



August 11, 2009

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

Attention: Trade and Commercial Regulations Branch

To Whom It May Concern:

Thank you for the opportunity to submit comments concerning the July 17 proposed modification notice concerning the application of the Jones Act to the carriage of merchandise to offshore oil and gas facilities. I am writing in strong support of the your proposal in order to ensure that U.S. coastwise vessels carry merchandise to domestic offshore oil and gas points, as intended by Congress.

Tidewater owns and operates over 450 energy-support vessels. Our role as an offshore energy service company is an integral part of the process of searching for, developing, and producing domestic crude oil and natural gas. We now have four locations in the Gulf of Mexico – three based in Louisiana and one in Texas – and many more throughout the world.

As a company with approximately fifty years of experience in the Gulf of Mexico, I write to share with you our perspective. Our business began in 1955, when a New Orleans family pioneered the development of the first offshore service vessel specifically made to support the new and growing offshore oil and gas industry. The "Ebb Tide" was the first oil and gas service vessel. Tidewater Marine Service, Inc., a public company, opened the next year in the Gulf of Mexico. Since 2000, we have invested hundreds of millions of dollars in a new construction program and acquisition of vessels to expand our fleet and improve our service.

We now have anchor handling towing supply vessels, towing supply and supply vessels, specialty boats, and crew boats, among a number of others to transport people, equipment, and supplies between mainland locations and offshore installations. We also tow and position mobile drilling rigs, assist in a variety of offshore construction projects, and aid in a number of specialty services.

Tidewater takes a tremendous amount of pride in our employees. In 2007, when we generated the highest profits in company history, we also achieved the best safety performance in our history. We certainly have a great deal to offer the offshore oil and gas industry, and look forward to continuing to do so.

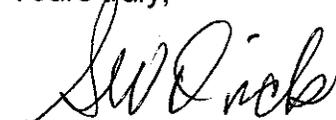
**TIDEWATER INC.**

Pan-American Life Center  
601 Poydras Street, Suite 1900  
New Orleans, Louisiana 70130-6040  
Telephone: (504) 568-1010

I urge your agency to adopt the pending proposal to ensure that cargo transported to offshore facilities is carried by U.S.-flag vessels. I believe that allowing any Jones Act coastwise trade work to continue to be done by foreign-flag vessels, with foreign workers, runs contrary to the intent of the Jones Act. We need your agency to act immediately to help support American companies, and our workers, as we work to revitalize the U.S. economy. Moreover, we need your agency to lay down clear rules so that we will have the confidence to continue investing in our fleet for the benefit of the oil and gas industry.

Thank you in advance for considering our views.

Yours truly,

A handwritten signature in black ink, appearing to read "S.W. Dick", written in a cursive style.

Stephen W. Dick  
Executive Vice President  
Tidewater Inc.



# LOUISIANA MID-CONTINENT OIL AND GAS ASSOCIATION

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730 NORTH BOULEVARD, BATON ROUGE, LA 70802  
TELEPHONE (225) 387-3205 FAX (225) 344-5502

August 11, 2009

U. S. Customs and Border Protection  
Office of International Trade, Regulations and Rulings  
**ATTN: Trade and Commercial Regulations Branch**  
799 9<sup>th</sup> Street, N. W., Mint Annex  
Washington, D.C. 20229

**RE: Custom and Border Protection (CBP) proposed modifications and revocations of previous rulings in reference to the "Jones Act," as it relates to coastwise laws to certain merchandise and vessel equipment.**

The Louisiana Mid-Continent Oil and Gas Association (LMOGA) representing the integrated and major independent oil and gas companies operating in the Gulf of Mexico respectfully request a 60-day comment period extension to allow adequate public input in response to the July 17, 2009, notice published in the Customs Bulletin as referenced above. With the comment period expiring on August 17, 2009, the proposed modifications to decades of previous Customs' rulings, under existing law, could go into effect by the end 2009.

As noted in the Custom Bulletin, July 17, 2009, CBP intends to limit or redefine its interpretation of the terms: "transportation of merchandise," "vessel equipment," "materials and tools," "foreseen and unforeseen repairs," "on or from that vessel," "pipelaying," etc. Any modifications or revocations of ruling letters could have broad implications and severely impact the offshore oil and gas industry and our member companies.

LMOGA fully supports the Jones Act which states no vessel may transport cargo between two U.S. points unless they are owned by Americans, crewed by Americans, and built in America. As a trade association based in the state of Louisiana, LMOGA proudly promotes American mariners, American shipyards, and American offshore supply companies. These service industries are vital to the offshore oil and gas industry and critical to the U. S. economy.

We respectfully submit the current proposed modifications and revocations of previous rulings are complicated issues requiring more input, discussion and time before any implementation.

Thank you for your consideration to our thoughts and views. Please call on us when we can provide additional information to you.

Sincerely,



Chris John  
President



Enterprise Products™

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ENTERPRISE PRODUCTS PARTNERS L.P.  
ENTERPRISE PRODUCTS OPERATING LLC

ENTERPRISE PRODUCTS GP, LLC, GENERAL PARTNER  
ENTERPRISE PRODUCTS OLPGP, INC., SOLE MANAGER

August 12, 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 9<sup>th</sup> Street, N.W., Mint Annex  
Washington, D.C. 20229

Dear Ms. Bell:

Enterprise Products Operating LLC ("Enterprise") appreciates the opportunity to provide these comments to you regarding the U.S. Customs & Border Protection (CBP) July 17, 2009 Proposed Modifications & Revocations of Ruling Letters Relating to the Customs Position on the Application of the Jones Act (CBP Proposal).

Enterprise is a U.S.-based company with approximately 36,000 miles of crude oil, natural gas and natural gas liquids pipelines. We operate approximately 2,500 miles of offshore pipelines and 17 platforms in the offshore Gulf of Mexico. Enterprise is primarily involved in providing transportation services with a capacity of 8 Bcf/day of natural gas, and 1 MBbls/day of crude and liquids from the offshore Gulf of Mexico to US domestic markets. We have approximately 200 employees and contractors that operate and maintain these offshore facilities, and who are totally dependent on water borne supplies and equipment

Enterprise has attempted to understand and anticipate the business impacts the CBP Proposal will have as it undoes decades of Custom's policy. The short time provided for comment on this proposal has not allowed us time to fully evaluate the possible impact to our operations and maintenance of our existing facilities and development of future projects and expansions. At a minimum, we believe that the CBP Proposal deserves more time to be fully evaluated for impacts and adjustments, and we would expect if changes do move forward, the implementation would occur in staged schedules that reduce shocks of inadequate marine resources or a halt in offshore energy development.

Enterprise has extensive offshore pipeline infrastructure which has been very expensive to develop, expand, operate and maintain. In the last 10 years, Enterprise has spent in excess of \$5 Billion on offshore infrastructure to help meet the need to develop energy supplies in the Gulf of Mexico to reach growing US domestic energy demands. Potential development is always dependent upon a balance of demand and supply, and, in pipeline transportation, it is dependent upon a balance of supply needing access to

markets and the significant cost and timelines to build and expand the supply to the best market access points to reach US consumers and manufacturers.

At this time of economic uncertainty, many energy projects are on a delayed or suspended schedule due to market conditions and costs, such that the CBP Proposal appears to have exacerbated negative impacts on future energy projects and more importantly on existing operations and contracts that have been based on long standing customs policies in this area. We believe this rule change produces ambiguities which would create unacceptable delays in executing offshore projects.

Further, it should be noted that foreign flag vessels, many of which are owned or leased and operated by US companies, are currently being utilized to support the efforts of the offshore industry primarily due to the lack of US flag vessels of comparable specification and capability. Enterprise owns and operates the world's deepest gas pipeline facility in 8000 feet of water. This facility currently transports over 12% of the natural gas produced in the Gulf of Mexico (which equates to approximately 2% of the US natural gas daily supply). In the event of an emergency, there are currently no US flag vessels capable of supporting a repair intervention for the facility, should it be needed.

Maintaining and operating the expansive offshore Gulf of Mexico energy infrastructure is a 24 hour/7 day a week, real-time operation of our industry. The process of recovery following disruptions from hurricanes is a massive human undertaking and in many cases must use all available marine personnel to inspect, repair, re-man, rebuild and re-commence vital energy flows to a waiting US energy market that is to some degree running on batteries (storage) for a large portion of its daily energy and fuel needs.

For this reason, Enterprise respectfully requests that the CBP extend its comment period on the CBP Proposal, from August 16, 2009 to October 15, 2009 to allow for more time to provide you with meaningful feedback.

We also ask the CBP to thoughtfully consider those filed comments and impacts of the CBP Proposal in developing an implementation schedule which is fair, reasonable and continues to support energy production and development for the US economy. Please forward any response or questions to my attention or to the attention of Delbert Fore, Director, Government Affairs.

Sincerely,



Dennis A. Jahde

Vice President, Offshore Engineering

WHITEFORD, TAYLOR & PRESTON L.L.P.

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August 17, 2009

VIA MESSENGER

U.S. Customs & Border Protection  
Office of International Trade  
Regulations and Rulings  
Trade and Commercial Regulations Branch  
799 9th Street, N.W., Mint Annex  
Washington, D.C. 20229

PUBLIC VERSION

For the attention of Sandra L. Bell

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:

This letter is submitted on behalf of our client, [ ] and its members<sup>1</sup>  
(collectively, "the Company" [ ]). The Company is [

]. The address of the Company is: [

]. The Company opposes the recent proposal of U.S. Customs and Border  
Protection ("CBP") to modify and revoke certain ruling letters.<sup>2</sup> This letter responds to  
the Notice and request for comments. As the Notice requires that any comments to CBP  
must be received on or before August 16, 2009, this letter is timely.

<sup>1</sup> [

]

<sup>2</sup> See 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, Customs Bulletins & Decisions, Vol. 43, No. 28 (July 17, 2009) at 54 -  
118 ("the Notice").

To avoid repeating comments that are being submitted simultaneously to CBP under separate cover, the Company adopts and incorporates in this submission by reference the facts and statements contained in the letter submitted on behalf of a large part of the U.S. offshore oil & gas industry ("Offshore Industry Letter").<sup>3</sup> The comments here expand on those presented in the Offshore Industry Letter and, to the extent applicable, focus specifically on the Company.

#### REQUEST FOR CONFIDENTIAL TREATMENT

The Company requests confidential treatment for the name of the Company, any Company projects, vessels, or prior ruling letters<sup>4</sup> or associated facts mentioned herein. See 19 C.F.R. 177.2(b)(2)(iv)(7). To assist in your efforts to produce a public summary, confidential information listed in this correspondence is contained within brackets.

We confirm that client contracts require that the Company keep confidential all aspects of the scope and content of the work for which the Company requested ruling letters referenced herein. The Company is contractually bound to honor the terms of the underlying contracts, which include broad confidentiality provisions. Not granting confidential treatment could materially prejudice the competitive position of the Company when bidding for projects affecting U.S. territorial waters and could risk breaching the confidentiality provisions to which the Company is bound, resulting in liability.

As a [

], the competitive position of the Company would also be materially prejudiced should competitors understand the [ ] scope of the Company's capabilities to engage in the types of activities [ ] and concerning the [ ] explained in the prior ruling letters issued to the Company and to the extent such information is disclosed herein.

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<sup>3</sup> Letter dated August 13, 2009, and submitted on behalf of the Association of Diving Contractors International ("ADCI"), the American Petroleum Institute ("API"), the International Association of Drilling Contractors ("IADC"), the International Association of Geophysical Contractors ("IAGC"), the International Marine Contractors Association ("IMCA"), the International Association of Oil & Gas Producers ("OGP"), the Offshore Operators Committee ("OOC"), and the U.S. Chamber of Commerce ("USCC").

<sup>4</sup> On at least three prior occasions, for example, the Company has [ ]  
]. See, e.g., [

].

Disclosing the way the Company works and how it performs its contracted work discloses policies that the Company works hard to keep confidential. Internal company policy requires [ ], and the Company also requires [ ]. Disclosing the name of the Company (as well as any of the other information for which confidential treatment is requested) in a public file [ ], violate [ ], and could materially prejudice the Company's competitive position when bidding for projects affecting U.S. territorial waters.

#### MERCHANDISE MEANS GOODS THAT ARE UNLADEN, NOT VESSEL EQUIPMENT

The Company agrees with the positions taken in the Offshore Industry Letter and, to avoid repetition, focuses its comments here on additional arguments that may assist CBP in determining whether to proceed with the modifications proposed in the Notice. The Notice claims that CBP "intends to modify its position" regarding two issues, namely "which merchandise may be transported" and "how {CBP} determines what constitutes 'vessel equipment'" for purposes of the Jones Act.<sup>5</sup>

Both issues, however, turn on the interpretation of "merchandise" as that term is used in the statute. Without detracting from nor neglecting the solid comments and arguments advanced in the Offshore Industry Letter, the Company respectfully submits that the proposed modification by CBP misreads the text and context of the governing regulation,<sup>6</sup> the statute on which such regulation is based,<sup>7</sup> and prior precedent (including case law and attorney general opinions). Worse, given the length of time that CBP has administered the rules it now proposes to reject, CBP risks arbitrarily substituting its own interpretation for that of Congress.

The statute provides, in general, that:<sup>8</sup>

a vessel may not provide any part of the transportation of merchandise ... between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel {is coastwise qualified}.

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<sup>5</sup> Notice at 54-55.

<sup>6</sup> 19 C.F.R. § 4.80(a) (Vessels entitled to engage in coastwise trade).

<sup>7</sup> 46 U.S.C. § 55102(b) (Transportation of Merchandise).

<sup>8</sup> *Id.* (emphasis added).

Generally the issues central to an interpretation of the statute are whether the vessel is coastwise qualified, whether it is transporting "merchandise," and whether such transportation is "between points in the United States" (directly or via an intervening foreign port).<sup>9</sup>

#### What the Notice Does Not Cover: Vessels and Coastwise Points

The Notice does not affect whether vessels are coastwise qualified<sup>10</sup> nor what constitutes traveling between coastwise points (or what constitutes a coastwise point). For purposes of these comments, the Company understands that existing CBP precedent regarding these issues is unaffected by the Notice, but please advise if our understanding is not correct. For example, even if the proposed modifications in the Notice are implemented, the coastwise laws will continue to not apply to the transportation of merchandise from a U.S. point to a non-U.S. port.<sup>11</sup> Similarly, cargo loaded outside U.S. jurisdiction, *e.g.*, at foreign ports or from offshore production platforms located in foreign or international waters,<sup>12</sup> will be considered not to be transported coastwise within the meaning of the Jones Act because the point of loading is not a coastwise point.<sup>13</sup> (In a prior ruling provided to the Company, CBP confirmed that merchandise may be loaded in [ ] and installed ultimately [ ]<sup>14</sup> - the Company understands that ruling letter stands and is unaffected by the Notice.)

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<sup>9</sup> The term "between points in the United States" as used here is intended to include all coastwise points as that term has been interpreted consistently by CBP. *See, e.g.*, 46 U.S.C. § 55101(b) (coastwise laws do not apply to the American Samoa and, except as provided elsewhere or by Presidential Proclamation, to the Northern Mariana Islands, Canton Island, or the Virgin Islands).

<sup>10</sup> This is not at issue here - the Coast Guard, not CBP, has administrative responsibility for certifying vessels for the purposes of the Jones Act. *See, e.g.*, 46 C.F.R. § 67.97 (determining United States built). What constitutes a "vessel" is also not at issue in the Notice. *See, e.g.*, CBP Ruling Letter 226989, dated August 2, 1996 (determining that the Punaise, an unmanned machine that pumps soil from sea/river bottom, does not constitute a "vessel"); *see also*, CBP Ruling Letter 110228, dated July 14, 1989, published as CBP Decision 89-115 (assessing statutory and case law interpretation of "vessel").

<sup>11</sup> *See, e.g.*, CBP Ruling Letter 113405, dated April 19, 1995.

<sup>12</sup> This does *not* include offshore production platforms attached to the OCS for purposes of exploration, development or production, because those platforms are considered coastwise points.

<sup>13</sup> CBP Ruling Letter 115439, dated August 9, 2001.

<sup>14</sup> *See* CBP Ruling Letter [ ], dated [ ] (issued to [ ] regarding large pieces of equipment, including [ ], manufactured in [ ] and loaded on the [ ] for transport to and ultimately installation on two jackets that constitute coastwise points).

### **What the Notice Does Cover: Rejecting the "Mission of the Vessel" Test**

The Notice does warn, however, that CBP plans to interpret strictly T.D. 78-387 (Oct. 7, 1976) ("**the 1976 Ruling**"). If implemented, CBP would permit a foreign flag vessel to lay pipe only because it is paid out, not landed, and only activity *incidental* to such pipe-laying operations would be permitted. With limited exceptions,<sup>15</sup> the proposed modifications would prohibit foreign flag vessels from transporting or installing pipe when facts depart from this narrow principle, claiming such activity constitutes the transportation of merchandise between two coastwise points (rejecting the "Mission of the Vessel" test, among other things). Second, reviewing T.D. 49815(4) (Mar. 13, 1939) ("**the 1939 Ruling**"), CBP would limit the definition of vessel equipment to articles necessary and appropriate for the navigation, operation, or maintenance of the vessel *itself* and the safety and comfort of the persons on board, as opposed to necessary and appropriate for a vessel to engage in a particular activity (also rejecting the "Mission of the Vessel" test).

### **Merchandise Is Material Not Necessary To A Vessel's Mission**

Broadly stated, the "Mission of the Vessel" test from the 1976 Ruling provides, among other things, that materials and tools necessary for the accomplishment of the mission of the vessel are not considered merchandise and, thus, their transportation does not implicate the coastwise laws. The test includes an assessment of whether the materials are of *de minimus* value or whether they are necessary to accomplish unforeseen repairs and usually carried aboard the vessel as supplies. This dovetails with the 1939 Ruling defining vessel equipment (and carving out what material CBP does not consider constitutes "merchandise" for purposes of the statute). Determining that material necessary for the accomplishment of the mission of the vessel does not constitute "merchandise" is in accord with the text, context, and history of Section 55102 and a similar, predecessor statute.

### **Sections 55103 and 55102 Are Distinct Provisions with Distinct Meanings**

CBP may not have anticipated the strong criticism against the modifications proposed in the Notice, particularly given the proposed (and ultimately issued) revocation order issued last year. In that order, CBP determined that a terminal operations manager - *i.e.*, a shore side employee - is considered a "passenger" for purposes of the coastwise laws, making transportation of that employee in a non-coastwise qualified vessel between two coastwise points a violation of the Jones Act.<sup>16</sup> CBP stated the following: "CBP, in precise concert with the protectionist nature of 19 U.S.C. § 55103, imposed a circumscribed construction as to the meaning of the term "passenger" under the U.S.

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<sup>15</sup> Such as dive operations to repair pipe and underwater portions of a drilling platform.

<sup>16</sup> CBP Ruling Letter 019524, dated February 27, 2008 (proposed revocation) and CBP Ruling Letter H019524, dated April 4, 2008 (revoking prior order). See 19 C.F.R. § 4.50(b) (defining passenger).

coastwise laws."<sup>17</sup> The CBP went on to hold: "Under this strict interpretation of the term 'passenger,' persons transported on a vessel are considered passengers unless they are 'directly and substantially' connected with the operation, navigation, ownership or business of *that vessel itself*."<sup>18</sup> Although CBP focuses on "that vessel itself" in the context of *passengers*,<sup>19</sup> the proposal in the Notice to define equipment as articles necessary and appropriate only to "the vessel itself" is misplaced in the context of *merchandise*.

The "Direct and Substantial" Test (of Section 55103)  
Is Not Identical To the "Mission of the Vessel" Test (of Section 55102)

The Direct and Substantial test has been applied consistently by CBP for years.<sup>20</sup> And such interpretation is consistent with the governing regulation of what constitutes a "passenger." 19 C.F.R. § 4.50(b) defines a passenger as "any person carried on a vessel who is not connected with the operation of *such vessel* ..." (emphasis added). The word "such" makes it clear that the person must be connected with the vessel itself. There is no corresponding read afforded by the merchandise statute.

A coastwise transportation of merchandise takes place when merchandise laden at a point embraced within the coastwise laws, *i.e.*, a coastwise point, is unladen at another coastwise point.<sup>21</sup> Congress specifically articulated in paragraph (a)(2) of 46 U.S.C. § 55102 that the definition of "merchandise" includes "valueless" material. Pursuant to 19 U.S.C. § 1401a, value is a merely a tool to determine "how imported merchandise shall be appraised[.]"

Merchandise Has a Duty Context

But CBP defers ultimately to the definition of "merchandise" contained in Title 19 of the U.S. Code, which concerns customs duties.<sup>22</sup> The relevant statute - 19 U.S.C. § 1401(c) - defines "merchandise" as, among other things, "goods, wares, and chattels of every description[.]" This definition is grounded in the concept of a dutiable good clearing customs. This also comports with the plain meaning of the word "merchandise," which

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<sup>17</sup> CBP Ruling Letter 019524, dated February 27, 2008.

<sup>18</sup> *Id.* (emphasis original).

<sup>19</sup> 46 U.S.C. § 55103. The Company takes no position here on whether CBP Ruling Letter 019524, dated February 27, 2008, is correct.

<sup>20</sup> See CBP Ruling Letters 116721 and 116659, dated September 25, 2006 and May 19, 2006, respectively (referencing the "direct and substantial" test).

<sup>21</sup> See, *e.g.*, CBP Ruling Letter 115940, dated April 17, 2003. See also, 46 U.S.C. § 55102 and 19 C.F.R. § 4.80b (both regarding coastwise transportation of merchandise).

<sup>22</sup> See, *e.g.*, CBP Ruling Letter H028460 dated July 1, 2008.

is defined as "goods for sale"<sup>23</sup> or "the commodities or goods that are bought and sold in business : WARES."<sup>24</sup>

Inserting the normal understanding of the term merchandise – goods for sale – into the statute makes the prohibition at issue here clear: a vessel may not transport goods for sale (even if such goods are valueless) between points in the United States unless such vessel is coastwise qualified. There is no suggestion that the statute (or regulation) requires CBP to link the vessel to the definition of merchandise, as is done in the passenger statute. To readily understand what constitutes merchandise, CBP developed guidance articulating what it is not – viz. equipment of a vessel or items not necessary to the mission of the vessel.

