

U.S. Chamber of Commerce

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August 16, 2009

Ann Beauchesne

Vice President

National Security & Emergency Preparedness Department

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

Dear Acting Commissioner Ahern:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses of every size, sector, and region is pleased to submit these comments on the proposed change to the U.S. Customs and Border Protection (CBP) interpretation of the Jones Act¹ as it applies to the transportation of certain merchandise and equipment between coastwise points. Given that CBP's proposed change would reverse more than 30 years of agency precedent and significantly impact both industry and the economy, the Chamber believes that it is, in fact, a rule and triggers the notice-and-comment rulemaking process set forth by the Administrative Procedure Act (APA).²

Every year federal agencies issue thousands of guidance documents – in the form of letters, preamble statements, memoranda, revocations, modifications, and policy statements – that are designed to “clarify” or “interpret” what regulated entities must do to comply with the laws and regulations the agencies administer. Often, however, these guidance documents impose additional regulatory requirements, or so fundamentally changes an agency's interpretation of an existing regulation or policy, as to actually be rules. The courts have examined this issue and recognized the problem posed by such guidance materials.³ The D.C. Circuit Court of Appeals, in *Appalachian Power* gave a particularly succinct description of the problem:

¹ 46 USC 55102.

² P.L. 79-404.

³ *Gen. Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as legislative rule requiring notice and comment); *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206 (D.C. Cir. 1999) (striking down OSHA Directive as legislative rule requiring notice and comment); Administrative Conference of the United States, Rec. 92-2, 1 C.F.R. 305.92-2 (1992) (agencies should afford the public a fair opportunity to challenge the legality or wisdom of policy statements and to suggest alternative choices).

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.⁴

The problem highlighted above is often compounded when an agency attempts to reverse position on a regulation or policy position, often to the extreme detriment of a regulated entity or entities. It is a well-established principle of administrative law that agency interpretations, even if reasonable, trigger notice and comment requirements under the APA when a later interpretation represents a significant change from a previous, definitive interpretation.⁵ This is essentially what has occurred with CBP's reinterpretation of the precedent allowing foreign-flagged vessels to carry deepwater energy exploration equipment. CBP has provided a definitive interpretation, and is now attempting to significantly revise that interpretation without notice and comment rulemaking under the APA.

Courts, working to prevent agencies from circumventing the APA and the regulatory process, have steadfastly required agencies to go through the notice-and-comment rulemaking process when revising previously stated policy positions. In *Paralyzed Veterans of America v. D.C. Arena*⁶, the court noted:

Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.⁷

In other words, when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has effectively amended its rule – something that cannot be legally accomplished without notice and comment.

⁴ *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The Court invalidated an EPA guidance document because it found the document impermissibly broadened the scope of EPA's regulation, required state enforcement activities, and was issued without compliance to formal notice and comment rulemaking procedures. The case makes clear that agency guidance documents that exceed their regulatory mandates have no binding legal effect.

⁵ *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). In this case, the D.C. Court of Appeals held that a Federal Aviation Administration (FAA) notice that subjected guide pilots to FAA regulations without notice and opportunity for comment was invalid under the APA because the FAA Alaskan region had told fishing and hunting guide pilots that they were not required to abide by FAA regulations applicable to commercial air regulations. See also, *Synco Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997).

⁶ *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997)

⁷ *Id.* at 586.

The Honorable Jay Ahern

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While the *Paralyzed Veterans* court did not require that the Department of Justice initiate a new rulemaking (its interpretation was not a significant departure from previous interpretation), it did note the necessity to do so when an agency is making a significant departure from prior interpretations:

Appellants' most powerful argument remains: that the Department of Justice's present interpretation of the regulation constitutes a fundamental modification of its previous interpretation and, even if it legitimately could have reached the present interpretation originally, it cannot switch its position merely by revising the technical manual. Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking... Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to "repeals" or "amendments." See e5 U.S.C. § 551(5). To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is surely why the Supreme Court has noted (in dicta) that APA rulemaking is required where an interpretation "adopt[s] a new position inconsistent with... existing regulations." *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 115 S.Ct. 1232, 1239, 131 L.Ed.2d 106 (1995); see also *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 240-41(D.C.Cir.1992).⁸

Similarly, the Office of Management and Budget (OMB) attempted to curb the practice of guidance document abuse by issuing a bulletin with clearly defined parameters between regulations and guidance documents.⁹ Unfortunately, agencies are still – whether intentionally or not – circumventing the formal regulatory process.

Based on the forgoing, the Chamber requests CBP to withdraw the proposed reversal of its longstanding policy regarding foreign-flagged vessels, and further requests that CBP adhere to the principles set forth in OMB's Final Bulletin for Agency Good Guidance Practice and procedural requirements of the APA when announcing significant regulatory shifts. At a minimum the Chamber strongly urges an extension of 90 days on the comment period for this proposed regulatory change, as stated in our letter of August 6, 2009. This will allow all interested parties to weigh in on this vital issue.

Sincerely,



Ann M. Beauchesne

⁸ *Id.* at 586.

⁹ "OMB Bulletin 07-02, "Final Bulletin for Agency Good Guidance Practice," January 18, 2009.



Shell Exploration & Production

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August 17, 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 9th 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:

Shell Exploration & Production Company, together with its affiliates engaged in offshore exploration and production (Shell), appreciates the opportunity to provide input on the *Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points* published on July 17, 2009 (the Notice). Shell's affiliates are collectively the largest leaseholder in the U.S. Outer Continental Shelf (OCS), including the Gulf of Mexico and Alaska, and the number two producer of oil and gas in the OCS. Shell has done a great deal to facilitate the creation of domestic jobs in the oil and gas industry through expanding domestic operations, including skills training programs, and by its advocacy of increased access to OCS oil and gas resources through the Minerals Management Service's 5-Year Program.

Shell is committed to compliance with the Jones Act requirements in the development of offshore energy resources. In 2008, Shell spent over \$250 million chartering Jones Act offshore support vessels. Shell realizes that a long-term commitment to the Jones Act is necessary for business continuity and has demonstrated that commitment as one of the largest users of Jones Act vessels in the OCS. Shell has on charter at any one time 35-45 Jones Act offshore support vessels. These vessels are chartered from a wide selection of shipowners, thus ensuring competitiveness. The majority of these Jones Act units are new or relatively new "Top of Class" vessels, many of which were built specifically to charter to Shell.

Shell participated in the preparation of the American Petroleum Institute (API) response to this Notice and Shell endorses API's comments. Shell also met with representatives of the domestic vessel industry to explore where the offshore oil and gas industry and domestic industry had common ground, with the goal of developing a consensus on the definition of vessel equipment and how it will be applied going forward to provide some certainty to the offshore industry. The meetings and discussions were productive, and all parties desired to work together, but the limited time available unfortunately did not allow a full vetting of the issues or the development

of a consensus position. Shell believes that an extension to the comment period or some other administrative means should be employed to provide an opportunity for the stakeholders to work together to develop a practical and reasonable definition of vessel equipment as it is used in various scenarios by different types of vessels. A clear, widely understood definition will help guide CBP in future Jones Act interpretations. In addition to API's comments, Shell's supplemental comments follow.

Informed Compliance

Shell's major concern here is the uncertainty inherent in the Notice, which, absent clarification, will make it extraordinarily difficult to plan for long-term exploration and development activities. Title VI (Customs Modernization Act) of the North American Free Trade Agreement Implementation Act included two new concepts – informed compliance and shared responsibility. In order to maximize compliance, the regulated community needs to “be clearly and completely informed of its legal obligations.” By overturning decades of CBP precedent on which the industry relied, and by providing no clear path forward with respect to compliance expectations, this proposal does exactly the opposite.

Before finalizing its proposal, CBP needs to meet its obligation under the Customs Modernization Act and provide clear guidance to the regulated community regarding its rights and responsibilities under the Jones Act as related to offshore work. To meet its responsibilities, CBP should clarify what items constitute “equipment” versus “merchandise” in varying contexts, including with respect to multi-purpose vessels. CBP also needs to ensure that the final modified rulings provide for consistency, as there are irreconcilable conflicts among some of the proposed rulings. Likewise, CBP needs to publish for review and comment those rulings mentioned but not included in the Notice, along with the proposed revisions to those rulings. In short, CBP's proposal raises more questions in this regard than it answers, which is contrary to the concept of informed compliance.

More specifically, CBP proposes to modify or revoke 20 rulings, but only eight of the proposed modifications are published in the Notice. These eight rulings and the proposed revisions to these eight rulings are available for comment. The CBP proposal lists 12 other rulings that will be modified in some way or another, whether substantively or merely by changing the justification for the ruling. By not publishing the modified proposed rulings for these 12, offshore operators are only left to guess as to how CBP may revise the rulings, many of which are quite different from the eight published rulings and many of which could have significant implications on offshore operations and planning, both short term and long term. These 12 rulings involve issues not fully addressed in the published rulings, such as the carriage of fenders; workover/platform barges; subsea construction, maintenance, repair, and salvage; diving platform/berthing; carriage of ROVs; installation of risers, tie-ins, and manifolds; and oil spill response. Shell and other operators perform these operations on a regular basis and without clarification would have little guidance on how their modification could impact these operations.

CBP has several options regarding correcting these informed compliance deficiencies:

1. Withdraw the proposal and re-issue it at such time as all proposed impacts are available for industry analysis and comment. This would allow the offshore oil and gas industry the necessary time to work with the domestic industry to find common ground and develop a consensus position, thus furthering certainty going forward.

2. Extend or re-open the comment period, for the same reasons as noted above.
3. Publish all rulings slated to be revised, along with their proposed new rulings, to allow industry to assess implications before CBP finalizes any policy change.
4. Delay the date by which the industry must comply with the new interpretations and grandfather existing contractual obligations entered into while relying on the prior interpretations or, in the alternative, implement a phased-in enforcement/compliance program.
5. Consult with the Minerals Management Service (MMS) to better understand potential impacts, including delays in offshore installation, construction, and repair work on approved energy development programs, as well as safety. Just this past April, MMS and the Coast Guard stated in a letter to API that they "continued to have significant concerns about the safety of Outer Continental Shelf (OCS) lifting operations."
6. Consult with the U.S. Coast Guard and consider its ability to perform its offshore safety, environmental response, and search and rescue missions in light of the proposed changes. Safety and environmental protection of offshore vessels, personnel, and installations on the OCS are the responsibility of the Coast Guard, but generally outside the range of Coast Guard search, rescue, and environmental response capabilities. In the short term, the proposal will likely add thousands of critical, heavy or awkward lifts to offshore operations, thus exposing mariners and vessels to significantly greater risk of injury, plus increasing the risk of environmental incidents and decreasing the effectiveness of response to them.

"Equipment" and Related Issues

Shell is concerned with the lack of clarity and uncertainty inherent in the Notice with respect to the definition of equipment and the use of equipment on various types of vessels. For CBP to attain its obligation of informed compliance, the definition of vessel equipment should be practical, based upon accepted industry standards, and capable of being understood by the regulated industry.

While the original impetus for the Notice was one industry organization's request to revoke one particular ruling (the former HQ 046137 or the Christmas Tree Ruling), what ultimately flowed out of that revocation request has the potential to create an immense amount of uncertainty for the offshore industry, along with many unintended consequences. Shell recommends that the rulings preceding the revocation of HQ 046137 remain in place as they properly interpreted the law, were carefully crafted after decades of precedent, and resulted in a practical way of operating on the OCS.

Shell is also concerned that the proposal, as written, will unnecessarily inject additional safety concerns related to operating on the OCS as indicated in the MMS/Coast Guard letter referenced previously. This is because items previously considered equipment (such as risers, jumpers, and pipeline connectors) and thus carried aboard the installing vessel, may now be considered merchandise, thus requiring a Jones Act vessel. This, in many cases, could require companies to "double up" with shadow vessels in the OCS (*i.e.*, one vessel carrying the merchandise and then

transferring it to the installation vessel at sea). Such ship-to-ship open sea transfers create a much higher risk of incidents to the ships and their crews, as well environmental concerns. The MMS and the Coast Guard have provided mandates to industry to improve the safety performance and reduce the incidences of such lifts offshore. Implementation of the CBP proposal "as is" would result in more lifts in open waters, thus countermanding the safety guidance industry has received from these agencies. Additionally, crowded seas near the platforms may increase the likelihood of allision, collision, and damage.

