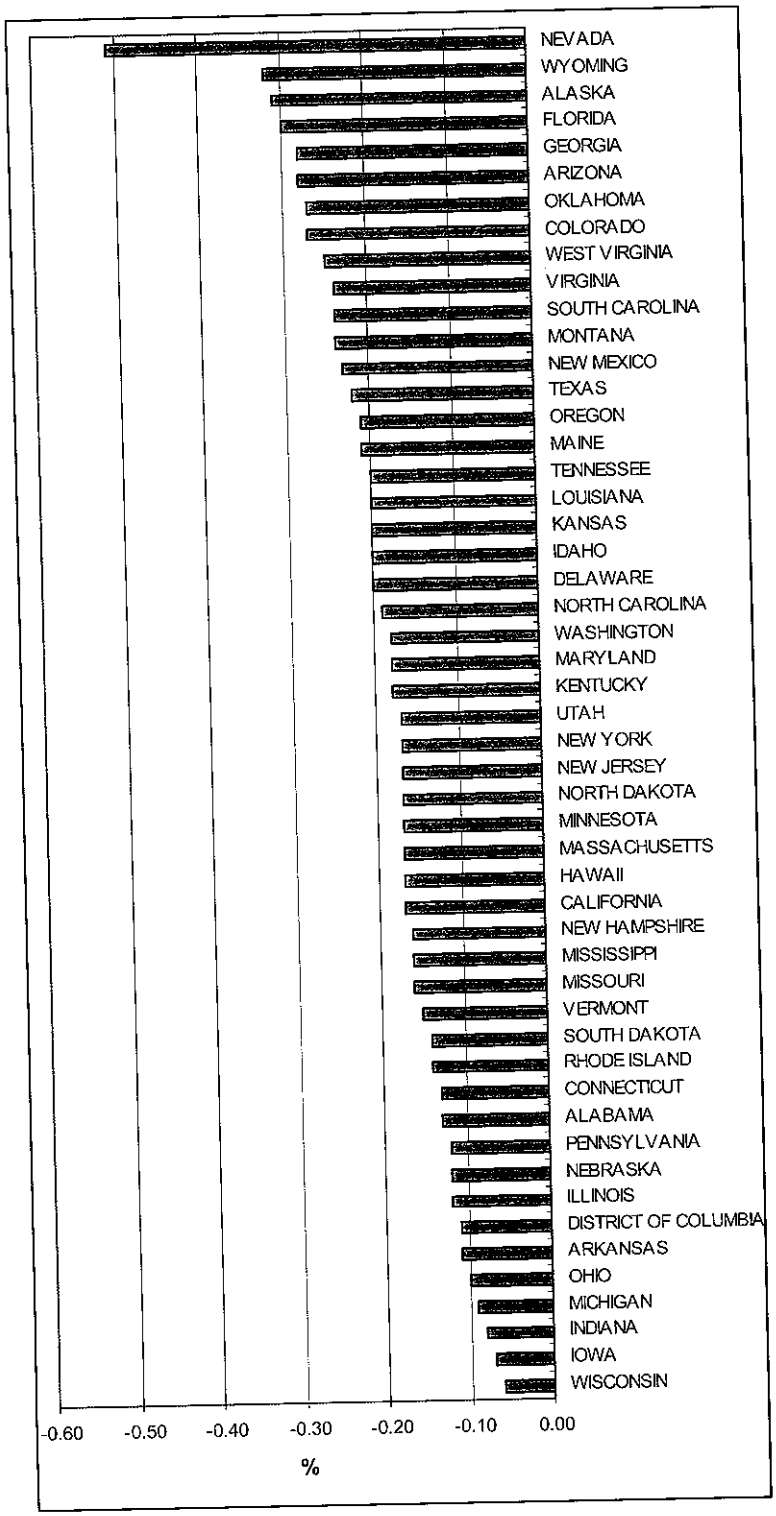
Total Employment (50% Production Loss Case)
Percentage Difference from Baseline in 2007



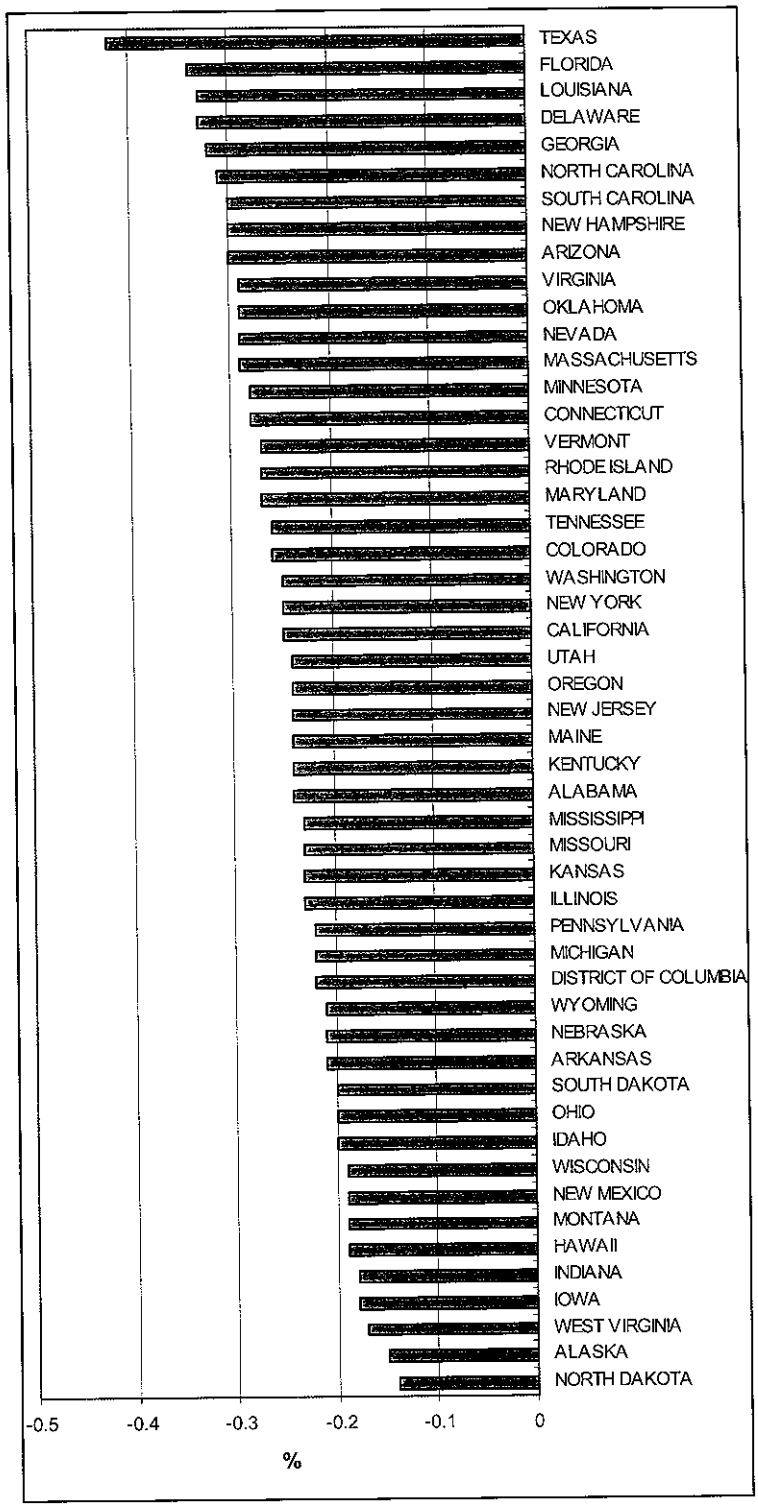
Total Employment (50% Production Loss Case)
Percentage Difference from Baseline in 2010



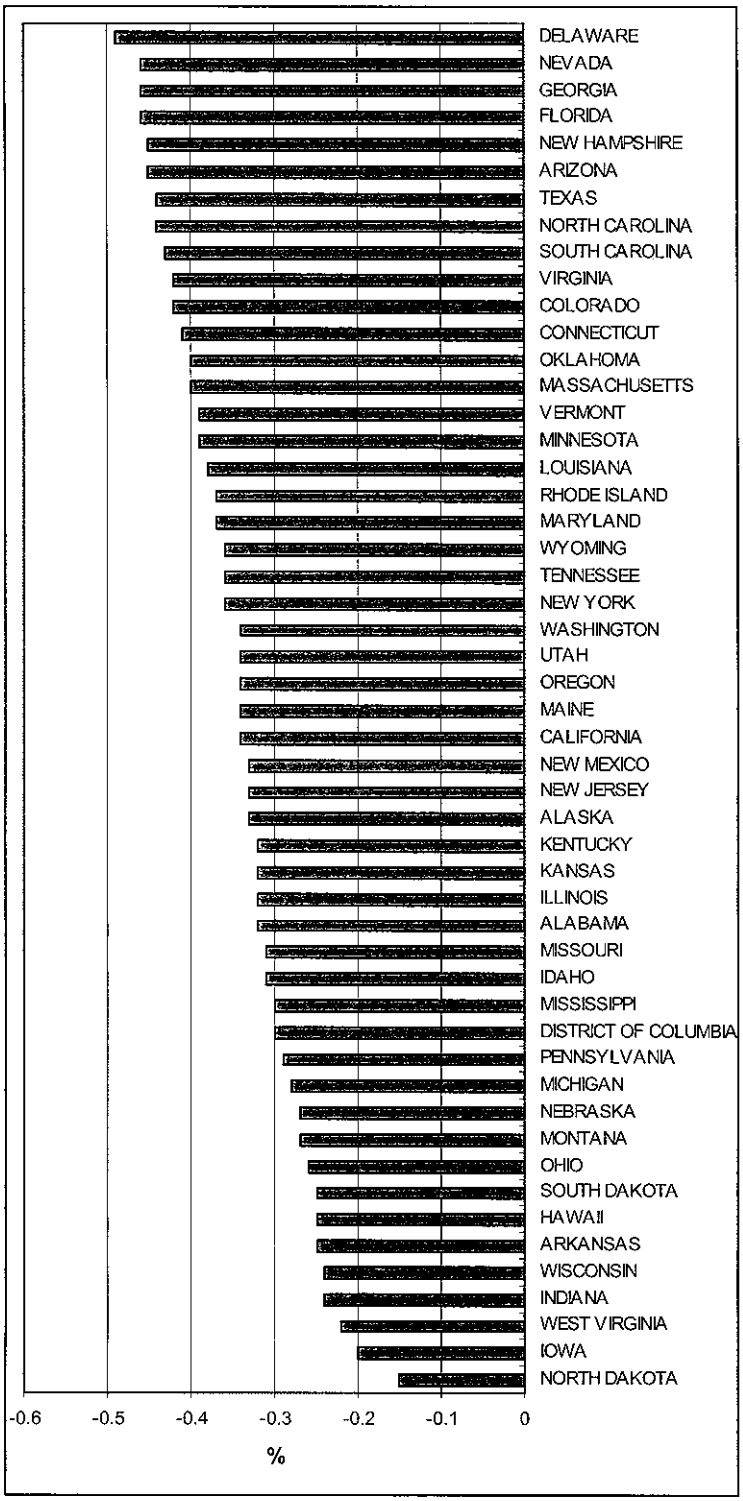
Total Employment (50% Production Loss Case)
Percentage Difference from Baseline in 2015