The understanding that "merchandise" should be read in the context of dutiable goods for sale is also supported in case law. For instance, the U.S. Court of Appeals for the D.C. Circuit found that "In {Section 55102} Congress aimed at ensuring domestic monopoly for the coastwise shipment of *goods*."<sup>25</sup> And this interpretation that the concept of merchandise is grounded in some semblance to a dutiable good extends back over a century to Attorney General opinions issued just after passage of the Jones Act<sup>26</sup> (and even to one such opinion interpreting what appears to be the predecessor to what is now Section 55102 – a key interpretation of which focused on whether goods were unloaded).<sup>27</sup>

#### Duty Concept Influences Concept of Unlading

Unloading and the concept that a good is dutiable are key factors underpinning the merchandise statute and its predecessor over a hundred years ago, and they are relevant today, as well. CBP recognizes as much by consistently holding that laying of pipe is not within the coastwise trade and may be performed by a foreign, non-coastwise qualified vessel.<sup>28</sup> And the Notice does not propose modification of this rule, because

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<sup>23</sup> Oxford English Dictionary at << [http://www.askoxford.com/concise\\_oed/merchandise?view=uk](http://www.askoxford.com/concise_oed/merchandise?view=uk) >> (last accessed Aug. 12, 2009).

<sup>24</sup> Merriam-Webster Online at << <http://www.merriam-webster.com/dictionary/merchandise> >> (last accessed Aug. 12, 2009). See also, American Heritage Dictionary at << <http://dictionary.reference.com/browse/merchandise> >> (last accessed Aug. 12, 2009) ("Goods bought and sold in business; commercial wares").

<sup>25</sup> *Autolog Corp., et. al. v. Regan*, 731 F.2d 25 (D.C.Cir. 1984) (emphasis original) (ruling that automobiles are personal property akin to luggage - viz. they are not goods for sale subject to the Jones Act).

<sup>26</sup> See 32 Op. Att'y Gen. 350 (Nov. 20, 1920) (Merchant Marine Act – Transportation of Fish Between Points in the United States via a Foreign Port); and 34 Op. Att'y Gen. 355 (Dec. 31, 1924) (Transportation of American Grain in Foreign Vessels Between American Ports via a Canadian Port).

<sup>27</sup> 29 Op. Att'y Gen. 575 (Nov. 20, 1912) (Foreign Tugboat Towing Logs Into Different Ports of the United States).

<sup>28</sup> See CBP Ruling Letter 103668, dated December 12, 1978, published as CBP Decision 79-321.

CBP recognizes that the paying out of pipe, cable, flowlines, and umbilicals is permissible because "there is no landing of merchandise and, therefore, no engagement in coastwise trade."<sup>29</sup>

But narrowing the interpretation to only those activities *incidental* to such pipelaying activity ignores the history and context of the statute, as well as the plain meaning of the term merchandise. So does the proposal to limit the definition of vessel equipment to articles necessary and appropriate for the navigation, operation, or maintenance of the vessel *itself* and the safety and comfort of the persons on board. Both attempt to arbitrarily graft the Direct and Substantial test onto the detailed history underpinning the consistent interpretation of the merchandise statute. The support for doing so is a bald reference to the fact that, when passed almost 90 years ago, the legislative history is protectionist for both the passenger and merchandise statutes.

In the context of the merchandise statute, defining what constitutes vessel equipment is simply the converse of asking what does not qualify as merchandise. CBP's approach in the Notice to somehow read in a requirement similar to the passenger regulation that any equipment must be incidental or necessary to the *vessel* (as opposed to the *mission*) is misplaced.

Company Items Are Equipment, Not Merchandise

In the case of the Company, generally [

].<sup>32</sup> Based on a plain reading of the statute, such items constitute equipment, not merchandise.

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<sup>29</sup> Notice at 61.

<sup>30</sup> Some of these items are [

<sup>31</sup> For example, [

].

<sup>32</sup> Indeed [

].

### **Congress May Agree With the Mission of the Vessel Test**

If Congress took no action to amend or otherwise overrule CBP's longstanding interpretation prior to the Notice, despite the fact that Congress passed several amendments to the Jones Act during the time of CBP's approach, there is a suggestion that Congress agrees with the existing tests and that no modification is required or desired.<sup>33</sup>

### **IF IMPLEMENTED, THE NOTICE WILL CAUSE SUBSTANTIAL HARM**

In broad terms, since 1920, the Jones Act has "reserved the United States domestic trade exclusively for vessels built in this country and owned by its citizens."<sup>34</sup> In essence, the Jones Act protects American competitors in domestic trade between points in the United States, and does so by excluding the use of foreign vessels.<sup>35</sup> But it also contains numerous examples of exceptions that have been etched into U.S. law for various reasons,<sup>36</sup> and over time CBP has developed a body of rulings to guide the industry.

### **CBP Must Issue Clear and Consistent Rules and Interpretations**

The reason for the rulings is clear: understanding the protectionist intent of the Jones Act, and the draconian forfeiture penalties associated with it, non-coastwise vessel owners require transparent rules to guide conduct. Failure to have such transparency will have a chilling effect on the willingness of non-coastwise qualified vessel owners to operate in areas embraced within the coastwise rules.

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<sup>33</sup> See, e.g., *Philadelphia Metal Trades Council v. Allen, et. al.*, 2008 U.S. Dist. LEXIS 65135, \*57-58 (E.D. Pa August 21, 2008) ("Congress' failure to take up a challenge during the lengthy history of consistent interpretation of the regulation at issue provides support for the Coast Guard's view of Congressional satisfaction with the Coast Guard's approach to the statute.").

<sup>34</sup> *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 574-75 (1980). See 46 U.S.C. § 55101, et. seq.; see also, 19 C.F.R. § 4.80, et. seq.

<sup>35</sup> See, e.g., *Sea-Land Service, Inc. v. Dole*, 596 F.Supp. 1143, 1145 (D.D.C. 1984); see also, *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 849-850 (D.C. Cir. 1987).

<sup>36</sup> See, e.g., 46 U.S.C. §§ 55101(b), 55108(b), 55113, 55114(c) and (d), 55116, 55117, 55119, and 55121 (enumerating various exceptions). Some exceptions to the Jones Act provisions may be used under certain proscribed circumstances. See also, § 213 of the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295 (116 Stat. 2099), dated November 25, 2002; H.Conf.Rep. 107-777, as reprinted in 2002 U.S.C.C.A.N. 1315, 1333 (authorizing use of specific non-qualified vessels in the coastwise trade of the United States to transport platform jackets from ports in the Gulf of Mexico to sites on the OCS for completion of certain projects, notwithstanding Jones Act or related maritime prohibitions on the use of foreign vessels).

### Penalties Could Be Draconian

Violating Section 55102 may result in seizure and forfeiture of the merchandise being transported or CBP may assess a penalty equal to the value of the merchandise or the actual cost of the transportation, whichever is greater.<sup>37</sup> Specifically what constitutes "the actual cost of the transportation" is unclear, however. The term "actual cost of the transportation" is not defined in the statute and there is scant recent guidance in case law or CBP Rulings as to how that term is interpreted in the context of Section 55102. There is, however, some CBP guidance in other international trade contexts, such as concerning issues involving valuation. In that context, CBP suggests that the "actual cost" includes not only the cost of transportation but also "other charges" and incidental expenses, including fuel surcharges, security charges, and handling fees.<sup>38</sup>

Not finding definitive guidance in CBP Ruling Letters indicating how CBP interprets the provisions at issue, and indeed it seems CBP exercises great flexibility in this area,<sup>39</sup> it is unclear what course CBP will take in response to what it perceives to be a violation. When a statute leaves room for interpretation, however, U.S. courts must respect reasonable readings made by the agency.<sup>40</sup> But deference is not abdication, and agency interpretations must be reasonable in light of the principles of statutory construction.<sup>41</sup> A permissible interpretation must make "considerable sense in terms of the statute's basic objectives" and plain language.<sup>42</sup> Here the penalties range from draconian (forfeiture) to potentially severe calculations of monetary penalties (whether interpreting "actual cost" to include other factors like fuel surcharges, security charges, and handling fees or "tonnage" to mean gross tonnage or net tonnage).

### Uncertainty Has Chilling Effect

It is conceivable that CBP may impose the harshest form of penalty for any violation of the Jones Act. This concern is not remote but likely in light of what appears to be a heightened enforcement environment at CBP as indicated by the publication of the Notice and the statement last year of an interest to give effect to the "protectionist nature" of the Jones Act.<sup>43</sup> The interest in avoiding stark penalties is increased also

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<sup>37</sup> 46 U.S.C. § 55102(c).

<sup>38</sup> See CBP Ruling Letters 004683 and 546111, dated April 12, 2007 and March 1, 1996, respectively.

<sup>39</sup> See CBP Ruling Letter 115431, dated September 4, 2001 ("In the event of any emergency evacuations which would involve the use of {certain} non-coastwise-qualified vessels in the coastwise transportation of passengers or merchandise in contravention of the coastwise laws cited {in the Ruling Letter}, such exigent circumstances may be taken into consideration in the assessment of any penalty action.").

<sup>40</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

<sup>41</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

<sup>42</sup> *Barnhart v. Walton*, 535 U.S. 212, 219 (2002).

<sup>43</sup> See CBP Ruling Letter 019524, dated February 27, 2008 (expressing a desire to honor "the protectionist nature" of the Jones Act).

considering that such penalties could apply even where the merchandise at issue is determined to be "valueless." Such uncertainty will have a severe chilling effect on the number of non-coastwise qualified vessel operators willing to operate between points embraced by the coastwise trade.

In the face of such uncertainty, typically non-coastwise qualified vessel owners seek and obtain CBP rulings letters regularly.<sup>44</sup> They do so to confirm whether specific activity is, in fact, permitted. Based on such letters, a substantial body of rules has developed that provides clear, transparent guidance to the industry. The Notice threatens to upset this clear guidance. Plus the negative effect of the proposed modification would not be limited to those to whom the revised ruling letters are issued.<sup>45</sup> Rather as recognized by Supreme Court Justice Ruth Bader Ginsburg, in an opinion drafted as an appellate court judge, "[s]uch letters, however, can have precedential value for other parties or other activities: 'In the absence of a subsequent change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances.'"<sup>46</sup>

#### 28 Days Is Insufficient Comment Period

Given the longstanding precedent and severe dislocation the Notice will cause, CBP must provide sufficient time for review and comment. Interested parties here, however, have only 28 days to review and comment on the Notice, which proposes changes having far-reaching impacts on the industry. Such time for review and comment is too short. By threatening to change existing practice to interpret narrowly what activities are permissible by [

], the Notice threatens to disrupt the U.S. maritime and offshore oil & gas industry - a result squarely at odds with the legislative intent of the Jones Act.

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<sup>44</sup> CBP issues binding ruling letters concerning "a specifically described Customs transaction" and issues an information letter in response to general requests for information about the application of the Customs laws. 19 CFR § 177.8(a); *see also, e.g.*, 19 CFR § 177.2(b) (describing specific facts required for ruling letter).

<sup>45</sup> CBP regulations provide that each ruling request letter "be applied only with respect to transactions involving operations identical to those set forth in the ruling letter." 19 C.F.R. § 177.9(b)(4). The regulations also provide that only "the person to whom the letter was addressed ... should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." 19 C.F.R. § 177.9(c).

<sup>46</sup> *Shipbuilders Council of America v. United States*, 868 F.2d 452, 453-454 (D.C.Cir. 1989) *quoting* 19 C.F.R. § 177.9(a).

### Protectionism Not Only Purpose of Jones Act

When enacted in 1920, protecting and benefitting domestic shipyards and workers was not the only purpose specified by the Jones Act. Congress was clear also that it viewed the Act as necessary for the national defense and to ensure that the United States shall have a merchant marine of the best equipped vessels.<sup>47</sup> The proposed modifications risk harming the national defense and depriving the United States of the best equipped vessels capable of servicing the offshore oil & gas industry - and clearly the prohibitions of the Jones Act may be waived when appropriate pursuant to 46 U.S.C. § 501. But when the harm is readily foreseeable, as is the case here, the Company urges that CBP consider carefully whether to proceed with modifications proposed in the Notice, even if CBP has the authority - at least on paper - to waive the application of the Jones Act in specific instances. Doing so will save time, expense, and uncertainty.

### Evaluate Whether Protectionism Will Backfire

Regarding the desire for a merchant marine of the best equipped vessels, the most recent codification of the Jones Act makes clear that this goal is something Congress wants "at all times."<sup>48</sup> This objective - and the unabashedly protectionist nature of the Jones Act - does not mandate and indeed runs counter to the changes proposed in the Notice.

### Coast Guard Rejected Kneejerk Protectionist Response

The Coast Guard faced an analogous question and rejected a kneejerk protectionist stance. In response to whether to repeal the requirement that at least half of the non-hull and non-superstructure components of a coastwise vessel be manufactured (both built and assembled) in the United States, the Coast Guard said:<sup>49</sup>

We believe Congress used the phrase "built in the United States" primarily to protect the United States shipbuilding industry rather than manufacturers ... The Coast Guard believes that forcing shipyards in the United States or vessel owners to use less satisfactory or more costly equipment of U.S. manufacture in order to ensure that vessels will qualify for use in the domestic trades or the fisheries, or to do without items because they are not available from domestic manufacturers, add an element of cost to shipbuilders, ship owners, and the public generally which is not required or justified by the Vessel Documentation Act.

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<sup>47</sup> Merchant Marine Act of 1920, Pub. L. No. 66-261, § 1, 41 Stat. 988 (1920).

<sup>48</sup> 46 U.S.C. § 50101(a)(1) (objective of Jones Act is that the United States have a merchant marine "sufficient to carry the waterborne domestic commerce and a substantial part of the waterborne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of the waterborne domestic commerce and foreign commerce at all times.") (emphasis added).

<sup>49</sup> *Philadelphia Metal Trades Council v. Allen, et. al.*, 2008 U.S. Dist. LEXIS 65135, \*51 (E.D. Pa August 21, 2008) quoting United States Documentation of Vessels, 48 Fed. Reg. 20,249, 20,250-51 (May 5, 1983).

In short, the Coast Guard expressed concern that taking the proposed action would *harm* rather than help those that the Jones Act is meant to protect. The same situation applies here.

The Modifications Proposed Here Would Harm U.S. Interests

Here, because of the ruling, the Company and other foreign flag carriers may be forced to suspend operations and potentially breach contracts, which would ultimately harm American workers who would lose their jobs in the maritime industry. Alternatively, as the Offshore Industry Letter notes, to prevent transportation between two coastwise points, work may be diverted to Mexico and Canada. This is particularly likely given the duty free access to the U.S. market because of NAFTA. This would have the unintended effect of diverting work away from U.S. interests to foreign ports and persons.

[ ]

Given the uncertainty that will follow implementation of the modifications proposed in the Notice, the Company will [ ]

]50

In addition to causing severe economic dislocation for U.S. workers, the oil and gas industry, and others, the Notice also risks disrupting maintenance and servicing of key infrastructure components for the United States. CBP would avoid any such harm by deciding ultimately not to implement the Notice.

CBP Modifications Have Harmed U.S. Interests In the Past

The Notice is not the first time that there is concern that the Jones Act may actually harm those that it is meant to protect. Recall that CBP modified a ruling that resulted ultimately in a congressional amendment (in the form of the Thirteenth Proviso).

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<sup>50</sup> In addition, as the Offshore Industry Letter argues, implementation of the modifications proposed in the Notice would have a chilling effect on exploration and development of OCS resources, which ultimately negatively impacts U.S. jobs.

The Thirteenth Proviso<sup>51</sup> permits non-coastwise qualified launch barges to transport platform jackets between two coastwise points, under certain circumstances. In short, the vessel must have been "built before December 31, 2000" and have "a launch capacity of at least 12,000 long tons."<sup>52</sup> In addition, the Secretary of Transportation must determine "that a suitable coastwise qualified vessel is not available for use in the transportation and, if needed, launch or installation of a platform jacket."<sup>53</sup>

The Thirteenth Proviso first appeared in 1988 and was substantially similar to the text of the current law.<sup>54</sup> It was inserted in response to a 1984 CBP Ruling Letter prohibiting foreign launch barges from transporting platform jackets from U.S. fabrication yards to offshore launch sites.<sup>55</sup> At the time, U.S. launch barges were not capable of transporting platform jackets in excess of 6,300 long tons.<sup>56</sup> Because the Jones Act prohibited foreign vessels capable of transporting larger platform jackets from doing so when the transport originated from a U.S. port, because the transport from a U.S. port to a coastwise point violated the "transportation of merchandise" provision of the Jones Act, Congress was concerned that oil leaseholders would begin to order larger platform jackets from foreign manufacturers. Ordering platform jackets from foreign manufacturers does not violate the Jones Act because the foreign vessels could transport from a foreign port to a U.S. coastwise point without violating the Jones Act, *i.e.*, the vessel is not engaging in trade between two coastwise points.

The impact, of course, was the unintended result that the Jones Act - which was meant to *protect* U.S. jobs in the maritime industry - risked *costing* U.S. jobs in the maritime industry.<sup>57</sup> In other words, U.S. manufacturers of platform jackets were at risk of losing contracts to foreign suppliers. Accordingly, Congress crafted this exception to permit the transport of platform jackets when there is a determination that no "suitable

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<sup>51</sup> 46 U.S.C. § 55108(b) and (c) (permitting non-coastwise qualified vessels to transport platform jackets, which includes topsides, jackets, and other components). It is named the "Thirteenth Proviso" because, when added originally to the Jones Act prior to recodification in 2006, it was the thirteenth proviso listed at 46 U.S.C. Appx § 883.

<sup>52</sup> 46 U.S.C. § 55108(b)(1).

<sup>53</sup> 46 U.S.C. § 55108(b)(2).

<sup>54</sup> The major difference between the original Proviso and the current Proviso is that, when enacted, the law applied only to vessels built before June 1988 - today it applies to vessels built before 2001. *See* Transportation of Sewage Sludge, Pub. L. No. 100-329, dated June 7, 1988 (102 Stat. 588); S. Rep. No. 100-327, at 3-4, *as reprinted in* 1988 U.S.C.C.A.N. 644, 646-47 (collectively, 1988 Thirteenth Proviso).

<sup>55</sup> *See* CBP Ruling Letter 107060, dated November 21, 1984; *see also*, 1988 Thirteenth Proviso.

<sup>56</sup> 1988 Thirteenth Proviso.

<sup>57</sup> *Id.* ("{u}nless the Customs Service ruling is legislatively reversed, American leaseholders on the OCS will be forced to order their deepwater platform jackets from the foreign port of fabrication {and} . . . {t}his would result in a major loss of the market for offshore platform jackets to foreign fabricators, along with thousands of American jobs.").

coastwise qualified vessel" is available to do so. Since its implementation, CBP has consistently applied the statute in accordance with its terms.<sup>58</sup>

### **Assess All Costs and Benefits of a Modification**

Here CBP does not need to force another legislative amendment. The existing rules - as aptly referenced and explained in the Offshore Industry Letter - are clear, transparent, and tenable. And they are in spirit with Section 55102 when, as discussed above, these rules are read in terms of the text, history and purpose of the Jones Act. Accordingly, the Company respectfully requests that the proposed modification not issue.

At a minimum, however, even if CBP decides to proceed, it should permit additional time to gather reasoned comments on this important issue. As the Offshore Industry Letter notes, Executive Order 12866 of September 30, 1993 states an important philosophy of regulatory planning and review that CBP should honor. It provides, in Section 1, that in deciding whether to regulate CBP should "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." The existing rules administered by CBP have been in place for over three decades (in the case of the 1976 Ruling) and almost three-quarters of a century (in the case of the 1939 Ruling). A delay for a reasonable period of time to assess thoroughly the costs and benefits of the proposed action is warranted, particularly given the time period for comments is inordinately short - only 28 days.<sup>59</sup>

### **NOTICE HAS NO EFFECT ON PRIOR RULING LETTERS ISSUED TO THE COMPANY**

The Company does not believe that it has received an interpretative ruling or decision subject to the Notice and does not believe that it engages in "substantially similar transactions" to those addressed in the Notice,<sup>60</sup> which the Company [

].<sup>61</sup> In light of the admonition to "advise CBP of substantially

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<sup>58</sup> See CBP Ruling Letter 114158, dated February 13, 1998 (permitting transport of a tower section weighing 10,030 long tons and a lower jacket weighing 7,770 long tons because no coastwise-qualified vessel could transport the materials safely); CBP Ruling Letter 114268, dated March 16, 1998 (permitting transport of a 8,355 long ton platform jacket because no coastwise-qualified vessel could transport the jacket safely).

<sup>59</sup> Responses must be submitted "on or before" August 16 (a Sunday). Interested parties, like the Company, must submit on the preceding Friday (August 14) to be certain that submissions are timely. The result is a two day loss to evaluate and prepare reasoned, cogent comments.

<sup>60</sup> Notice at 56.

<sup>61</sup> [

identical transactions or of a specific ruling not identified" - and to avoid any claim of failure to do so - the Company notes that, for purposes of these comments, it understands that existing CBP precedent regarding the issues identified in this section of the Company's comments are not affected by the Notice, but please advise if our understanding is not correct.<sup>62</sup>

The Company is concerned primarily regarding what effect, if any, the Notice has on [

instance, is [ ]]. The [ ]], for

].

CBP has consistently held that [ ] is not within the coastwise trade and may be performed by a foreign, non-coastwise qualified vessel.<sup>63</sup> But the Notice raises a potential myriad of issues concerning items that could be deemed essential to both the vessel *and* the mission, such as whether the Notice has any effect on CBP Ruling Letter [

]. Again, unless advised otherwise, the Company believes that the Notice does not.<sup>64</sup>

Similarly, should the proposed modification be implemented and subsequently the Company [

], the Company confirms its understanding that the proposed modifications of the Notice have no effect on the prior guidance granted to [

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<sup>62</sup> The Company expressly reserves any and all rights and remedies.

<sup>63</sup> See CBP Ruling Letter [ ]].

<sup>64</sup> The Company believes that the Notice also has no effect on the use of [

]. Notice at 107.

]

As the Notice has no bearing on determinations regarding [

] Similarly, the Company understands that [ ] are not considered a coastwise point when [ ]. As CBP advised in its last ruling letter to [ ], "this agency has long-held that the lack of any permanent or temporary attachment to the seabed operates to exclude [ ] vessels operating [ ] from becoming coastwise points pursuant to the [ ]."<sup>65</sup> The Company understands that the Notice has no bearing on this issue, as well, even when the [ ]

\* \* \*

For the reasons stated herein, the Company respectfully requests that CBP reject the modifications proposed in the Notice.