1. The definition of vessel equipment requires clarification.

Shell believes that CBP should reaffirm and continue to apply the interpretation of vessel equipment as provided for in its rulings and decisions prior to the revocation of the Christmas Tree Ruling. The Notice states the intent is to strictly interpret and adhere to the definition of vessel equipment as given in two Treasury Decisions, T.D. 49815(4) (the 1939 Ruling) and T.D. 78-387 (the 1976 Ruling) 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 the precedent contained in the 1939 and 1976 Rulings as being static – CBP must recognize that such interpretations will need to continue to evolve through time, as they have for the past 70 or so years.

Certain rulings regarding equipment proposed-to-be-modified by CBP should be either clarified or reaffirmed in their original form, which are discussed in more detail below. The proposed modifications of rulings contained in the Notice create a conflicting picture of the delineation between vessel equipment and merchandise, and fail to recognize that many vessels are multi-purpose vessels. For example, vessels may be configured in multiple ways to achieve their objectives and each objective may require tools and equipment to allow for performance of that objective. These tools and equipment may or may not be aboard the vessel at all times and are commonly offloaded at ports different from which they were loaded. CBP must clarify that multi-purpose vessels may carry different types of equipment based on their mission and that the unloading of that equipment in these circumstances is not a violation of the coastwise laws. API discusses this issue at length in its comments.

One common theme in defining vessel equipment is that it includes items carried aboard a vessel for use by the vessel or for use by the personnel on the vessel. In addition to making case-by-case determinations as to what constitutes equipment under the Jones Act, CBP can look to its own interpretations related to the Vessel Repair Statute for guidance. In HQ 113366, CBP expounds on the impossibility of defining each piece of vessel equipment, noting the ultimate decision is based upon an analysis of the use of the item and the vessel's service. *See also* HQ 105807. This highlights the importance of CBP recognizing the dynamic nature of the offshore industry and the necessity for interpretations to take into account technological advances. Another theme is whether the item carried aboard the vessel is for use aboard the vessel or for transportation by the vessel.

Shell believes that the use of established and accepted international and regulatory interpretations of vessel equipment should be one of the things considered by CBP in making its equipment determinations. International and domestic regulation of vessels provides over one hundred years of experience in defining and regulating vessel equipment. For example, CBP could look to items carried aboard a vessel that are subject to regulation under the auspices of the

International Maritime Organization or the U.S. Coast Guard. This could help eliminate substantial uncertainty about what constitutes equipment currently inherent in CBP's proposal. For example, CBP could look to types of equipment included in a vessel's operations manual, safety management system, and preventative maintenance plans, as guidance. Another key determinative factor for vessel equipment is whether or not the vessel or persons aboard the vessel operate, maintain, or repair that equipment.

2. Comments on Specific Rulings/Proposed Modifications.

Some of the rulings discussed in the Notice have created substantial confusion in terms of what is (or is not) vessel equipment as it pertains to a vessel that undergoes a conversion. While we agree that ruling HQ 115356 (affirmed in the Notice) regarding the conversion of a deck barge to a power barge is correct, we disagree with CBP's proposed modification of rulings HQ H029417 and HQ H032757, related to an exhibit hall barge, as discussed more fully in API's comments. In the exhibit hall barge rulings, CBP originally and correctly determined that once an exhibit hall was erected on a deck barge, the exhibit hall was equipment of the barge. In the Notice, however, CBP proposes to reverse this determination. CBP's position is incomprehensible and cannot be reconciled with the power barge ruling or other rulings related to the conversion of vessels. As such, the original exhibit hall barge rulings should be reconfirmed. If adopted, the proposed modified exhibit hall rulings would raise questions with respect to the conversion of many other types of vessels. The bottom line – once items have been affixed to, or placed on a vessel, for a period of time to facilitate a particular operation or mission, the vessel has been converted to some other type of vessel and thus the vessel's "operation" or "mission" has changed for that period.

Also of significant concern is CBP's proposal to eliminate, for all intents and purposes, the "operation" of the vessel from consideration, as discussed more fully in API's comments. The seminal 1939 Ruling states that the "term equipment ... includes portable articles necessary and appropriate for the navigation, *operation* or maintenance of the vessel...." "Operation" and "navigation" are not synonymous terms and each must be given its own meaning. The "operation" of a vessel should be read as a vessel's function, objective, mission, or purpose, separate and apart from its transportation function ("navigation") or upkeep ("maintenance"). The operation of a vessel cannot be divorced from what is or is not equipment of the vessel and CBP cannot simply read this word out of the 1939 Ruling.

Comments on specific rulings proposed to be modified

As a general matter, the eight proposed modified rulings should be revised to reflect API's comments with respect to its legal view of the 1939 and 1976 Rulings and their application. More specifically, Shell is providing the following additional comments:

- (1) HQ 115185 / proposed HQ H061697 – CBP proposes to modify HQ 115185 by re-classifying jumper pipes, risers, and spool pieces as merchandise. CBP should adhere to the 1976 Ruling and reaffirm this original ruling because installation of these items *is* incidental to the pipelay operation, regardless of whether one or two vessels are utilized. The issue of installation (of manifolds, jumpers, connectors, *etc.*) incidental to pipelay operations should be addressed by viewing the entire pipeline installation process. Pipelay is the major activity of a pipeline installation, but not the only activity. Each pipeline installation is approved and permitted by MMS. Each component part of the pipeline is issued a pipeline

segment number by MMS. The installation of the individual segments of an incomplete pipeline, whether conducted by the pipelay vessel or another vessel, should be considered incidental to the pipelay operation. Under this concept the installation of individual segments of an incomplete pipeline should be considered incidental to the pipelay operation as they are all a part of the pipeline installation process. Using a different vessel does not make such installation any less incidental to the overall operation.

- (2) HQ 115218 / proposed HQ H061698 – CBP proposes to modify HQ 11528 by re-classifying a pipeline tie-in spool piece as merchandise. For the same reasons as stated above in (1), the original ruling should be reaffirmed because installation of a spool piece is incidental to the pipelaying activity, irrespective of whether it is done from a separately mobilized vessel.
- (3) HQ 111889 / proposed HQ H061934 – CBP proposes to modify HQ 111889 by re-classifying a multi-well template and marine risers as merchandise, despite recognizing that these items are “equipment essential to [the MODU’s] intended *operation*.” The original ruling should be reaffirmed and CBP should hold that items carried by a drill rig in furtherance of that rig’s drilling operations are equipment of that rig. In this case, the drill rig was provisioned in the United States after being modified. The same rationale, however, would apply to a drill rig moving between points on the OCS. If Customs were to hold otherwise, a drill rig would arguably not be able to move between coastwise points with equipment on board that was transported to it by a Jones Act vessel.
- (4) HQ 115938 / proposed HQ H061992 – Here, CBP has misstated the *de minimus* test from the 1976 Ruling, paragraph (6), thereby making the “equipment” test much more prohibitive. CBP should correctly re-state this test to provide certainty and avoid confusion as discussed in API’s comments.
- (5) HQ H029417 / proposed HQ H061993 and HQ H032757 / proposed HQ H061994 – As discussed above, CBP wrongly re-classifies an exhibit hall structure attached to a barge as merchandise. This ruling is directly analogous to the power barge (HQ 115356) and drill barge (HQ H036016) rulings relating to the conversion of a vessel. As such, the original exhibit hall rulings should be reaffirmed.

Key rulings that should be reaffirmed

While there was not nearly adequate time to review all rulings related to offshore activities, Shell believes, at minimum, the following rulings should be reaffirmed in an effort to achieve some small semblance of certainty.

- (1) HQ 111892 – This ruling deals with the use of Yokohama fenders in lightering operations, whereby CBP rightly characterizes them as equipment. Customs proposes to modify this ruling, though it is unclear why. Shell believes this ruling is well thought out and provides excellent guidance with respect to equipment of a vessel.
- (2) HQ H036016 – This ruling deals with the use of the non-coastwise-qualified deck barge, converted to perform drilling operations. CBP does not propose to modify this ruling, but because it is well thought out and provides excellent guidance with respect to equipment, CBP should confirm its continued validity.

- (3) T.D. 49815(4) and T.D. 78-387 – These two seminal rulings should be reaffirmed as written. The CBP proposal misstates language in T.D. 78-387, as described in detail in API's comments. This must be clarified when CBP finalizes its proposal. In addition, Shell requests that CBP provide guidance on the meaning of *de minimus* and recognize that *de minimus* is a relative term in relation to offshore operations and with full consideration of the comparative costs of offshore operations.
- (4) HQ 113137, HQ 103995, and HQ 108223 – Shell believes, consistent with prior CBP precedent, that the provision of well stimulation and cementing service is not a Jones Act activity and requests that CBP reaffirm these rulings. For example, HQ 108223 states "...we have held that the use of a vessel to blend, mix and place cement in oil wells is not a use of the vessel in coastwise trade. On the basis of this ruling, we have ruled that the use of a non-coastwise qualified vessel in oil well stimulation described as the blending of specific mixtures of water, hydrochloric acid and other agents and then pumping the blended mixture into an oil field is not coastwise trade. We have ruled that the transportation of the cement used in the oil wells and that of the chemicals, *etc.* used in the oil well stimulation is not coastwise trade ... because such transportation is only of supplies incidental to the vessel's service which are consumed in that service."

The Notice has sparked controversy among industry, law makers, and federal agencies because of the uncertainty inherent in it and the potential for chaos it is certain to create unless significant clarifications are made when the new policy is finalized. Statements that this proposal will "not impact offshore energy development" are simply not true. The uncertainty and lack of clear guidance itself will cause delays while offshore operates endeavour to ascertain whether a proposed activity is (or is not) consistent with the Jones Act.

In closing, Shell feels strongly that CBP must bring some certainty back into offshore oil and gas operations. By adopting API's comments, as supplemented by Shell's, CBP will do just that. Thank you for the opportunity to comment on the Notice. If you have any questions or need clarification on any of Shell's comments, please call me.

Sincerely,



John M. Belcher
Manager, Regulatory Affairs and Policy

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

Technip USA, Inc. ("Technip") and its international affiliates are world leaders in the fields of engineering, construction and project management for the oil and gas industry. As part of its worldwide operations, Technip assists oil and gas companies such as Exxon, Shell, BP, Anadarko and Petrobras with the development of offshore oil and gas fields including the fabrication and installation of subsea structures in the U.S. Gulf of Mexico. Technip has operating centers and industrial assets in Houston, Texas and Claremont, California as well as a fabrication facility located in Mobile, Alabama, which collectively employ over 2,500 people in the United States.

We are writing in response to 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

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July 17, 2009 (the "Notice"). In the Notice, U.S. Customs and Border Protection ("CBP") has proposed changes to its interpretation of the definition of vessel equipment and of pipelaying activities as they relate to coastwise trade restrictions under the Jones Act. These changes will modify more than thirty years of precedent that CBP has established. Technip is concerned that this sudden change to long-standing precedents will adversely affect the current state of oil and gas operations in the Gulf of Mexico and the ability of offshore contractors to meet the future needs of deepwater operations in the Gulf of Mexico.

Background Information on the Jones Act and Coastwise Trade

Under the Jones Act, Congress sought to restrict transportation of merchandise between U.S. coastwise points. Under the coastwise statute, the transportation of all items determined to be merchandise from one coastwise point to coastwise points located on the Outer Continental Shelf must generally be accomplished by vessels with a U.S. coastwise endorsement. Any items transported as vessel equipment between two coastwise points, however, does not give rise to a coastwise trade violation as the items are considered to be equipment of the vessel and not merchandise.

It is our understanding that the changes proposed in the Notice arose after an industry group known as the Offshore Marine Service Association ("OMSA") challenged a recent CBP ruling. In the ruling, CBP had initially determined that a large subsea structure known as a

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“Christmas Tree” was necessary for the *mission* of the vessel and was thus vessel equipment.

The Christmas Tree ruling was revoked by CBP after the challenge by OMSA. CBP then issued the Notice proposing to modify the definition of vessel equipment so it was no longer items necessary for the mission of the vessel. We believe that CBP had correctly interpreted the vessel equipment standard for over thirty years and is now restricting the definition of vessel equipment unnecessarily in response to one ruling which had inappropriately applied the existing standard.

Industry Response to Notice

Many other companies operating in the United States share Technip’s opposition to the proposed changes. Technip is a member of the International Marine Contractors Association (“IMCA”), and many of our clients are members of the American Petroleum Institute (“API”). Both IMCA and API have submitted comments to CBP for their consideration. Technip specifically expresses support of both IMCA’s and API’s comments and requests that CBP give serious consideration to comments that represent the views of a large portion of the offshore oil and gas industry.