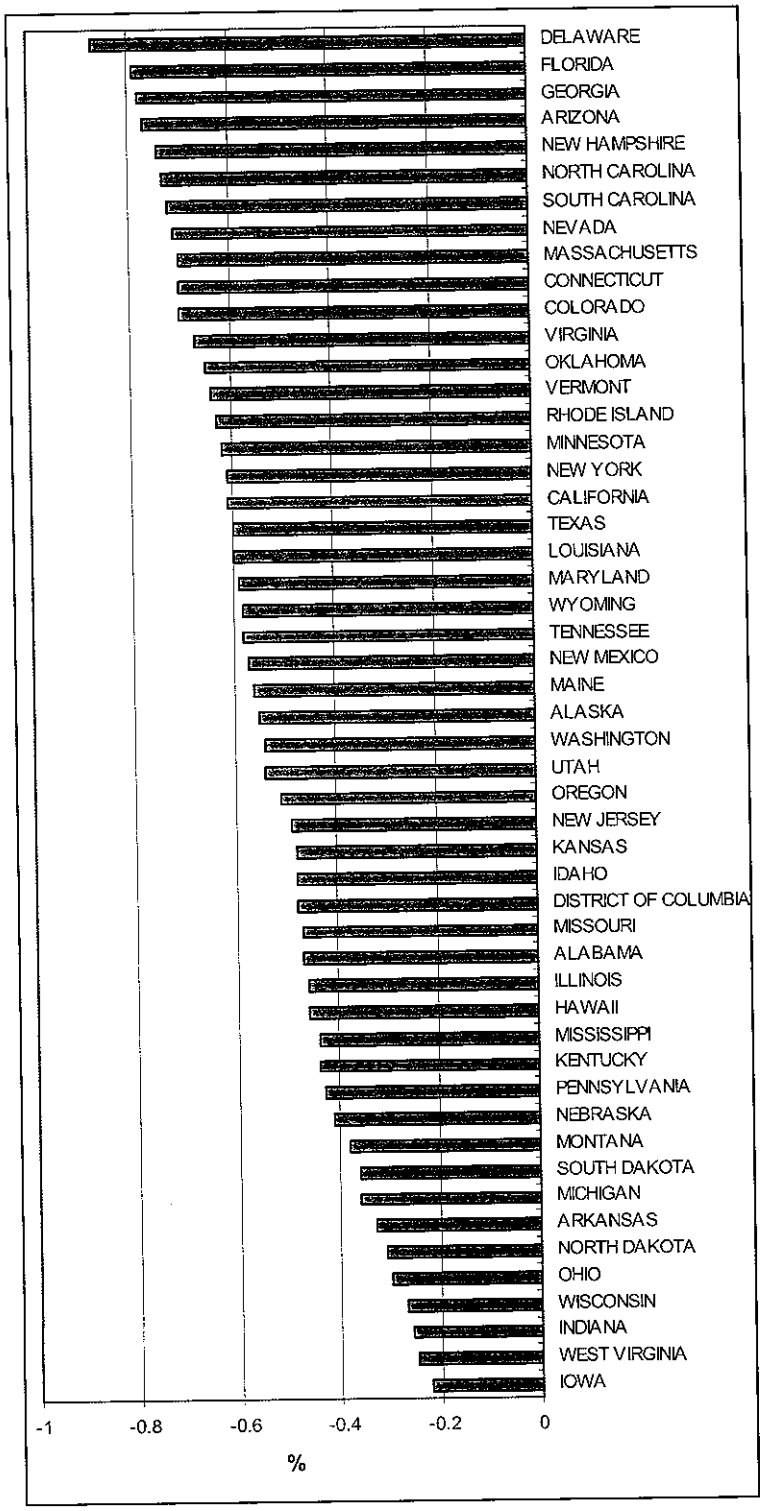
Real GSP (100% Production Loss Case)
Percentage Difference from Baseline in 2007



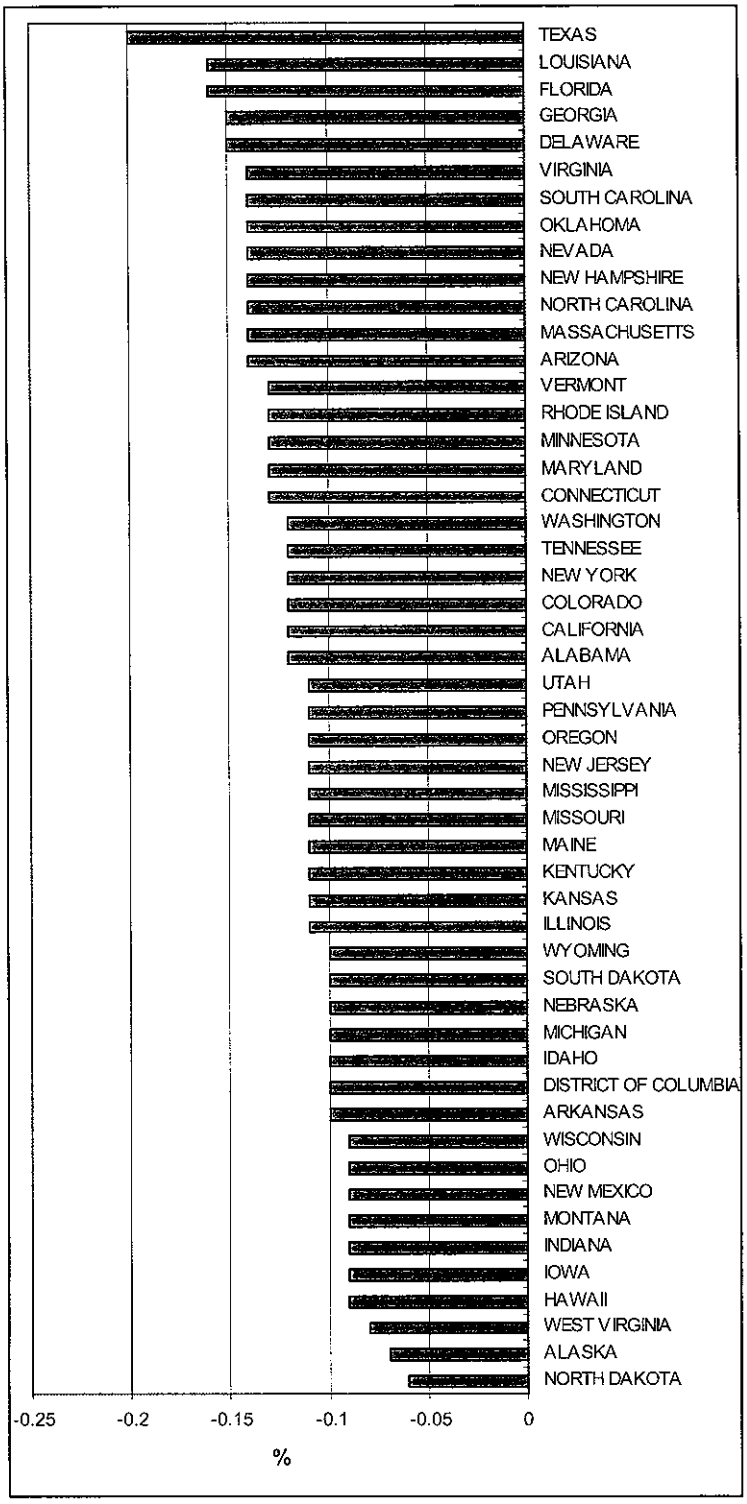
Real GSP (100% Production Loss Case)
Percentage Difference from Baseline in 2010



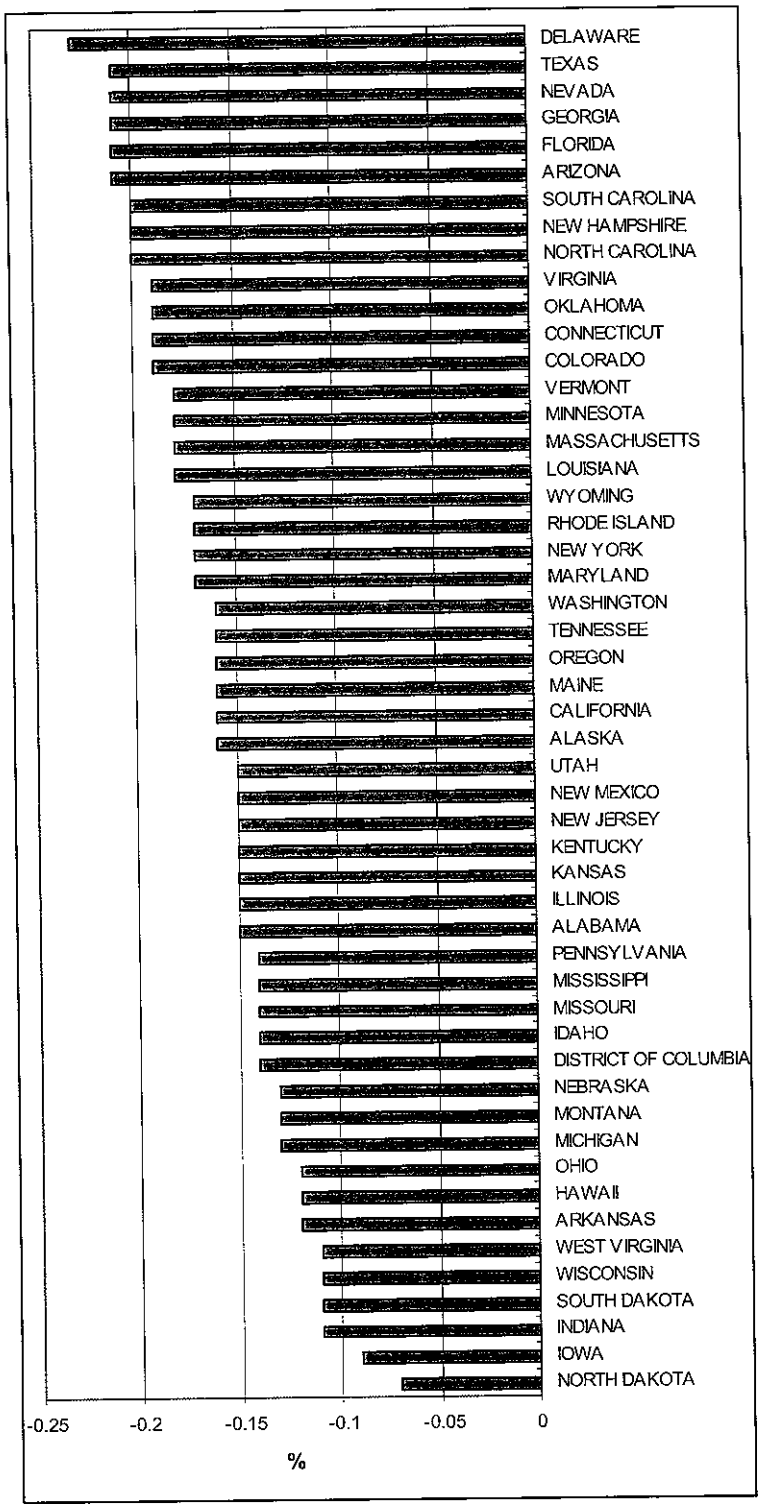
Real GSP (100% Production Loss Case)
Percentage Difference from Baseline in 2015