Respectfully submitted,

  
Alexander W. Koff

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<sup>65</sup> [

<sup>66</sup> [

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August 12, 2009

Ms. Sandra L. Bell  
U.S. Customs and Border Protection  
Office of International Trade  
Regulations and Rulings  
Attention: Trade and Commercial Regulation Branch  
799 9<sup>th</sup> 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:

I am writing with respect to the July 17, 2009 proposal by U.S. Customs and Border Protection (CBP) entitled *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*. This proposal would change longstanding interpretations of the Jones Act which the offshore industry has relied on for over 30 years. As a major offshore contractor operating in the Gulf of Mexico since 1978, Heerema Marine Contractors (HMC) takes the Jones Act very seriously and we have a proven track record of adhering to these requirements. We are very concerned with the fact that a response period of only 30 days has been allowed on an issue that can have significantly damaging effects on not only HMC's business, but the oil and gas industry as a whole.

After all the attempts by a number of major industry players to request an extension of time, it is astonishing that CBP has to date rejected all such overtures. The 30 day period for comments is simply not enough time to thoroughly evaluate the impact of the proposed changes to HMC's business, let alone the fact that CBP has not performed any economic impact studies to share with the industry. Of particular concern is the apparent influence of the Offshore Marine Service Association ("OMSA") on these proposed ruling changes. It is our understanding with the submittal of one letter from OMSA seeking a revocation of the Christmas Tree ruling issued by CBP on February 20, 2009, that CBP not only decided to revoke the Christmas Tree ruling, but also to revoke at least 20 additional rulings issued over the last 30 years. To take such drastic measures as a result of a single letter from a trade association representing only one facet of the offshore industry, is simply irresponsible in view of the billions of dollars invested by industry based on longstanding CBP precedent. Moreover, any such action should be subject to the full due process under the Administrative Procedures Act as a full rulemaking.

HMC's track record of installing over 80% of the existing major deep water facilities, and a significant portion of the heaviest pipelines in the Gulf of Mexico, has been made possible by our long standing commitment of making our unique vessels available in this region of the world. The threat of having our business unnecessarily interrupted, or in the worse case, creating a regime in which HMC can no longer compete in offering our



services in the future, is a significant concern to us and our customers in view of the substantial work performed by HMC in the U.S. offshore market.

HMC is a member of the International Marine Contractors Association (IMCA), the largest international trade association representing offshore, marine and underwater engineering companies supporting energy related projects worldwide. HMC has worked with IMCA in the preparation of detailed comments with regards to the CBP proposal. HMC hereby confirms that it fully supports and adopts the IMCA comments which clearly and precisely lays out the valid rationale for objecting to the adoption of most of the CBP proposals. In addition, HMC provides the following supplemental comments, tailored specifically to its operations, addressing the adverse affect the CBP proposal could have on HMC, if adopted and put into effect in a final CBP decision.

#### Background on HMC Vessels and Equipment

HMC operates three deepwater construction vessels (DCVs) with both heavy lift capacity for installing topsides, and depth reach lowering capacity. These DCVs are multipurpose and are capable of installing foundations, moorings, SPARs, TLPs, and integrated topsides. In addition, one of them, the *DCV Balder* has pipelaying and other related equipment installed on it to lay and repair pipelines, flowlines, and similar items. In addition, these vessels periodically operate with multi-purpose foreign-flag construction support (MPCS) vessels under contract with HMC to perform a variety of offshore support services, including commonly the use of ROVs to assist in pipelaying, flowline, and similar installation work. The following are examples of some of HMC's operations that could be adversely affected if CBP decided that these items were not considered "equipment of the vessel."

- The *DCV Balder* routinely operates with pipelay lay materials necessary for these operations including a J-lay tower (vertical lay system for laying pipe), pipe crates with double jointed pipe, automated ultrasonic testing systems, coating stations, scanners, and welding equipment.
- All of the DCVs routinely operated with large cranes, hammers, critical to perform work as a DCV.
- The MPCS vessels routinely work with winches, ROVs, survey equipment and a large A-Frame winch used for offshore work.

#### Concerns and Recommendations

HMC is very concerned that should CBP adopt its proposal that it could result in the above cited items being considered merchandise rather than equipment of the vessel. Due to the massive nature of DCVs and the equipment discussed above, it is simply impractical and unsafe, both to personnel and equipment, to engage in transfers at sea of this equipment. In addition, HMC is very concerned that CBP may not recognize that these vessels are multipurpose and conduct different missions depending on the assignments by its customers.



These vessels are not designed to perform only a single mission. Accordingly, it is critical that CBP, in its final determination, ensure that HMC's multipurpose vessels be deemed to be able to continue to perform the multitude of offshore activities conducted today and that the items discussed above continue to be deemed "equipment of the vessel."

In closing we wish to point out that there will be a multitude of unintended consequences for the offshore construction industry coming out of these proposed modifications and new interpretations of the Jones Act. While the Jones Act is in place to regulate the transportation of goods between coastwise points, it should in no way start regulating offshore installation work on the OCS. Our belief is these modifications and revocation of rulings is indeed an attempt to initiate regulation of installation activities.

We appreciate the opportunity to provide these comments and respectfully request your concurrence to reconsider these proposed changes, or as a minimum grant an additional 60 day comment period for proper assessment of the proposal and a more complete response.

Sincerely,

Bruce Gresham  
Vice President  
North America  
Heerema Marine Contractors U.S. Inc

# Eric Galerne

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Unit 118  
Houston, Texas 77095

66 #2

August 14, 2009

by Hand Delivery

**US CUSTOMS AND BORDER PROTECTION  
OFFICE OF INTERNATIONAL TRADE  
REGULATIONS AND RULINGS  
ATT: TRADE AND COMMERCIAL REGULATIONS BRANCH  
799 9<sup>TH</sup> STREET  
N.W. MINT ANNEX  
WASHINGTON, D.C. 20229**

To whom it may concern,

I am writing to you today, to submit my comments 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"** ruling. My comments will address why the intended action to modify and/or revoke previous rulings is not correct.

Let me state that not extending the comment period so I can get full advantage of the FOIA disclosures I requested of CBP is a detriment to my due process rights. Nonetheless, here are my comments.

As way of introduction and prerequisite qualification on this subject, I have been involved with commercial diving and commercial coastwise/non coastwise vessel operations on every US shore line from the Great Lakes to Alaska, since 1977. I am still actively involved in the maritime industry as both a small business owner and as an employee and perhaps that gives me an insight to the "correctness" of this ruling.

The proposed ruling action is incorrect based on the following arguments;

1. CBP has arbitrarily embellished upon the "merchandise" definition beyond that which is contained in the Merchant Marine Act of 1920 (Jones Act) and as later re-codification to CFR 46 Subpart 55102(a)
2. CBP has introduced additional ambiguous language and modified or revoked previous rulings that provided clarity and this effectively renders the concept of "Informed Compliance" impossible for industry to follow, as required under the US Customs Modernization Act (Mod Act), enacted under the NAFTA Treaty.
3. CBP has not complied with Agency Procedures Act or the Regulatory Flexibility Act

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4. CBP has not coordinated its actions with other interested agencies when administering and enforcing the "Jones Act"
5. CBP has not conducted internal or external independent study or investigation on the issue but instead relied on facts, opinions and information from biased, private parties.

The precipitous nature in which the CBP is trying to impose this change on industry is viewed as "arbitrary and capricious".

These circumstances are arbitrary since the CBP has the authority to set the comment for any length of time great then 30 days and yet given this complicated issue deserving a great amount of time, decides to set it at the minimum required under law. To quote US Customs and Border Protection's own Sandra Bell "many complicated factors can be involved in customs issues" and yet CBP wishes to set the shortest comment permissible for the issue.

It is capricious in that the CBP is rushing to overturn 30 years of precedent in 120 days with impulsive disregard to industry/congressional pleadings, despite ignoring the procedures CBP is obligated to follow. In addition, I have submitted 10 FOIAs requests that were filed with your FOIA at the same time I asked for the extension and due to the "rush to ruling" attitude, I have not had the opportunity to review CBP's responses which have yet to arrive.

## Argument 1 Against the Intended Action

CBP HAS ARBITRARILY EMBELLISHED UPON THE "MERCHANDISE" DEFINITION BEYOND THAT WHICH IS CONTAINED IN THE MERCHANT MARINE ACT OF 1920 (JONES ACT) AND AS LATER RE-CODIFICATION TO CFR 46 SUBPART 55102(A)

The proposed ruling is incorrect because it errs in the definition of merchandise. I urge the CBP to **READ THE MERCHANT MARINE ACT OF 1920 RE-CODIFIED IN RELEVANT PART VERSION AS 46 U.S.C. SUBPART 55102** and its revision history which is attached as Exhibit 4 for your convenience. You will see the intent applied "strictly" to US Government goods and valueless material, not private property! **THAT HAS NEVER CHANGED!** Therefore CBP's entire case is without merit. CBP is not authorized to extend law, merely to administer and enforce what's there. By extending the definition to include private material as well, they have exceeded their authority!

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The Jones act was explicitly written to protect the transport of public and valueless material to bolster the domestic shipping industry with the government's share of its transportation requirements. **Nowhere does it mention the protections extend to private party merchandise.** At issue is the embellishing of the "merchandise" definition beyond that which is contained in the Merchant Marine Act of 1920 (Jones Act) and as later re-codification to CFR 46 Subpart 55102(a) in 2006. CBP references this definition to support its claim however must supplement it with a "borrowed" definition from U.S.C. 19, because the original text does not support their position.

In the drafting of the Merchant Marine Act of 1920, it provided a strict and narrow definition of merchandise in section 55102 as follows:

## ***55102. Transportation of Merchandise***

### ***(a) DEFINITION In this section, the term "Merchandise" includes***

***(1) merchandise owned by the United State Government, a State or a subdivision of a State, and***

***(2) valueless material***

It is clear that in the Merchant Marine Act of 1920 (Jones Act), the Merchandise definition supplied above should apply to this section. It is also very clear what it includes, items owned by government or valueless material. No other type of merchandise is mentioned, here or anywhere else in the act! It was clear that the US Government intended to use its buying power of dollars it spent on its transportation needs, to bolster the US Shipping Industry. Nowhere does it commit private goods to the same requirement.

One might argue that if the meaning of "include" was to be a broad definition of all merchandise, then the code should have include a phrase such as "including but not limited to" which would leave the interpretation to include additional items besides the two mentioned and open the door for a legitimate broadening by CBP with its "merchandise" definition borrowed from 19 U.S.C 1401(c). Then again when it was drafted in 1920, that typical all inclusive capture phrase was not prevalent. From time to time statutes are re-codified. *"Re-codification refers to a process where existing codified statutes are reformatted and rewritten into a new codified structure. This is often necessary as, over time, the legislative process of amending statutes and the legal process of construing statutes by nature over time results in a code that contains archaic terms, superseded text, and redundant or conflicting statutes."*

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When Section 883 was re-codified in 2006 as 46 U.S.C 55102, there was no excuse not to broaden the meaning, if in fact, that was what was intended all along. However it was left untouched and identical despite the re-codification . One can reasonable infer that the intention of the statute was to apply to the two types of merchandise listed and no other.

So what could have encouraged the drafters of the Merchant Marine Act of 1920 (Jones Act) and as later re-codification to CFR 46 Subpart 55102(a) to craft the definition so narrow, mentioning only those items? What was their intent? The Merchant Marine Act of 1920 was enacted, following WW1, to ensure the US had a fleet of domestic **CARGO** and **PASSENGER** vessels the Government could call to service in case of wartime to move troops and armaments overseas.

This section was to ensure the Government had a stock of US civilian **CARGO** and **PASSENGER** vessels available to move war time armament and troops, **NOT** to protect a small specialized fleet of US **MULTIPURPOSE SUBSEA CONSTRUCTION** vessels that do not exist!

With the formation of the Military Sealift Command (MSC), it would seem that the Jones Act provision has been made redundant and no longer serves the stated purpose. In the past two (2) major wartime overseas mobilizations, **NO** oilfield cargo vessels were called upon to supplement the US armed forces which would indicate the original purpose of the law to provide a civilian base of cargo and personnel vessels has been antiquated. Certainly no Subsea Construction Vessels were called upon!

In the argument put forth by CBP, it brushes by the definition of merchandise at every chance it gets because it knows it's a weak point in their case. They "arbitrarily " extend the definition in the following manner with no detailed legal basis supplied " et seq.: see also 19 U.S.C. 1401(c) (stating that the word "merchandise" means.."

**"Et seq" from Latin means "and the following one or ones" and is an unsupported broadening of the merchandise definition without any legal basis or foundation to do so.**

The expanded definition from 19 U.S.C. 1401(c) reads in part:

**"the word Merchandise means goods, wares and chattels of every description and includes merchandise the importation of which is prohibited..."**

This definition was drafted to denote those items subjected to duties and not to that which is afforded cabotage protection.

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Clearly the definitions are not even close to being similar. The former is very narrow only including by specific mention Public Property and valueless material and the latter includes everything in existence including illegal merchandise. If the later was intended, then I think the former definition would have been drafted substantially different or at the very least, clarified when the law was re-codified in 2006 since there were many ruling letters issued on this specific subject. Certainly by 2006, most of the issues we are discussing here, including over 20 rulings issued by CBP all in some form relying on this convoluted and borrowed definition, could have been clearly expanded, but it was not! Why not? Could it be that it was NOT the original intent of the drafters to have a broader meaning than that which was written? I believe that to be the case and a subject for judicial review and determination.

I contend that CBP may have borrowed improperly from USC 19, Customs and Tariff act, to broaden an otherwise explicit and narrow definition of "merchandise" included in the original Merchant Marine Act of 1920 (Jones Act), one that includes public goods and worthless material and nothing else and as such has the entire interpretation wrong from day one, including the proposed ruling subject to this comment period.

If CBP is adamant on "strictly interpret" TD 78-387, it should first strictly interpret the base act that spawned TD 78-387, namely the definition of "merchandise" provided in the Merchant Marine Act of 1920, which indicates application only to public items and worthless material.

Additionally, CBP is so comfortable in throwing out 30 years of precedent with respect to definitions of merchandise, why stop there? Why not throw out 89 years and "strictly interpret" the "merchandise" definition to include public items owned by the government and valueless material as it was written? Limiting CBP review period to just the last 30 years seems arbitrary and capricious. If CBP is adamant on correcting its mistakes in this ruling, why not start from the beginning!

## Argument 2 Against the Intended Action

CBP HAS INTRODUCED ADDITIONAL AMBIGUOUS LANGUAGE AND MODIFIED OR REVOKED PREVIOUS RULINGS THAT PROVIDED CLARITY AND THIS EFFECTIVELY RENDERS THE CONCEPT OF "INFORMED COMPLIANCE" IMPOSSIBLE FOR INDUSTRY TO FOLLOW, AS REQUIRED UNDER THE US CUSTOMS MODERNIZATION ACT (MOD ACT), ENACTED UNDER THE NAFTA TREATY.

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The proposed ruling is incorrect because it is unclear and incomplete. Under the Customs Modernization Act (Title VI of the North American Free Trade Agreement Implementation Act, Public Law 103-182), on December 8, 1993, two new concepts emerged from the law including *informed compliance* and *shared responsibility*.

Through "Informed Compliance" the law imposes a greater obligation on the CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. . Cited from CBP's own proposed ruling language, "In order to maximize voluntary compliance with the custom laws and regulations, the trade community needs to be clearly and completely informed of its legal obligation. " it is clear that the new ruling language is unclear and as a result CBP has failed to make the rules clear to be followed. The ruling creates more questions than it answers and is ripe with ambiguity and contradictions. Both sides will be submitting questions regarding the need for further clarification just based on the written proposed language. So the clarity issue affects both opposing viewpoints!

There remains issues of clarity on the fundamental aspects of the new rules including

- Definition of "merchandise" provided by CBP is not consistent with the Merchant Marine Act of 1920 language
- Definition of "Vessel Equipment" and the distinction between operation of the vessel and mission of the vessel when no difference is apparent. Claiming to strictly interpret 78-387 which supports "the mission of the vessel" standard and in the same breathe argue against it to define permissible vessel equipment
- Definition of "de minimus" is not identified
- Detailed explanation of each previous ruling that was changed, how it was changed and the new interpretations provided rather than wholesale enumerations of changed ruling following on ruling discussion.
- If "incidental" to operations is construed as a single physical operation from a single vessel or can be conducted under numerous mobilizations of the same vessel
- CBP provides no "test" to help clarify the discrepancies and therefore the ruling is incomplete

CBP provides an informed compliance publication entitled " What every Member of the Trade Community Should Know About: Coastwise Trade: Merchandise, January 2009 which answers none of the above ambiguity. CBP has refused to take time to clarify this during the public comment period. It's unclear as well if we will have these clarified

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prior to final ruling, if at all. With these items in the air, I do not see how the CBP can live up to its "informed compliance" standard required under law.

## Argument 3 Against the Intended Action

### CBP HAS NOT COMPLIED WITH THE AGENCY PROCEDURES ACT (APA) OR THE REGULATORY FLEXIBILITY ACT (RFA)

The proposed ruling is incorrect because the procedures used during its formation were not consistent with the Administrative Procedure Act nor the Regulatory Flexibility Act. The **Administrative Procedure Act (APA)** (P.L. 79-404) is the United States federal law that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations. The APA also sets up a process for the United States federal courts to directly review agency decisions. It is one of the most important pieces of United States administrative law. The Act became law in 1946. The basic purposes of the APA are: (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; (4) to define the scope of judicial review.

The APA applies to both the federal executive departments and the independent agencies. U.S. Senator Pat McCarran called the APA "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated" by federal government agencies. The text of the APA can be found under Title 5 of the United States Code, beginning at Section 500.

The APA requires that in order to set aside agency action, the court must conclude that the regulation is "**arbitrary and capricious**, an abuse of discretion, or otherwise not in accordance with the law."

The service sector of the US Offshore industry has "significant" small business content throughout the country, a fact CBP would know if it had done the research and study required of it. The proposed ruling will have a "significant impact" on small business in the oil field sector. I have submitted a FOIA to disclose all the steps CBP has followed in order to access the extent to which CBP has complied under the **Regulatory Flexibility Act**. I am still awaiting a response and to properly examine of the released documents.

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The Regulatory Flexibility Act is perhaps the most comprehensive effort by the U.S. federal government to balance the social goals of federal regulations with the needs and capabilities of small businesses and other small entities in American society.

In practice, the RFA has been an interesting and much-imitated attempt to "scale" the actions of the federal government to the size of the groups and organizations affected.

Passed in 1980, the RFA has been gradually strengthened in the intervening years, and has historically enjoyed strong bipartisan support.

"It is the purpose of the Regulatory Flexibility Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives...of applicable statutes, to fit regulatory and informational requirements to the scale of businesses...To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." **CBP has indicated they are inflexible to granting an extended hearing period or any clarification during the comment period.** This position is contrary to the above principle.

The key requirement of the law is that federal agencies must analyze the impact of their regulatory actions on small entities (small businesses, small non-profit organizations and small jurisdictions of government) and, where the regulatory impact is likely to be "significant", affecting a "substantial number" of these small entities, seek less burdensome alternatives for them. Both current and proposed federal regulations are subject to the RFA. The industry has substantial small business content employed as defined in the U. S. Small Business Administration, Table of Small Business Size Standards. As a result, CBP must be cognoscente of the requirements set forth in the **Regulatory Flexibility Act (RFA)** and its subsequent amendments and mandates.

In accordance with the RFA, the CBP is required "reach out" to small business by publishing a notice in trades and industry publications affected by the rule change prior to comment period expiration. I am not aware this has been done in any publications. Some of the relevant publications it should have been published in are;

- Industry Publications include
- Maritime Reporter
- Underwater Magazine
- Workboat Magazine
- Go Gulf Magazine
- ODS Petrodata Newsletter

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- Offshore Magazine
- API Insight Magazine
- Oil and Gas Journal
- Subsea Magazine

## **My FOIA requests the documents and correspondence that would document whether or not the CBP has followed these guidelines.**

The process for seeking these less burdensome alternatives is three-fold: agencies must reach out to the affected small entities and solicit their views, the views of the SBA Office of Advocacy must be considered, and agencies must publish both an initial regulatory flexibility analysis (RFA), and/or a final regulatory flexibility analysis (RFA) in the Federal Register, or provide a certification that the regulation will have no such "significant impact." **CBP failed to publish any of these requirements nor the certification that it was not required.**

The order required federal agencies to analyze their major regulatory undertakings and to take action to ensure that these regulations achieved the desired results with minimal burden on the U.S. economy. **The rule, if passed as written, it will have a significant impact on the economy through its disturbing effects on domestically produce oil and gas from the GOM offshore fields.**

In August 2002, President George W. Bush issued Executive Order 13272, further implementing the RFA. The Executive Order requires federal agencies to establish written procedures and policies explaining how they measure the impact of their regulatory proposals on small entities and to vet those policies with the Office of Advocacy; to notify the Office of Advocacy before publishing draft rules expected to have a significant small business impact; and to consider the Office of Advocacy's written comments on proposed rules and publish a response with the final rule. (see my FOIA as to the correspondence with SBA regarding this rule). E.O. 13272 also requires the Office of Advocacy to provide notification as well as training to all agencies on how to comply with the RFA. These additional requirements permit the Office of Advocacy to work closely with federal agencies in considering the impacts of proposed regulations on small entities.

Like the Administrative Procedure Act that it amends, the RFA primarily defines the required procedural steps in a process. **While agency non-compliance with these required steps can (and has) led to suspensions of various regulations by the courts, it is the failure to faithfully observe the process, not the subject matter of the regulations, that has led to these outcome.**

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## Executive Orders

And let's not forget the Executive orders issued including Executive Order 12866 requiring CBP to assess: (1) the benefits anticipated, (2) the costs to businesses and any adverse impacts on the efficient functioning of the economy and private markets, including employment and competitiveness, and (3) the quantification of these costs as well as feasible alternatives, that at a given point in time, protectionist policy, along with inefficient industries leads to higher prices and lower quality goods for the consumer than if the good or service produced by the industry was produced on the international market.