The level of response generated by the Notice indicates the great concern that industry members have regarding the potential effect of the proposed changes on the offshore oil and gas industry. During a time of economic crisis, CBP should carefully evaluate any proposed changes that could have a potentially devastating effect on offshore oil and gas production. If CBP does

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not consider the arguments and comments made by API and IMCA, the impact of the proposal on the offshore industry would have a chain reaction severely affecting the exploration and development of Outer Continental Shelf resources.

Vessel Equipment

Specifically, Technip supports the position that CBP's interpretations of "vessel equipment" under the existing rulings have generally been in accordance with the historic and common definition of "vessel equipment". While CBP erred in issuing the original Christmas Tree ruling which provided that a large subsea structure was equipment of the vessel because it was essential to the mission of the vessel, that errant decision should not invalidate thirty plus years of consistent and reasonable holdings by CBP.

CBP initially carved out "vessel equipment" from the definition of merchandise in a 1939 Treasury Decision (the "1939 Decision").¹ In the 1939 Decision, CBP's predecessor stated that equipment was meant to include portable articles necessary for the navigation, operation, or maintenance of the vessel and for the comfort and safety of the persons on board.² The Notice purports to return to this intent of the 1939 Decision in establishing the proper definition of vessel equipment. CBP expounded on the term "vessel equipment" as it related to offshore

¹ T.D. 49815(4)

² Specifically, CBP stated that the term "equipment," ... includes portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board. It does not comprehend consumable supplies either for the vessel and its appurtenances or for the passengers and the crew. The following articles, for example, have been held to constitute equipment: rope, sail, table linens, bedding, china, table silverware, cutlery, bolts and nuts.

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developments in a Treasury Decision (the "1976 Decision").³ In the 1976 Decision, CBP held, among other things, that "materials and tools necessary for the accomplishment of the mission of the vessel (i.e., materials to be expended during the course of the . . . operations and tools necessary in such operations) for use by the crew of the vessel" were not considered merchandise, and thus their transportation did not implicate the coastwise laws because it was incidental to the vessel's operations. The 1976 Decision further stated that "while materials and tools . . . which are necessary for the accomplishment of the mission of the vessel are not considered merchandise within the meaning of Section 883, any article which is to be installed and therefore, in effect landed. . . is normally considered merchandise."

Since the 1976 Decision, CBP has issued numerous rulings based on the 1939 Decision and the 1976 Decision providing that non-coastwise qualified vessels could carry articles between coastwise points as long as those articles were "fundamental to the vessel's operation" or "necessary to the mission of the vessel" because such articles would be considered equipment of the vessel.

As detailed in the IMCA comments, due to the tremendous change in offshore operations since the 1939 Decision, the inclusion of the language "mission of the vessel" as set out in the 1976 Decision is the appropriate standard. This standard clearly includes tools, articles and other items that are necessary for the activities of the vessel. There is nothing unclear about the

³ T.D. 78-387

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language of this standard. CBP erred in its assessment of a situation under the standard and should correct the assessment of the scenario by CBP, not the standard itself.

Unintended Effects of the Proposed Changes

If the changes are implemented as currently proposed in the Notice, the modifications to the definition of vessel equipment will have a profound impact on the development of offshore facilities on the Outer Continental Shelf. Offshore contractors, such as Technip, that install floating and subsea structures in the deepwater Gulf of Mexico will be significantly affected. They have operated under the definition of vessel equipment that has existed for thirty plus years and have developed procedures and technologies to comply with the existing interpretation of the coastwise trade statute. The lack of clarity in the new standards will severely curtail their ability to operate on the Outer Continental Shelf.

In addition, frequent offshore lifts between a coastwise-qualified supply vessel and the specialized construction vessels operated by Technip and other deepsea contractors would be required under the proposed changes. Concerns over safety conditions resulting from these required frequent offshore lifts will be a serious issue offshore and may also curtail activities on the Outer Continental Shelf due to safety reasons.

Technip, as well as other operators, will be operating with unclear standards governing their activities. The potential to have major pieces of equipment that are integral to the function of the vessel deemed to be merchandise and subject to forfeiture will have a chilling effect on the

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willingness of offshore contractors to risk their own equipment to operate in the Gulf of Mexico. This will result in increased costs, delays and project issues for operators of oil and gas facilities in the Gulf of Mexico. API's comments provide detailed information on the potential economic effects of such a change.

Further, the proposed changes conflict with existing WTO and NAFTA standards as detailed in IMCA's comments. Setting a standard that conflicts with international obligations could result in unintended consequences in international trade.

Given the serious economic issues that could result from the proposed change, CBP must consider the effects their proposal will have on the U.S. economy. Under Executive Order 12866, agencies are required to consider: (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 competitive, and (3) the quantification of these costs as well as feasible alternatives. Thus, CBP should consider the potential economic impact of its proposed changes beyond a purely legal viewpoint.

Request for Extension Period

On July 31, 2009, Technip submitted a request for an extension to the thirty day comment period in order to allow a complete review of the proposed changes and to allow the industry time to consider the potential effects. Many other companies involved in the offshore oil and gas industries similarly requested additional time. The requests for such an extension were denied.

Technip

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We believe this was in error by CBP and that the proposed changes as set out in the Notice far exceed what could be reasonably understood by all interested parties.

Conclusion

Technip supports the comments and positions as outlined by IMCA and API in their responses. We believe that CBP has correctly applied the law for decades, and that the results of one misapplied ruling should not require changes to an existing standard that is clear and in accordance with the intentions of the Jones Act.

The Jones Act was only intended to restrict transportation of merchandise between coastwise points. It was not intended to restrict non-coastwise qualified vessels from operating in U.S. waters. In allowing non-coastwise qualified vessels to operate in U.S. waters, legitimate equipment of the vessel must also be permitted and is appropriately excluded from merchandise. In determining what constitutes vessel equipment, the "mission of the vessel" standard, as has been applied by CBP for thirty plus years, is one that is clear, yet flexible enough to adapt to various scenarios. CBP, however, must retain responsibility for properly enforcing such a standard. Simply because CBP failed to enforce the standard correctly in the Christmas Tree ruling, there is no justifiable reason for CBP to dramatically change the way it has looked at interpreting what is equipment for decades.

Accordingly, based on the discussion and analysis herein and the economic effects that

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would result, we recommend CBP refrain from implementing an unclear standard and instead retain the thirty plus years of precedent that is better understood by industry. We appreciate the opportunity to provide these comments. If you have any questions or need clarification, please do not hesitate to contact the undersigned.

Sincerely,



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sverkin@technip.com



August 16, 2009

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

Helix Energy Solutions Group, Inc. ("Helix"), a Minnesota corporation, is a major service provider in the world's offshore oil and gas fields. Helix and its subsidiaries own and operate well service vessels, multiple service vessels and pipelay vessels in the United States Gulf of Mexico and in oil and gas fields around the world. These vessels fly the flag of various jurisdictions, including the United States. Helix's United States flag vessel, the Q4000, was built in the United States under the Title XI government guaranteed finance program. Helix's subsidiary, Canyon Offshore, Inc. ("Canyon"), owns and operates remotely operated vehicles and vessels that perform subsea installation services for the pipeline and other industries. Helix is also the lessee on several oil and gas leases in the United States Gulf of Mexico. Helix is publicly traded on the NYSE.

We are writing in response to the *Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points* published on July 17, 2009 (the "Notice"). In the Notice, U.S. Customs and Border Protection ("CBP") has proposed changes to the interpretation of the definition of vessel equipment and of pipelaying activities as they relate to coastwise trade restrictions under the Jones Act. Helix is greatly concerned with the potential effects that the changes proposed by the Notice could have on the oil and gas industry as well as many of the operations being conducted by Helix and its subsidiaries in the U.S. Gulf of Mexico. If the changes as described in the Notice are put into effect without modification, then existing operations may be severely delayed or become cost-prohibitive. This would have devastating effects not only on Helix and its subsidiaries, but on the entire oil and gas industry in the Gulf of Mexico.

Helix, representing itself and its subsidiaries, including Canyon, is a member of the International Marine Contractors Association ("IMCA"). Several of Helix's and Canyon's

clients are members of the American Petroleum Institute ("API"). Both IMCA and API have submitted comments to CBP for their consideration. Helix and Canyon are providing these comments

supplementary to the comments being prepared by IMCA and API. In addition, we provide our support for the comments submitted by IMCA and API.

Introduction

In enacting the Jones Act, Congress sought to restrict transportation of merchandise between U.S. coastwise points. Under the Jones Act, the transportation of merchandise from one coastwise point to another coastwise point located on the Outer Continental Shelf must generally be accomplished by vessels holding a U.S. coastwise endorsement. In deciding whether the offshore transportation of an item is restricted to coastwise qualified vessels, CBP looks as a initial matter to whether such item constitutes "merchandise." Vessel equipment has long been held not to be merchandise. Thus the carriage of any articles that were considered to be legitimate equipment of the vessel could be transported on non-coastwise qualified vessel without violating the Jones Act.

If an item constitutes merchandise, it may nevertheless be carried by a non-coastwise vessel if the transport is made in relation to activity that does not violate the Jones Act because it does not involve transportation from one coastwise point to another coastwise point. CBP has long held that pipelaying does not involve transportation from a coastwise point to another coastwise point, and has therefore permitted transportation by non-coastwise qualified vessels of items that are related to such activities.

For the reasons stated below, CBP's Notice constitutes any undue narrowing of prior rulings regarding what constitutes vessel equipment and what involves transportation between coastwise points with regard to pipelaying and related activities.

Vessel Equipment vs. Merchandise

During the past thirty years, the expansion of oil and gas exploration into the U.S. Gulf of Mexico led to major developments in the equipment used by offshore service vessels for drilling, pipelaying, well services and other projects. CBP was therefore required to determine whether for Jones Act purposes this new equipment was either vessel equipment or merchandise. CBP broadly interpreted the term "vessel equipment" in a 1976 Treasury Decision (the "1976 Ruling").¹ In this 1976 Ruling, CBP held, among other things, that "materials and tools necessary for the accomplishment of the mission of the vessel (i.e., materials to be expended during the course of the . . . operations and tools necessary in such operations) for use by the crew of the vessel" were not considered merchandise, and thus their transportation by non-coastwise qualified vessels did not violate the coastwise laws. Since the 1976 Ruling, CBP has issued numerous rulings evaluating whether or not various pieces of equipment were "vessel

¹ T.D. 78-387

equipment” for coastwise trade purposes using the “mission of the vessel” standard set forth in the 1976 Ruling. It was a simple standard that was clear, concise and allowed CBP the flexibility it needed to look at each vessel’s situation and properly evaluate whether the items were “vessel equipment.”

On February 20, 2009, CBP issued a ruling related to the installation of a large subsea structure known as a “Christmas Tree” which appeared to greatly expand the established precedent. See HQ 046137. This ruling, in part, held that the Christmas Tree which was installed on the seabed by the transporting vessel was equipment of the vessel under the “mission of the vessel” standard. In March 2009, an industry group known as the Offshore Marine Service Association (“OMSA”), requested that CBP revoke the Christmas Tree ruling. In its request, OMSA argued that CBP had erred in treating the Christmas Tree as equipment of the vessel rather than merchandise. After review, CBP decided to revoke the Christmas Tree ruling as inconsistent with the existing rulings on vessel equipment. Under the 1976 Ruling and the decisions which followed, the Christmas Tree should have been classified as merchandise. Its transportation between coastwise points would have to be done by a coastwise qualified vessel, unless an established exception applied. The error was thus not in the standard being applied, but rather in the application by CBP of the standard.

Even if the overall mission of the vessel was to install a specific article (e.g. the Christmas Tree), that does not mean that such article should be classified as vessel equipment rather than merchandise. The Christmas Tree ruling was simply a case of a flexible standard being applied in an incorrect manner. The Christmas Tree was being transported by the vessel for purposes of being installed at the site on the Outer Continental Shelf and not as vessel equipment. The 1976 Ruling had language that specifically addressed this situation. The 1976 Decision provided that “while materials and tools . . . which are necessary for the accomplishment of the mission of the vessel are not considered merchandise within the meaning of Section 883, any article which is to be installed and therefore, in effected landed. . . is normally considered merchandise.”