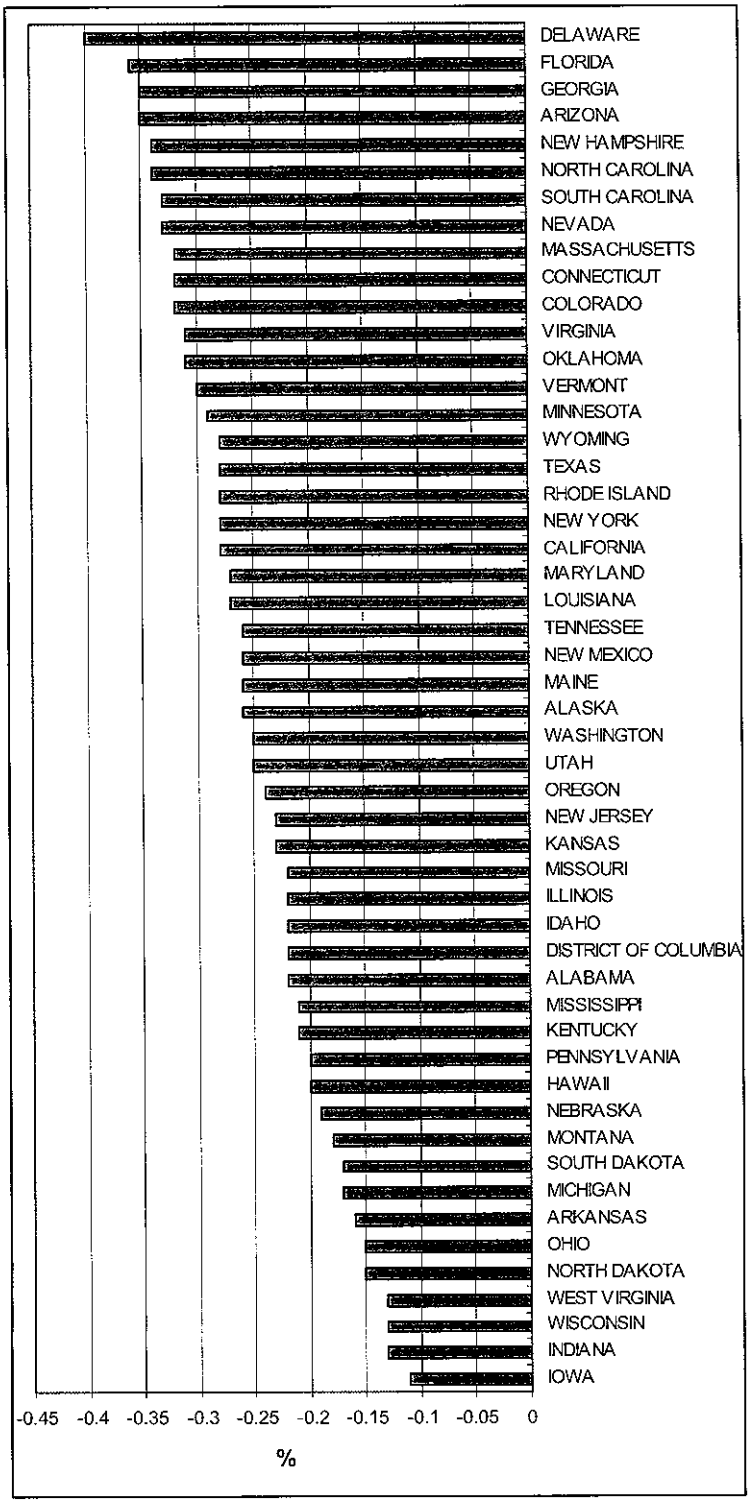
Real GSP (50% Production Loss Case)
Percentage Difference from Baseline in 2007



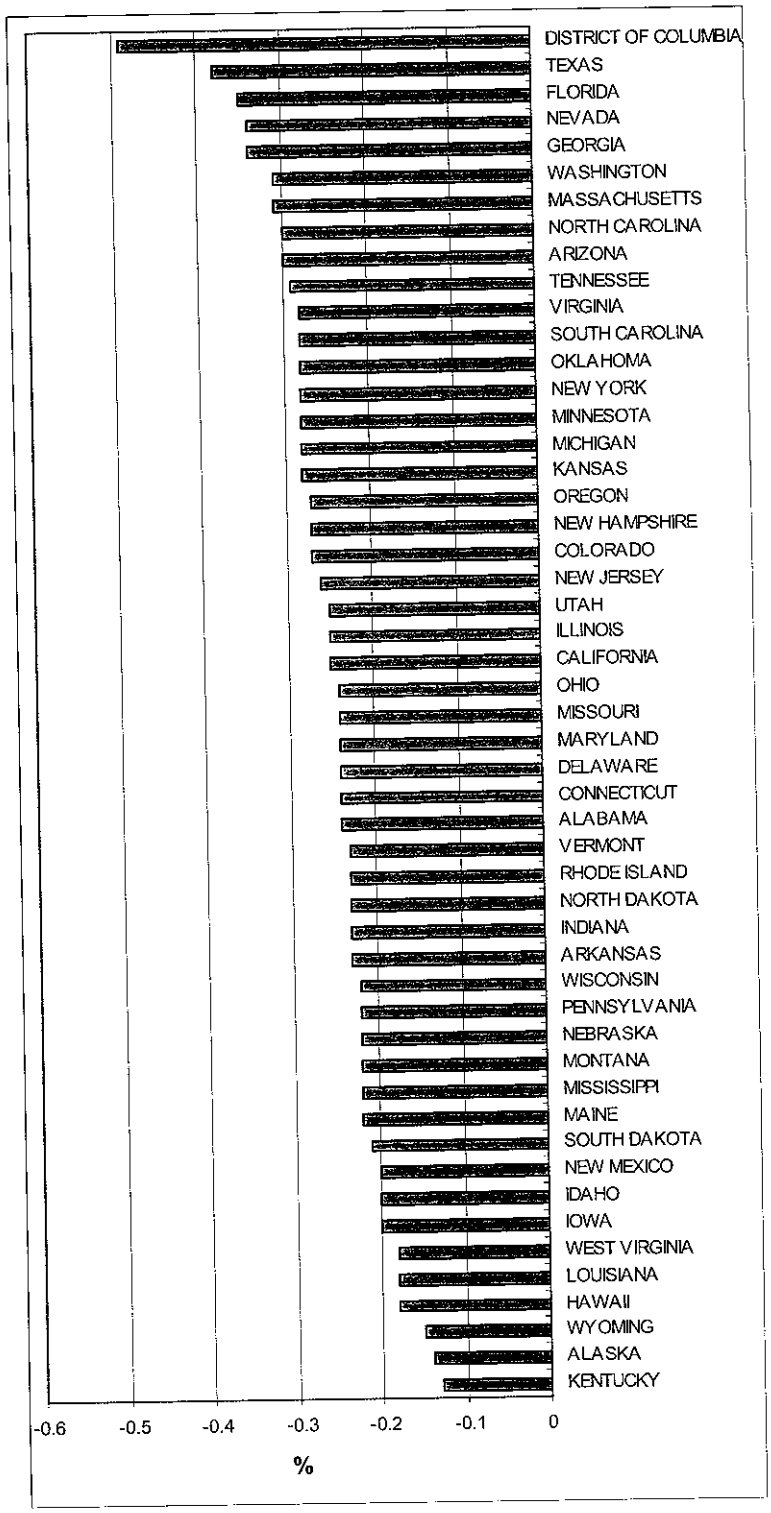
Real GSP (50% Production Loss Case)
Percentage Difference from Baseline in 2010



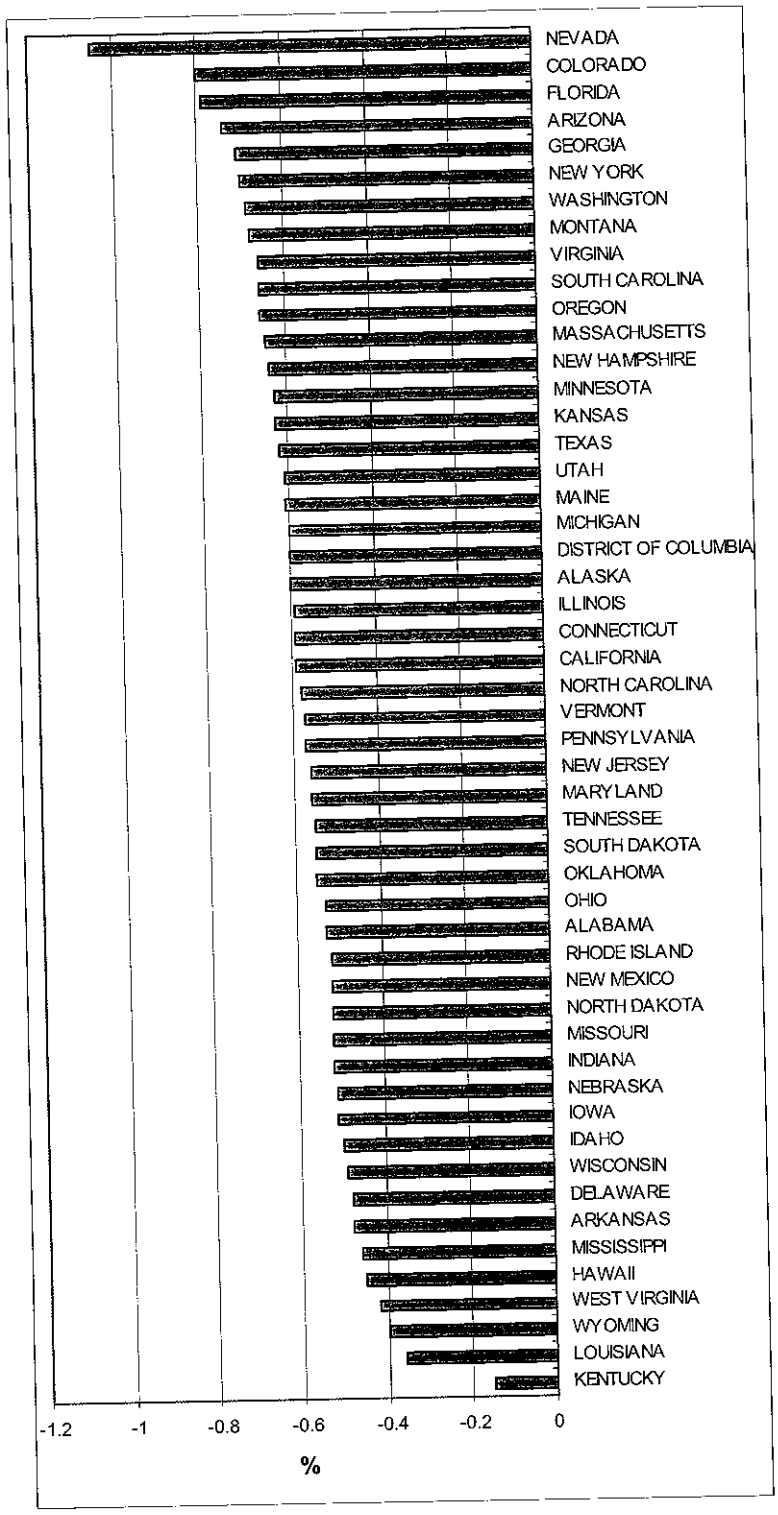
Real GSP (50% Production Loss Case)
Percentage Difference from Baseline in 2015