It is my contention that the FOIA request will prove that the CBP has not "faithfully observed the process" and therefore the rule should be overturned on the due process violation.

## Argument 4 Against the Intended Action

### CBP HAS NOT COORDINATED ITS ACTIONS WITH OTHER INTERESTED AGENCIES WHEN ADMINISTERING AND ENFORCING THE "JONES ACT"

The proposed ruling is incorrect because the methods employed to formulate the ruling do not follow CBP own stated guidelines. As stated in the CBP published Coastwise Trade: Merchandise, an Informed Compliance Publication January 2009, "The CBP enforcement and administration of the Jones Act **requires** coordination with other interested agencies, such as Maritime Administration of the US Department of Transportation, the US Coast Guard, the US Department of defense and the US department of Energy."

I have submitted 10 Freedom of Information Act (FOIA) requests to the CBP in order to determine the level at which the CBP followed its own instructions in coordinating with these and other agencies when formulating and promulgating the final ruling in question.

Coordinating with the following agencies for the following data would have been the minimum expected and written documents should exist within CBP that demonstrate this compliance.

**US DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION (MARAD),** concerning the monitoring, assessing and reporting of the availability and operating status of all coastwise-qualified vessels, including those capable of undertaking deepwater subsea oilfield construction activities.

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**US DEPARTMENT OF ENERGY**, concerning the impact to the energy supply if all non coastwise-qualified subsea oilfield construction vessels were suddenly and effectively disallowed to operate in US waters.

**US DEPARTMENT OF DEFENSE**, concerning the impact to its energy supply for its operations, if all non coastwise-qualified subsea oilfield construction vessels were suddenly and effectively disallowed to operate in US waters.

**SMALL BUSINESS ADMINISTRATION (SBA)**, concerning the impact on the small business community and ascertaining the number of small business entities affected, if all non coastwise-qualified subsea oilfield construction vessels were suddenly and effectively disallowed to operate in US waters. In addition did the U.S. Customs and Border Protection agency analyze and determine the applicability of the Regulatory Flexibility Act requirements to this proposed ruling.

**U.S. COAST GUARD**, with respect to assessing the near and long term availability of U.S.C.G. licensed vessel officers and seamen capable of manning existing and new coastwise vessels to undertake subsea oilfield construction activities. Was the **U.S. COAST GUARD** asked for the impact such a ruling would have on the U.S. Coast Guard's ability to engage, retain and meet its own manpower resources, should the rule become finalized.

**U.S. NAVY**, with respect to the impact such a ruling would have on the US Navy's ability to engage and retain its manpower resources needed in time of war, should the rule become finalized.

**U.S. DEPARTMENT OF STATE** with respect to the impact such a ruling would have on international treaties, specifically those of the International Maritime Organization (IMO) and World Trade Organization (WTO), that the United States is party to and signatory of, should the rule become finalized.

**DEPARTMENT OF THE INTERIOR, MINERAL MANAGEMENT SERVICE**, with respect to the impact such a ruling would have on the Mineral Management Service's effective management of energy and mineral resources on the nation's Outer Continental Shelf, including the environmentally safe exploration, development, and production of oil and natural gas, as well as the effect on the amount of revenues collected for minerals developed on federal lands, should the rule become finalized. Was the **DEPARTMENT OF THE INTERIOR, MINERAL MANAGEMENT SERVICE**, asked about the impact to the

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restoration of operations should Hurricane damage once again destroy the Gulf of Mexico infrastructure if all non coastwise-qualified vessels were suddenly and effectively disallowed to participate in the repair.

**UNITED STATES DEPARTMENT OF LABOR**, with respect to the availability of personnel to man positions aboard new ships as well personnel available to US shipyards for the construction of ships.

While I await the results which I was hoping would be given during the comment period, I am now forced to speculate that the coordinating was not completed. Based on the lack of enlightened thought put into the consequences of the ruling, I speculate that most if not all of the required coordination has not been performed and therefore the ruling needs to be de-railed on this basis of procedural due process violation if this is the case.

## Argument 5 Against the Intended Action

CBP HAS NOT CONDUCTED INTERNAL OR EXTERNAL INDEPENDENT STUDY OR INVESTIGATION ON THE ISSUE BUT INSTEAD RELIED ON FACTS, OPINIONS, AND INFORMATION FROM BIASED, PRIVATE PARTIES.

The proposed ruling is incorrect because the CBP has not implemented its own due diligence study of the ruling. If CBP had done its due diligence, it would have uncovered a US Congress Office of Technology Assessment report performed in 1989 that expressed strong reservations about further expanding cabotage restrictions on the US OCS since the potential benefits are far outweighed by the negative effects it would have on the specialized vessel segment.

The CBP has an obligation to study and show evidence that the proposed ruling change will accomplish the purpose of the Merchant Marine Act of 1920 (Jones Act) as it was originally written.

The ruling was put in place to protect **CARGO** and **PASSENGER** vessels. The effect of this rule will be on specialized vessels including **Offshore Pipe Laying Vessels, Offshore Derrick Barge Vessels, Multi Purpose Subsea Constructions Vessels and Diving Support Vessels**. Not only does the rule NOT Protect **CARGO** and **PASSENGER** Vessels, it attempts to protect a US Fleet of **SPECIALIZED Vessels THAT DO NOT EXIST!**

CBP cannot demonstrate that the non coastwise high tech subsea construction vessels it will prohibit, are the same vessels type, **CARGO** and **PASSENGER**, that the MMA sought to

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protect, because they are not. Therefore the ruling should not be tolerated because it has no reasonable chance of addressing the original intent of the Act.

In addition, under Executive Order 12866 requiring CBP to assess: (1) the benefits anticipated, (2) the costs to businesses and any adverse impacts on the efficient functioning of the economy and private markets, including employment and competitiveness, and (3) the quantification of these costs as well as feasible alternatives

As stated in my FOIA request on this point and an answer for which I still await;

*"In regards to the formulation and promulgation of 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"** ruling, I request a copy of any and all correspondence, legal opinions and documents produced as a result of internal or external analysis or study with respect to the above ruling."*

In addition, CBP must be "given" incorrect data with respect to the supply and demand characteristics of this market segment to be so complacent. Here are the facts. There are 87 vessels that are actively marketed in the US GOM for the subsea construction market, 26 are US flag and the remaining 61 are non coastwise Qualified(Quest Offshore resources Inc. study dated August 2009).

These vessels are divided among 4 major groups including 1) deck pipe lay vessels, 2) deepwater pipe lay vessels, 3) Diving support vessels and 4) Multipurpose vessels.

To replace the foreign vessel with US vessels, 8 deck pipe layers, 19 deepwater pipe layers, 12 Diving support, and 22 multipurpose vessels are needed today, assuming current demand, though demand is expected to grow through 2012 approximately 25%. All data is derived from a recent Quest Offshore Resources study.

According to published US shipyard vessel construction contracts (US Shipyard Order spreadsheet attached), there are **ZERO** US deck pipe layers, **ZERO** US deepwater pipe layers, **ZERO** diving support vessels and **TWO** multipurpose vessels currently in US shipyards being built. Is this the fleet that will replace the **SIXTY-ONE** vessels currently employed? Any sensible person would be extremely alarmed at these numbers. If CBP have been told there is no supply issue, have OMSA show you the construction contracts for the vessels they intend on replacing the fleet with in the near term. They can't. This is why CBP is required to do its own independent analysis and study of these issues before embarking on misguided and uninformed large scaled industry disturbing changes.

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I need to see all the study CBP has performed to be in compliance with the various rules requiring it to fully analyze the issue before I can render a definitive discussion. I was hoping to be granted the extension which would allow me to receive the results and make an informed evaluation. However CBP precipitous rush to ruling has taken away my opportunity and yet another due process "faux pas" on CBP's part. I can infer that based on the confused state of the proposed ruling and its total avoidance of consideration of issues required of it to be studied, that CBP has probably not followed protocol and as a result the proposed ruling must be tabled until such time as this due diligence is completed correctly.

## **COASTWISE QUALIFIED VESSELS IN SUFFICIENT NUMBERS ARE NOT AVAILABLE CURRENTLY. THAT'S A FACT!**

There is no coastwise qualified fleet of replacement vessels sitting idle anywhere in the world awaiting to take on the role played by the foreign vessels that will be prohibited from carrying its work material to site. Nor is there a fleet being built currently! Not all work material can be safely transferred from one coastwise qualified vessel to a non coastwise qualified vessel at sea. The transportation being targeted is the "incidental" transport of the equipment to be installed. The proponents of the argument would prefer risking human safety at sea then concede the "de minimis" transportation portion that is "incidental" to these subsea construction operations.

## **CONCLUSION**

I urge the agency to **READ THE MERCHANT MARINE ACT OF 1920 RE-CODIFIED IN RELEVANT PART VERSION AS 46 U.S.C. SUBPART 55102** and its revision history is attached as **Exhibit 4 for your convenience!** You will see the intent applied "strictly" to US Government goods and valueless material, not private property! **THAT HAS NEVER CHANGED!** Therefore CBP's entire case is without merit. **CBP is not authorized to extend law, merely to administer and enforce what's there.** By extending the definition to include private material as well, they have exceeded their authority! Instead of throwing out 30 years of precedent as intended under this ruling, CBP needs to be throwing out 89 years of precedent restricting private merchandise coastwise transport solely to coastwise qualified vessels!

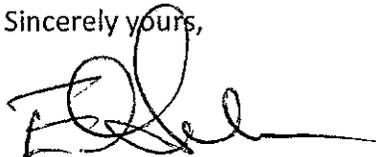
The proposed ruling is way out of line, will not produce the benefits intended, but will destabilize in the short term, the supply and demand of the subsea construction vessel market which is currently in equilibrium. The Americanization solution you are aiming to impose is not available for 5-7 years, so industry will find other alternative methods to legally deliver the energy the country needs. Unfortunately that is likely to be at the expense of US jobs and US manufactured goods.

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In closing, I believe you should withdraw the current proposed ruling and maintain the current status quo. If you must act, do so responsibly by reaching out to industry and developing a consensus on the reasonable path forward with respect to implementing any changes. By implementing the ruling as written, I can assure neither CBP nor US Merchant Industry interests will see the results expected. If the ruling must be finalized, add a 5-7 year transition period to allow for the domestication of the fleet. Otherwise, I am confident this case will go for judicial review.

Sincerely yours,



Eric Galerne. PMP  
Concerned US Citizen and Small Business Operator

### Exhibits

1. 10 FOIA Requests of US Customs and Border Protection related to this issue
2. US Shipyard Orders
3. API Analysis of Vessels Supporting Oil and Gas Operations in the US and Worldwide
4. U.S.C. 46 55102 and its Revision History

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## **Exhibit 2**

### **US Shipyard Orders**

Current U.S. Shipbuilding Contracts

(as of July 25, 2009)

If there are any errors in or omissions from this table, please e-mail me at [tingcolton@aol.com](mailto:tingcolton@aol.com). Please note that this table does not include inland barges, fishing vessels, recreational vessels or anything else that's < 50 feet.

| Shipyard                | Location          | Type of Vessel        | Customer                  | Contract #  | Yard # | Name                 | Description              | Contract Price (\$MM) | Contract Delivery |
|-------------------------|-------------------|-----------------------|---------------------------|-------------|--------|----------------------|--------------------------|-----------------------|-------------------|
| A. & L. Industries      | Amelia LA         | Lowboat               | Seton Marine              |             | 327    | Penelope II, Seton   | 900 hp                   |                       | 2009              |
| WT Marine               | Bayou La Batre AL | response boats        | U.S. Coast Guard          | RPM 2501008 | 100    | Batch 3, 30 boats    | 15 ft                    |                       | 2010-11           |
| Aver Philadelphia       | Philadelphia PA   | Product Carrier       | American Shipping/CSG     |             | 12     | Crossway Mariner     | 47,000 dwt               | 83.3                  | Aug-09            |
| Aver Philadelphia       | Philadelphia PA   | Product Carrier       | American Shipping/CSG     |             | 13     | Crossway American    | 47,000 dwt               | 83.7                  | Dec-09            |
| Aver Philadelphia       | Philadelphia PA   | Product Carrier       | American Shipping/CSG     |             | 14     | Crossway Limpa       | 47,000 dwt               | 83.1                  | Apr-10            |
| Aver Philadelphia       | Philadelphia PA   | Product Carrier       | American Shipping/CSG     |             | 15     | Crossway Cascade     | 47,000 dwt               | 83.2                  | Aug-10            |
| Aver Philadelphia       | Philadelphia PA   | Product Carrier       | American Shipping/CSG     |             | 16     | Crossway Chincok     | 47,000 dwt               | 83.3                  | Dec-10            |
| Moak Ship & Dry Dock    | Ketchikan AK      | SRCT Ferry            | Matanuska Susitna Borough |             |        | Susitna              | 20 cars, 1000 passengers | 28.0                  | Apr-10            |
| Moak Ship & Dry Dock    | Ketchikan AK      | Tank Barge            | Chewon Canada             |             |        | Coal Harbor No. 5    |                          |                       | Dec-09            |
| Moak Ship & Dry Dock    | Ketchikan AK      | Ferry                 | Ketchikan Gateway Borough |             |        | New Fishnet II       |                          |                       | Sept-10           |
| AB American Marine      | Bellingham WA     | Ferry                 | Kilbuck Ferries           |             |        |                      | 77 ft.                   |                       | 2010              |
| Almat Boats             | Rowanburg OK      | Patrol Boat           | Port of Seattle           |             |        |                      | 97 ft.                   |                       | 2009              |
| Almat Chambersed Boats  | Bellingham WA     | Cutter Boats          | US Coast Guard            |             |        |                      | 48 boats                 | 24 ft.                | 2009              |
| Almat Chambersed Boats  | Bellingham WA     | Bridge Erection Boats | US Marine Corp.           |             |        |                      | 42 boats                 | 27 ft.                | 12.8              |
| AMFES                   | Brownsville TX    | Keels-Up              | Perforadora Central       |             |        | Super Hub            |                          |                       | Jan-09            |
| AMFES                   | Brownsville TX    | Keels-Up              | Rovan Companies           |             |        | Super Hub            | 195.0                    |                       | Apr-09            |
| AMFES                   | Brownsville TX    | Keels-Up              | Rovan Companies           |             |        | Super Hub            | 195.0                    |                       | Apr-09            |
| AMFES                   | Brownsville TX    | Keels-Up              | Rovan Companies           |             |        | Super Hub            | 195.0                    |                       | Dec-09            |
| Atlantic Marine Alabama | Mobile AL         | Product Carrier       | MB Shipping               |             | 107    |                      | 49,000 dwt               |                       | 2009              |
| Atlantic Marine Alabama | Mobile AL         | Product Carrier       | MB Shipping               |             | 104    |                      | 49,000 dwt               |                       | 2010              |
| Atlantic Marine Alabama | Mobile AL         | Product Carrier       | MB Shipping               |             | 105    |                      | 49,000 dwt               |                       | 2010              |
| Atlantic Marine Florida | Jacksonville FL   | PSV                   | Humbolt Offshore Services |             | 251    | ICE Silverton        | 240 ft.                  |                       | 4-09              |
| Atlantic Marine Florida | Jacksonville FL   | PSV                   | Humbolt Offshore Services |             | 252    | ICE                  | 240 ft.                  |                       | 10-10             |
| Atlantic Marine Florida | Jacksonville FL   | PSV (G)               | Humbolt Offshore Services |             |        | ICE Centerline       | 270 ft.                  | 35.0                  | 6-0-2009          |
| Austal USA              | Mobile AL         | General Combat Ship   | U.S. Navy                 | 1CS2        | 610    | Independence         | 420 ft.                  | 223.3                 | Jan-09            |
| Austal USA              | Mobile AL         | General Combat Ship   | U.S. Navy                 | 1CS4        | 610    | Conomads             | 420 ft.                  |                       | Jan-12            |
| Austal USA              | Mobile AL         | High-Speed Transport  | U.S. Army                 | HHSV 1      | 631    | Fortitude            | 730 ft.                  | 183.1                 | Nov-10            |
| A & B Boat Builders     | Bayou La Batre AL | Lowboat               | MP River Operations       |             | 274    |                      | 1,350-hp                 |                       | 2009              |
| A & B Boat Builders     | Bayou La Batre AL | Lowboat               | MP River Operations       |             | 275    |                      | 1,350-hp                 |                       | 2010              |
| A & B Boat Builders     | Bayou La Batre AL | Lowboat               | MP River Operations       |             | 276    |                      | 1,350-hp                 |                       | 2010              |
| A & B Boat Builders     | Bayou La Batre AL | Lowboat               | MP River Operations       |             | 277    |                      | 1,350-hp                 |                       | 2010              |
| A & B Boat Builders     | Bayou La Batre AL | Lowboat               | MP River Operations       |             | 278    |                      | 1,350-hp                 |                       | 2010              |
| A & B Boat Builders     | Bayou La Batre AL | Lowboat               | MP River Operations       |             | 279    |                      | 1,350-hp                 |                       | 2011              |
| Bath Iron Works         | Bath ME           | Destroyer             | U.S. Navy                 | DDG 109     | 501    | Jason Purnham        | 9,238 tdr                | 32.7                  | 12-Aug-09         |
| Bath Iron Works         | Bath ME           | Destroyer             | U.S. Navy                 | DDG 111     | 505    | Spruance             | 9,238 tdr                | 48.0                  | 10-Mar-10         |
| Bath Iron Works         | Bath ME           | Destroyer             | U.S. Navy                 | DDG 112     | 509    | Michael S. Murphy    | 9,238 tdr                | 36.2                  | 11-Oct-10         |
| Bath Iron Works         | Bath ME           | Destroyer             | U.S. Navy                 | DDG 115     | 507    |                      | 9,238 tdr                |                       |                   |
| Bath Iron Works         | Bath ME           | Destroyer             | U.S. Navy                 | DDG 100     | 601    | Zinnwald             | 4,364 tdr                | 1,392.4               | 7-Jun-12          |
| Bath Iron Works         | Bath ME           | Destroyer             | U.S. Navy                 | DDG 100     | 602    | Michael Monseur      | 4,364 tdr                |                       | 7-Jun-12          |
| Bath Iron Works         | Bath ME           | Destroyer             | U.S. Navy                 | DDG 100     | 603    |                      | 4,364 tdr                |                       | 10-Jun-15         |
| Bay Shipbuilding        | Bayou La Batre AL | Tank Barge            | U.S. Shipping             |             | 268    |                      | 137,000 lbs              | 90.0                  | Jan-09            |
| Beant Boats             | Warren RI         | Ferry                 | Puerto Rico AT&T          |             | 324    |                      | 75 ft.                   |                       | May-09            |
| Beant Boats             | Warren RI         | Water Taxi            | Puerto Rico AT&T          |             | 325    |                      | 45 ft.                   |                       | May-09            |
| Bluebonnet Marine       | Corpus Christi TX | Lowboat               | Florida Marine Tugs       |             | 123    | John Cox             | 3,400-hp                 |                       | Dec-09            |
| Bluebonnet Marine       | Corpus Christi TX | Lowboat               | Florida Marine Tugs       |             | 124    | Cap. Susan Vannatter | 3,400-hp                 |                       | Aug-09            |
| Bluebonnet Marine       | Corpus Christi TX | Lowboat               | Florida Marine Tugs       |             | 125    |                      | 3,400-hp                 |                       | 2010              |
| Bluebonnet Marine       | Corpus Christi TX | Lowboat               | Florida Marine Tugs       |             | 126    |                      | 3,400-hp                 |                       | 2010              |
| Boatco                  | Bayou La Batre AL | Lowboat               | Superior Energy           |             | 120    |                      |                          |                       | 2009              |
| Boatco                  | Bayou La Batre AL | Lowboat               | Superior Energy           |             | 121    |                      |                          |                       | 2009              |
| Bollinger Shipyards     | Amelia LA         | Tank Barge            | Ex-Sa Transportation      |             | 332    |                      | 103,000 lbs              |                       | 2009              |
| Bollinger Shipyards     | Amelia LA         | Tank Barge            | EMMT                      |             | 328    |                      | 35,000 lbs               |                       | 2009              |
| Bollinger Shipyards     | Amelia LA         | Tank Barge            | Bochard Transportation    |             | 301    | B No. 281            | 60,000 lbs               |                       | 2010              |
| Bollinger Shipyards     | Louisport LA      | PSV                   | Bea Mar LLC               |             | 303    |                      | 240 ft.                  |                       | Aug-09            |
| Bollinger Shipyards     | Louisport LA      | PSV                   | Bea Mar LLC               |             | 304    |                      | 240 ft.                  |                       | Oct-09            |
| Bollinger Shipyards     | Louisport LA      | PSV                   | Bea Mar LLC               |             | 305    |                      | 240 ft.                  |                       | Dec-09            |
| Bollinger Shipyards     | Louisport LA      | PSV                   | Bea Mar LLC               |             | 306    |                      | 240 ft.                  |                       | Feb-10            |
| Bollinger Shipyards     | Louisport LA      | PSV                   | Bea Mar LLC               |             | 307    |                      | 240 ft.                  |                       | Apr-10            |
| Bollinger Shipyards     | Louisport LA      | PSV                   | Bea Mar LLC               |             | 308    |                      | 240 ft.                  |                       | Jun-10            |
| Bollinger Shipyards     | Louisport LA      | Fast Response Cutter  | U.S. Coast Guard          | WPP         | 371    | Centinel             | 135 ft.                  | 85.0                  | Dec-10            |
| Bollinger Shipyards     | Louisport LA      | Coastal Patrol Boat   | U.S. Coast Guard/Compt    | WPP         |        |                      | 87 ft.                   |                       |                   |
| Bollinger Shipyards     | Louisport LA      | Coastal Patrol Boat   | U.S. Coast Guard/Compt    | WPP         |        |                      | 87 ft.                   |                       |                   |
| Boyan's Boat Craft      | Louisville LA     | Crewboat              | Hudson Chouest            |             | 1708   |                      | 177 ft.                  |                       | May-09            |
| Boyan's Boat Craft      | Louisville LA     | Crewboat              | Hudson Chouest            |             | 1709   |                      | 177 ft.                  |                       | Aug-09            |
| Boyan's Boat Craft      | Louisville LA     | Crewboat              | Gulf Western Logistics    |             |        |                      | 143 ft.                  |                       | 2009              |
| Boyan's Boat Craft      | Louisville LA     | Crewboat              |                           |             |        |                      | 165 ft.                  |                       | 2010              |
| Boyan's Boat Craft      | Louisville LA     | Crewboat              |                           |             |        |                      | 175 ft.                  |                       | 2010              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | TAM                       |             |        | Isle Star            |                          |                       | 2009              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | Undisclosed               |             |        |                      |                          |                       | 2009              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | Undisclosed               |             |        |                      |                          |                       | 2009              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | Undisclosed               |             |        |                      |                          |                       | 2009              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | Undisclosed               |             |        |                      |                          |                       | 2009              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | Undisclosed               |             |        |                      |                          |                       | 2009              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | Undisclosed               |             |        |                      |                          |                       | 2009              |
| C & C Boat Works        | Belle Chasse LA   | OSV                   | Undisclosed               |             |        |                      |                          |                       | 2009              |
| C & C Boat Works        | Mobile AL         | Crewboat              | Graham Gulf               |             | 65     |                      | 173 ft.                  |                       | Apr-09            |
| C & C Boat Works        | Mobile AL         | Crewboat              | Graham Gulf               |             | 66     |                      | 173 ft.                  |                       | Aug-10            |
| C & C Boat Works        | Bayou La Batre AL | Mine Launcher         | Marine Oil Services       |             | 307    | Gamma 1000           | 32,500 gall              |                       | 2009              |
| C & C Boat Works        | Mobile AL         | Training Craft        | U.S. Navy                 | YF 703      |        |                      | 116 ft.                  | 9.8                   | Aug-09            |
| C & C Boat Works        | Mobile AL         | Training Craft        | U.S. Navy                 | YF 704      |        |                      | 116 ft.                  | 8.1                   | Dec-09            |
| C & C Boat Works        | Mobile AL         | Training Craft        | U.S. Navy                 | YF 705      |        |                      | 116 ft.                  | 2.8                   | Nov-10            |
| C & C Boat Works        | Mobile AL         | Training Craft        | U.S. Navy                 | YF 706      |        |                      | 116 ft.                  | 8.3                   | Mar-11            |