However, as an apparent reaction to the revoked ruling, CBP did not stop at simply revoking the Christmas Tree ruling, but then proposed to revoke or modify numerous rulings issued since the 1976 Ruling. In the Notice, CBP states that it is modifying the definition of vessel equipment from items “necessary for the mission of the vessel” to items “necessary for the navigation, operation or maintenance of the vessel” in order to return to the interpretation set forth in a 1939 Treasury Decision.² In the modified rulings attached to the Notice, however, the application of the new definition provides a confusing standard. The comments submitted by IMCA describe the vagueness, inconsistencies and concerns with the standards being proposed under the modified rulings. Under the Notice, CBP has proposed overturning over thirty years of rulings that had set forth a relatively clear understanding of the definition of vessel equipment and replace it with a standard that is vague and unnecessarily complicates the analysis of what items are vessel equipment.

² T.D. 49815(4)

We believe that CBP had correctly interpreted the vessel equipment standard for over thirty years and is now restricting the definition of vessel equipment unnecessarily in response to one ruling which had inappropriately applied the existing standard. For purposes of determining if equipment, tools or other items being carried onboard a vessel should be treated as either vessel equipment or merchandise for coastwise purposes, CBP should consider the following points in accordance with the 1976 Ruling:

- If an article is placed on board a vessel to facilitate the accomplishment of that vessel's mission (e.g. to install, connect or repair a subsea structure), then CBP should treat such articles as equipment.
- If an article is placed onboard the vessel solely for transportation of that article to a coastwise point, then such article should be considered merchandise and would not be classified as vessel equipment.

Coastwise Points and Installation of Pipelines and Pipeline Connectors

Since the 1976 Ruling, CBP has consistently held that non-coastwise qualified vessels may engage in pipelaying as such activity is not a use in coastwise trade. CBP has based these rulings on the language in the 1976 Ruling which states that it is the fact that the pipe is not landed but rather paid out during the course of the pipelaying operation which makes such operation permissible. Pipelaying thus does not involve transportation from one coastwise point to another coastwise point. Following the 1976 Ruling, CBP issued numerous rulings permitting pipeline connectors (e.g. risers, flying leads and jumpers) to be transported to and installed at a coastwise point, so long as the installation work was conducted from the same vessel that transported the connectors. The installation of pipeline connectors under certain circumstances was permissible as an extension of the pipelay exception.

The ability of non-coastwise qualified vessels to install pipeline connectors under certain situations has been a standard since the early 1980s. In accordance with CBP's position, the offshore industry has developed technology and procedures in accordance with that standard. For instance, large pipelaying vessels often lay pipe and a smaller light construction vessel follows with the installation of the pipeline connectors which are part of the pipelaying operation. Under Customs Ruling HQ 108442 (August 13, 1986), CBP recognized that a non-coastwise qualified vessel (in that case, a liftboat) working in tandem with a pipelaying vessel could carry pipeline connectors provided that the liftboat installed the connectors and was not merely transporting them to the field. The plain implication of this and other similar rulings was that the transportation and installation of these items did not involve transportation between coastwise points because they are related to pipelaying activities.

As noted above, the Notice seems to have been spurred by the decision in the Christmas Tree Ruling, but there is no compelling reason to modify or revoke decisions such as Customs Ruling HQ 108442 as a result of the revocation of the Christmas Tree Ruling. These two rulings involve completely separate considerations.

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As permitted by CBP's position for decades, the industry practice of using a light construction vessel in tandem with large pipelaying vessels developed due to economic and safety considerations. It simply did not make economic sense to have a pipelay vessel with a much higher per diem rate installing connectors as it laid pipe. Having a pipelay vessel install pipeline connectors rather than leaving the work to a light construction vessel would result in significantly increasing the cost of any pipeline installation operation. In addition, pipelay vessels are generally large scale vessels and simply do not have the ability to undertake the tight maneuvers that might be required to properly place a pipeline connector. If the pipelay vessel were required to carry out such operations, there would be an increased risk of damage to subsea wellheads, pipeline and other structures during the process.

Under CBP's proposed revisions, it appears that pipeline connectors could only be transported by a non-coastwise qualified vessel if they are installed from the vessel in connection with a pipeline installation. Given that there are not sufficient U.S. coastwise qualified vessels that are capable of performing the pipelay work for deepwater operations, this would give offshore operators two choices – (1) transport the pipeline connectors to the offshore site using coastwise qualified vessels and lift the pipeline connector to the light construction vessel for installation or (2) use the pipelay vessel that is laying the pipe to install the pipeline connectors. This would have severe economic consequences by significantly increasing the cost of any operation involving the installation of pipeline connectors. The increased cost will either be for hiring a second supply vessel to shadow the light construction vessel or to pay the higher per diem rate of the pipelay barge to install the pipeline connectors as it lay the pipe. This proposal would also have significant safety concerns as operators would then have to choose between (1) carrying out a lift of the pipeline connector from the offshore supply vessel to the light construction vessel or (2) attempting to negotiate tight maneuvers with a large scale vessel which has limited maneuverability.

It does not appear that CBP has considered the economic and safety concerns of these proposed changes. Under Executive Order 12866, CBP must consider the effects their proposal will have on the U.S. economy and must coordinate with other agencies. In accordance with Executive Order 12866, agencies are required to consider among other things: (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 competition, (3) the quantification of these costs as well as feasible alternatives, (4) the degree and nature of the risk posed by activities regulated under their jurisdiction, (5) whether such regulations are inconsistent, incompatible, or duplicative with regulations and guidance documents of other federal agencies, and (6) tailoring its regulations to impose the least burden on society and taking into account the costs of cumulative regulations.

In evaluating the revocation of decades of precedent, CBP has an obligation under Executive Order 12588 to consider the economic effects, the safety risks and the potential incompatibility with vessel safety standards issued by other agencies. The industry has operated safely and efficiently under the existing standards. The standard that CBP is trying to impose by

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undoing thirty years of precedent is one which may have been workable in 1976 when operations were being carried out in shallow water and pipelay vessels were much smaller. To change the standards at this point would cause serious consequences in the offshore industry.

Request for Extension Period

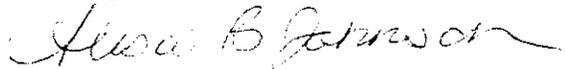
On July 21, 2009, Helix submitted a request for an extension to the thirty day comment period in order to allow a complete review of the proposed changes and to allow the industry time to consider the potential effects. Many other companies involved in the offshore oil and gas industries similarly requested additional time. The requests for such an extension were denied. We believe this was in error by CBP and that the proposed changes as set out in the Notice far exceed what could be reasonably understood by all interested parties.

Conclusion

Helix and Canyon generally support the comments and positions as outlined by IMCA and API in their responses. We believe that CBP has correctly applied the law for decades, and that the results of one misapplied ruling should not require changes to existing standards that are clear and have been in effect for decades.

Accordingly, based on the discussion and analysis herein and the economic effects that would result, we recommend CBP refrain from modifying the existing standards and instead retain the thirty plus years of precedent that is better understood by industry. We appreciate the opportunity to provide these comments. If you have any questions or need clarification, please do not hesitate to contact the undersigned.

Sincerely,



Alisa B. Johnson
Executive Vice President and
General Counsel
Helix Energy Solutions Group, Inc.

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Tulsa, OK 74101-0645

August 17, 2009

BY HAND AND EXPRESS MAIL

Sandra L. Bell
U.S. Customs and Border Protection
Office of International Trade,
Regulations and Rulings
Attention: Trade and Commercial Regulations Branch
799 9th Street, NW
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:

On behalf of Williams Field Services – Gulf Coast Company, L.P. (“Williams”), I write to express my full support for the comments submitted by the American Petroleum Institute (“API”) on proposed modifications and revocations that would reverse more than 30 years of precedent interpreting the Jones Act. Specifically, and as explained below, Williams respectfully recommends that the United States Customs and Border Protection: (i) extend the deadline to permit the submission of supplemental comments and (ii) convene a technical conference to permit an informed and reasoned assessment of the consequences of the proposals.

By “Notice” issued July 17, 2009 (the “July 17 Notice”), the United States Customs and Border Protection solicited comment on proposed modifications to and revocation of “Ruling Letters” interpreting the Jones Act. The Jones Act, among other things, prohibits the movement of merchandise in the waters of the United States by foreign-built and foreign-flagged ships. The United States Customs and Border Protection also directed that comments, if any, on the proposed modifications and revocations be submitted within 30 days of the July 17 Notice or on or before August 16, 2009.

Headquartered in Tulsa, Oklahoma, Williams’ parent, The Williams Companies, Inc. is a publicly-traded company (NYSE: WMB) that, through its subsidiaries, engages in natural gas exploration, production, gathering and processing and transportation, as well as the marketing and trading of natural gas and natural gas liquids. The Williams gathering and processing business unit has significant deepwater and subsea operations in the Gulf of Mexico requiring the use of sophisticated and expensive vessels able and available to conduct highly specialized operations,

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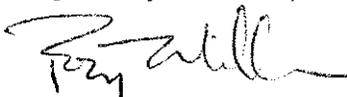
including subsea installation and construction support, pipe/umbilical laying and maintenance of seafloor equipment. The modifications and revocations of Ruling Letters interpreting the Jones Act, accordingly, will have a significant – and inimical – impact on the ability of Williams to conduct safe, technologically efficient and cost effective deepwater and subsea operations.

Williams is a member of API and, as noted above, supports fully the comments submitted by API on the proposed Jones Act modifications and revocations. While Williams will not repeat here the statements of fact and conclusions of law contained in the API Comments, two recommendations put forward by API should be amplified. First, Williams respectfully recommends that the United States Customs and Border Protection extend the deadline for the submission of comments on the modification and revocation proposals. As proposed, in 30 days the modifications and revocations would overturn 30 years of precedent interpreting the Jones Act and, more important, visit significant and costly consequences on companies conducting deepwater and subsea operations and consumers of natural gas, natural gas liquids and petroleum. Williams respectfully submits that, given the reliance by all entities conducting deepwater and subsea operations in the waters of the United States on the long-standing precedent interpreting the Jones Act, a 30 day comment period to determine whether the precedent should be reversed is both inadequate and unfair. I have also been advised by counsel that absolute enforcement of a 30 day comment period for a proposal with such far-reaching consequences may not comply with the “reasoned decision-making” required of all agency action. Williams, accordingly, respectfully requests that the United States Customs and Border Protection extend the deadline by 90 days to permit the submission of supplemental comments.

Second, Williams respectfully requests that United States Customs and Border Protection augment the extended comment period by convening a technical conference on the modification and revocation proposals. At such a conference, company officials and industry consultants would appear before United States Customs and Border Protection to present expert views and informed analyses on the impact on the proposals to reverse the Ruling Letters and the consequences of such a reversal on the market for natural gas, natural gas liquids and petroleum. A technical conference coupled with an extended deadline for the submission of supplemental comments, in sum, ensures that any final decision on the modification and revocation of Ruling Letters interpreting the Jones Act will be the product of informed and reasoned agency action.

I thank you for the opportunity to offer the above comments and endorsement of the comments submitted by API. If you have any questions or need additional information, please do not hesitate to contact me at your earliest convenience.

Respectfully submitted,



Rory L. Miller
Vice President, Gulf Coast
Williams Field Services – Gulf Coast Company, L.P.

Oceaneering International, Inc.

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August 17, 2009

Via Hand Delivery

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

Att'n: Trade and Commercial Regulations Branch
Ms. Sandra L. Bell, Executive Director

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," 43 Cust. B. & Dec. No. 28 (Jul. 17, 2009) ("Proposed Ruling")

Dear Ms. Bell:

Oceaneering International, Inc. provides engineered services and products primarily to the offshore oil and gas industry, with a focus on deepwater applications. Many of these products and services support the oil and gas industry in the U.S. Gulf of Mexico ("GOM"). Oceaneering serves the GOM by way of its offices and facilities in Texas and Louisiana. The success of Oceaneering's offshore business today is to a large degree the product of the pivotal Treasury Decision (T.D.) 78-387, originally issued as ruling letter HQ 101925 to Oceaneering in 1976.

As discussed in more detail below, Oceaneering requests Customs and Border Protection ("CBP") reconsider the Proposed Ruling and re-adopt and adhere to the principles plainly set forth in T.D. 78-387 and the subsequent thirty plus years of precedent. Furthermore, Oceaneering adopts and incorporates the detailed comments of the American Petroleum Institute ("API").

The offshore industry has been shaped by decades of precedent found in the rulings pertaining to the Jones Act issued by CBP and its predecessors. This precedent interprets the nearly ninety-year old Jones Act correctly and in the context of a rapidly changing and expanding industry. The technological advancements and continued exploitation of deepwater reserves require the continued evolution in interpretation and regulation that has taken place, not a rollback or rescission of established precedent.