Real Personal Income (100% Production Loss Case)
Percentage Difference from Baseline in 2007

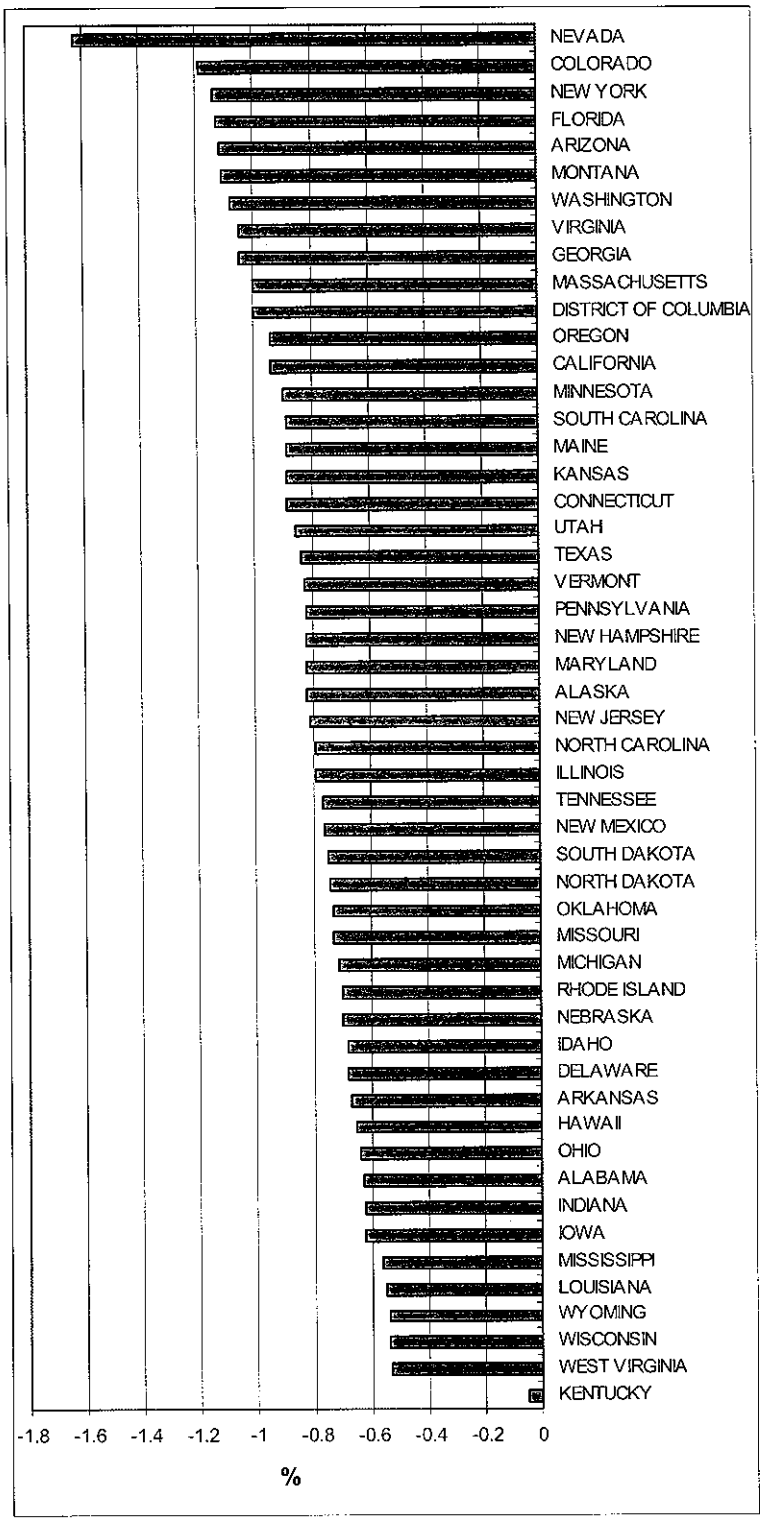


Real Personal Income (100% Production Loss Case)
Percentage Difference from Baseline in 2010



Real Personal Income (100% Production Loss Case)

Percentage Difference from Baseline in 2015



Attachment B

An Analysis of Vessels Supporting the Offshore Oil and Gas Exploration and Production Industry in the United States and Worldwide

February 24, 2009

Prepared for:

The American Petroleum Institute

Prepared by/Submitted by:

ecology and environment, inc.
International Specialists in the Environment

Table of Contents

List of Tables

Appendix

1 Introduction

Ecology and Environment, Inc. (E & E) was contracted to assist the American Petroleum Institute (API) in locating and presenting information regarding the numbers, types, and nationalities of vessels supporting the offshore oil and gas exploration and production (E & P) industry in the Gulf of Mexico and worldwide. Our evaluation includes a discussion of the nationality, or flag states, of the various vessel types with an emphasis on how the vessel's flag can affect its ability to participate in various types of offshore E & P support activities in United States (U.S.) waters. This report summarizes the key provisions of the U.S. coastwise vessel trade laws, commonly referred to as the Jones Act, that require the use of U.S. flag vessels for the carriage of cargo and passengers between two points located in U.S. waters. This report includes separate sections that examine the following topics:

- Background information on the types of vessels that routinely support the offshore E & P industry,
- An analysis of commercial data regarding the types, numbers, and nationalities (i.e. flag states) of offshore support vessels worldwide with an emphasis on the U.S. Outer Continental Shelf (primarily the Gulf of Mexico),
- A discussion of U.S. coastwise trade laws (commonly referred to as cabotage laws) and their applicability to various support vessel types engaged in the offshore oil and gas E & P industry in U.S. waters,
- A discussion of a past U.S. government report that examined the potential impacts to the offshore oil and gas E & P industry resulting from changes to the existing coastwise trade laws in the U.S. This section includes a discussion regarding the potential for retaliatory action on the part of other nations should the United States enact new legislation further restricting the use of specialized offshore support vessels in U.S. waters.

2 Vessels Supporting the Offshore Oil and Gas Exploration and Production Industry

The offshore oil and gas E & P industry could not function without the support of numerous types of specialized support vessels. Worldwide, there is a fleet of over 8,000 vessels that support various aspects of offshore operations.[1] Of those vessels, there is a subset of approximately 5,500 vessels of many types that are capable of providing full or part-time support to the offshore oil and gas E & P industry. These offshore support vessels[2] are used for a variety of critical services including carrying supplies, moving drilling rigs from one location to another, setting and moving anchors, obtaining seismic and geophysical data, installing and repairing offshore facilities and pipelines, conducting well maintenance and servicing activities, transporting personnel, serving as standby and emergency response resources, supporting diving operations, and miscellaneous other activities.

[1] Clarkson Research Services Ltd., *A-Z of Offshore Support Vessels of the World, 2008* ed.

[2] The term "offshore support vessel" will not be shortened in this report by using the acronym OSV as that abbreviation is frequently used in the United States to describe "offshore supply vessels", a subset of offshore support vessels.

2.1 Types of Offshore Support Vessels

This report evaluates the types, number, and nationalities of offshore support vessels, but does not include a detailed evaluation of Mobile Offshore Drilling Units (MODUs).[3] MODUs are a group of self-propelled and non self-propelled vessels that mobilize to offshore locations worldwide for the purpose of drilling wells to explore for and produce oil and gas. While MODUs are a key component of the offshore oil and gas industry, this report is focused on the other vessel types that support the offshore oil and gas industry. It is worth noting that the numbers of MODUs actively working will have a direct impact on the demand for associated offshore support vessels.

For the purposes of this report, the following vessel types are considered to be offshore support vessels:

- **Supply Vessels and Platform Supply Vessels**. These vessels carry equipment and supplies to MODUs and other offshore oil and gas drilling and production facilities. Usually equipped with cargo tanks for drilling mud, pulverized cement, diesel fuel, potable and non-potable water, and chemicals used in the drilling process. They can also carry equipment and supplies on a large open deck usually located aft. Platform Supply Vessels (PSVs) are viewed by some in the industry as more recently built and larger in size than Supply Vessels. They perform the same service.
- **Anchor Handling Tug**. These vessels are used to tow MODU's from one location to another and set and retrieve large anchors used to moor floating MODUs and other offshore floating equipment.
- **Anchor Handling Tug Supply (AHTS)**. Similar in design and use as the Anchor Handling Tug above, except that these vessels have the added ability to carry supplies and equipment to service offshore oil and gas operations.
- **Crewboats**. Smaller fast vessels between 65 and 200 feet in length used to transport passengers to offshore oil and gas facilities (or between offshore facilities) typically capable of carrying small amounts of cargo and supplies.
- **Seismic Survey/Geophysical**. The vessels are equipped with specialized equipment to collect data needed to characterize the seafloor and underlying geologic formations.
- **Diving Support Vessels**. These vessels are capable of supporting manned and/or remotely operated vehicle (ROV) diving operations.
- **Offshore Construction and Installation**. This category includes a number of vessel types that support the construction and installation of offshore oil and gas platforms, pipelines, and related facilities. Vessel types in this group include Pipelaying Vessels, Crane and Derrick Lay Barges, and various self-propelled and non self-propelled Heavy Lift Vessels.
- **Multi-Purpose Support Vessels**. This category includes small utility vessels, well intervention vessels, and related multi-purpose support vessels that do not fit within other vessel types.

[3] The February 2009 issue of *The Offshore International Newsletter* published by ODS Petrodata, reported that there were 713 MODUs in the world fleet with 611 under contract. Of this worldwide total, there were 119 MODUs in the U.S. Gulf of Mexico with 81 working under contract.

- **Standby/Rescue Vessels**. These vessels act as a safety standby and personnel rescue resource for oil and gas operations and may include firefighting capability. This vessel type operates primarily in the offshore areas of the North Sea due to regulatory requirements in that region.
- **Well Stimulation Vessels**. These specialized vessels perform fracturing or acidizing of producing wells to maintain or increase oil and gas production rates.