|                         |                |                     |                           |         |                  |              |                    |                     |
|-------------------------|----------------|---------------------|---------------------------|---------|------------------|--------------|--------------------|---------------------|
| C & G Boat Works        | Baton Rouge LA | Tug                 | Moran Towing              |         |                  |              | 1,300-hp           | 2009                |
| C & G Boat Works        | Baton Rouge LA | Tug                 | Crescent Towing           |         |                  |              |                    | 2009                |
| C & G Boat Works        | Baton Rouge LA | Tug                 | Crescent Towing           |         |                  |              |                    | 2010                |
| C & G Boat Works        | Baton Rouge LA | Tug                 | Crescent Towing           |         |                  |              |                    | 2010                |
| C & G Boat Works        | Baton Rouge LA | Towboat             | Marathon Petroleum        |         |                  |              | 4,000-hp           | Jan-09              |
| C & G Boat Works        | Baton Rouge LA | Towboat             | Marathon Petroleum        |         |                  |              | 4,000-hp           | Apr-09              |
| C & G Boat Works        | Baton Rouge LA | Towboat             | Marathon Petroleum        |         |                  |              | 4,000-hp           | Feb-10              |
| C & G Boat Works        | Baton Rouge LA | Towboat             | Marathon Petroleum        |         |                  |              | 4,000-hp           | Mar-10              |
| Candies Shipbuilding    | Houma LA       | PSV                 | Ctto Candies              |         |                  |              | 280-ft.            | 2009                |
| Chesapeake Shipbuilding | Salisbury MD   | Coastal Cruise Ship | American Cruise Lines     |         | Independence     |              | 130 pages          | Aug-09              |
| Chesapeake Shipbuilding | Salisbury MD   | Coastal Cruise Ship | American Cruise Lines     |         |                  |              | 130 pages          | 2009                |
| Chesapeake Shipbuilding | Salisbury MD   | Tug                 | Yare Brothers             | 93      |                  |              | 3,000-hp           | 2009                |
| Chesapeake Shipbuilding | Salisbury MD   | Tug                 | Yare Brothers             | 94      |                  |              | 3,000-hp           | 2010                |
| Chesapeake Shipbuilding | Salisbury MD   | Tug                 | Yare Brothers             | 95      |                  |              | 3,000-hp           | 2010                |
| Chesapeake Shipbuilding | Salisbury MD   | Tug                 | Yare Brothers             | 96      |                  |              | 3,000-hp           | 2011                |
| Comard Industries       | Morgan City LA | Crane Barge         | Corps of Engineers        |         |                  |              | 200 ft.            | May-10              |
| Corn Island Shipyard    | Lamar LA       | Tank Barge          | Penn Maritime             | 200     | Penn 601-07      |              | 90,000-hbl         | 2009                |
| Corn Island Shipyard    | Lamar LA       | Tank Barge          | Penn Maritime             | 201     | Penn 601-02      |              | 90,000-hbl         | 2009                |
| Corn Island Shipyard    | Lamar LA       | Tank Barge          | Penn Maritime             | 202     | Penn 601-07      |              | 90,000-hbl         | 2009                |
| C & G Boat Works        | Baton Rouge LA | Towboat             | Colling Barge Line        | 1       |                  |              | 2,000 hp           | Sept-09             |
| Dakota Creek Industries | Anacortes WA   | AMR Vessel          | Ctto Candies              | 3       | Ross Candies     |              | 285-ft             | Nov-09              |
| Dakota Creek Industries | Anacortes WA   | AMR Vessel          | Otto Candies              | 53      |                  |              | 285-ft             | Mar-10              |
| Dakota Creek Industries | Anacortes WA   | ATB Tug             | Crowley Marine            |         | Engage           |              | 16,320-hp          | Nov-10              |
| Dakota Creek Industries | Anacortes WA   | ATB Tug             | Crowley Marine            |         | Legend           |              | 16,320-hp          | Nov-10              |
| Dakota Creek Industries | Anacortes WA   | ATB Tug             | Crowley Marine            |         | Liberty          |              | 16,320-hp          | Mar-12              |
| Dorvalog Connecticut    | Bridgewater CT | Escort Tug          | Boston Towing             |         |                  |              |                    | 2009                |
| Dorvalog Connecticut    | Bridgewater CT | Escort Tug          | Boston Towing             |         |                  |              |                    | 2009                |
| Eastern Shipbuilding    | Panama City FL | MTT                 | Harves Gulf Marine        | 291     | Harves Carrier   |              | 200 ft.            | Jan-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Jul-09              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Aug-09              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Sept-09             |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Oct-09              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Nov-09              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Dec-09              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Jan-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Feb-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Mar-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Apr-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | May-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Jun-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Jul-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Aug-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Florida Marine Transports |         |                  |              | 900-ft 2,000-hp    | Oct-10              |
| Eastern Shipbuilding    | Panama City FL | PSV                 | Lafayette Marine          |         | John Berio Lab   |              | 200 ft.            | 2009                |
| Eastern Shipbuilding    | Panama City FL | PSV                 | Lafayette Marine          |         | John Lab         |              | 200 ft.            | 2009                |
| Eastern Shipbuilding    | Panama City FL | PSV                 | Lafayette Marine          |         |                  |              | 200 ft.            | 2010                |
| Eastern Shipbuilding    | Panama City FL | PSV                 | Amos Marine               |         | Dwight S. Ramsey |              | 202 ft.            | 2010                |
| Eastern Shipbuilding    | Panama City FL | PSV                 | Amos Marine               |         |                  |              | 202 ft.            | 2010                |
| Eastern Shipbuilding    | Panama City FL | Fire Boat           | City of New York          |         | Three City Three |              | 110 ft.            |                     |
| Eastern Shipbuilding    | Panama City FL | Fire Boat           | City of New York          |         | Three Engine II  |              | 110 ft.            |                     |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Grouse Corp               |         | Umla Reed        |              | 4,000-hp           | Jan-09              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Grouse Corp               |         | Paula Rable      |              | 4,000-hp           | Sept-09             |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Grouse Corp               |         | Jackie England   |              | 4,000-hp           | Mar-10              |
| Eastern Shipbuilding    | Panama City FL | Towboat             | Grouse Corp               |         | Lodie M. Seal    |              | 4,000-hp           | Mar-10              |
| Eastern Shipbuilding    | Panama City FL | Tug                 | E. N. Ross                |         | Revere I         |              | 90 ft.             | 2011                |
| Eastern Shipbuilding    | Panama City FL | Tug                 | E. N. Ross                |         | Revere II        |              | 90 ft.             | 2010                |
| Electric Boat           | Groton CT      | Submarine           | U.S. Navy                 | 558,780 | 201              | Missouri     | 770-ft             | 1,577               |
| Electric Boat           | Groton CT      | Submarine           | U.S. Navy                 | 558,782 | 202              | Mississippi  | 770-ft             | 1,741               |
| Electric Boat           | Groton CT      | Submarine           | U.S. Navy                 | 558,784 | 203              | North Dakota | 770-ft             | 2,000               |
| Electric Boat           | Groton CT      | Submarine           | U.S. Navy                 | 558,786 | 204              |              | 770-ft             | 2,000               |
| Electric Boat           | Groton CT      | Submarine           | U.S. Navy                 | 558,788 | 204              |              | 770-ft             | 2,000               |
| Electric Boat           | Groton CT      | Submarine           | U.S. Navy                 | 558,790 | 205              |              | 770-ft             | 2,000               |
| Ess Shipyard            | Galveston TX   | Stake Boat          | SE Bar Pilots             | 12      |                  |              | 104 ft.            | 11-09               |
| Freeport Shipbuilding   | Freeport TX    | Crane Boat          | Starlight Marine          | 271     |                  |              | 100 ft.            | Apr-09              |
| Geo Shipyard            | New Bern NC    | Patrol Boat         | Cabrasson Sheriff         | 193     |                  |              | 90 ft.             | May-09              |
| Geo Shipyard            | New Bern NC    | Survey Boat         | Corps of Engineers        | 197     |                  |              | 91 ft.             | Dec-09              |
| Geo Shipyard            | New Bern NC    | Fisheries           | State of Mississippi      | 198     |                  |              | 91 ft.             | Oct-10              |
| Shaddington Shiplog     | Somerses MA    | Pilot Boat          | Lake Charles Pilots       | 10      |                  |              | 73 ft.             | Mar-09              |
| Shaddington Shiplog     | Somerses MA    | Escort Boat         | U.S. Navy                 | 770-84  | 72 boats         |              | 95-ft              | Apr-09 to<br>Jan-10 |
| Shaddington Shiplog     | Somerses MA    | Pilot Boat          | Freeport Harbor Company   | 347     |                  |              | 55-ft.             | Oct-09              |
| Shaddington Shiplog     | Somerses MA    | Ferry               | New York Water City       | 361     |                  |              | 72-ft.             | Jan-09              |
| Shaddington Shiplog     | Somerses MA    | Pilot Boat          | Galveston Pilots          | 363     |                  |              | 70-ft.             | Oct-10              |
| Shaddington Shiplog     | Somerses MA    | Ferry               | Undisclosed               | 366     |                  |              | 73-ft.             | Sept-09             |
| Great Lakes Towing      | Cleveland OH   | Lift Boat Tug       | Inge International        |         |                  |              | 2,800-hp           | 2009                |
| Gulf Craft              | Datterson LA   | Towboat             | Sacor Marine              | 400     |                  |              | 173 ft.            | 2009                |
| Gulf Craft              | Datterson LA   | Towboat             | Sacor Marine              | 407     |                  |              | 165 ft.            | 2009                |
| Gulf Craft              | Datterson LA   | Towboat             | Sacor Marine              |         |                  |              | 190 ft.            | Sept-09             |
| Gulf Craft              | Datterson LA   | Towboat             | Sacor Marine              |         |                  |              | 190 ft.            | Mar-10              |
| Gulf Craft              | Datterson LA   | Towboat             | Sacor Marine              |         |                  |              | 190 ft.            | Sept-10             |
| Gulf Craft              | Datterson LA   | Towboat             | Sacor Marine              |         |                  |              | 190 ft.            | Mar-11              |
| Gulf Island Marine Lab  | Houma LA       | Towboat             | API River Operations      |         | API Tuglet       |              | 6,000-hp           | Mar-10              |
| Gulf Island Marine Lab  | Houma LA       | Towboat             | Undisclosed               |         |                  |              | 6,000-hp           | 2010                |
| Gulf Island Marine Lab  | Houma LA       | Towboat             | Undisclosed               |         |                  |              | 6,000-hp           | 2011                |
| Gulf Island Marine Lab  | Houma LA       | Towboat             | Undisclosed               |         |                  |              | 6,000-hp           | 2011                |
| Gulf Ship               | Galveston MS   | Escort Tug          | Galliano Marine Services  | 229     | C-Tracker 21     |              | 110 ft.            | 2009                |
| Gulf Ship               | Galveston MS   | Escort Tug          | Galliano Marine Services  | 230     | C-Tracker 22     |              | 110 ft.            | 2009                |
| Sunderson               | Portland OR    | Deck Barge          | Crowley Maritime          |         | Barge 433-6      |              | 109 ft. by 105 ft. | 2009                |
| Sunderson               | Portland OR    | Deck Barge          | Crowley Maritime          |         | Barge 433-7      |              | 109 ft. by 105 ft. | 2009                |
| Sunderson               | Portland OR    | Deck Barge          | Crowley Maritime          |         | Barge 433-8      |              | 109 ft. by 105 ft. | 2010                |
| Sunderson               | Portland OR    | Deck Barge          | Crowley Maritime          |         | Barge 433-9      |              | 109 ft. by 105 ft. | 2010                |





|                        |                  |                        |                          |         |                     |                   |                 |         |
|------------------------|------------------|------------------------|--------------------------|---------|---------------------|-------------------|-----------------|---------|
| Thomas-Sa Boatbuilders | Bonnet LA        | Tug                    | Yano Brothers            | 138     |                     | 4200-hp           |                 | 2009    |
| Thomas-Sa Boatbuilders | Bonnet LA        | Tug                    | Yano Brothers            | 139     | Seymour             | 4200-hp           |                 | 2009    |
| Thomas-Sa Boatbuilders | Bonnet LA        | Tug                    | Goffaly & Crismon        | 141     | Victor F. Goffaly   | 4200-hp           |                 | 2009    |
| Thomas-Sa Boatbuilders | Lockport LA      | Tug                    | Penn Maritime            | 110     |                     | 4000-hp           |                 | 2009    |
| Thomas-Sa Boatbuilders | Lockport LA      | Tug                    | Penn Maritime            | 111     |                     | 4000-hp           |                 | 2009    |
| Todd Shipyard          | Everett WA       | Livestock Carrier      | Pinge Sound NS           | 98      |                     |                   | 0               | May-00  |
| Todd Shipyards         | Seattle WA       | Ferry                  | Washington State Ferries | 99      |                     |                   | 65.3            | May-00  |
| United States Marine   | Culpeper MS      | East Patrol Boat       | Chambers Coast Guard     | 119     |                     |                   | 16.3            | Sept-00 |
| United States Marine   | Culpeper MS      | East Patrol Boat       | Chambers Coast Guard     | 119     |                     |                   | 16.3            | Sept-00 |
| United States Marine   | Culpeper MS      | East Patrol Boat       | Chambers Coast Guard     | 119     |                     |                   | 16.3            | Sept-00 |
| United States Marine   | Culpeper MS      | Ab. V Patrol Boat      | Kauaii Navy              |         |                     |                   | 61.6            | Jan-02  |
| US Barge               | Portland OR      | Deck Barge             | Young Bros.              |         |                     |                   |                 | 2009    |
| US Barge               | Portland OR      | Deck Barge             | Young Bros.              |         |                     |                   |                 | 2009    |
| US Barge               | Portland OR      | Deck Barge             | Harley Marine            |         |                     |                   |                 | 2009    |
| US Barge               | Portland OR      | Deck Barge             | Harley Marine            |         |                     |                   |                 | 2009    |
| US Barge               | Portland OR      | Deck Barge             | Harley Marine            |         |                     |                   |                 | 2009    |
| Verret Shipyard        | Plaquemine LA    | Livestock              | Blessey Marine           |         |                     | 1200 hp           |                 | Mar-06  |
| Verret Shipyard        | Plaquemine LA    | Livestock              | Blessey Marine           |         |                     | 1200 hp           |                 | 2008    |
| V.I. Haller Marine     | Pascagoula MS    | Research Vessel        | N.O.A.A.                 | 1227    | 1957                | 1250 hdt          | 30.0            | Jul-09  |
| V.I. Haller Marine     | Pascagoula MS    | Coastal Mapping Vessel | N.O.A.A.                 | 1250    | 1963                | Fordham R. Jossie | 124.6, 315, 370 | Sept-09 |
| V.I. Haller Marine     | Pascagoula MS    | Fast Missile Craft     | Egyptian Navy            | 1337.1  | 1975                | 300 hdt           | 23.0            | Oct-02  |
| V.I. Haller Marine     | Pascagoula MS    | Fast Missile Craft     | Egyptian Navy            | 1337.2  | 1977                | 300 hdt           | 23.0            | Jan-03  |
| V.I. Haller Marine     | Pascagoula MS    | Fast Missile Craft     | Egyptian Navy            | 1337.3  | 1978                | 300 hdt           | 23.0            | Mar-03  |
| V.I. Haller Marine     | Pascagoula MS    | Range Tender Ship      | U.S. Navy                | 1338.12 | 1979                | Howard O. Larsen  | 100.0           | Apr-03  |
| V.I. Haller Marine     | Pascagoula MS    | A.T. Tug               | Cowley Marine            | 1982    | Achievement         | 820 hp            |                 | 21-2009 |
| V.I. Haller Marine     | Pascagoula MS    | A.T. Tug               | Cowley Marine            | 1983    | Innovation          | 820 hp            |                 | 11-2010 |
| V.I. Haller Marine     | Pascagoula MS    | A.T. Tug               | Cowley Marine            | 1984    | Vision              | 820 hp            |                 | 21-2010 |
| V.I. Haller Marine     | Pascagoula MS    | Tank Barge             | Cowley Marine            | 1986    | 650.8               | 185,000 barrels   | 80.0            | 21-2009 |
| V.I. Haller Marine     | Pascagoula MS    | Tank Barge             | Cowley Marine            | 1987    | 650.8               | 185,000 barrels   | 80.0            | 11-2010 |
| V.I. Haller Marine     | Pascagoula MS    | Tank Barge             | Cowley Marine            | 1988    | 650.10              | 185,000 barrels   | 80.0            | 21-2010 |
| V.I. Haller Marine     | Pascagoula MS    | Tank Barge             | Cowley Marine            | 1991    | 750.1               | 190,000 barrels   | 85.0            | 21-2011 |
| V.I. Haller Marine     | Pascagoula MS    | Tank Barge             | Cowley Marine            | 1993    | 750.2               | 190,000 barrels   | 85.0            | 21-2012 |
| V.I. Haller Marine     | Pascagoula MS    | Tank Barge             | Cowley Marine            | 1995    | 750.3               | 190,000 barrels   | 85.0            | 21-2013 |
| V.I. Haller Marine     | Pascagoula MS    | FSV                    | F & M Ref. Co.           | 1996    |                     | 230,000           | 25.0            | Jan-00  |
| V.I. Haller Marine     | Pascagoula MS    | FSV                    | F & M Ref. Co.           | 1997    |                     | 230,000           | 25.0            | Mar-00  |
| V.I. Haller Marine     | Pascagoula MS    | FSV                    | Condor Shipbuilding      | 1998    | Holland de Kromhout | 235,000           | 30.0            | Jan-00  |
| V.I. Haller Marine     | Pascagoula MS    | Survey Ship            | U.S. Navy                | 1-058   |                     |                   |                 | Feb-02  |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 90      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 91      | Edgar H. Moran      | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 92      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 93      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 94      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 95      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 96      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 97      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 98      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Washburn & Doughty     | East Boothbay ME | Tug                    | Moran Towing             | 99      | Edward C. Moran     | 3,000 hp          |                 | 2009    |
| Western Towing         | Seattle WA       | Tug                    | Western Towing           | 17      |                     | 4200-hp           |                 | 2009    |
| Ward Marine            | Seattle WA       | Long-Range Tenders     | U.S. Coast Guard         | 130     |                     | 500               |                 | 2009    |
| Ward Marine            | Seattle WA       | Short-Range Tenders    | U.S. Coast Guard         | 131     |                     | 500               |                 | 2009    |

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**Exhibit 3**

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

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

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**February 24, 2009**

**Prepared for:**

**The American Petroleum Institute**

**Prepared by/Submitted by:**



**Ecology and Environment, Inc.**  
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# 1 Introduction

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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

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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.<sup>1</sup> 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<sup>2</sup> 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.

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<sup>1</sup> Clarkson Research Services Ltd., *A-Z of Offshore Support Vessels of the World, 2008* ed.

<sup>2</sup> 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).<sup>3</sup> 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.

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<sup>3</sup> 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.<sup>4</sup> 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.

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<sup>4</sup> Clarkson Research Services Ltd., 2008.

Table I

| 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 <sup>1</sup>   | 37         | 12.5 | 259         | 87.5     | 296         |
| Diving Support Vessels <sup>2</sup>       | 15         | 15.5 | 82          | 84.5     | 97          |
| Pipelaying Vessels <sup>3</sup>           | 25         | 36.8 | 43          | 63.2     | 68          |
| Crane and Derrick Lay Barges <sup>4</sup> | 39         | 24.1 | 123         | 75.9     | 162         |
| Heavy Lift Vessels <sup>5</sup>           | 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          |
| <b>Totals</b>                             | <b>951</b> |      | <b>4581</b> |          | <b>5532</b> |

**Table Notes**

<sup>1</sup> Includes Survey, Seismic Survey, and Geophysical Survey Vessels

<sup>2</sup> Includes Diving Support and ROV/Submersible Support vessels

<sup>3</sup> Includes Pipe Layer, Pipe Laying Barge and Pipebury vessels

<sup>4</sup> Includes Crane Barges and Derrick Lay Barges

<sup>5</sup> Includes Heavy Lift Cargo Vessel and Heavy lift Crane Ships

Source: Clarksons 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

| <b>Number of Offshore Support Vessels Registered by Country</b> |  |             |
|---|--|-------------|
| <b>Country</b>  | <b>Number of Registered Offshore Support Vessels</b> | <b>Rank</b> |
| 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.<sup>5</sup> Of this total,

<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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 fleet 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.<sup>8</sup> 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.<sup>9</sup> 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:

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<sup>6</sup> ODS-Petrodata, p.8.