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The segment most adversely affected under the Proposed Ruling is not the many supply boats frequenting offshore rigs and platforms, nor is it the drilling rigs and floating production platforms which rarely, if ever, come in to port. Instead, it is the marine segment comprised of large, very sophisticated multi-service vessels ("MSVs"). MSVs have the size and capabilities required for multiple, highly specialized operations in a range of roles, depths, locations and conditions, but still retain the capability of traveling in to port. These versatile vessels have come into use to meet the evolving needs of the deepwater oil and gas industry for the laying of pipe and umbilicals, subsea construction, and the installation, maintenance and repair of subsea facilities. MSV missions, configurations, equipment, tools and materials often vary and overlap from one deployment to another. Together they comprise a vital link in the path of oil and gas from reservoir to consumer. Transportation of materials necessary to complete the job is an integral part of their operations and mission, but not the primary purpose. T.D. 78-387 and its progeny have, and should continue to, reflect this reality. The Proposed Ruling attempts, in effect, to roll back offshore technology more than three decades to a rigid and simplistic paradigm of maritime commerce not reflective of our energy development world today. It neither protects American jobs nor American businesses, nor does it serve America's needs today.

CBP has recognized in numerous rulings that the transportation of certain materials was so integral to the service mission or operations of the vessel that the Jones Act was not applicable to the vessel's activities because merchandise was not being transported between coastwise points. Oceaneering's current operation of its foreign flagged vessels and underwater remotely operated vehicles ("ROVs") in the GOM is critically dependent upon the following established precedent being upheld, including the transportation of certain materials associated therewith. Accordingly, Oceaneering strongly urges CBP to reassess its proposal and reconfirm the following principles and precedent under T.D. 78-387 and its progeny.

- *ROVs installed on vessels.* In HQ 113841, CBP found, as it does in proposed ruling HQ H061935, that an ROV installed on and operated from a vessel engaged in cable-laying operations (a species of pipe-laying) is vessel equipment. HQ 113841 acknowledges this is the case because the ROV is essential to the completion of the mission of the vessel;¹
- *Pipe-laying and repairing*
 - *Pipelines, cables and the like.* In T.D. 78-387, subparagraph (1), CBP construed the meaning of transportation under the Jones Act regulation, 19 CFR § 4.80b, to exclude the paying out of pipe and similar activities; the pipe,

¹ CBP proposes to rescind its well established past precedent that the ROV is vessel equipment because it is "essential to the mission of the vessel." This proposal relies on an erroneous reading of what constitutes vessel equipment for purposes of the Jones Act.

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cable or similar item was found not to be a use in the coastwise trade because the pipe or cable is not landed but is only paid out in the course of the operation. T.D. 78-387 CBP held further, in subparagraph (2), that the repairing of pipe is indistinguishable from laying of pipe;

- *Flexible flowlines, umbilical lines and risers.* In HQ 115311, reaffirmed by proposed HQ H061700, CBP held that installation and transportation of flexible flowlines, umbilical lines, and risers on the U.S. outer continental shelf ("OCS") do not constitute a violation of 46 U.S.C. § 55102 as the lines are paid out and transportation and installation of the risers is incidental to the laying of the lines by the same vessel. This analysis is correct;² and
- *Underwater inspection and repair of offshore or subsea structures.* In T.D. 78-387, subparagraph (6), CBP concluded that the transportation of such materials and tools is not restricted by the Jones Act, "since such transportation is incidental to the vessel's operations," provided that the "repair materials are of *de minimis* value or materials necessary to accomplish unforeseen repairs" and "such materials are usually carried aboard the vessel as supplies." In effect the items at issue were of such limited value that they did not need to be regulated under the Act or were "[l]egitimate equipment and stores of the barge for its use,"

In addition to, and not in lieu of, any matter addressed or relief requested in the comments submitted by API, Oceaneering specifically requests that CBP take the following action with regard to the rulings discussed below:

- 1) *The Installation and Incidental Transportation of Pipeline Connectors Should be Subject to the Same Rules as Pipelaying Operations:* Withdraw the proposed revocation of HQ 115185 and HQ 115218 (Attachment B) and modification of HQ 1153113 by the Proposed Ruling and affirm that the installation and incidental transportation of pipeline connectors are subsumed within the treatment of pipe-laying and pipeline repair activities:
 - a) The installation of jumper pipe, risers, flying leads, and other pipeline connectors laden at a coastwise point for the purpose of installation at or near another coastwise point, is not a use in coastwise trade, but is merely another aspect of pipe-laying or

² CBP inappropriately proposes to reverse its consistent position in HQ 115185 and HQ 115218 with respect to jumper pipes, risers and other pipeline connectors. CBP's proposal relies on an erroneous reading of precedent, and an improper narrowing of the pipe-laying/pipeline repair exclusion.

³ HQ 111889 is distinguishable insofar as the drilling rig on which the risers were staged had no role in pipe-laying or pipe repair.

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pipeline repair. CBP accepts that the unloading and installation of such pipeline connectors incidental to pipe-laying or pipeline repair by a non-coastwise vessel does not violate the Jones Act. Activities that are essentially pipe-laying or pipeline repair may be combined or separated in various ways depending on the project and available resources. To treat such activities differently based on arbitrary distinctions in the timing or sequencing of work, all of which is incidental to the laying or repairing of a pipeline, serves no purpose. Oceaneering is not proposing the extension of the holdings in HQ 115185, HQ 115218 and HQ 115311 to articles other than pipe and pipeline connectors;

- b) HQ 115185 correctly applied T.D. 78-387, subparagraphs (1), (2) and (5), to jumper pipe. The sole function of jumper pipe is to connect to and complete a pipeline. Jumper pipe is necessary to the function of a pipeline, as are risers and flying leads. In T.D. 78-387, subparagraph (5), CBP held that installation of pipeline connectors is not a use in the coastwise trade; neither is the transportation of such pipeline connectors for such purpose, as these activities are *incidental to the pipe-laying operations* of the vessel. The installation and incidental transportation of pipeline connectors, whether jumper pipe, risers, flying leads, or other pipeline components, by foreign flagged vessels are not uses in coastwise trade. Such activities should be subsumed within the category of pipe-laying and pipeline repair. CBP, therefore, should not modify HQ 115185;
- c) HQ 115218 held that transportation and installation of pipeline tie-in spool pieces on a previously laid flowline were in accordance with the Jones Act. A pipeline tie-in spool piece is essentially a pipeline connector. Like jumper pipe, it is necessary to the function of the pipeline. Despite separate mobilizations for installation of the flowline and spool piece, the CBP holding comports with T.D. 78-387, wherein transportation and installation of pipeline connectors are found to be incidental to pipe-laying. It should not matter if the tasks comprising pipe-laying or repairing operations are performed at different times. It may be impossible or infeasible for a vessel to carry a spool piece concurrently with pipe or umbilical. The installation of the spool piece should be considered as part of the larger pipe-laying or pipeline repair project, and proposed ruling HQ H061698 should be modified to be consistent with Oceaneering's comments or withdrawn;
- d) HQ 115311 held that the transportation of flexible flowlines and umbilical lines for the purpose of installation is not a use in coastwise trade. CBP reaffirms HQ 115311 in proposed H061700, that installation and incidental transportation of flexible flowlines, umbilical lines, and risers on the OCS do not constitute a violation of 46 U.S.C. § 55102, as the transportation and installation of these articles are incidental to the laying of pipeline by the same vessel. Oceaneering supports the analysis of HQ 115311 which is in line with precedent;

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- 2) *CBP Should Re-adopt the Mission-of-the-Vessel Test:* Adhere to the interpretation of vessel equipment reflected in T.D. 78-387 and subsequent precedent, whereby CBP will consider any specialized **purpose, capabilities and mission** of the particular vessel in determining what constitutes vessel "operations" and thus what vessel equipment is excluded from the vessel utilization limits of the Jones Act. The 70-year-old definition of vessel equipment found in T.D. 49815(4), "portable articles necessary for the navigation, operation, or maintenance of the vessel..." (emphasis added) has been correctly understood and applied. Vessel equipment should not be limited to just those articles necessary for the most basic functions of a generic cargo or passenger vessel. Instead, CBP should consider the specialized purpose, capabilities and mission of the particular vessel in determining what constitutes vessel "operations" and thus what vessel equipment is excluded from the vessel utilization limits of the Jones Act. The concept should remain in place that materials transported solely for the purpose of and integral to the service mission or operations of a vessel are vessel equipment and not merchandise. Further, consistently with such principle, CBP should:
- a) Clarify that, when CBP speaks of a vessel having a "sole use", such as a vessel's "sole use . . . in effecting underwater repairs to offshore or subsea structures" pursuant to subparagraph (6) of T.D. 78-387, such use need not be the vessel's *only* possible use, designation or capability. For example, the vessel need not be a single-purpose vessel limited to effecting such repairs, but merely a vessel, regardless of its potential capabilities, currently engaged in that particular operation or mission. Such a conclusion is consistent with T.D. 78-387, subparagraph (6): "The Customs Service is of the opinion that the sole use of a vessel in effecting underwater repairs to offshore or subsea structures is not considered a use in coastwise trade." Repairs to the underwater portions of offshore or subsea structures currently are typically performed by dive support and MSVs outfitted for this role;
 - b) Confirm, as held in HQ113841 and HQ H061935, that an ROV and associated tooling installed aboard a non-coastwise-qualified vessel to perform ROV services from the vessel are vessel equipment, not merchandise, even if (i) the ROV services are not incidental to pipe-laying, (ii) the vessel from which the ROV is operated is not a pipe-laying or other single-purpose vessel, and (iii) the ROV is installed at one coastwise point and ultimately uninstalled at another coastwise point. Typically, an ROV is installed at a coastwise point, travels with the vessel between coastwise points and performs services while deployed from the vessel. In almost all cases the ROV remains tethered to the vessel via an umbilical. The transportation of the ROV aboard and the operation of the ROV from the vessel should not be activities prohibited by the Jones Act;

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- 3) Affirm the holding in T.D. 78-387, subparagraph (6), that repair materials transported between coastwise points, to be exempt from the application of the Jones Act, must be either (a) of *de minimis* value or (b) necessary to effect unforeseen repairs, *provided* that such materials are usually carried aboard the vessel as supplies or equipment;
- 4) Clarify the meaning of repair material of *de minimis* value in a pragmatic and reasonable manner such as by considering the value of such material in comparison to the significant value of the oilfield equipment or structure it is to repair; and
- 5) Continue to review ruling requests to apply the definition of vessel equipment on a case-by-case basis consistent with Oceaneering's comments. In HQ 113841, CBP held "decisions as to whether a given article comes within the definition of 'vessel equipment' are made on a case by case basis."

Oceaneering has committed significant resources and created hundreds of jobs in reliance upon the decades of ruling guidance which is now at risk of being overturned. If the Proposed Ruling becomes final in its current form, numerous contractual commitments will become impossible to perform and legal actions are bound to ensue. The adverse economic impact will be significant. CBP's precipitous action is unfair and disruptive to Oceaneering and those who depend on the marine contracting industry's ability to support deepwater oil and gas exploration and production. Indeed, the Proposed Ruling may constitute an unlawful taking without due process.

Furthermore, and contrary to the assertions of some, there are many Americans employed on and supporting foreign flagged vessels in the GOM, including employees of Oceaneering. The Proposed Ruling will put many American citizens out of work during perhaps the most severe economic recession in seven decades.

If CBP determines that all or some of the Proposed Ruling will be implemented, it must be done in a way that is reasonable and comports with applicable law. The manner in which CBP intends to implement the Proposed Ruling is procedurally deficient. API's comments address these deficiencies in as much detail as the very short comment period has allowed. CBP has the power to chart another course that will avoid at least some of the more negative consequences of the Proposed Ruling and will comport with legal requirements. We strongly urge CBP, if further study does not result in a substantial alteration of the Proposed Ruling, to adopt (1) a phased implementation or enforcement compliance schedule, and (2) "grandfathering" operations performed pursuant to existing contractual commitments. The number of coastwise-qualified vessels in the GOM is insufficient to execute the quantity and type of deepwater subsea field development work required and, irrespective of anyone's best efforts, will remain so for a significant period of time.