While the vessel types described above may appear static, in reality offshore support vessels often perform services outside their principal category. There are limits to what certain vessel types can do (e.g. it would be impossible for a crewboat with insufficient horsepower and no winch to act as an Anchor Handling Tug), however, vessels sometimes perform activities outside their primary vessel type based on customer needs and the laws and regulations in the local area.

2.2 Worldwide Offshore Support Vessels

Clarkson Research Services Ltd. maintains an updated list of offshore support vessels worldwide.[4] As part of this project, E & E obtained and reviewed Clarkson's 2008 database edition of *A-Z of Offshore Support Vessels of the World.* The 2008 database version contains 8,134 vessels within 29 major categories. As part of our analysis we eliminated a number of vessel types that we did not consider to be representative of the core areas of offshore oil and gas exploration and production support. For instance, we eliminated dredges, shuttle tankers, offshore production vessels, and similar vessel categories vessels that we considered unsuitable for the analysis of primary offshore support vessels. Following this screening process, we were left with a list of 5,532 vessels representing 20 vessel types. For the purpose of presentation, we consolidated the 20 vessel types into 12 categories by combining several vessel types into a single category. The final analysis was conducted using 5,532 vessels grouped into these 12 categories.

Table 1 provides a summary of the numbers of offshore support vessels contained within 12 specific categories. Each vessel type is further broken down into the number of vessels within the group that are registered under the U.S. flag (i.e. U.S. documented) and the number that are registered under foreign flags (or unregistered). This same information is presented as a bar chart in Appendix A.

[4] Clarkson Research Services Ltd., 2008.

Table 1

OFFSHORE SUPPORT VESSELS OF THE WORLD

Type	US	% US	Non-US	% Non-US	Total
Supply Vessels	420	39.0	658	61.0	1078
Platform Supply Vessels	140	20.9	530	79.1	670
Anchor Handling Tug	146	27.0	394	73.0	540
Anchor Handling Tug Supply	103	5.2	1869	94.8	1972
Seismic/Geophysical Survey[1]	37	12.5	259	87.5	296
Diving Support Vessels[2]	15	15.5	82	84.5	97
Pipelaying Vessels[3]	25	36.8	43	63.2	68
Crane and Derrick Lay Barges[4]	39	24.1	123	75.9	162
Heavy Lift Vessels[5]	1	1.1	87	98.9	88
Multi-Purpose Support	10	5.1	187	94.9	197
Standby/Rescue Vessels	12	3.5	332	96.5	344
Well Stimulation Vessels	3	15.0	17	85.0	20
Totals	**951**		**4581**		**5532**

Table Notes

[1] Includes Survey, Seismic Survey, and Geophysical Survey Vessels
[2] Includes Diving Support and ROV/Submersible Support vessels
[3] Includes Pipe Layer, Pipe Laying Barge and Pipebury vessels
[4] Includes Crane Barges and Derrick Lay Barges
[5] Includes Heavy Lift Cargo Vessel and Heavy lift Crane Ships

Source: Clarkson's A-Z Offshore Support Vessels of the World 2008 ed.

3 Offshore Support Vessel Flag States

Clarkson's database of worldwide offshore support vessels provides information on the flag state of offshore support vessels. Of the 5,532 offshore support vessels included in this analysis, 951 are U.S. flag vessels. Thus, U.S. flag vessels represent about 17.2% of all of the offshore support vessels worldwide, as defined in this analysis. Table 2 provides a list of the 15 nations with the most registered offshore support vessels. The United States has more than twice as many registered (flagged) vessels as the second ranked country (Norway and Norway International) with 951 as compared to 448. This dominant position is evident in spite of the fact that many U.S. based companies have at least a portion of their offshore support vessel fleets registered in nations other than the U.S.

Table 2

Number of Offshore Support Vessels Registered by Country		
Country	**Number of Registered Offshore Support Vessels**	**Rank**
United States	951	1
Norway & Norway International	448	2
Singapore	437	3
Panama	405	4
St. Vincent & the Grenadines	271	5
Vanuatu	261	6
United Kingdom	201	7
India	155	8
Peoples Republic of China	140	9
Malaysia	129	10
Bahamas	126	11
Brazil	118	12
United Arab Emirates	117	13
Marshall Islands	106	14
Mexico	96	15
Unflagged or Unknown	32	N/A

Source: Clarkson Research Services Ltd. *A-Z of Offshore Support Vessels of the World*, 2008

4 Offshore Support Vessels in the United States

There is limited data regarding the exact number of offshore support vessels operating in U.S. waters. The vast majority of offshore support vessels operating in the United States are found in the U.S. Gulf of Mexico with a small number operating offshore California and Alaska. ODS-Petrodata, a leading provider of commercial data for the offshore oil and gas industry, publishes a monthly update of the numbers of primary offshore support vessels operating in major oil and gas provinces worldwide. In the February 16, 2009 issue of *The Offshore International Newsletter*, ODS-Petrodata reported that there were 216 Platform Supply Vessels (PSVs) and 29 Anchor Handling Tug Supply (AHTS) vessels located in the U.S. Gulf of Mexico for a total of 245 vessels.[5] Of this total,

[5] ODS-Petrodata. *The Offshore International Newsletter,* Volume 18, No. 39. February 16, 2009, p.8.

ODS-Petrodata reported that 217 were under contract and working, a decrease of 18 vessels from the prior month.[6] The combined number of PSV and AHTS vessels actively working in the U.S. Gulf of Mexico has decreased in the past two months closely tracking the decline in actively working drilling rigs (i.e. MODUs). It is normal for offshore supply vessel utilization rates to rise and fall with increases or decreases in offshore drilling activity levels. This is frequently driven by oil and gas commodity prices which have fallen significantly in recent months.

The February 16, 2009 edition of *The Offshore International Newsletter* contains a historical chart of offshore support vessels located in the U.S. Gulf of Mexico since January of 2007.[7] Following a significant decline in early 2007, the combined number of PSVs and AHTSs in the U.S. Gulf of Mexico has remained relatively stable around 240 vessels (plus or minus 10 vessels). Nearly all of these vessels are registered under the U.S. flag to qualify to carry cargo or passengers between locations in the United States (i.e. engage in coastwise trade). This topic is discussed further in the next section. It is likely that the ODS-Petrodata information undercounts the total number of offshore support vessels working in the U.S. Gulf of Mexico because crewboats, seismic survey, facility and pipeline construction/installation, and other miscellaneous vessels are not included in the total. If one assumes that as many as 260 additional crewboats, multi-purpose vessels, and miscellaneous other U.S. flag vessels are uncounted by the ODS-Petrodata survey, then the total feet of U.S. flag offshore support vessels working on the U.S. OCS is in the range of 500 vessels.

A recent discussion with a representative of the Offshore Marine Service Association (OMSA) suggested that there are between 40 and 50 foreign flag offshore support vessels operating on the U.S. OCS as of February 19, 2009.[8] After adding these foreign vessels to the fleet of approximately 500 U.S. flag vessels, the total fleet of offshore support vessels operating on the U.S. OCS is on the order of 550.[9] Based on these estimates, it is likely that foreign offshore support vessels constitute 10% or less of the vessels supporting the offshore oil and gas industry on the U.S. OCS.

5 The Impact of Current U.S. Cabotage Policies on Offshore Support Vessel Activities

The offshore support vessel business in the United States is dominated by U.S. flag vessels. As discussed in Section 4, it is likely that foreign flag vessels make up 10% or less of the vessels supporting the U.S. offshore oil and gas industry on the OCS. This results from the fact that, with limited exceptions, U.S laws reserve the privilege of conducting "coastwise trade" only to vessels that are built and documented in the United States and crewed with U.S. citizens. Title 46, United States Code Appendix, § 883 (often called the "Jones Act"), provides that no merchandise shall be transported between points in the United States covered by the coastwise laws, in any vessel other than one that is coastwise-qualified (i.e., U.S.-built, owned and documented). Similar laws exist requiring that only U.S. documented vessels with a coastwise trade endorsement may engage in towing or carrying passengers between ports or places in the United States. Taken together, these laws are sometimes referred to as "cabotage", or coastwise trading, restrictions.

Section 4(a) of the Outer Continental Shelf Lands Act of 1953, as amended (OCSLA), extended the laws of the United States to:

---

[6] ODS-Petrodata, p.8.

[7] ODS-Petrodata, p.9.

[8] Bill Daughdrill (E & E) and Joe Kavanaugh (OMSA) telephone conversation of February 19, 2009

[9] This number likely undercounts smaller U.S. documented vessels such as liftboats, utility vessels, and other miscellaneous barges and support vessels servicing near shore oil and gas fields on the U.S. continental shelf.

"the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom ... to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction within a State."

The 1978 amendments to OCSLA added language concerning temporary attachment to the seabed. The amendments provided that U.S. Federal law would apply to all activities or all devices in contact with the seabed for exploration, development, and production. The legislative history states that Congress intended for U.S. Federal law to be applicable to activities on drilling rigs, and other watercraft, when they are connected to the seabed by drillstring, pipes, or other appurtenances, on the OCS for exploration, development, or production purposes.

As a result, the U.S. coastwise trade laws were extended to MODUs during the period they are secured to or submerged onto the seabed of the OCS. In like fashion, the coastwise trade laws were also extended to drilling and production platforms, artificial islands, and similar structures, as well as devices attached to the seabed of the OCS for the purpose of resource exploration operations.

The net effect is that only U.S. flag vessels (i.e. U.S. built, owned, and documented) can:

- Carry cargo between shore and an offshore MODU, platform, or other fixed or floating facility while temporarily or permanently attached to the seabed,
- Carry cargo between two such offshore locations (or points),
- Carry passengers from shore to an offshore MODU, platform, or other fixed or floating facility while temporarily or permanently attached to the seabed,
- Carry passengers between two such offshore locations,
- Engage in towing between shore and an offshore MODU, platform, or other fixed or floating facility while temporarily or permanently attached to the seabed, or
- Engage in towing between two such offshore locations.

As a consequence, U.S. built, owned, and documented offshore support vessels are guaranteed a monopoly for the majority of work on the U.S. OCS. All Supply Vessels and Anchor Handling Tug Supply (AHTS) vessels serving offshore MODU's, fixed platforms, and similar fixed and floating facilities attached to the seafloor must be U.S. flag vessels if they carry cargo or supplies. The same is true for offshore service vessels carrying passengers. Much of the towing for MODUs and other offshore floating equipment must also be performed by U.S. flag vessels, as well. There are a limited number of specific activities that foreign flag vessels can perform on the U.S. OCS (subject to very specific rules) without violating the U.S. cabotage laws, including:

- Performing exploration and field development drilling (MODUs)
- Seismic survey work,
- Heavy-lift crane construction and installation work,
- Pipe laying,
- Diving Support work,
- Cable laying work,
- Certain towing jobs involving MODUs

Because of the coastwise trade restrictions most offshore support vessels operating on the U.S. OCS are U.S. flag vessels manned with U.S. crews. As discussed in Section 4, as of February 2009 there are likely 500 or more U.S. flag offshore support vessels on the U.S. OCS as compared to only 40 or 50 foreign flag offshore support vessels (excluding MODUs). These numbers are preliminary and will require further validation but are thought to be reasonable estimates for the present.