<sup>7</sup> ODS-Petrodata, p.9.

<sup>8</sup> Bill Daughdrill (E & E) and Joe Kavanaugh (OMSA) telephone conversation of February 19, 2009

<sup>9</sup> 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**

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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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.

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<sup>10</sup> Tidewater Marine, 2008 Annual Report, pp. 9-10.

<sup>11</sup> Tidewater Marine, p.9.

<sup>12</sup> Tidewater Marine, p. 6.

## 7. Congressional Report on U.S. Cabotage Restrictions

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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).<sup>13</sup> 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.<sup>14</sup>*

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*

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<sup>13</sup> 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).

<sup>14</sup> 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 LAGC survey indicated that some may split their fleets between U.S. and foreign operations and others might concentrate exclusively on foreign operations.*<sup>15</sup>

Overall, the OTA report concluded, "In general, only a few benefits would seem to stem from the changes analyzed..."<sup>16</sup> 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".<sup>17</sup> 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.*<sup>18</sup>

*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.*<sup>19</sup>

## **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.

<sup>15</sup> U.S. Congress, Office of Technology Assessment, p. 22.

<sup>16</sup> U.S. Congress, Office of Technology Assessment, p. 29.

<sup>17</sup> U.S. Congress, Office of Technology Assessment, p. 29.

<sup>18</sup> U.S. Congress, Office of Technology Assessment, pp. 29-30.

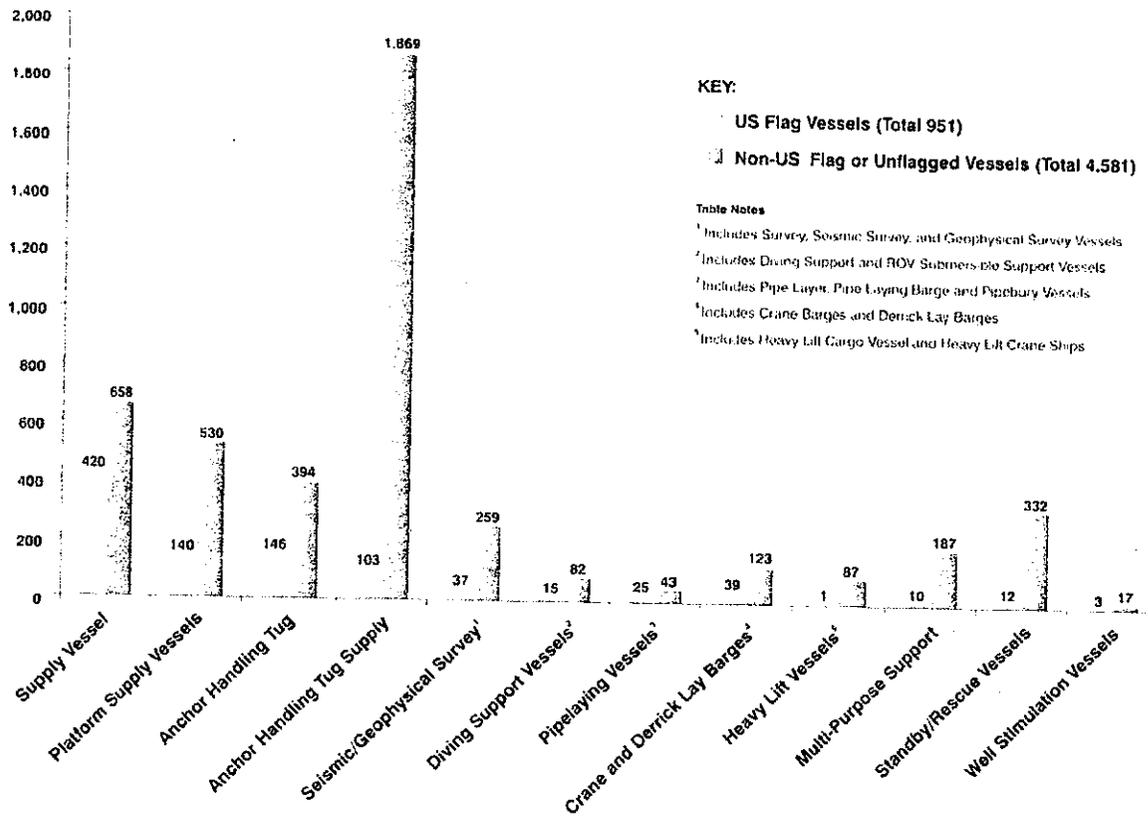
<sup>19</sup> U.S. Congress, Office of Technology Assessment, p. 30.

## **APPENDIX A**

Bar Chart

Offshore Support Vessels of the World

### OFFSHORE SUPPORT VESSELS OF THE WORLD



Source: Clarkson's A 2 Global Support Vessels of the World 2008-09

**Eric Galerne**

8524 Hwy 6 North  
Unit 118  
Houston, Texas 77095

**Exhibit 4**

**U.S.C. 46 Subpart 55102**

**And**

**Revision History**

-CITE-

46 USC Sec. 55102

01/08/2008

-EXPCITE-

TITLE 46 - SHIPPING  
Subtitle V - Merchant Marine  
Part D - Promotional Programs  
CHAPTER 551 - COASTWISE TRADE

-HEAD-

Sec. 55102. Transportation of merchandise

-STATUTE-

(a) Definition. - In this section, the term "merchandise" includes -

- (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and
- (2) valueless material.

(b) Requirements. - Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel -

- (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
- (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

(c) Penalty. - Merchandise transported in violation of subsection (b) is liable to seizure by and forfeiture to the Government. Alternatively, an amount equal to the value of the merchandise (as determined by the Secretary of Homeland Security) or the actual cost of the transportation, whichever is greater, may be recovered from any person transporting the merchandise or causing the merchandise to be transported.

-SOURCE-

(Pub. L. 109-304, Sec. 8(c), Oct. 6, 2006, 120 Stat. 1632.)

-MISC1-

#### HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code)                                    | Source (Statutes at Large)  |
|-----------------|---|---|
| 55102           | 46 App.:883 (words before 1st proviso, 11th proviso). | June 5, 1920, ch. 250, Sec. 27 (words before 1st proviso, 11th proviso), 41 Stat. 999; July 2, 1935, ch. 355, 49 Stat. 442; Pub. L. 95-410, title II, Sec. 213, |

Oct. 3, 1978, 92 Stat. 904;  
Pub. L. 101-329 [100-329],  
Sec. 1(a)(1), [Sec. 1(a)]  
June 7, 1988, 102 Stat. 588;  
Pub. L. 102-587, title V,  
Sec. 5501(b), Nov. 4, 1992,  
106 Stat. 5085.

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In subsection (a)(1), the words "(as defined in section 2101 of the [sic] title 46)" are omitted because the definition of "State" is being moved to chapter 1 and will apply to the entire title.

In subsection (b), the words "may not provide any part of the transportation of" are substituted for "No . . . shall be transported" and "or for any part of the transportation" because of the reorganization of the language. The words "including Districts, Territories, and possessions thereof" are omitted because of the definition of "United States" in chapter 1 of the revised title. The words "to which the coastwise laws apply" are substituted for "embraced within the coastwise laws" for consistency with section 55101. The words "is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade" are substituted for "owned by persons who are citizens of the United States", and the words "has been issued a certificate of documentation with a coastwise endorsement under chapter 121" are substituted for "documented under the laws of the United States", for clarity and consistency in the revised title. The words "or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement" are added for consistency with section 12102 as revised by the bill. The requirement that the vessel be built in the United States is omitted from this section for consistency with the requirements for a coastwise endorsement, which also require that the vessel be built in the United States except in certain circumstances. The words "or vessels to which the privilege of engaging in the coastwise trade is extended by section 808 of this Appendix or section 22 of this Act" are omitted because the relevant portion of section 808, and section 22, have been repealed.

In subsection (c), the words "any person" are substituted for "any consignor, seller, owner, importer, consignee, agent, or other person or persons" to eliminate unnecessary words.

-End-



## International Marine Contractors Association

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14 August 2009

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Ms Sandra L Bell, Executive Director  
US Customs and Border Protection  
Office of International Trade  
Regulations and Rulings  
Attention: Trade and Commercial Regulations Branch  
799 9<sup>th</sup> Street, NW, Mint Annex  
Washington, DC 20229  
United States of America

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**

We are writing regarding 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 17 July 2009 ("the Notice"). US Customs and Border Protection (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. If CBP decides to adopt the proposal in the Notice as written, it would result in a complete paradigm shift on how the oil and gas industry operates offshore and would almost certainly result in many companies being forced to breach existing contracts. This proposal would have far-reaching and highly damaging effects on the offshore oil and gas industry and, ultimately, the US 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 US trade balance.

The International Marine Contractors Association (IMCA) is the largest international trade association representing offshore, marine and underwater engineering companies supporting energy related projects world-wide. IMCA has approximately 600 member companies promoting good practice consistent with internationally accepted standards, particularly in the areas of health, safety, environment, quality, efficiency, and technology. Standardization of technical, commercial and uniform regulatory approaches helps achieve efficiency in a global market. IMCA endeavors to monitor changes in legislation and regulations and keep its members informed. Therefore, we are grateful for the opportunity to be able to facilitate our US members' interests by providing these comments on the proposed changes on their behalf.

#### **Summary of Comments**

As discussed in more detail below, CBP got it mostly right in its interpretative rulings in the last 30 years. These rulings were primarily based on a 1976 Treasury Decision (TD 78-387, "the 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 offshore installation of a large subsea system was wrongly decided and revoked it. However, that does not somehow make invalid 30 plus years of precedent that was established following the 1976 Ruling.

Importantly, should CBP decide to move forward with this proposal, the revoked ruling should remain revoked and the other rulings following the 1976 Ruling should remain in place. Indeed, it is irresponsible, in contravention of established rulemaking procedures and unnecessary for CBP to take the extraordinary measures described in the Notice after affording the industry only 28 days to comment (taking into account the last two days are weekend days) in the middle of the summer, particularly in view of the substantial impact the modifications will have on industry and the economy. And while the purpose of the Jones Act is to regulate the transportation of merchandise between coastwise points, we believe the CBP proposal goes beyond its jurisdiction in an attempt to regulate installation activities.

## Background

### The Coastwise Laws

Under the coastwise merchandise statute (commonly known as the Jones Act), the transportation of merchandise between US points must be accomplished by US-built, US-flag vessels, owned 75% by US citizens and never sold foreign. Specifically, no merchandise shall be transported between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than one that is coastwise qualified. 46 USC § 55102. As interpreted by CBP, merchandise means goods, wares and chattels of every description, including valueless material. CBP has carved out “equipment” of the vessel from the definition of merchandise going all the way back to a 1939 Treasury Decision (TD 49815(4), “the 1939 Ruling”), which essentially states that equipment means portable articles necessary for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons onboard.<sup>1</sup> 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, which states that the laws of the United States are extended to the subsoil and seabed of the OCS and to all artificial islands and all installations and other devices permanently or temporarily attached to the seabed.

### CBP Rulings Reflecting Developments in Deepwater Technology and Specialist Vessels

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, particularly when it involves the use of new technology, such as that developed over the years as industry has gone to deeper waters offshore. This avoids severe penalties that could be assessed should CBP make a determination after the fact that a particular operation/movement 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.

There have been tremendous advances in the equipment, vessels, and technology that have facilitated deepwater OCS activities over the past years. In fact, deepwater OCS activities – including the subsea technology, floating facilities, and other sophisticated equipment and methods needed to advance offshore development – had not even been contemplated at the time of the original 1939 Ruling. Over the years, CBP has rightly recognized and accommodated these developments and the evolving nature of deepwater activities by refining the definition of equipment of the vessel.

Furthermore, the specialist vessels operating offshore today are configured in various ways to accomplish a multitude of missions and operations to provide flexibility in order to operate efficiently and economically. Operators commonly modify vessels to meet the needs of the offshore oil and gas industry by mobilizing equipment that becomes integral to the daily operations of the vessel in order for the vessel to accomplish its assigned missions. For example, pipelaying or dive support equipment is commonly attached to the vessel if the work assigned by an operator for a particular charter period is for pipelaying or diving services.

It is critical that CBP recognizes that the items discussed above constitute vessel equipment and not merchandise because it is standard industry practice to fit out a vessel in this way for use in the “operation” of the vessel. This equipment becomes integral to the operation of the vessel so it can achieve its mission and is not unladen during normal operations until that particular mission or type of operation of the vessel is complete or changes. Accordingly, CBP should recognize that these items are not “unladen” as merchandise at a second coastwise point, even if removed at a second port, because the purpose was not to “transport” the item, but rather to use it in offshore services. Any items used in this fashion should be considered vessel equipment.

### The 1976 Treasury Decision Got it Right

The 1976 Ruling is the seminal ruling on which CBP has relied heavily when ruling on offshore deepwater developments projects. The 1976 Ruling concerned a diving support work barge. This one ruling, however, is far from the only ruling on which CBP should base its future decisions – there are other equally important rulings. In the 1976 Ruling, CBP held, among other things, that materials and tools necessary for the accomplishment of the mission of the vessel were not considered merchandise and

<sup>1</sup> 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 onboard. It does not include 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. TD 49815(4).

thus their transportation did not implicate the coastwise laws because lading/unlading these items was incidental to the vessel's operations. To qualify for this treatment, for repair work, these 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 pipelaying and repairing of pipe from a vessel did not implicate the coastwise laws as long as the vessel carrying the pipe is also laying the pipe because, according to CBP, the pipe is not landed, but is paid out in the course of the pipelaying operation.

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"<sup>2</sup> because the articles would be considered equipment of the vessel. At the same time, industry has relied on this fundamental precedent and invested millions of dollars in equipment and vessels in order to accomplish the offshore work.

### **CBP's Reversal of Decades of Precedent**

It is noteworthy that industry relied heavily on the decisions that consistently flowed from the 1976 Ruling and these subsequent rulings represented a logical progression of technological advances in the offshore oilfield. On 20 February 2009, however, CBP issued a ruling related to the installation of a large piece of equipment on the seabed which further expanded on this established precedent. See the 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") that was 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 that February 2009 Christmas Tree ruling. In its request, OMSA argued that CBP had erred in treating the Christmas Tree, a large, valuable article placed on a vessel for transportation and installation, as equipment of the vessel rather than merchandise. While OMSA's request was expressly and specifically limited to seeking revocation of the Christmas Tree Ruling, it vaguely suggested, without providing any 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 at least 20 additional rulings issued over a span of more than 30 years and to re-interpret the 1939 Ruling, which has been consistently interpreted by CBP for over 70 years. Astonishingly, CBP proposes to wipe out a significant portion of the body of law on which the offshore industry has relied in developing the subsea technology, floating facilities, and other sophisticated equipment, practices, procedures, and methods currently in use without giving industry adequate time to assess the proposal's impacts, let alone provide constructive comments. In addition, no assessment has been conducted of the substantial safety risks or the environmental pollution risks that could result as a consequence of implementation of CBP's proposal.

### **The "Mission of the Vessel" Test is the Correct Test for Equipment Used by a Vessel**

#### **The Vessel "Itself" Proposed Test**

CBP's proposal is based on a new distinction between the operation or mission of a vessel and the operation or mission of a vessel "itself". In making this distinction, CBP has, in a rather convoluted way, proposed to redefine "equipment of a vessel" by inserting the word "itself" into the definition of that term in the 1939 Ruling. The language in the 1939 Ruling, however, is clear and concise and neither includes nor needs the word "itself" inserted 70 years later.

We believe that by reading the word "itself" into its language now is arbitrary and capricious, resulting in a corrupted meaning of the entire definition which has been undisturbed for over 70 years. Ultimately, however, insertion of this word is a distinction without any difference. As discussed above, part of the 1939 Ruling states that "The term equipment...includes portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel..." As discussed in more detail below, the 1939 Ruling uses three different terms, operation, navigation, and maintenance, each with distinctly different meanings. Otherwise, as a matter of statutory construction, the 1939 Ruling would have used two terms, maintenance and either operation or navigation, if the terms navigation and operation had the same meaning.

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<sup>2</sup> 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," "essential to the mission of the vessel," "necessary for the accomplishment of the mission of the vessel," and "necessary to carry out a vessel's functions." It is simply incredible that CBP now concludes that this fundamental doctrine has been wrong all these years.

**Meaning of Operation/Accomplishment of the Mission**

The CBP proposal would have the practical effect of somehow, but erroneously, including “operation” within the 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”<sup>3</sup>. “Navigation,” on the other hand, means “the art or practice of getting ships ... from place to place”<sup>4</sup> or “the art ... of setting a safe course for a ship ... from one place to another by means of ... instruments”<sup>5</sup>. 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*. Put simply, CBP is changing the plain language to justify a reversal of prior rulings when no reasonable or logical basis actually exists.

The 1939 Ruling intended to exempt from the Jones Act any equipment used in furtherance of the operation or the mission of the vessel. At the time of the 1939 Ruling, no one could have predicted the vast changes in technology that would evolve with deep water development. In turn, as recognized in subsequent CBP rulings, the definition and applicability of the term equipment of the vessel has also evolved.

In its proposal, CBP relies predominantly on two rulings, one from 1939 and one from 1976, with respect to what is, or should be, “equipment” of a vessel. From 1939 to 1976 to present, however, the offshore industry has evolved and technological advances have occurred at a rapid rate. Likewise, the equipment utilized onboard offshore vessels has also evolved. CBP cannot look at this precedent as being static and must recognize that it will continue to change as time marches on.<sup>6</sup> Therefore, the CBP should continue to accord deference to the 1939 Ruling taking into account evolving technology.

One of the examples that CBP uses to support its proposal is HQ 115356 (May 22, 2001) involving 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 year that the exhibit hall was equipment of the vessel. In essence, both vessels, by their fundamental design were deck barges and would be classified as such absent the addition of other *equipment* installed on a vessel. Putting articles on a barge, such as a generator, changes the barge from a deck barge to a power barge – and its mission/operation is that of a power barge.<sup>7</sup> Similarly, putting an exhibit hall on a deck barge changes the barge from a deck barge to an exhibit hall barge. Once such articles have been semi-permanently affixed to a vessel and the articles remain on the vessel for an extended period of time in order to facilitate the mission of the vessel, 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 here is the objective or mission to transport the generator or exhibit hall from point A to point B. The movement of these items between coastwise 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 a result of CBP’s proposal.

More significantly, vessels can always be, and commonly are, modified to change the type of vessel, which may change the operation or mission of a vessel. For example, a tank barge could be converted to a freight vessel. Once converted to a freight vessel, it would be outfitted as a freight vessel and would no longer be considered a tank vessel. Similarly, in the exhibit hall ruling, once the exhibit hall was installed, the vessel would no longer be considered a deck barge.

In fact, an excellent analysis supporting this position is reflected in a recent CBP ruling issued within the last year involving a deck barge that was proposed to be substantially modified to either a mobile submersible drilling rig or a mobile submersible platform. HQ 036016 (August 29, 2008). Supporting members and equipment were to be affixed in a semi-permanent manner.

<sup>3</sup> Merriam Webster Dictionary (2009).  
<sup>4</sup> Id.  
<sup>5</sup> The Marine Encyclopedic Dictionary (1996).  
<sup>6</sup> We note that under the Vessel Repair Statute (“VRS”), CPB has determined dutiable equipment to include portable articles necessary or appropriate for the navigation, operation, or maintenance of a vessel, but not permanently incorporated in or permanently attached to its hull or propelling machinery, and not constituting consumable supplies. These determinations under the VRS might provide useful guidance in assisting in determining what constitutes equipment for coastwise trade purposes, however, there is not enough time given the short comment period to further evaluate these determinations.  
<sup>7</sup> Although it is not entirely clear, it appears that in the power barge ruling, the vessel was previously used in a service other than a power barge because the ruling indicates it was “retrofitted.” This is analogous to the situation involving the exhibit hall barge which underwent a conversion to change it from a deck barge to a traveling exhibition hall.

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 constituting equipment of the vessel and not merchandise<sup>8</sup>. It is noteworthy that the power barge ruling that CBP cites was referenced in this ruling as a basis for finding that the equipment was integral to the operation of the vessel as a power barge.

Accordingly, we strongly urge CBP to retain the use of the "mission of the vessel" test in making equipment rulings. The essence of this test should be that as long as the items are used to accomplish the operation and mission of the vessel, and are used in that capacity during any particular voyage or segment of a voyage, then the materials should be deemed equipment of the vessel and may be unladen without being considered merchandise after the materials are no longer used as equipment of the vessel. Should the items, after having been used in the operation of the vessel no longer be used as equipment to support operation of the vessel, then be transported between coastwise points (e.g. such as the Yokohama Fenders discussed in footnote 8), then the materials would revert to merchandise requiring transportation by a coastwise qualified vessel.

### **The Potential Effect of the CBP Proposal on Multi-Purpose Vessels**

The CBP proposal raises many questions and creates much uncertainty. In attempting to clarify an area of law the industry formerly understood, CBP has raised more questions than answered when the simple solution is to follow the well-reasoned holdings in the 1976 Ruling, as well as the Yokohama fender and drill barge rulings discussed above.

As we understand it, if the CBP proposal were adopted as written, it could have a profound effect on the entire offshore industry. It could be interpreted as having the practical effect of limiting the use of a foreign-flag vessel offshore to a single purpose, which clearly CBP did not, one would hope, intend. Most of the foreign-flag vessels used offshore are multi-purpose vessels.

For example, under CBP's apparent rationale in its proposal and proposed modified rulings, in order for a vessel to lay pipe consistent with the coastwise laws, one could conclude that it would have to be a dedicated pipelaying vessel. This rationale raises questions about the use of multi-purpose vessels to lay pipe or conduct other activities on the OCS. There are currently no US-flag vessels classified as pipelaying vessels and there are only a hand-full of foreign-flag pipelaying vessels in the world-wide inventory, none of which regularly operates 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. Under the exhibit hall rationale discussed above, there is some uncertainty as to whether these vessels would be allowed to conduct pipelaying operations because the pipelaying equipment used aboard the vessel could arguably be considered merchandise. Accordingly, if the CBP proposal is adopted as is, pipelaying operations from a vessel other than a dedicated pipelay vessel are in question because they are being done from a vessel other than a vessel specifically classified/designated as a pipelaying vessel.