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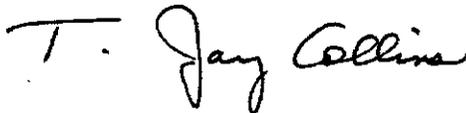
In summary, enforcement of the Jones Act does not require the implementation of the Proposed Ruling. The current regulation of the offshore industry comports with existing law. The proposed revocation or modification of numerous ruling letters, some of which CBP has not even identified yet, is not supported by law and will serve only to increase the costs and risks of meeting those needs, foster greater dependence upon foreign energy sources, and hurt American companies and American jobs. Indeed, the Proposed Ruling is not being promulgated in accordance with applicable law and regulation including a study of the economic impacts.

The Proposed Ruling deserves more careful study and more time for comment than the minimum 30-day period granted. If CBP is unwilling proceed in this manner, we urge CBP to withdraw the proposal, appropriately modify it in line with the comments of API and this letter, and implement the final proposal over a period of time and in a manner which will afford adequate time for the offshore industry to honor its contractual obligations and adapt to the new regulatory environment.

If you have any questions or would like additional information, please do not hesitate to contact me.

Very truly yours,

OCEANEERING INTERNATIONAL, INC.



T. Jay Collins
President and Chief Executive Officer

cc: Hon. Janet Napolitano
Secretary, Department of Homeland Security

subsea 7

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August 17, 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 9th 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:

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 July 17, 2009 (the "Notice").

Subsea 7 is one of the world's leading subsea engineering and construction companies servicing the oil and gas industry. Subsea 7's office is located in Houston, Texas, and employs nearly 200 people. Subsea 7 recently opened its new pipeline fabrication spoolbase in Port Isabel, Texas. The investment in the spoolbase, in excess of \$30 million, allows the company to expand its presence and capabilities and provide customers with a leading edge world-class solution to serve the increasing deepwater market. This spoolbase will employ up to 100 people and utilize Port Isabel local residents to build this workforce.

Subsea 7 fully endorses and supports comments issued by the International Marine Contractors' Association ("IMCA"), of which the company is a long standing member.

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

For and on behalf of Subsea 7 (US) LLC,



Ian Cobban
Vice President
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Ms. Sandra L. Bell
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Attention: Trade and Commercial Regulations Branch
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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:

Thank you for the opportunity to submit comments 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 July 17, 2009 (the "Notice"). As discussed in more detail below, J. Ray McDermott, SA ("JRM") strongly opposes the Customs and Border Protection ("CBP") proposed ruling modifications and revocations and endorses the comments submitted by the International Marine Contractors Association ("IMCA").

JRM designed and installed the first steel platform in the U.S. Gulf of Mexico in twenty feet of water for Superior Oil in 1947. The company later designed and commissioned the first construction barge specifically for the offshore industry, the DB4, in 1949. In the years since, JRM has played a major role in designing, fabricating and installing offshore infrastructure for the oil and gas industry worldwide. JRM has had a continuous presence in the U. S. Gulf through a number of different entities for more than sixty years and has always used coastwise endorsed vessels in support of its operations offshore. Had the CBP proposal been limited to a restatement of the Jones Act restrictions on the transport of merchandise with regard to items not remaining on vessels during operations, JRM would have supported the revision. Unfortunately, by replacing the "necessary for the mission of the vessel" test that has been used to define vessel equipment since 1976 with a more restrictive definition of the 1939 test stated in T.D. 49815 (4), "necessary for the navigation, operation or maintenance of the vessel *itself* and the safety and comfort of the persons onboard", CBP is effectively expanding the scope of the Jones Act from its historic role as a cabotage law to a law regulating installation methods offshore. If CBP's adopts its proposals in a final determination, it would appear that JRM would not be allowed to use its pipelay systems on its non-coastwise qualified heavy lift vessels (even though the ruling expressly affirms the pipelay exception to the



Jones Act). This is because the systems are modular and might be found by CBP to not be "necessary for the operation of the vessel *itself*" because JRM's vessels are multipurpose and the pipelay systems could thus be deemed "merchandise" and be subject to forfeiture if transported between coastwise points.

JRM believes that this expansion violates the terms of the United States accessions to both the WTO and NAFTA and that it would result in immediate retaliatory measures against U.S. flag vessels abroad. This would substantially adversely affect our operations worldwide. In addition to our seven U.S. flag barges, JRM has hired one hundred and twenty U.S. flag vessels to support its worldwide operations since September 1, 2008. All of these vessels and their crews stand to be adversely affected by the proposed ruling. JRM submitted a request to Customs to extend the thirty day comment period to allow time for all the affected companies to study the impact that this ruling could have on our businesses. Unfortunately, CBP refused to grant the extension so we have not had adequate time to complete and provide a proper impact analysis with our submission.

Accordingly, consistent with IMCA's comments and the comments contained herein, JRM respectfully requests that CBP modify this proposal by restricting the scope of the changes to issues regarding the transport of merchandise, reject the vessel "itself" test, and re-adopt the "mission of the vessel test" as the basis for determining what does or does not constitute vessel equipment, and confirm that JRM may continue to conduct pipelay operations on the U.S. OCS on its non-coastwise qualified vessels.

Sincerely,

David P. Roquemore
Senior Vice President Operations

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**NORTH AMERICAN SUBMARINE CABLE ASSOCIATION COMMENTS
ON PROPOSED MODIFICATION AND REVOCATION OF RULING
LETTERS RELATING TO THE CUSTOMS POSITION ON THE
APPLICATION OF THE JONES ACT TO THE TRANSPORTATION OF
CERTAIN MERCHANDISE AND EQUIPMENT BETWEEN COASTWISE
POINTS**

Before U.S. Customs and Border Protection, Department of Homeland Security.

The North American Submarine Cable Association ("NASCA") urges the U.S. Customs and Border Protection ("CBP") to revise its 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 ("Proposed Modification") to address the domestic and international legal regimes governing undersea telecommunications cables and extend the deadline for comments.

NASCA is a non-profit association of submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems¹.

First, NASCA requests an extension to file more detailed comments concerning the Proposed Modification.

1. NASCA's members include: Alaska Communication Systems; Alaska United Fiber System Partnership; Alcatel-Lucent Submarine Networks; Apollo Submarine Cable System Ltd.; AT&T, Inc.; Brasil Telecom of America, Inc. / GlobeNet; Global Crossing Ltd.; Global Marine Systems Limited; Hibernia Atlantic; Level 3 Communications, LLC; New World Network, USA, Inc.; Reliance Globalcom; Southern Cross Cables Limited; Sprint Nextel Corp.; Tyco Telecommunications (US) Inc; Verizon Communications, Inc.; and VSNL International, Inc.

Second, NASCA requests that CBP amend the Proposed Modification to address the special legal protection afforded submarine cables in international and domestic law.

NASCA is willing to meet with CBP to discuss its specific concerns with, and offer reasonable solutions to, the Proposed Modification should our request for an extension not be granted.

Respectfully submitted,

Bob Wargo

by Ohio T. Robinson

Robert Wargo – President
North American Submarine Cable Association

NORTHAMERICAN SUBMARINE CABLEASSOCIATION
c/o David Ross Group
127 Main Street
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Before
U.S. CUSTOMS AND BORDER PROTECTION
U.S. DEPARTMENT OF HOMELAND SECURITY
Washington, D.C.

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In the Matter of

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

**COMMENTS OF
TYCO TELECOMMUNICATIONS (US) INC.**

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*Counsel for
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16 August 2009

EXECUTIVE SUMMARY

Tyco Telecommunications (US) Inc. (“Tyco Telecom”) urges Customs and Border Protection (“CBP”) to modify and clarify its vessel-equipment proposal and to affirm its separate and longstanding line of rulings finding that undersea telecommunications cable and cable-laying equipment are not subject to the Jones Act’s coastwise trading restrictions. Tyco Telecom also urges CBP to clarify that its jurisdiction on the outer Continental Shelf extends only to the exploration and exploitation of mineral resources, whereas U.S. and international law afford unique protections and freedoms to undersea cables. CBP’s proposal, although directed toward energy-related activities, would cause collateral harm to the U.S. undersea cable industry and U.S. economic and national security interests associated with undersea cables, driving manufacturing, marine maintenance, cable depot, and other related jobs out the United States while increasing the costs and delays of critical undersea cable repairs.

As CBP has repeatedly recognized, the undersea cable industry is different from other industries that operate subject to the coastwise laws. It transports neither cargo nor people, but rather installs and repairs complex communications systems on the seabed—systems that are critical to U.S. economic and national security interests. Cable and cable-laying equipment, as decades of CBP decisions reflect, are therefore not subject to the Jones Act’s coastwise trading restrictions.

Yet CBP nevertheless proposes that certain undersea cable-related activities previously deemed non-coastwise trade will now be subject to the Jones Act’s coastwise trading restrictions. CBP has apparently responded to a concern that its rulings have exempted too many energy-industry articles from coastwise trade, including “multi-well templates, marine risers, oilfield equipment, and structural components.” Yet CBP does not limit its proposal to the energy

industry or particular activities within that industry. Instead, CBP uses far-reaching and potentially confusing language to propose revocations and modifications that will have significant economic and commercially disruptive consequences on the undersea cable industry and the telecommunications networks it supports.

First, in reinterpreting the term “vessel equipment” to address particular concerns arising with the offshore energy services industries, CBP fails to account for a separate, longstanding line of rulings finding that undersea cable installation and maintenance activities fall outside the scope of the Jones Act’s coastwise trading restrictions. Those rulings have held that undersea cable installation and repair activities—particularly those involving paid-out cable—do not involve “merchandise” as defined in the Jones Act, and that the lack of continuity for any incidental transport of cable and cable-laying equipment renders such material outside the definition of “merchandise” for transport. Cable, repeaters, and cable-laying equipment differ from “merchandise” because they are not goods or wares intended for transportation between two coastwise points. Regardless of how it defines or redefines “vessel equipment,” CBP should affirm the separate line of rulings—and their underlying rationale—treating undersea cable installation and maintenance activities as beyond the scope of the coastwise trading restrictions. Otherwise, CBP will inflict grave harm on the undersea cable industry and U.S. economic and national security interests.

Second, CBP’s proposal improperly characterizes the Outer Continental Shelf Lands Act and the Jones Act itself as extending the coastwise laws of the United States to all activities on the outer Continental Shelf. This extraterritorial interpretation of these statutes is inconsistent with their express statutory language, U.S. treaty obligations, and customary international law as observed by the United States, which afford unique freedoms and protections to undersea cables

and distinguish them from minerals exploration and exploitation (including pipeline activities), which are subject to regulation on the outer Continental Shelf. Consequently, CBP should clarify that any proposed revocation or modification of CBP letter rulings would apply to undersea cable-related activities, if at all, only within the three-nautical-mile territorial sea as specified in CBP's existing regulations, recognizing that even those activities conducted within the three-nautical-mile territorial sea would not be subject to the Jones Act's coastwise trading restrictions, as they would not involve the transportation of "merchandise."

If left unmodified, CBP's proposal could, perversely, push undersea cable manufacturing, depot activities, and positioning of cable ships outside the United States. Under CBP's proposal, cable ships operating from outside the United States and sourcing new or repair cable from foreign factories or depots would still be permitted to conduct installation and maintenance operations within the U.S. territorial sea. CBP's proposal would also harm U.S. economic and national security interests by jeopardizing timely repairs and rendering them more costly, undermining other federal government efforts to ensure the continuity and security of communications on undersea cables, as well as more timely repair and restoration. Finally, CBP's proposal would create significant regulatory uncertainty, increasing the risk of inconsistent application by various customs districts and necessitating time-consuming and costly requests for ruling letters.

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Before
U.S. CUSTOMS AND BORDER PROTECTION
U.S. DEPARTMENT OF HOMELAND SECURITY
Washington, D.C.

In the Matter of

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

**COMMENTS OF
TYCO TELECOMMUNICATIONS (US) INC.**

Tyco Telecommunications (US) Inc. (“Tyco Telecom”) urges Customs and Border Protection (“CBP”) to modify and clarify its vessel-equipment proposal¹ and to affirm its separate and longstanding line of rulings finding that undersea telecommunications cable and cable-laying equipment are not subject to the Jones Act’s coastwise trading restrictions.² Tyco Telecom also urges CBP to clarify that its jurisdiction on the outer Continental Shelf extends only to the exploration and exploitation of mineral resources, whereas U.S. and international law afford unique protections and freedoms to undersea cables. CBP’s proposal, although expressly focused on energy-related activities, would cause collateral harm to the U.S. undersea cable

¹ See Gen. Notice, 19 C.F.R. Part 177, *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*, 43 Cust. B. & Dec. 54 (July 17, 2009) (“CBP Proposal”).