6. Possible Impact of Further Extending U.S. Cabotage Policies on the OCS

The U.S. fleet of 951 offshore service vessels is the largest in the world and is currently more than twice as large as the next largest fleet (the 448 ship combined fleet of the Norwegian and Norwegian International registers). While approximately 500 U.S. flag offshore support vessels may be currently located in U.S. waters, many of the remaining vessels participate in the offshore oil and gas service industry in countries around the world. The U.S. flag vessels operating overseas support hundreds, if not thousands, of jobs for U.S. citizens. The vessels themselves may be completely or partially manned by U.S. citizens. While foreign nationals may be employed on these vessels in certain countries, U.S. law requires that the master of a U.S. documented vessel be a U.S. citizen. Thus, the U.S. fleet of offshore support vessels is spread around the world in all the major oil and gas producing regions employing a substantial number of U.S. citizens as mariners, managers, and maintenance staff. Only the fact that the cabotage laws in many other nations are not as restrictive as those in the United States allows these vessels to operate in this fashion.

Taken together, the U.S. coastwise trade laws (the Jones Act and related legislation) represent one of the most restrictive sets of cabotage laws in the world. With limited exceptions, it establishes a virtual monopoly for U.S. flag vessels with respect to the carriage of cargo and passengers in coastwise trade including on the U.S. OCS. Non-U.S. flag vessels can only participate in a very limited set of highly specialized activities on the U.S. OCS (not involving the carriage of cargo or passengers between points in the U.S.). The cabotage laws of many coastal nations are less restrictive than those of the U.S. providing U.S. based vessel operators the opportunity to maintain many of their vessels under the U.S. flag and still compete for work internationally.

6.1 Further U.S. Cabotage Restrictions Could Restrict Vessel Mobility/Flexibility

There have been discussions in the recent past about further extending U.S. cabotage restrictions on the OCS under the banner of various "Buy American" proposals. Such proposals could have unintended consequences that are contrary to overall U.S. interest. The offshore oil and gas industry ensures efficiency by being able to move MODUs and offshore support vessels to any location worldwide that requires additional equipment to support increased activity levels. The "international" nature of MODUs, including the ability to move in a relatively unrestricted fashion between nations, has been one of the foundations of the offshore oil and gas industry. In like fashion, many nations allow foreign flag offshore support vessels to operate in their coastal waters (although some require the use of their citizens as members of the crew). The ability to quickly move MODUs and offshore support vessels where they are needed most, increases overall efficiency and can act to reduce the overall cost of producing oil and gas reserves. In this way, the "supply" of offshore support vessels can be quickly balanced to meet the demand wherever that demand is located. Increased cabotage restrictions in the U.S. and other nations could act to decrease the ability of offshore support vessels to meet changes in demand at various locations.

6.2 Highly Specialized Vessels May be Unavailable

Heavy-Lift construction and pipelaying are included in the small group of activities that can be conducted by foreign vessels on the U.S. OCS. Large heavy-lift and deepwater pipelaying vessels exist in relatively small numbers and few are documented in the U.S. Large derrick lay barges like the SAIPEM 7000 and J. Ray McDermott's DB-50 have large cranes capable of lifting very heavy platform deck modules. This is a critical activity for installing new oil and gas production facilities in offshore areas around the world. The SAIPEM 7000 can lift up to 7,000 tons and the DB-50 nearly 4,000 tons with their main cranes. Few vessels with these heavy lift capabilities exist in the world and none this large are flagged in the United States. The SAIPEM 7000 is flagged in the Bahamas and the DB-50 in Panama. These specialized vessels frequently travel from one oil and gas producing region to another to perform specific jobs that are scheduled many months or years in advance. An extension of the U.S. cabotage laws to prevent these vessels from working on the U.S. OCS could cause a shortage of this class of vessel and/or lead to inefficient use of any replacement vessels. Similar issues exist with respect to specialized pipelaying vessels and other offshore construction vessels.

6.3 Other Nations Could Take Retaliatory Action

U.S. flag offshore support vessels are working in the offshore waters of many nations around the world in support of the offshore oil and gas E & P industry. As an example, Tidewater Marine is a U.S. based company that operates the largest single fleet of offshore support vessels in the world. In early 2008, the company operated a fleet of 460 vessels and employed 8,400 people worldwide.[10] Tidewater Marine reported that as of March 31, 2008, the company's fleet consisted of 350 foreign flag vessels and 110 U.S. flag vessels.[11] At that time, the company was actively marketing a fleet of 426 offshore support vessels with just 54 or 12.7% located in the United States. The remaining 372 vessels, including upwards of 50 or more U.S. flag vessels, were working in overseas markets such as the Persian Gulf, Egypt, Australia, Brazil, India, Indonesia, Malaysia, Mexico, Trinidad, Venezuela, and West Africa. Tidewater reported that international operations contributed 84% of corporate revenues in 2008.[12] Several other major U.S. based offshore support vessel operators have a similar mix of U.S. and foreign flag vessels in their fleets and generate significant revenue from their international operations. The offshore support vessel industry is very much an international marketplace.

A risk of further extending the U.S. cabotage restrictions concerning foreign flag offshore support vessels operating on the U.S. OCS is that other nations would be more inclined to place similar restrictions on U.S. vessels operating in their coastal waters. While a number of foreign nations have their own cabotage restrictions, a retaliatory expansion of overseas cabotage laws could have a negative impact on a number of U.S. based companies competing in these markets due to a loss of market access for their U.S. flag fleets.

[10] Tidewater Marine, 2008 Annual Report, pp. 9-10.
[11] Tidewater Marine, p.9.
[12] Tidewater Marine, p. 6.

7. Congressional Report on U.S. Cabotage Restrictions

In 1989, the U.S. Congress, Office of Technology Assessment (OTA) evaluated the issue of foreign vessel operations in the U.S. Exclusive Economic Zone (EEZ).[13] The OTA report examined the Virgin Islands trade, offshore lightering, offshore oil and gas exploration and development, and the commercial cruise vessel industry. With respect to the offshore oil exploration and development industry, the study concluded that existing cabotage laws largely exclude foreign registered vessels from engaging in "transportation" related activities on the OCS including carrying passengers or cargo between "points" in the U.S. The report noted, however, that foreign vessels could perform certain non-transportation related offshore work on the U.S. OCS under cabotage restrictions then in effect. These vessels and activities included:

- Drilling Rigs (MODUs)
- Seismic Survey vessels
- Crane Barges
- Pipe Laying Vessels
- Anchor Handling Vessels
- Building Offshore Production Platforms

Regarding the issue of potentially extending non-transportation related cabotage restrictions, the OTA report observed:

> *There could be a substantial impact on the offshore oil and gas industry, however, if cabotage policies were extended to cover all activities in this sector, not just those involving transportation. The fleets of vessels possibly affected could include offshore platforms, mobile drilling rigs, seismic vessels, anchor handling vessels, and others. While many of these are now U.S. owned and operated, there is no requirement for them to be. Many U.S. vessels of these types also operate around the world and in the coastal waters of other nations. The ownership and registry mix of such vessels operating in the U.S. EEZ, as well as the EEZ of other nations, can vary substantially over time, and it is difficult to make an accurate projection of this mix.*[14]

The 1989 OTA report's discussion on seismic survey vessels is helpful in understanding the potential risks of further extending the U.S. cabotage laws on the OCS. The report noted:

> *The benefits of extending cabotage law to geophysical vessels, in the short term, would most likely be some increase in seagoing jobs on those vessels operating in the EEZ. According to IAGC [International Association of Geophysical Contractors] data, only 20 percent of those positions (roughly 600 in all) are occupied by non-U.S. nationals at present. It is unclear how the industry might restructure to comply*

[13] U.S. Congress, Office of Technology Assessment, Competition in Foreign Seas: An Evaluation of Foreign Maritime Activities in the 200-Mile EEZ-Background Paper, OTA-BP-0-55 (Washington, DC: U.S. Government Printing Office, July 1989).

[14] U.S. Congress, Office of Technology Assessment, p. 20.

with cabotage laws because so many operators conduct worldwide operations with significant flexibility of movement of vessels worldwide. Respondents to the IAGC survey indicated that some may split their fleets between U.S. and foreign operations and others might concentrate exclusively on foreign operations.[15]

Overall, the OTA report concluded, "In general, only a few benefits would seem to stem from the changes analyzed..."[16] The OTA report was only able to confidently predict benefits to the U.S. maritime industry by applying new U.S. cabotage restrictions to the passenger vessel industry in the U.S. involving 1-day "cruises to nowhere".[17] Two of the final findings in the OTA report concluded:

Most industry respondents to OTA's inquiries believe that the consequences of extending cabotage laws will take the form of an industry shift to alternatives that just further avoid a commitment to U.S.-built and U.S.-operated vessels. The results, therefore, would tend to be more self-defeating than enhancing for the U.S. maritime industry.[18]

There are some obvious direct costs-to other affected industries and to certain consumers--of extending cabotage laws. There are also some costs that are neither obvious nor certain. All of these must be carefully evaluated in each specific case in order to arrive at a sound policy choice.[19]

8 Conclusion

In 1989, the U.S. Congress Office of Technology Assessment expressed strong reservations about further expanding cabotage restrictions on the U.S. OCS. The logic in that report appears equally valid today as it was 20 years ago. There are predictable risks to extending U.S cabotage restrictions on the OCS, including the possibility of creating a hostile trading environment with other nations that encourages their leaders to retaliate either in kind or in ways more difficult to predict. The current U.S. cabotage laws have allowed the U.S. flag fleet of offshore support vessels to remain the strongest in the world with more than twice as many registered vessels as the next largest fleet (951 U.S. flag vessels to Norway and Norway International's 448).

This report estimates that 90% or more of the offshore support vessels currently working on the OCS are U.S. flag vessels, built in the U.S. and manned with U.S. citizens. Existing U.S. cabotage laws permit a small market for foreign registered vessels engaged in specific (primarily non-transportation related) activities including; mobile drilling units, heavy lift construction, pipelaying, seismic survey and related services). Many of these specialized vessels rely on the ability to transit to other countries to meet the demands of a worldwide market for their services. Extending U.S. cabotage laws to include these activities could result in market inefficiencies and higher costs to the offshore oil and gas industry and ultimately U.S. consumers.

[15] U.S. Congress, Office of Technology Assessment, p. 22.
[16] U.S. Congress, Office of Technology Assessment, p. 29.
[17] U.S. Congress, Office of Technology Assessment, p. 29.
[18] U.S. Congress, Office of Technology Assessment, pp. 29-30.
[19] U.S. Congress, Office of Technology Assessment, p. 30.