The concern expressed above is not just limited to pipelaying operations. The same concern would apply to most offshore operations requiring the services of a specialized vessel. Another example is the use of ROVs aboard vessels in support of OCS operations. Although CBP indicated in its proposed modification to HQ 113841 involving a cablelaying vessel that the use of an ROV would not be prohibited in support of cablelaying operations, the basis for the modification was that the ROV would be allowed because it was necessary for the operation of a cablelaying vessel to monitor the placement of the cable. However, the previous rationale to support the use of the ROV (i.e. it was essential to completion of the mission of the vessel) was revoked. Therefore, under CBP's proposed rationale, the use of ROVs aboard multi-purpose vessels is in question. In addition, there are only a few dive support vessels ("DSVs") or ROV support vessels ("RSVs") actually operating in the GOM, which, because of the designation/classification of these vessels would clearly be able to carry ROVs. Similar to pipelaying activities, most of the vessels conducting repair work offshore requiring the use of ROVs are multi-purpose vessels and not DSVs or RSVs. Moreover, there are currently not enough of these coastwise qualified specialist multipurpose vessels to perform existing work offshore, much less future work.

In summary, there is great concern that many of the operations currently carried out in support of OCS activities may be in question because most of the vessels used offshore are multi-purpose vessels and not vessels designated for a single use. CBP needs to clarify that multi-purpose vessels may have articles on board that are equipment supporting those multiple uses. In any final decision, it is critical that CBP explicitly recognize that a vessel may have equipment on board used in various distinct operations, such as pipelaying, construction, and dive support, among others and that a multi-purpose vessel should not be restricted to only one type of work offshore.

<sup>8</sup> In another well thought out ruling which CBP has proposed to revise (HQ 111892 dated September 16, 1991), a vessel was utilizing large Yokohama fenders to assist in lightering operations. The fenders were to be laden at one coastwise point, utilized for lightering operations, and then transported to another west coast port. In a well reasoned and straight forward ruling, CBP held that because the fenders were used during lightering operations, the fenders would be considered equipment used in furtherance of operation of the vessel.

## **The 1976 Ruling and its Progeny are the Correct Tests for Items Not Remaining Aboard a Vessel During Installation Operations**

### **The CBP Proposed “Incidental to Pipelaying” Test**

With regard to pipelaying operations, the operative language in the CBP proposal is that the transportation and installation of pipeline connectors and other materials will only be allowed using a foreign-flag vessel if “incidental to the pipe laying operations of a vessel.” There is no need for CBP to dispense with the existing precedent in the 1976 Ruling – it works, is understood, and should be left alone. The precedent worked well until CBP failed to follow it in the Christmas Tree ruling discussed above.

### **Pipelaying, Operations Similar in Nature to Pipelaying and Repair Work using Materials of *De Minimus* Value**

It is important to restate the 1976 Ruling test with regard to pipelaying, activities similar in nature to pipelaying, and *de minimus* materials used for repair because it has proven to be a workable test and has been relied on heavily by industry in its investment of vessels and associated hardware to work offshore in deepwater as technology has evolved.

- 1 *Pipelaying*: The use of a vessel in laying pipe is not a use in the coastwise trade, even when the pipe is laid between two coastwise points. Further, since the use of a vessel in pipelaying is not a use in the coastwise trade, the vessel performing the work may carry the pipe which it is to lay between such points. It is the fact that the pipe is not landed but only paid out in the course of the pipelaying operation which makes this operation not a violation of the coastwise laws by a foreign-flag vessel.
- 2 *Repairing of Pipe*: Similarly, there is no distinction to be made between repairing pipe and the laying of pipe in view of the unique characteristics of pipelaying activities which take them out of the purview of the coastwise laws.
- 3 *Repairs to Offshore or Subsea Structures other Than Pipe*: If the repair of subsea materials is foreseen and requires a repair material or component of more than *de minimus* value (such as a structural member) then the transportation of the components must be accomplished by a coastwise-qualified vessel.

With regard to (1) above and pipelaying, CBP has consistently held that any activity which by its nature is akin to pipelaying with regard to the technique of the laying a material, such as flowlines, umbilicals, and jumper pipes, is treated the same as pipelaying and not subject to the coastwise laws because the materials are paid out or laid on the seabed.

Similarly, with regard to (2) above, including repair activities involving the laying of material, such as flowlines and jumper pipes, they are also treated the same as the repairing of pipe and not subject to the coastwise laws.

With regard to (3) above and activities involving repairs offshore, in making a determination when repair materials installed at a coastwise point are either merchandise or repair materials, CBP completely misstated the doctrine espoused in the seminal 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 modified ruling, HQ H061992, CBP changed the “*or*” to an “*and*” thereby making the test inclusive and confusing the rationale in the 1976 Ruling, rather than strictly interpreting it. In conjunction with the application of the correct *de minimus* test, CBP should be cognizant of the fact that in the 1976 Ruling CBP 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.

### **Normal Equipment Complement of a Vessel Used During Installation Operations**

Following the publication of the 1976 ruling, CBP issued a multitude of rulings addressing different types of articles that would be considered equipment of the vessel that could be carried aboard a non-coastwise qualified vessel and installed during subsea operations offshore as long as these materials were installed by the vessel that transported the articles to be installed. For example, see HQ 115185 and HQ 115218. These are two of the rulings CBP now seeks to revise. In these rulings, citing the 1976 Ruling, CBP consistently ruled that this work could be performed on the basis that these articles were considered part of the normal equipment complement for that type of vessel to carry out its mission or function. For example, non-coastwise qualified dive support vessels and subsea construction vessels could install items such as pipeline connectors and risers even though these items were not paid out and laid on the seabed.

This analysis, that a non-coastwise qualified vessel could carry and install certain articles is fundamentally based on the concept that because the function or mission of a particular vessel (as discussed above under the “Mission of the Vessel Test”), was to

install these types of subsea articles to connect the various components of an OCS facility. On the other hand, the transportation of an article such as a Christmas Tree must be performed by a coastwise qualified vessel because a Christmas Tree is simply a large piece of merchandise.

### **OMSA Agrees with the IMCA Analysis**

Of note, OMSA agrees that the proper test to apply is the 1976 Ruling as discussed above. “The original and proper doctrine is that a foreign vessel that was performing a permitted service could transport from one coastwise point to another its tools, legitimate supplies and items of *de minimus* value that would be installed or attached to the destination point incident to the performance of the service.” OMSA Letter to CBP dated March 23, 2009, Page 11. Moreover, OMSA specifically cites the 1976 Ruling as the proper test with regard to the transportation and installation of materials offshore *Id.*, page 10.

Moreover, OMSA states that rulings issued by CBP after the 1976 Ruling were indeed correct on the basis that the transporting vessels were performing a function “- connecting the various components of the OCS facility.” *Id.*, page 9. According to OMSA, this doctrine is acceptable because it governs items that are part of the vessel’s complement for the purpose of connecting various components of an OCS facility to accomplish its mission. *Id.*, page 10.

OMSA concludes that “any article, other than one that is normally part of the vessel’s complement and necessary for its operation, is merchandise, if it is laden at one point and unladen at another point. Whenever the line is drawn in close cases, large, valuable articles which are placed on a vessel for the sole purpose of transporting and installing are clearly merchandise and not equipment.” *Id.*, page 12. We agree with this analysis.

Accordingly, both OMSA and IMCA agree that the test to be applied is the test espoused in the 1976 Ruling with regard to items not remaining aboard during installation operations. Specifically, the test that should be applied is:

- 1 Any activity involving the installation or repair of pipe, or items such as flowlines or jumper pipes, that are installed in a manner similar to pipelaying, can be accomplished by a non-coastwise qualified vessel because these activities are not subject to the coastwise laws.
- 2 During repair operations, the installation of items that are not paid out or laid, may be accomplished by a non-coastwise qualified vessel as long as the materials are of *de minimus* value or materials necessary to accomplish unforeseen repairs, provided that such materials are usually carried aboard the vessel as supplies.
- 3 A non-coastwise qualified vessel may carry and install articles (*i.e.* equipment) to connect the various components of an OCS facility as long as these articles are carried as part of the normal complement of the vessel to accomplish its mission.

### **Operational, Safety, Financial and Practical Impacts**

It is important to highlight the potential impact that the Notice will have on the regulated offshore community from an operational, financial, and practical perspective. The proposal would have far-reaching and highly damaging impacts on the offshore oil and gas industry, and ultimately the US economy and national security interests. Essentially, it would significantly curtail industry’s ability to explore and produce offshore US oil and gas, likely increasing reliance on imported oil and exacerbating the US trade balance.

The proposal would also protect a fleet of US vessels that does not currently exist. US companies conducting deepwater oil/gas operations rely on some of the world’s most sophisticated and expensive vessels for highly specialized operations, such as subsea installation and construction support, pipe/umbilical laying, and maintenance of seafloor facilities. Such vessels take years and huge investments to build, operate, and man. The vast majority of these are foreign-flag vessels. In fact, an independent study commissioned by API<sup>9</sup> reveals that, out of the world complement of offshore support vessels, only 5% (or ten vessels) of the world’s multi-purpose support vessels will be allowed to transport, install, and repair equipment on the OCS if the CBP proposal was adopted and only coastwise vessels could be used. Without the proper support vessels and resources necessary to repair offshore platforms, recovery efforts will be severely hampered, oil and gas supplies may be hindered for a greater amount of time, and the United States may be forced to rely even further on foreign sources of energy. The uncertainty and lack of clarity in CBP’s proposal brings into question the use of many of the foreign-flag specialist vessels.

In the short term, because of the uncertainty, the adoption of the CBP proposal would almost certainly result in a requirement to use coastwise-qualified offshore supply vessels “shadowing” a non-coastwise specialist vessel from site to site to conduct

<sup>9</sup> *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).

operations throughout the OCS. Such an arrangement would not only be costly, but would pose unacceptable safety risks in many cases, and greatly expand the time schedule within which OCS operations could occur. While CBP may consider this as an acceptable risk for routine operations, it certainly is unacceptable when weather conditions essentially prohibit the transfer of merchandise or equipment ship-to-ship while underway or when time is of the essence in emergency situations, such as immediately following a hurricane or a terrorist attack, in order to bring the offshore energy development operations back on line as soon as soon as possible. In addition, adoption of the CBP proposal would run counter to the OCSLA policy that operations should be conducted in a safe manner.<sup>10</sup>

In addition, it is clear that CBP has not coordinated its proposal with other key agencies with jurisdiction over OCS activities such as the Minerals Management Service or the Coast Guard. This coordination must be accomplished before any final action to ensure that agency action offshore is coordinated and there are no unintended consequences.

The impact of the proposal, if finalized in its current form, on the offshore industry would have a chilling effect on exploration and development of OCS resources. Not willing to risk excessive CBP penalties, US companies would likely be forced to shut down operations and breach existing contracts. Furthermore, due to the uncertainty that will likely result if CBP adopts the proposal "as is", owners and operators will not feel comfortable planning long term or in undertaking any contemplated operations until they obtain a CBP ruling confirming that any contemplated operation is consistent with the Jones Act. As such, CBP will almost certainly be inundated with ruling requests and projects will inevitably suffer delays. This could result in losses of thousands of jobs and hundreds of million dollars in US revenues. Industry's ability to install, maintain, and repair critical infrastructure would be adversely impacted, possibly resulting in US job losses and significantly reducing the ability to recover from a severe hurricane or even a terrorist attack. Such impacts would be economically harmful at any time, but especially during a recession.

### **Delayed Implementation or Phased-In Compliance**

The proposed changes in the Notice are particularly egregious because the "rulemaking" process is so short. It is estimated that the US industry would need five to seven years to build vessels capable of supporting deepwater operations and train crews. This is a capital-intensive effort, in difficult economic times. In short, neither the oil and gas industry of the United States nor the overall economy of the United States, particularly in the middle of a recession, can afford to have CBP rush to conclusions without ample time to fully understand and consider the pros and cons of the implications and legal effect the Notice may have, including ramifications to long-term contracts that will likely be breached. Should CBP decide to adopt its proposal, it needs delayed implementation to provide industry with a reasonable time to build or acquire the coastwise qualified vessels necessary to continue work offshore. Furthermore, no consideration or allowance has been given to existing contracts and projects that have recently been bid that will be significantly impacted by the proposed changes to the Notice.

At a minimum, should CBP decide not to delay implementation, it should implement its decision based on a phased-in compliance period so that companies have adequate time to implement any resulting changes. In summary, due to the significant lead time and tremendous investments involved in the retention and scheduling of contractors, IMCA recommends that the rule include a transitional period and/or a delayed compliance date.

### **Protectionism**

#### **World Trade Organization Agreement Requirements**

The proposed changes are protectionist in nature and thus run counter to the Obama Administration's free trade policies. The proposed changes could well give rise to retaliation against all US-flag carriers, not limited to only US-flag vessels operating on the OCS. Furthermore, adoption of the CBP proposal would run counter to the obligations of the United States under the World Trade Organization (WTO) Agreement. Specifically, Article 3(a) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") exempts certain legislation, including the Jones Act, restricting the use, sale, or lease of foreign-built or foreign-reconstructed vessels that was existing when a country became party to the WTO Agreement from the coverage of the WTO Agreement. While that exemption is quite broad, it does not cover modifications to the legislation that decreases its conformity

<sup>10</sup> Operations in the OCS should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health. 43 U.S.C. § 1332(6)

with GATT 1994. We believe that should CBP adopt its proposal, that this would constitute a modification to the legislation in a manner that decreases its conformity with GATT 1994.

The proposed changes would modify the definition of vessel equipment relied upon by the industry that have been in effect since 1976 and draw upon interpretations of the Jones Act dating back to 1939, before the WTO's predecessor agreement was negotiated. Congress has modified the Jones Act since the original interpretations at issue were made without changing the definition to revoke those interpretations. This indicates that Congress intended the Jones Act legislation to provide the coverage that CBP now intends to eliminate. By restricting the definition of equipment these rulings would subject new goods to the restrictions of the Jones Act, denying them the freedom of transit they currently enjoy under Article V of the GATT 1994. Such a change decreases the Jones Act's conformity with GATT 1994 by restricting the applicability of Article V of the GATT 1994. Therefore, revoking these rulings would result in a modification of the legislation that decreases the legislation's conformity with GATT 1994. Such action would likely result in a United States breach of its party obligations under the WTO Agreement.

## **NAFTA**

Moreover, CBP's proposed changes would negatively affect the ability of industry to provide installation services under the Outer Continental Shelves Lands Act, 43 USC §§ 1333 *et seq.* in violation of NAFTA requirements. Specifically, by changing the definition of the term "vessel equipment" from the current test of "necessary for the mission of the vessel" to "necessary for the operation of the vessel *itself*" CBP seeks to expand the scope of the Jones Act to cover installation methods used on the OCS. In enacting this proposed change, CBP would be effectively limiting the type of systems used in the installation of structures on the OCS to systems that are part of the identification of the vessel itself.

NAFTA requires that service providers of the other NAFTA Parties be accorded national treatment, i.e. treatment no less favorable than that the United States accords to its own service providers. The proposed changes would violate this principle of NAFTA. Under NAFTA, this national treatment principle applies to all services unless specifically excepted. The United States did not except future measures relating to offshore installation services from the coverage of the Agreement. See NAFTA Annex II, Reservations for Future Measures (Chapters 11, 12 and 14): Schedule of the United States. While the United States has excepted future measures relating to maritime cabotage services, CBP's proposed changes affect installation services that do not involve the lading and unloading of merchandise in waters embraced by the coastwise laws and, therefore, are not cabotage services. Therefore, CBP's proposed revocation and reinterpretation would violate the United States' NAFTA obligations to the extent that it denies Mexican and Canadian installation service providers national treatment.

## **Potential to Move Work out of the United States**

If this proposal is adopted by CBP, it may have the unintended effect of moving business out of the United States in order to avoid the uncertainty inherent in this proposal. For example, companies may decide to base operations in Mexico or other countries, and transport and install repair parts and other items needed offshore from there in order to avoid transportation between two coastwise points. This could have the effect of moving jobs and goods away from the United States, therefore producing an opposite effect of what is intended. It is noteworthy, that pursuant to NAFTA, many of the components installed offshore could be made in Canada or Mexico without any significant duty impact and transported and installed on the US OCS by foreign flag vessels without violating the Jones Act.

## **Failure to Follow Procedural Due Process and to Take Into Account the Economic Impacts**

### **Failure to Adhere to the Administrative Procedure Act ("APA")**

CBP does not have the authority to modify or revoke its longstanding precedent related to the coastwise trade pursuant to the authority under 19 USC § 1625(c) with regard to the modification and revocation of a CBP ruling. 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 the 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 Procedures Act, 5 USC § 553. The CBP proposed changes are so substantial that the only means in which CBP may make such changes is through a full rulemaking, with notice and comment in the Federal Register. In fact, the regulations published by CBP acknowledge that, even if interpretative rulings related to coastwise trade were subject to the procedures under 19 USC § 1625(c), that this process is inapplicable to circumstances requiring publication of an interim or final rule in the Federal Register under the APA. 19 CFR § 177.12(d)(vi).

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 *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration*, 177 F.3d 1030, 1035 (DC Cir. 1999), the DC Court of Appeals, in a case involving a change by the Federal Aviation Administration to a longstanding interpretation of its regulations, stated that the agency's previous advice had "become an authoritative departmental interpretation, an administrative common law". In that case the FAA had disregarded 30 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 does 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 comments procedure under the APA – namely notice and comment in the Federal Register.

It is noteworthy, that in a recent circumstance involving a CBP proposal to establish new criteria to determine whether non-coastwise qualified vessels are in violation of the Passenger Vessel Services Act ("PVSA") involving the coastwise transportation of passengers, the CBP published its proposed interpretation and solicited comments in the Federal Register. 72 Fed. Reg. 224 (21 November 2007). This evidences that at least in the past, CBP recognized that any regulatory actions involving an interpretive rule involving coastwise trade should be published in the Federal Register and not the Customs Bulletin.<sup>11</sup> Accordingly, the use of 19 USC § 1625, is legally inappropriate for such a wide-ranging and potentially devastating change in policy to an entire industry and due process requires this CBP action to be taken pursuant to the notice and comment requirements of the APA.

### **Failure to Adhere to Executive Order 12866 – Regulatory Planning and Review**

Regardless of whether CBP uses the procedures under 19 USC § 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 12866. The apparent failure of CBP to conduct such analysis directly contravenes fundamental principles of agency action.

CBP's action is clearly a "significant regulatory action" under Executive Order 12866 and thus CBP cannot lawfully implement its proposal until it completes the cost and benefit assessment required by the Executive Order. Specifically, under this Executive Order, CBP must assess, among other things: (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. See section 6(a)(3)(C) of Executive Order 12866. Needless to say, as articulated in the IMCA comments these issues present huge challenges.

In fact, these requirements were noted by the Office of Management and Budget in its 13 August 2008 letter to the Department of Homeland Security concerning the CBP proposed interpretation discussed above under the APA discussion relating to the definition of a coastwise voyage under the PVSA. OMB rejected the CBP proposed interpretation and returned it to CBP for reconsideration for failure to meet the basic requirements of Executive Order 12866. 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 Executive Order 12866 are intended for application to actions other than notice and comment rulemaking under the APA and would also apply to actions taken under 19 USC § 1625 and are therefore clearly applicable to CBP's proposal. Section 1 of the Executive Order requires 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...". "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

<sup>11</sup> Although in the case involving the PVSA, CBP had proposed a new interpretation of its regulation related to the transportation of passengers and did not propose to modify or revoke prior CBP rulings in this area as is the case in the current situation at issue here, CBP should be handling it in the same manner. This is because the effect would be to modify the treatment previously accorded by CBP to substantially identical transactions, which would otherwise be covered under 19 USC § 1625(c)(2), if not published in the Federal Register pursuant to the APA.

of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency”.

As recently recognized by President Obama, “[t]he fundamental principles and structures governing contemporary regulatory review were set out in Executive Order 12866 of September 30, 1993.” *Regulatory Review*, 74 Fed. Reg. 5977 (Office of the President, 3 February 2009) (memorandum for heads of executive departments and agencies). The procedures underlying development of this CBP proposal must conform to those “fundamental principles” that govern such an action.

Accordingly, regardless of whether CBP views the modification and revocation of these prior interpretation rulings subject to the notice and comment requirements of 5 USC § 553 or 19 USC § 1625, the potential overall impact of agency action is so enormous, sound and rational administrative principles dictate that careful consideration of such aspects in accordance with Executive Order 12866 must be integral to such a far-reaching proposal as this. However, having disregarded this mandate entirely in the development of this proposal, CBP’s failure to incorporate procedures for a meaningful cost-benefit analysis in this matter renders the proposed action inherently arbitrary and capricious. Such disregard, in our view, represents a serious abuse of agency discretion.

## Related Documents

- ◆ In these comments we have referred in footnote (9) specifically to the report *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).

This document provides useful background material about the vessels operating offshore and relevant arguments to the CBP proposals.

First, it is an independent study commissioned before the CBP’s proposals were published, so it was not prepared in response to rebut CBP’s proposal and has useful relevant content. Secondly, the content mixes well the vessel statistics, understanding of the operations and market and the implications of change. It contains good cross checking of facts from the database and other sources of data about the vessels. Thirdly, it referenced to an earlier US Government study: US 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).

The report explains that the conclusions of the study in 1989 remain valid today. The 1989 study explains that the effect of extending the reach of the Jones Act as CBP’s proposals do, would be detrimental to all parties. For these reasons, we have included a copy of this report in an Appendix to these comments.

- ◆ A further relevant piece of information is an open letter from IMCA to Ken Wells, OMSA, dated 7 August 2009, which provides discussion about the actual operations impacted by the CBP proposals. This also included as an Appendix to these comments.

## Conclusion

CBP has correctly applied the law for the last 70 years, with the one notable exception that brought this issue to a head, and there is no reason to change this fundamental doctrine now based on one letter from one interested organization, which ironically generally agrees with the 1976 Ruling and its progeny.

CBP correctly revoked the Christmas Tree ruling. That said, there is no justifiable reason for CBP to dramatically change the way it has looked at interpreting what is equipment for decades because of one wrong ruling. CBP got it wrong, corrected that wrong, and should have stopped there.