² See Section 27 of the Merchant Marine Act of 1920, Pub. L. No. 66-261, *codified at* 46 U.S.C. §§ 55102 *et seq.* (“Jones Act”).

industry and U.S. economic and national security interests associated with undersea cables, driving manufacturing and jobs out of the United States while increasing the costs and delays of critical undersea cable repairs.

Tyco Telecom's comments are divided into three parts. In part I, Tyco Telecom provides background on undersea telecommunications and cable ships, explaining their purposes and importance, as well as background on Tyco Telecom itself, as the sole U.S.-based undersea cable system and services supplier. In part II, Tyco Telecom explains why CBP's proposal to redefine cable and cable-laying equipment as "merchandise" under the Jones Act conflicts with a separate, longstanding line of CBP rulings finding that cable and cable-laying equipment are not subject to the Jones Act's coastwise trading restrictions. To reconcile its Proposal with the Jones Act and prior CBP rulings and to avoid grave harm to U.S. economic and national security interests, Tyco Telecom asks CBP to clarify that cable and cable-laying equipment are not merchandise and that use of such cable and cable-laying equipment breaks the continuity of any transport. In part III, Tyco Telecom explains why CBP's assertion of general jurisdiction on the outer Continental Shelf conflicts with U.S. law, U.S. treaty obligations, and customary international law as observed by the United States. Tyco Telecom asks CBP to clarify that any proposed revocation or modification of CBP letter rulings would apply to undersea cable-related activities, if at all, only within the three-nautical-mile territorial sea specified in CBP's regulations.

I. BACKGROUND

A. Undersea Telecommunications Cables and Cable Ships³

Contrary to popular perception, more than 90 percent of U.S. international telephone, data, and Internet traffic travels by undersea cable—a percentage that has increased over time. Undersea cables provide higher-quality, more reliable and secure, and less expensive communications than do communications satellites. Undersea cables (most of them built by Tyco Telecom) also provide the principal connectivity between the contiguous United States and Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands.

Undersea cables play a critical role in ensuring that the United States can communicate with itself and the world, and in supporting the commercial and national security endeavors of the United States and its citizens. Undersea cables support U.S.-based commerce abroad, and provide access to Internet-based content, a substantial proportion of which is located in the United States, as evidenced by international bandwidth buildout. They also carry the vast majority of U.S. Government traffic, as the U.S. Government does not generally own or operate its own undersea cable systems, other than for certain U.S. Navy operations.⁴

³ The terms “undersea cable” and “submarine cable” are interchangeable to describe telecommunications systems laid on the sea floor. In these comments, we use the term “undersea cable” to avoid any suggestion that it is used in connection with the watercraft known as a submarine.

⁴ See, e.g., “Contract Awarded for Kwajalein Cable System,” U.S. Army News (June 13, 2008), available at www.army.mil/-news/2008/06/13/9972-contract-awarded-for-kwajalein-cable-system-kcs/ (describing Defense Information Systems Agency’s contract for service on the privately-owned HANTRU1 system, which will connect Guam with the U.S. Army Kwajalein Atoll/Reagan Test Site in the Republic of the Marshall Islands); Naval Facilities Engineering Command, Capabilities, available at https://portal.navfac.navy.mil/portal/page/portal/navfac/navfac_ww_pp/navfac_hq_pp/navfac_che_pp/navfac_che_ocean/tab4000467.

Undersea cables—which have the diameter of a garden hose—are laid and repaired by cable ships built specifically for cable-related operations and designed for covering vast distances and multi-month deployments. Cable ships are crewed by highly trained and experienced merchant mariners, submersible engineers, and cable operations staff. In the course of cable-laying and repair operations, the crew pays out cable from enormous holding tanks and splices in repeaters from special racks. (The repeaters regenerate the optical signal on a cable and are spaced approximately every 80 kilometers.) These ships use a variety of remotely-operated vehicles (“ROVs”), sea plows, lines, and grapnels for manipulating cable and repeaters beyond the ship. Almost all cable ships are purpose-built, and attempts to convert other flat-bed vessels have been less than successful, as such vessels are ill-suited to rough weather conditions and must pay cable out directly from an unprotected deck. At present, there are no coastwise-qualified commercial cable ships serving the United States, as none is even flagged in the United States.⁵

Although damage to undersea cables is rare, it is typically caused by commercial fishermen (whose nets and clam dredges ensnare cables), vessel anchors, hurricanes, underwater landslides, and seismic events such as earthquakes. Timely repairs are critical given the economic and national-security significance of traffic carried by these cables. Consequently, maintenance providers and cable ships must be prepared to respond rapidly, with continuously-qualified personnel, vessels on stand-by, and appropriate equipment. Recent damage to undersea

⁵ See International Cable Protection Committee, Cable Ships of the World, www.iscpc.org/information/Cables_hips_1.htm, www.iscpc.org/information/Cables_hips_2.htm. Note that this registry misidentifies Tyco Telecom’s cable ship *Global Sentinel* as registered in the United States. In fact, it is registered in the Republic of the Marshall Islands. The U.S. Navy has a single cable ship devoted to its own cable operations. See Military Sealift Command, USNS *Zeus* Cable Repair Ship, www.msc.navy.mil/inventory/ships.asp?ship=175&type=CableRepairship.

cables in east Asia, south Asia, and western Africa in July and August of 2009 only underscores the importance of such maintenance operations.⁶

Cable maintenance providers contract with individual owners of undersea cable systems and with regional maintenance authorities for the provision of long-term maintenance services. They also occasionally contract with system owners for one-off maintenance operations. Cable and repeaters for repairs are typically manufactured on a system-specific basis and kept on hand for immediate use by the maintenance provider.

B. Tyco Telecom

New Jersey-headquartered Tyco Telecom is a leading integrated supplier and manufacturer—and the only such U.S.-based supplier/manufacturer—of undersea fiber-optic systems and a leading provider of comprehensive marine installation and maintenance services for undersea fiber-optic telecommunications systems. Tyco Telecom is a subsidiary of Tyco Electronics Ltd., a leading global provider of engineered electronic components, network solutions, specialty products, and undersea telecommunication systems.⁷

⁶ “Asia Telecom Svcs Disrupted by Cable Damage, 2nd Update,” *Dow Jones Newswires* (Aug. 13, 2009) (describing damage likely caused by Typhoon Morakot off the Taiwanese coast), available at <http://online.wsj.com/article/BT-CO-20090813-706065.html>; “16-hr link failure sparks Bangladesh coup fears,” *The Times of India* (Aug. 15, 2009) (noting that disruption of the SEA-ME-WE-4 undersea cable serving Bangladesh had provoked coup fears among other governments and intelligence agencies), at <http://timesofindia.indiatimes.com/news/world/south-asia/16-hr-link-failure-sparks-Bangladesh-coup-fear/articleshow/4895302.cms>; “Cable fault cuts off West Africa,” *BBC News* (July 30, 2009) (describing damage to SAT-3 cable system serving western Africa), available at <http://news.bbc.co.uk/2/hi/technology/8176014.stm>.

⁷ Contrary to an assertion made in this proceeding by a British marine services competitor (Global Marine Systems Ltd.), Tyco Telecom is a U.S.-based business incorporated in Delaware. See Letter from Douglas Burnett, Squire, Sanders & Dempsey L.L.P., to CBP, at 2 (Aug. 14, 2009) (asserting that “Tyco [is] a Bermuda company”). Tyco Telecom’s ultimate parent company, Tyco Electronics Ltd., is a Swiss corporation, but Tyco Telecom itself maintains its headquarters in Morristown New Jersey, in addition to significant additional

Tyco Telecom and its corporate predecessors manufactured cable for one of the first trans-Atlantic telegraph cables in 1867 and built the first trans-Atlantic telephone cable in 1956. Tyco Telecom pioneered undersea fiber-optics and designed and built TAT-8, the first trans-Atlantic optical network in 1988. It also developed the world's first seamless 10 gigabit-per-second global network. As such, Tyco Telecom is a flagship U.S. technology company and a significant provider of U.S. manufacturing jobs.

Tyco Telecom's system supply business offers comprehensive subsystems and turnkey solutions for undersea telecommunications. It has completed more than 120 installation projects around the world and installed more than 450,000 kilometers of cable for commercial, research, and government customers. Tyco Telecom maintains manufacturing facilities in New Hampshire and operates industry-leading research and development labs in New Jersey—facilities that once formed part of Bell Labs.

Tyco Telecom's marine services business offers a broad range of services, from project feasibility studies to on-demand maintenance services. Tyco Telecom operates a fleet of high-technology, purpose-built cable ships, with fleet headquarters in Baltimore, Maryland, and U.S. depots in Baltimore, Guam, Honolulu, Portland (Oregon), and St. Croix. Tyco Telecom's Reliance-class vessels are the most advanced and versatile in the industry, equipped with state-of-the-art cable, navigation, dynamic positioning, and safety equipment and capable of sustained operations in harsh weather conditions. None of Tyco Telecom's cable ships is coastwise qualified, as they were built either in Singapore or Spain and are flagged in the Republic of the Marshall Islands and Spain.

manufacturing, research, fleet operations, and depot activities elsewhere in the United States. Neither Tyco Telecom nor Tyco Electronics Ltd. is affiliated with Tyco International Ltd.

Tyco Telecom is one of the largest providers of undersea cable maintenance services—both globally and in the U.S. market—and contracts with numerous individual system owners and regional maintenance authorities. Tyco Telecom’s cable ships are capable of sailing within 24 hours in response to particular cable damage.

II. CBP’S PROPOSAL FAILS TO ACCOUNT FOR CBP’S LONGSTANDING AND SEPARATE TREATMENT OF UNDERSEA CABLE ACTIVITIES OR THE IMPACT OF ITS PROPOSAL ON SUCH ACTIVITIES

In reinterpreting the term “vessel equipment” to address particular concerns arising with the offshore energy services industries, CBP fails to account for a separate, longstanding line of rulings finding that undersea cable installation and maintenance activities fall outside the scope of the Jones Act’s coastwise trading restrictions. Those rulings have held that undersea cable installation and repair activities—particularly those involving paid-out cable—do not involve “merchandise” as defined in the Jones Act, and that the lack of continuity for any incidental transport of cable and cable-laying equipment renders such material outside the definition of “merchandise” for transport. Regardless of how it defines or redefines “vessel equipment,” CBP should affirm the separate line of rulings—and their underlying rationale—treating undersea cable installation and maintenance activities as beyond the scope of the Jones Act’s coastwise trading restrictions. Otherwise, CBP will inflict grave harm on the undersea cable industry and U.S. economic and national security interests.

A. In a Separate Line of Rulings, CBP Has Long Held That Cable and Cable-Laying Equipment Are Not Subject to the Jones Act’s Coastwise Trading Restrictions

CBP and its predecessors have long held that the sole use of a non-coastwise-qualified vessel to lay or repair cable between points in the United States or in international waters does

not violate the Jones Act's coastwise trading restrictions.⁸ This holding has been extended to cable-laying vessels.⁹

CBP has held that "[t]here is no distinction [to be] made between the repair of existing cable and the laying of new cable."¹⁰ Accordingly,

The characteristic of cable laying, the absence of a landing of merchandise, which places the activity outside the coastwise laws, provides the basis for our ruling that the transportation of cable and repair materials by a vessel, to be used by the crew of the vessel, in the repair of the cable, is not prohibited by the coastwise laws.¹¹

CBP further has held that

[s]ince the replacement cable and the repaired sections of existing cable are repair materials used by the repair vessel in the cable repairs, the transportation of those items by the repair vessel is not prohibited by the coastwise law so long as they are not landed at a second point in the United States.¹²

⁸ See, e.g., Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979) (noting that there is "no distinction made between the repair of existing cable and the laying of new cable" and thus "the use of a vessel to repair cable is not a use in the coastwise trade"); Customs Service Decision 79-321, 13 Cust. B. & Dec. 1481 (Dec. 12, 1978) (concluding that Jones Act does not prohibit use of a foreign vessel to lay pipe between points embraced by the coastwise laws of the United States); Treasury Decision 78-387, 12 Cust. B. & Dec. 826 (Oct. 7, 1976) (same); *Am. Mar. Officers Serv. v. STC Submarine Sys., Inc.*, 949 F.2d 121 (4th Cir. 1991) (same).