APPENDIX A

Bar Chart

Offshore Support Vessels of the World

OFFSHORE SUPPORT VESSELS OF THE WORLD

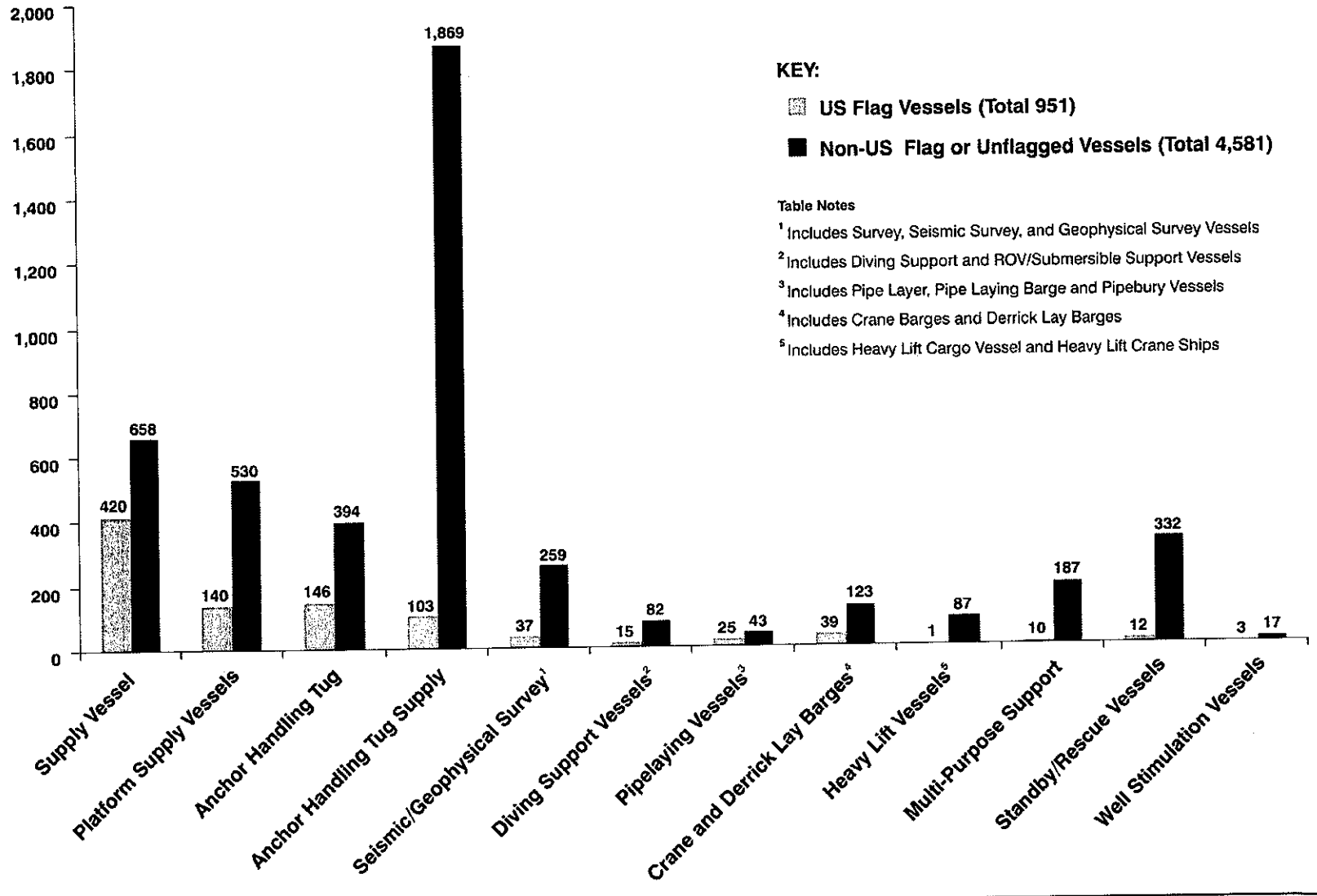


Table Notes

[1] Includes Survey, Seismic Survey, and Geophysical Survey Vessels

[2] Includes Diving Support and ROV/Submersible Support Vessels

[3] Includes Pipe Layer, Pipe Laying Barge and Pipebury Vessels

[4] Includes Crane Barges and Derrick Lay Barges

[5] Includes Heavy Lift Cargo Vessel and Heavy Lift Crane Ships

Source: Clarkson's A-Z Offshore Support Vessels of the World 2008 ed.

Attachment C

United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Washington, DC 20240

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

APR 2 2 2009

Mr. Allen Verret
Executive Director – Offshore Operators Committee
One Lakeway – 3900 Causeway Boulevard, Suite 700
Metarie, Louisiana 70002

Dear Mr. Verret:

The Minerals Management Service (MMS) and the U.S. Coast Guard (USCG) continue to have significant concerns about the safety of Outer Continental Shelf (OCS) lifting operations.

Since February 2006, the MMS has issued seven Safety Alerts to address OCS lifting operations. We have worked cooperatively with industry organizations, operating companies, contractors, and manufacturers to better understand the high number of lifting incidents on the OCS, and to prevent their recurrence. These efforts have included:

1) Participation in both domestic and international lifting conferences;
2) Increased focus on obtaining more accurate lifting incident data through better onsite investigations;
3) Increased distribution of lifting incident, injury, and fatality data to industry through postings on our websites;
4) Better in-house analysis of lifting incident data with subsequent sharing of this information between MMS and USCG, and with industry at conferences and meetings;
5) Participation in standards development work;
6) Formation of the International Regulators Forum lifting work group;
7) Updating MMS regulations in 30 CFR 250.108 and USCG regulations in 46 CFR Subchapter I-A; and
8) Creation of a "standing" Lifting Safety Subcommittee.

Despite these efforts, OCS lifting operations continue to be unacceptably dangerous. There have been twenty-four fatalities from lifting operations since 1995. Over the same timeframe, 269 workers have been injured during these operations. Currently, lifting incidents account for approximately 20 percent of all OCS fatalities and injuries. Just this month, one employee was killed and another injured while lowering a high pressure hose with an air hoist on a fixed facility. In February 2008, two were killed when a crane boom failed on a mobile offshore drilling unit.

We would appreciate feedback regarding your plans for improving the safety of offshore lifting operations, and request your responses by May 22, 2009. In the interim, we intend

to thoroughly evaluate the lifting regulations found in 30 CFR 250.108 and 46 CFR Subchapter I-A to determine if changes to these regulations are needed. We will also consider changes to both agencies' inspection and enforcement policies to help achieve better lifting safety results.

Thank you for your attention to this matter. If you have any questions, do not hesitate to contact us.

Sincerely,

Chris C. Oynes
Associate Director, for Offshore
Energy and Minerals Management

Brian M. Salerno
Rear Admiral, U.S. Coast Guard
Assistant Commandant for Marine,
Safety, Security and Stewardship

United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Washington, DC 20240

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

APR 2 2 2009

Mr. Jack Gerard
Chief Executive Officer – American Petroleum Institute
1220 L Street, Northwest, Suite 900
Washington, D.C. 20005

Dear Mr. Gerard:

The Minerals Management Service (MMS) and the U.S. Coast Guard (USCG) continue to have significant concerns about the safety of Outer Continental Shelf (OCS) lifting operations.

Since February 2006, the MMS has issued seven Safety Alerts to address OCS lifting operations. We have worked cooperatively with industry organizations, operating companies, contractors, and manufacturers to better understand the high number of lifting incidents on the OCS, and to prevent their recurrence. These efforts have included:

1) Participation in both domestic and international lifting conferences;
2) Increased focus on obtaining more accurate lifting incident data through better onsite investigations;
3) Increased distribution of lifting incident, injury, and fatality data to industry through postings on our websites;
4) Better in-house analysis of lifting incident data with subsequent sharing of this information between MMS and USCG, and with industry at conferences and meetings;
5) Participation in standards development work;
6) Formation of the International Regulators Forum lifting work group;
7) Updating MMS regulations in 30 CFR 250.108 and USCG regulations in 46 CFR Subchapter I-A; and
8) Creation of a "standing" Lifting Safety Subcommittee.

Despite these efforts, OCS lifting operations continue to be unacceptably dangerous. There have been twenty-four fatalities from lifting operations since 1995. Over the same timeframe, 269 workers have been injured during these operations. Currently, lifting incidents account for approximately 20 percent of all OCS fatalities and injuries. Just this month, one employee was killed and another injured while lowering a high pressure hose with an air hoist on a fixed facility. In February 2008, two were killed when a crane boom failed on a mobile offshore drilling unit.

We would appreciate feedback regarding your plans for improving the safety of offshore lifting operations, and request your responses by May 22, 2009. In the interim, we intend

to thoroughly evaluate the lifting regulations found in 30 CFR 250.108 and 46 CFR Subchapter I-A to determine if changes to these regulations are needed. We will also consider changes to both agencies' inspection and enforcement policies to help achieve better lifting safety results.

Thank you for your attention to this matter. If you have any questions, do not hesitate to contact us.

Sincerely,

Chris C. Oynes
Associate Director, for Offshore
Energy and Minerals Management

Brian M. Salerno
Rear Admiral, U.S. Coast Guard
Assistant Commandant for Marine,
Safety, Security and Stewardship

United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Washington, DC 20240

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

APR 2 2 2009

Dr. Lee Hunt
President – International Association of Drilling Contractors
10370 Richmond Avenue, Suite 760
Houston, Texas 77042

Dear Dr. Hunt:

The Minerals Management Service (MMS) and the U.S. Coast Guard (USCG) continue to have significant concerns about the safety of Outer Continental Shelf (OCS) lifting operations.

Since February 2006, the MMS has issued seven Safety Alerts to address OCS lifting operations. We have worked cooperatively with industry organizations, operating companies, contractors, and manufacturers to better understand the high number of lifting incidents on the OCS, and to prevent their recurrence. These efforts have included:

1) Participation in both domestic and international lifting conferences;
2) Increased focus on obtaining more accurate lifting incident data through better onsite investigations;
3) Increased distribution of lifting incident, injury, and fatality data to industry through postings on our websites;
4) Better in-house analysis of lifting incident data with subsequent sharing of this information between MMS and USCG, and with industry at conferences and meetings;
5) Participation in standards development work;
6) Formation of the International Regulators Forum lifting work group;
7) Updating MMS regulations in 30 CFR 250.108 and USCG regulations in 46 CFR Subchapter I-A; and
8) Creation of a "standing" Lifting Safety Subcommittee.

Despite these efforts, OCS lifting operations continue to be unacceptably dangerous. There have been twenty-four fatalities from lifting operations since 1995. Over the same timeframe, 269 workers have been injured during these operations. Currently, lifting incidents account for approximately 20 percent of all OCS fatalities and injuries. Just this month, one employee was killed and another injured while lowering a high pressure hose with an air hoist on a fixed facility. In February 2008, two were killed when a crane boom failed on a mobile offshore drilling unit.