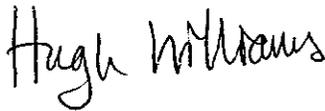
In short, in accordance with this precedent, as long as an item (i.e. equipment) is placed aboard a vessel to facilitate the accomplishment of its mission to install, connect, or repair subsea items, and is not placed aboard the vessel solely for transportation of that item (i.e. merchandise) to a coastwise point, then a non-coastwise vessel may perform that work.

Accordingly, based on the discussion and analysis herein we recommend CBP take the following action.

- ◆ Immediately retract its proposal and retain the current precedent.
- ◆ Should CBP decide to move forward, it should:
  - seek common ground with the domestic vessel industry consistent with the comments herein;
  - proceed with notice and comment in the Federal Register and conduct a thorough cost-benefit analysis in accordance with the APA and EO 12866;
  - Re-confirm that the 1976 Ruling and its progeny were correct except for the Christmas Tree ruling consistent with the IMCA analysis discussed herein;
  - provide for a transitional period or phased-in compliance period, including grandfathering to protect vessels currently under contract, to provide industry the necessary time to implement required changes.

We appreciate the opportunity to provide these comments. If you have any questions or need clarification, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink that reads "Hugh Williams". The signature is written in a cursive, slightly slanted style.

Hugh Williams  
Chief Executive

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**“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)*

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

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**February 24, 2009**

**Prepared for:**

**The American Petroleum Institute**

**Prepared by/Submitted by:**



**ecology and environment, inc.**

International Specialists in the Environment

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# 1 Introduction

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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

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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.<sup>1</sup> 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<sup>2</sup> 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.

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<sup>1</sup> Clarkson Research Services Ltd., *A-Z of Offshore Support Vessels of the World*, 2008 ed.

<sup>2</sup> 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).<sup>3</sup> 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.

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<sup>3</sup> 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.<sup>4</sup> 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.

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<sup>4</sup> 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 <sup>1</sup>   | 37         | 12.5 | 259         | 87.5     | 296         |
| Diving Support Vessels <sup>2</sup>       | 15         | 15.5 | 82          | 84.5     | 97          |
| Pipelaying Vessels <sup>3</sup>           | 25         | 36.8 | 43          | 63.2     | 68          |
| Crane and Derrick Lay Barges <sup>4</sup> | 39         | 24.1 | 123         | 75.9     | 162         |
| Heavy Lift Vessels <sup>5</sup>           | 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          |
| <b>Totals</b>                             | <b>951</b> |      | <b>4581</b> |          | <b>5532</b> |

**Table Notes**

<sup>1</sup> Includes Survey, Seismic Survey, and Geophysical Survey Vessels

<sup>2</sup> Includes Diving Support and ROV/Submersible Support vessels

<sup>3</sup> Includes Pipe Layer, Pipe Laying Barge and Pipebury vessels

<sup>4</sup> Includes Crane Barges and Derrick Lay Barges

<sup>5</sup> 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

| <b>Number of Offshore Support Vessels Registered by Country</b> |  |             |
|---|--|-------------|
| <b>Country</b>  | <b>Number of Registered Offshore Support Vessels</b> | <b>Rank</b> |
| 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.<sup>5</sup> Of this total,

<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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**

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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:

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<sup>6</sup> ODS-Petrodata, p.8.

<sup>7</sup> ODS-Petrodata, p.9.

<sup>8</sup> Bill Daughdrill (E & E) and Joe Kavanaugh (OMSA) telephone conversation of February 19, 2009

<sup>9</sup> 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**

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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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.

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<sup>10</sup> Tidewater Marine, 2008 Annual Report, pp. 9-10.

<sup>11</sup> Tidewater Marine, p.9.

<sup>12</sup> Tidewater Marine, p. 6.

## 7. Congressional Report on U.S. Cabotage Restrictions

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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).<sup>13</sup> 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.<sup>14</sup>*

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*

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<sup>13</sup> 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).

<sup>14</sup> 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.*<sup>15</sup>

Overall, the OTA report concluded, "In general, only a few benefits would seem to stem from the changes analyzed..."<sup>16</sup> 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".<sup>17</sup> 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.*<sup>18</sup>

*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.*<sup>19</sup>

## **8 Conclusion**

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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.

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<sup>15</sup> U.S. Congress, Office of Technology Assessment, p. 22.

<sup>16</sup> U.S. Congress, Office of Technology Assessment, p. 29.

<sup>17</sup> U.S. Congress, Office of Technology Assessment, p. 29.

<sup>18</sup> U.S. Congress, Office of Technology Assessment, pp. 29-30.

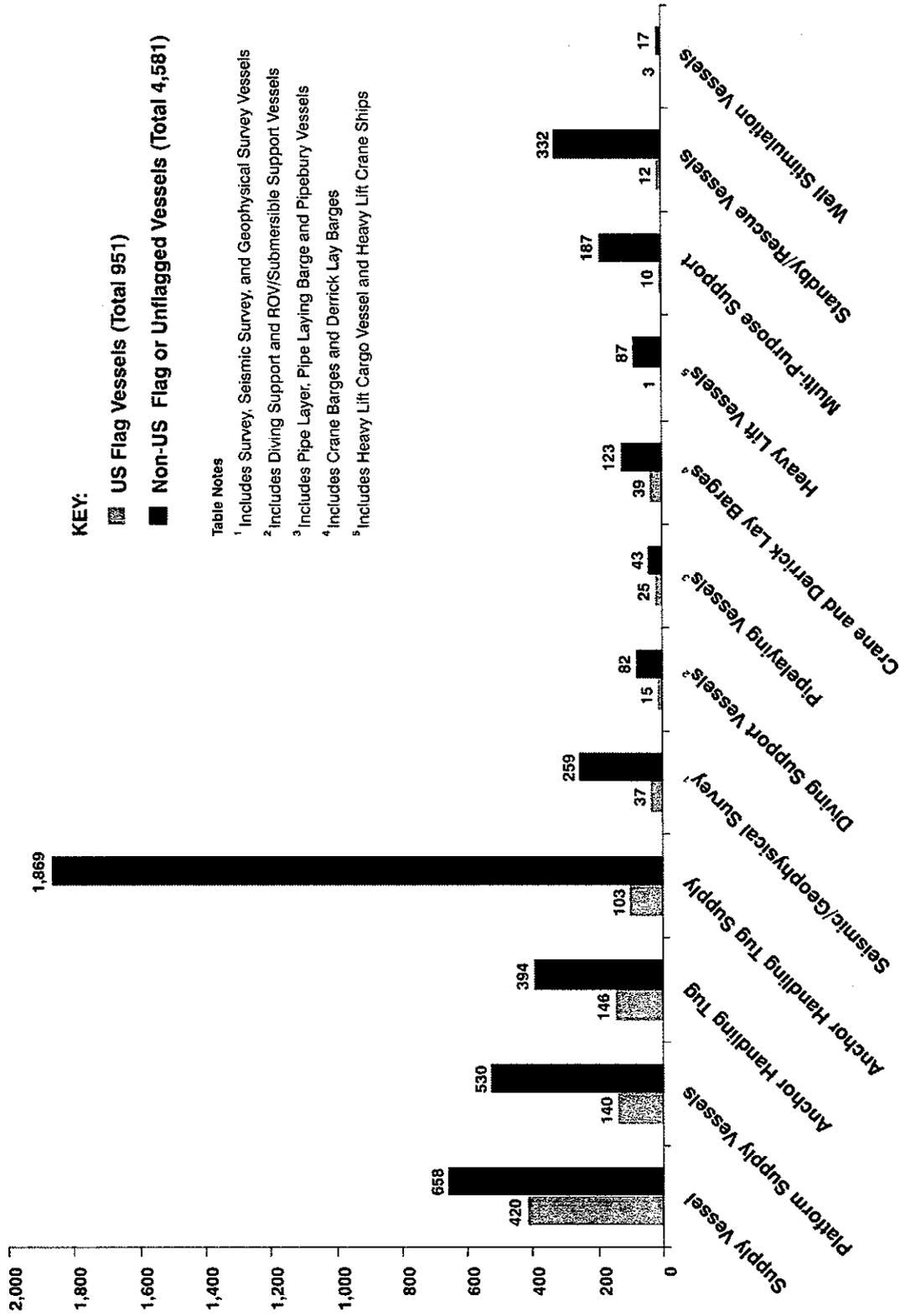
<sup>19</sup> U.S. Congress, Office of Technology Assessment, p. 30.

## **APPENDIX A**

Bar Chart

Offshore Support Vessels of the World

# OFFSHORE SUPPORT VESSELS OF THE WORLD



**An open letter from IMCA to Ken Wells, OMSA, dated 7 August 2009:  
“Proposed US Customs Ruling to Modify the Application of the Jones Act”**



## International Marine Contractors Association

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7 August 2009

Offshore Marine Service Association (OMSA)  
990 N Corporate Drive, Suite 210  
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For the attention of Ken Wells, President  
Copied by e-mail to [Ken@offshoremarine.org](mailto:Ken@offshoremarine.org)

Dear Ken,

### **Proposed US Customs Ruling to Modify the Application of the Jones Act**

I refer to your email of 31 July attaching a white paper on this matter sent to Gulf Port Colleagues, which has been copied to me.

You infer arguments to foreign vessel owners and a trade group representing them. Since IMCA does indeed represent international marine construction activities I'm happy to reply.

This letter starts by identifying our concerns and their context, and some detailed comments on the paper are attached in an enclosure.

#### **IMCA's Concerns about the Proposed Ruling**

We have three main concerns:

- 1 The lack of clarity and certainty in the target of the proposed rule change. There is a whole offshore oil and gas industry which could be impacted but the actual target may be quite small. The new ruling is silent on the actual operations it wishes to target and creates an immense amount of uncertainty about the impact on operations other than the installation of large items. The implications here are potentially huge.
- 2 The imprecision of the wording in the proposed rule change. I think we agree here, as you have sought in your white paper to interpret what is included and what is not. This should not need interpreting and unfortunately I don't think you have interpreted it correctly. However, we are seeking clarity and certainty to the extent possible.
- 3 The short timeline for consultation. The fact that there is a lack of clarity of the target and interpretation of the wording indicates that all parties in industry and government need enough time to debate this fully. Then, with all the facts, a proper decision can be made.

#### **The International Offshore Oil and Gas Industry**

I think it may be useful to provide some context to the offshore oil and gas industry – internationally and in the United States.

This industry is amazing. It has progressed and continues to progress by leaps and bounds in the face of all sorts of technical, commercial and political barriers and challenges. Its successes have been achieved by a joint effort between governments, oil companies, onshore and offshore service providers, and contractors. The swings and roundabouts of politics and oil price, as well as the global location of the resource, mean that this is a global business. Contractors have invested in very expensive specialist vessels to work in this market. It is notable that American offshore production (and thus marine activity) has leapt in the past ten years after a lean period.

To try to recover investment in these vessels, they need to be able to move around the world to where the work is. As such, there needs to be clarity and certainty in terms of what work they can legally perform. Though some of them have been in US waters recently, it is hard to predict whether they will stay there in the long term. That will depend on the market. Some of the vessels complete a campaign in one region then go to another region, because there is insufficient work in one region to keep the vessel busy. In some specialist cases there are only a handful of top-of-the-range vessels in the world with their particular capacity. In most cases the marine construction vessels are multi-purpose. They need to be able to deliver an integrated service as well, to maximise the usefulness of one hull in a number of slightly different markets – lifting and pipelaying being an example of two different markets, whereas most of these vessels carry a remotely operated vehicle (ROV), an example of an integrated service. The US Customs and Border Protection (CBP) proposal creates unacceptable uncertainty with respect to operations of multi-purpose vessels and implies that a vessel can only have one purpose or function. This could potentially result in the prohibition of using any multi-purpose vessel, which constitutes most of the foreign flag specialist vessel fleet in the Gulf of Mexico, from performing installation work offshore.

## **The American Offshore Oil and Gas Industry**

The operations of these foreign-flag vessels are impacted by local regulations. In the case of America, the operations must comply with requirements such as the 'Jones Act'. The interpretation of the Jones Act has evolved over the years, but still requires many cumbersome requests for rulings. The CBP proposal will almost certainly create an onslaught of new ruling requests, because previous Jones Act interpretations regarding what was acceptable now come into question. One objective we seek is not to make even more requests for rulings necessary, but rather find some certainty and common ground upfront to the extent possible.

Foreign vessels which are needed to do the work on the outer continental shelf (OCS) have to develop some or all of the following modus operandi:

- ◆ They cannot supply themselves from a US ports, so they use a large fleet of US flag supply vessels;
- ◆ They use a large fleet of US flag supply vessels to transport oil field components out to the vessel;
- ◆ The added cost of operating in this manner has been swallowed by the oil companies and the public who buy the oil;
- ◆ The foreign-flag vessels may be maintained in US ports and equally some US flag vessels are maintained in foreign ports;
- ◆ The collective industry of oil companies and both foreign and US flag vessels supports a huge supply chain of companies and services in America;
- ◆ Most projects are completed by a spread of vessels, both foreign and US flag. Creating this uncertainty for the foreign flag vessels would have a significant impact on the US flag vessels that were part of the spread.

The foreign flag vessels are not only owned by foreign companies. Several American companies own and operate foreign flag vessels that operate on the OCS. And, both groups have significant presence in America. They have American offices employing American employees and use the American supply chain. Their vessels, though perhaps foreign flag, will also have onboard crew, clients and subcontractors who are American. For every foreign flag vessel working offshore with foreign nationals there are many Americans working alongside. This debate should not be about foreign seafarers.

A balance had been struck, albeit upset by one recent ruling in particular, and we are concerned about unnecessarily upsetting that balance by a lack of clarity or without detailed financial analysis of the implications.

I note that there are almost no top-of-the range drilling and marine construction vessels, so to develop the more complex projects foreign flag vessels are needed. There are also far from sufficient American flag smaller capacity vessels to complete the less complex projects, so again foreign flag vessels are needed – this was particularly highlighted in the recovery period from the hurricanes a few years ago when so much clean-up and repair work was required – so this balancing act is indeed required. More clarity and certainty is imperative so that these foreign-flag vessels are available when needed. There is not a parallel American fleet crewed up and ready to go which is somehow being prevented from working. The American fleet that does exist does not have some of the above cost burdens. Therefore, it can and does compete and win work and help to deliver the projects required.

## **Particular Wording in the CBP's Proposed Rule Change**

Examples of the operations and wording/interpretations that concern us include:

Pipelaying

Though a foreign flag vessel designated as a 'pipelay vessel' may, depending on the interpretation of the wording, be able to lay pipe, any vessel which lays pipe but is designated as a 'multi-purpose vessel' may not be able to lay pipe. Very few vessels that lay pipe are designated as pipelay vessels (alone) and few, or none, operate in the Gulf of Mexico (GOM) today.

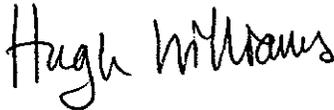
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| Other operations  | The same argument applies to other operations by multi-purpose vessels, including possibly the carriage of an ROV.  |
| Repair work, and spool piece/riser installation                   | Pipelaying from a pipelay vessel has always been and continues to be exempted. Under the CBP proposal, though, the concept of 'paying out' would no longer apply to any vessel doing repair work or spool piece/riser installation, unless incidental to pipelaying. This would appear to shut down most repair work because little new pipelaying work is being accomplished on a daily basis. |
| Mission of the vessel   | The proposal basically eliminates consideration of the mission of the vessel. It is imperative that CBP retain the flexibility to consider the mission, especially as related to multi-purpose vessels, and recognise that the mission of the vessel is the same as the operation of the vessel which can have more than one mission depending on the design of the vessel.                     |
| Transit from port to offshore site, or from site to site offshore | The concept of limiting equipment to 'necessary and appropriate for the navigation, operation or maintenance of the vessel' could prohibit vessels with other equipment (built-in or not) transiting.   |

Each of these concerns is sufficient to stop an existing or contemplated project including a repair project which could delay operations or even shut down a field.

### **Conclusion**

Since I understand that the impetus behind these proposed rule changes has come from OMSA, IMCA would be pleased to work with OMSA to develop a consensus position on some of these issues and ask CBP to adopt the consensus position, as appropriate, when it finalises its proposed policy change. At a minimum, we would like to meet OMSA to discuss this matter.

Yours sincerely



Hugh Williams  
Chief Executive

Att: Comments on OMSA's White Paper, issued 31 July 2009

## IMCA Comments on OMSA's White Paper, issued 31 July 2009

OMSA's white paper addresses the US CBP's proposal and sets forth OMSA's views and possibly the target of the proposed policy change (i.e. the transportation of merchandise), but unfortunately we believe the wording of CBP's policy change is not aligned with these views.

Extracts from the OMSA white paper are attributed and written in italics, followed in each case by our comments.

OMSA *Since the announcement by Customs and Border Protection (CBP) of its intent to more properly align a number of rulings on offshore transportation of merchandise with the Jones Act and the intent of Congress, there has been an increasing amount of misunderstanding and misinformation over the proposal.*

Comment IMCA agrees that there is misunderstanding of the proposal, and perhaps misinformation based on that misunderstanding, due to differing interpretations caused by ambiguous wording and unclear objectives. CBP has declared that a strict interpretation will be applied, which means that 'worst case' must be assumed across the board, even if this is not what OMSA intended.

OMSA *To set the record straight, the CBP proposal:*

- ◆ *Does not preclude the ability of foreign vessels to perform work offshore.*
- ◆ *Does not address and therefore does not impact the laying of pipe, cable and flowlines.*

Comment Bullet 1 – we disagree. By limiting the definition of equipment and operation of the vessel as currently proposed, foreign flag vessels may be precluded from conducting many kinds of work.

Bullet 2 – we believe the wording could be interpreted as meaning that pipelay can only be conducted by a vessel designated as a pipelay vessel. Most vessels currently used to lay pipe are classed as multi-purpose support vessels (MSVs) or dive support vessels (DSVs), not pipelay vessels. There are in fact very few vessels designated as pipelay vessels. If this means that most vessels cannot be used to lay pipe, as may be the conclusion reached based on CBP's current proposal, this has huge ramifications for the industry. In addition, it appears under the CBP proposal that no pipelaying repair work can be performed by foreign flag vessels unless incidental to pipelaying. This will have a major adverse impact because there is much more repair work being performed offshore than new pipelaying and there is a very limited capacity of coastwise qualified vessels that can perform this work.

OMSA *What CBP has done is to thoroughly analyze its rulings and to recognize that for several years those rulings have drifted away from the clear intent of the law that a vessel may not provide transportation of merchandise (cargo) between two US points unless that vessel is owned by Americans, crewed by Americans and built in America.*

Comment We do not agree that for several years the rulings have drifted away from the intent of the law although there has been a ruling recently which was not consistent with CBP precedent. In addition, this is not the only thing the new proposal does. It does much more than just limit the transportation of cargo. If it is OMSA's intent only to clarify that foreign flag vessels cannot transport cargo then OMSA and IMCA should work together to ensure that the CBP wording actually says this, rather than creating an immense amount of uncertainty about the wholesale operation of support vessels.

OMSA *The CBP proposal is squarely based on its own precedence dating back over 30 years. It would address the issue in a way that clearly sets out the rules for vessel owners and their customers to follow.*

Comment The CBP proposal actually overturns about 30 years of precedent with only a 30 day comment period. This proposal would affect current and future domestic oil and gas production, projects and operations as well as American jobs engaged in and supporting this work. Beyond that, the proposal does not in any way clearly set out rules for vessel owners, but rather raises more questions than it answers.

OMSA *The proposal sets out two clear guidelines:*

- 1 *There is a difference between transporting and installing cargo. Foreign vessels will still be able to install cargo but only a US flag, coastwise endorsed vessel can transport it, unless in fact it is 'equipment of the vessel'.*
- 2 *Equipment of a vessel is what any reasonable person would think it is – equipment used onboard the vessel for navigation, operation and maintenance of the safety and comfort of the people on board.*

Comment 1 – we agree that foreign vessels should be able to install materials and be allowed to have equipment of the vessel aboard.

2 – we want to clarify that equipment of the vessel, utilised in the operation of the vessel, includes specialist marine construction equipment that defines the vessel as, for example, an MSV and includes items such as dive spreads, ROV spreads, lifting/handling and laying equipment, and the like. OMSA and IMCA should work

together to ensure that the final CBP ruling clarifies to the extent possible items that are clearly equipment and that there is a *de minimus* test for certain other materials.

OMSA *One trade group representing foreign vessel owners has claimed 'This could shut down most activities in the deep water Gulf of Mexico for an extended period of time.' Nothing could be further from the truth. US flag vessels are available to transport the cargo that is covered by this proposal today.*

Comment As discussed above, the proposed changes affect much more than transportation alone. Thus they could have a huge negative impact on the industry and related jobs because of the lack of clarity and certainty in the proposal with regard to issues related to installation and repairs offshore that US flag vessels are incapable of performing today.

OMSA *Consequently, it would appear the foreign vessel owners are trying to obscure the issue and take attention away from the fact that they have been doing work that was against the very intent of the Jones Act for a number of years and the US government is finally putting a stop to that.*

Comment It is important to point out that foreign-flag vessel owners have been operating consistently with long-standing CBP interpretations. The intent is to highlight the dangers of unclear wording not to obscure anything. The industry has had 30 years of experience of successfully working with the intent of the Jones Act, not against it.

OMSA *In addition to American mariners, American shipyards and American offshore supply companies, the positive implications for coastal ports and communities are great. US vessels spend on average more than \$325,000 per year, per vessel, on local services like supplies, maintenance and repairs. Foreign vessels generally avoid doing this work in US ports. US vessels also pay local ad valorem taxes, which foreign vessels do not. There have also been notable cases in which foreign vessels avoided paying any corporate or crew income taxes, even though they may work in US waters for as long as a year at a time.*

Comment The industry, including foreign flag vessels, does a huge amount to support American mariners, shipyards, offshore supply companies, coastal ports and communities. It is because of the existing Jones Act requirements that the supply and cargo handling is indeed carried out by American flag vessels. If the industry is impacted by these changes it is all of these parties which will suffer, hence our concern to bring this out into the open so that all impacts can be properly assessed in a reasonable manner. In addition, it is not uncommon for US flag vessels to perform maintenance and repair work in foreign shipyards in accordance with US laws to minimise costs in some cases.