We would appreciate feedback regarding your plans for improving the safety of offshore lifting operations, and request your responses by May 22, 2009. In the interim, we intend

to thoroughly evaluate the lifting regulations found in 30 CFR 250.108 and 46 CFR Subchapter I-A to determine if changes to these regulations are needed. We will also consider changes to both agencies' inspection and enforcement policies to help achieve better lifting safety results.

Thank you for your attention to this matter. If you have any questions, do not hesitate to contact us.

Sincerely,

Chris C. Oynes
Associate Director, for Offshore
Energy and Minerals Management

Brian M. Salerno
Rear Admiral, U.S. Coast Guard
Assistant Commandant for Marine,
Safety, Security and Stewardship

CSG

CONSULTATIVE SHIPPING GROUP

71

14 August 2009

US Customs and Border Protection
Office of International Trade, Regulations, and Rulings
799 9th Street, NW
Mint Annex
Washington, DC 20229
Attn: Trade and Commercial Regulations Branch

I am writing in my capacity as Chairman of the Consultative Shipping Group (CSG), which comprises the maritime administrations of the governments of Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Republic of Korea, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, Sweden and the United Kingdom. The Commission of the European Communities also participates in the activities of the Group.

I wish to highlight concerns regarding proposed changes to longstanding interpretations of the application of the Jones Act to the transportation of certain merchandise and specialized equipment between coastwise points, as contained in Customs Bulletin and Decisions, Volume 43, No. 28, 17 July 2009.

The proposed changes seem to indicate a reversal of more than 20 rulings that, collectively, constitute a long standing established precedent on which the international shipping community and the offshore oil and gas industry has relied for decades. Such a move would have a dramatic impact on foreign flag vessels, including vessels from a number of CSG countries, which would be barred from carrying specialised equipment for deepwater offshore exploration and development in the Gulf of Mexico and other US offshore areas. The denial of market access would put in immediate jeopardy their considerable investment over decades in resources and equipment to assist in the conduct of the highly specialized operations, such as subsea installation and construction support and maintenance of seafloor facilities, and would raise legal issues stemming from the required renegotiation of longstanding contractual arrangements.

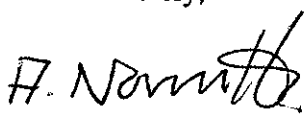
It is my understanding that the proposed rule could seriously impact US oil and gas operations given the reliance on vessels specifically developed for this market which the US shipping industry cannot wholly provide. These potentially vast market disruptions would come at a most inauspicious time given the considerable burdens confronting the maritime sector, as well as on oil and gas operations, due to the present economic climate.

I am also not least concerned that the proposed changes, it seems, would constitute a regrettable derogation from the shared commitment by members of the OECD and the World Trade Organization to the broad principles of free and fair competition, open market access, and non-discrimination. Such principles have served trading nations well by fostering greater affluence and prosperity and are of particular importance to an inherently transnational and global sector as the maritime. Actions, therefore, that run counter to an open trade system should be taken with the utmost prudence and restraint.

Of particular concern is the truncated comment period provided by the notice. Sweeping regulatory changes that have global impact require careful consideration. Yet the 30-day comment period provides only a small window to adequately develop comprehensive and informative responses. Furthermore, the time period falls during late-summer when many key parties are unavailable. Because of the very short notice period consultations with CSG maritime administrations are still ongoing.

The CSG respectfully requests that the US Customs Border Protection extends the comment period from 30 to at least 90 days, with comments due 16 October. The added time would allow for more thorough examination by stakeholders impacted directly by the proposed rule, thus providing US Customs Border Protection with more thorough and comprehensive information before taking a final decision on the issue, so that the potentially substantial adverse impacts of the proposed changes can be fully considered.

Yours sincerely,



Andreas Nordseth
CSG Chairman
E-mail an@dma.dk

72

August 14, 2009

Ms. Sandra L. Bell
U.S. Customs and Border Protection
Office of International trade
Regulations and Rulings
Attention: Trade and Commercial Regulations Branch
799 Ninth Street, N.W., Mint Annex
Washington, D.C. 20229

Re: Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points

Dear Ms. Bell:

Cal Dive International, Inc. ("Cal Dive") takes this opportunity to comment on the Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points published on July 17, 2009 (the "Proposed Ruling"). U.S. Customs and Border Protection ("CBP") has previously been provided with comments, including those submitted by the American Petroleum Institute ("API") and the International Marine Contractors Association ("IMCA"), which address substantive and procedural legal issues and the potential adverse effect of the notice on offshore oil and gas production. Cal Dive agrees with API and IMCA and generally adopts those comments herein by reference. CBP is proposing to hastily overturn over 30 years of precedent that industry has relied on by investing millions of dollars on the necessary resources to conduct oil and gas operations simply based on the fact that one trade organization has averred that CBP made a mistake on one recent ruling.

Due to the dynamic nature of the offshore industry, it has become standard practice for owners and operators to seek rulings to confirm that contemplated operations are approved by CBP so as to avoid severe penalties that could be assessed should CBP make a determination after the fact that a particular operation was prohibited by the Jones Act. Over the years, CBP has issued a vast number of coastwise trade rulings, which constitute a sophisticated body of precedent on which industry has relied for decades. Cal Dive obtained a Ruling Letter (HQ 113838) from CBP in 1997 and has conducted its operations and planned its acquisitions in substantial reliance on that Ruling. As required on page 56 of the Proposed Ruling, Cal Dive hereby notifies CBP that HQ 11838 is one of the Ruling Letters "modified" by the Proposed

2500 CityWest Boulevard, Suite 2200 • Houston, TX 77042 • Phone (713) 361-2600 • Fax (713) 361-2690

Ruling. Other than listing HQ 11838 as "modified", CBP provides no further guidance in the Proposed Ruling to Cal Dive on any change to the substantive holdings of the original Ruling Letter.

If CBP decides to adopt the Proposed Ruling as written, it would result in at best, lack of clarity regarding the legality of long-standing operations and practices and, at worst, a complete paradigm shift on how the oil and gas industry operates offshore. Without considerably more clarity, the industry would have to err on the side of caution to avoid violations that result in fines and forfeiture of assets. Thus, regardless of CBP's intent, the Proposed Ruling, as written, could have far-reaching and highly damaging effects on the offshore oil and gas industry and, ultimately, the U.S. economy and national security interests. Essentially, it could significantly curtail industry's ability to explore and produce oil and gas in the Gulf of Mexico, increasing reliance on imported oil and exacerbating the U.S. trade imbalance.

In summary, and as discussed in more detail by API and IMCA, CBP got it mostly right in its interpretative rulings in the last 30 years primarily based on a 1976 ruling, which recognized the evolving technology necessary to conduct oil and gas exploration and development on the Outer Continental Shelf ("OCS") in the deeper waters of the Gulf of Mexico. CBP rightly determined that one of its recent rulings involving the transportation and installation of a large system offshore was wrongly decided and revoked it. However, that improper decision does not somehow make invalid 30 plus years of precedent that was established following the 1976 ruling. In short, the revoked ruling should remain revoked and the other rulings following the 1976 ruling should remain in place. Finally, it is unnecessary for CBP to take the extraordinary measures described in the Proposed Ruling after affording the industry only 30 days to comment, particularly in view of the substantial impact the modifications will have on industry. Accordingly, we urge CBP to: (1) provide additional time to comment on this proposal, and (2) revise its proposal consistent with the following comments.

Cal Dive will not readdress those legal and procedural issues raised by API and IMCA in detail in this comment but will refer to those arguments only as necessary to focus on how the Proposed Ruling will affect the day to day operations of Cal Dive in the U.S. Gulf of Mexico, which are vital for the exploration, development, and production of oil and gas resources on the OCS.

Background Information on Cal Dive

Cal Dive is a U.S. company, incorporated in Delaware, headquartered in Houston, Texas and is publicly traded on the New York Stock Exchange under the ticker symbol "DVR". Cal Dive provides subsea support for the oil and gas industry, including such services as surface and saturation diving, derrick, pipelay, pipe burial, subsea construction, inspection, maintenance and repair and the decommissioning of offshore production and pipeline infrastructure on the OCS. Cal Dive is currently the market leader in the diving support business. It has land-based facilities in Port Arthur and Sabine Texas, and Broussard, New Orleans, Lafayette and Fourchon,

Louisiana. These shore-based facilities employ approximately 300 U.S. workers, which support the company's fleet of 31 U.S. and foreign flagged vessels, of which 20 are U.S. flagged and eight are foreign flagged. Approximately 1,500 U.S. workers are employed on the 28 vessels in Cal Dive's fleet operating in U.S. waters.

Cal Dive's growth into one of the largest marine diving contractors in the world was enhanced greatly by the acquisition of certain assets from Acergy (formerly Stolt Offshore) and Torch, Inc. in 2005, Fraser Diving in 2006 and Horizon Offshore in 2007. The acquisition of these assets, which at the time was a significant financial undertaking for Cal Dive, was based in large part on the anticipated need for the type of equipment acquired, particularly in the U.S. Gulf of Mexico, and the ability to utilize this equipment in furtherance of Cal Dive's operations in the U.S. Gulf based on nearly 30 years of precedent established through Customs ruling letters allowing such vessels to engage in pipelay installation and diving operations. In particular, Cal Dive's acquired certain assets in reliance on a Ruling Letter Cal Dive received on February 25, 1997 concerning a myriad of operations contemplated offshore. (HQ 11838.)

Cal Dive's Foreign Flagged Vessels

Cal Dive currently owns and operates a fleet of 31 vessels, made up of 21 surface and saturation diving support vessels and 10 construction barges. Cal Dive also owns an advance burial plow and ten portable saturation diving systems. All but three of these vessels are marketed in and work in U.S. waters.

Of the 28 vessels working in U.S. waters, 20 are U.S. flagged. The eight foreign flagged vessels in Cal Dive's fleet are not supply vessels but are considered "specialty" vessels. There are very few, if any, U.S. flagged vessels capable of performing the type of work these vessels perform. These vessels are: BRAZOS, CANYON, LONE STAR, M/V KESTREL, M/V MYSTIC VIKING, M/V UNCLE JOHN, M/V AMERICAN CONSTITUTION and M/V MIDNIGHT STAR.

The LONE STAR, a Vanuatu flagged vessel built in 1961, is a pipelay barge which performs pipelay, the repair of existing pipelines, as well as certain installation work. The LONE STAR is deployed in U.S. and foreign waters, having worked in Mexico and Colombia. There are no more than three or four U.S. flagged vessels with the capability of the LONE STAR. Two of those vessels are owned by Global Industries. Reducing the ability of the LONE STAR to perform work will have a detrimental impact on competition and the industry's overall capabilities to perform work offshore. All crewmembers are U.S. workers.

The BRAZOS, a Vanuatu flagged vessel built in 1978, is a pipelay barge which is capable of performing pipelay and repair work and other installation work. The BRAZOS has performed work only intermittently since returning from West Africa in 2005. All crewmembers are U.S. workers.