⁹ See, e.g., Customs Ruling Letter HQ 112866 (Aug. 31, 1993) (ruling that laying of cable is not coastwise trade); Customs Service Decision 89-40, 23 Cust. B. & Dec. 617 (Dec. 2, 1988) (same); Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979) (noting that cable repair is no different from laying of cable).

¹⁰ Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979). This reasoning builds on Customs' determination that the laying of pipe does not constitute a restricted form of coastwise trade. See also Customs Service Decision 78-347, 12 Cust. B. & Dec. 826, subpara. (2) (Oct. 7, 1976) (stating that "there is no distinction to be made between repairing pipe and the laying of new pipe. Therefore, the sole use of the work barge in repairing pipe is not a use in the coastwise trade, and in view of the unique characteristics of pipelaying operations which take them out of the purview of the coastwise laws, the transportation of pipe and repair materials by the work barge, to be used by the crew of the work barge in the repair of the pipeline, is also an activity that is not prohibited by the coastwise laws.").

¹¹ Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979).

¹² *Id.*

These ruling letters remain valid.¹³

Cable ships must carry repair materiel on board in order to perform maintenance activities. Because they cannot know how much cable will be required to complete a repair until they are actually on site, this inventory may sometimes exceed the amount necessary for a repair.

Recognizing this uncertainty, CBP has held that

[w]hile cable carried as part of the repair cable inve[n]tory of a cable-laying and repair vessel is not vessel equipment and is not installed, we are of the opinion that its carriage on the vessel in this status for substantial periods would similarly break the continuity of its transportation between coastwise points, so that its offloading at Honolulu after having originally been laden [*sic*] at San Diego would not consummate a coastwise transportation of merchandise in violation of [the Jones Act's coastwise trading restrictions].¹⁴

Initial cable installation requirements, by contrast, can be more precisely predicted. CBP was asked whether a coastwise violation would occur if a cable-laying vessel, on a voyage to lay approximately 1,100 nautical miles of cable between Florida and the U.S. Virgin Islands, off-loaded up to 40 nautical miles of excess cable at a United States port other than the port of loading. Customs held that “[i]f up to 5 % of the cable laden on a vessel and intended for use in a cable-laying operation is not used, it may be unladen at a second point in the United States without violation [of the Jones Act's coastwise trading restrictions].”¹⁵

In a 1992 ruling that neglected to cite C.S.D. 79-230, CBP stated that:

[i]f a non-coastwise-qualified vessel lades cable as cargo for the purposes not of using it before arrival at a second U.S. point, but merely to transport

¹³ See, e.g., 19 C.F.R. §§ 177.9, 177.12 (stating that ruling letters remain valid unless revoked or modified).

¹⁴ Customs Service Decision 79-230, 13 Cust. B. & Dec. 1314 (Oct. 16, 1978) (holding that repair cable laded on a cable vessel at one coastwise point and carried aboard for a three-year period could be offloaded at a different coastwise port without violating the coastwise laws).

¹⁵ Customs Service Decision 82-136, 16 Cust. B. & Dec. 945 (June 7, 1982).

it to that second such point, the vessel will be considered to have transported merchandise in the coastwise trade in violation of section 883 [recodified as 46 U.S.C. § 55102].¹⁶

CBP bases this intent-driven analysis on the “the fact that the cable was not laded for the purpose of furthering the primary mission of the transporting vessel”¹⁷—the same rationale it rejects in the Proposal. CBP’s 1992 ruling conflicts with over thirty years of precedent building on CBP’s understanding that cable and cable-repair equipment differ from run-of-the-mill items laded on vessels in coastwise waters. Moreover, it relies on an intent-based rationale that cannot be reconciled with CBP’s prior rulings and that mirrors the “primary mission” rationale rejected in the CBP Proposal. For that reason, CBP should also revoke or modify HQ 111591 to the extent that it relies on improper reasoning.

B. CBP’s Proposal Incorrectly Concludes that Cable and Cable-Laying Equipment Must Be “Merchandise” if They Cannot Be “Vessel Equipment”

By failing to account for this separate and longstanding undersea cable-related line of rulings, CBP’s Proposal incorrectly concludes that cable and cable-laying equipment must be “merchandise” if they cannot be “vessel equipment.”¹⁸ In its existing rulings, CBP had reasoned that undersea cable is not subject to the Jones Act’s coastwise trading restrictions because it is laid (and not “transported”) between points in the United States. “The characteristic of cable laying, the absence of a landing of merchandise” is what “places the activity outside the coastwise laws.”¹⁹ CBP also previously held that because cable is used in furtherance of the

¹⁶ Customs Ruling Letter HQ 111591 (May 18, 1992).

¹⁷ Customs Ruling Letter HQ 110402 (Aug. 18, 1989).

¹⁸ CBP Proposal, 43 Cust. B. & Dec. at 61.

¹⁹ Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979).

“primary mission” of the cable-laying vessel, it is similar to “vessel equipment.”²⁰ And CBP or its predecessors had defined “vessel equipment” as articles “necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board.”²¹

In its Proposal, CBP now proposes to adopt a strict interpretation of Treasury Decision 78-387 and to modify its interpretation of Treasury Decision 49815(4) regarding “vessel equipment.” CBP has apparently reacted to a concern that its rulings have exempted too many energy-industry articles from coastwise trade, including “multi-well templates, marine risers, oilfield equipment, and structural components.”²² Yet CBP does not limit its proposal to the energy industry or particular activities within that industry.

Instead, it suggests that the exclusion of cable and cable-laying equipment from “vessel equipment” would render it “merchandise.”²³ In fact, it would be neither, as the numerous CBP rulings—some even cited, though not applied, in the Proposal—provide.²⁴ And to the extent it is

²⁰ CBP Proposal, 43 Cust. B. & Dec. at 61.

²¹ Treasury Decision 49815(4) (Mar. 13, 1939).

²² CBP Proposal, 43 Cust. B. & Dec. at 61.

²³ *Id.* (describing prior rulings as extending the definition of “vessel equipment without regard to whether the article was necessary to the navigation, operation, and maintenance or comfort and safety of the individuals aboard the vessel *itself*” and identifying certain rulings to be modified “with respect to their findings that certain merchandise is vessel equipment.”).

²⁴ *See, e.g.*, Customs Ruling Letter HQ 115333 (Apr. 27, 2001) (“Customs has held that equipment used by a cable-laying vessel during the course of a cable-laying operation, may be laden on a vessel at a coastwise point and used by the vessel for reasons relating to the operation of the vessel and may later be unladen at a second coastwise point without violation of [the Jones Act coastwise trade restrictions].”); Customs Ruling Letter HQ 110402 (Aug. 18, 1989) (“The Customs Service has ruled that equipment laden on a non coastwise-qualified vessel at a coastwise point and used by the vessel for reasons relating to the operation of the vessel may be later unladen at a second coastwise point without violation of [46 U.S.C. § 55012]. The use of the equipment between American ports will have broken the continuity of the transportation between American ports.”); Customs Service Decision 79-230 (Oct. 16, 1978) (holding that “cable carried as part of the repair cable inventory of a

like either, its use on board the vessel breaks the continuity of transportation and takes it outside the scope of the restrictions on coastwise trade.²⁵

As drafted, the Proposal's potentially confusing wording risks capriciousness in any future enforcement. CBP's assertion that it "recognizes that the list of rulings and decision in this notice may not be complete and that there may exist other rulings which have not been identified which are inconsistent with this notice"²⁶ is unnecessarily vague and burdensome to cable ship operators.

Tyco Telecom and other suppliers and providers of marine services have invested billions of dollars in reliance on CBP's prior rulings. Tyco Telecom in particular has made significant investments in the United States itself and generates significant U.S. manufacturing output and employment. The Proposal, however, displays no evidence that CBP has considered the impact of its revised interpretation of T.D. 78-387 and T.D. 49815(4) on any part of the undersea cable industry. Indeed, the negative effects on the undersea cable industry will be significant and will pose potentially disastrous consequences for U.S. economic activity and national security, as explained in part II.D below.

cable-laying and repair vessel is not vessel equipment and is not installed, we are of the opinion that its carriage on the vessel . . . would similarly break the continuity of its transportation between coastwise points, so that its offloading at Honolulu after having originally been landen [*sic*] at San Diego would not consummate a coastwise transportation of merchandise in violation of [46 U.S.C. § 55102].").

²⁵ *Id.*

²⁶ CBP Proposal, 43 Cust. B. & Dec. at 62.

C. Consistent with Its Other Line of Rulings, CBP Should Clarify Its Proposal to State that Cable and Cable-Laying Equipment Are Not Subject to the Jones Act's Coastwise Trading Restrictions Even if Such Cable and Cable-Laying Equipment Are Not "Vessel Equipment"

CBP should clarify its Proposal to reflect its decades-long line of rulings holding that undersea cable and cable-laying equipment are not subject to the Jones Act's coastwise trading restrictions.

1. Cable and Cable-Laying Equipment Are Not Merchandise

Even if cable and cable-laying equipment can no longer be deemed "vessel equipment," as they sometimes were, CBP repeatedly has held that they do not constitute "merchandise." Indeed, cable and cable-laying equipment fit uneasily in the Jones Act framework, if at all; although not vessel "supplies," nor "vessel equipment," they are "similar to vessel equipment."²⁷ Nevertheless, they differ from "merchandise" because they are not goods or wares intended for transportation between two coastwise points.

Cable ships transport neither goods nor passengers. Instead, they install and repair undersea cable systems which rest on or in the seabed. Cable and cable-laying equipment constitute a class apart, neither supplies nor vessel equipment under CBP's interpretation, but equipment used in the operation of the vessels. This distinction differs from CBP's now-disfavored "necessary to the mission" rationale. Instead, without cable or cable-laying equipment, a cable-laying vessel cannot properly function. CBP's line of cases reflect this understanding and CBP should clarify its Proposal to take heed of those rulings.

²⁷ See, e.g., Customs Ruling Letter HQ 115333 (Apr. 27, 2001).

2. Use of Cable and Cable-Laying Equipment On Board the Cable Ship Breaks the Continuity of Any Transport

CBP should reiterate its line of rulings holding that use of cable-laying and repair equipment on board the vessel breaks the continuity of transportation between two U.S. coastwise points for the purposes of coastwise laws. This reasoning is based on an appropriately strict reading of the Jones Act and its implementing regulations. The Jones Act's coastwise trading restrictions apply to the "transportation of merchandise" by water between United States coastwise points. Under the regulations, a "coastwise transportation of merchandise" occurs when merchandise laden at one coastwise point "is unladen at another coastwise point."²⁸ Cable-laying and repair equipment, however, is likely to be used on board the vessel between the two coastwise points.²⁹ As in HQ 114305, this use breaks the continuity of transportation so that the Jones Act's coastwise trading restrictions do not apply.

CBP also should reject its intent-based analysis regarding cable laded on a repair vessel. Instead, it should determine whether the cable, repeaters, cable-laying or repair equipment will be used on board the vessel. If so, the Jones Act's coastwise trading restrictions should not apply. CBP should further clarify that cable laded at one coastwise point and off-laded into a storage depot or warehouse at a second coastwise point is not subject to the Jones Act's coastwise trading restrictions because although the cable "is not vessel equipment and is not

²⁸ 19 C.F.R. § 4.80b.

²⁹ Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979); Customs Service Decision 82-136, 16 Cust. B. & Dec. 945 (June 7, 1982); *see also* Customs Service Decision 79-321, 13 Cust. B. & Dec. 1481 (Dec. 12, 1978); Treasury Decision 78-387, 12 Cust. B. & Dec. 826 (Oct. 7, 1976); Customs Ruling Letter HQ 112866 (Aug. 31, 1993); Customs Service Decision 89-40, 23 Cust. B. & Dec. 617 (Dec. 2, 1988); Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979); Customs Service Decision 79-346, 13 Cust. B. & Dec. 1522 (Jan. 30, 1979).

installed, ... its carriage on the vessel in this status ... would similarly break the continuity of its transportation between coastwise points.”³⁰

D. CBP’s Proposal Would Inflict Grave Harm on the Undersea Cable Industry and U.S. Economic and National Security Interests

CBP’s Proposal, if left unmodified, would inflict grave harm on the undersea cable industry and U.S. economic and national security interests. In addition to the legal reasons discussed above, CBP should modify its proposal for a variety of prudential reasons.

First, the CBP Proposal could, perversely, push undersea cable manufacturing, depot activities, and ship positioning of cable ships outside the United States. Under the CBP Proposal, cable ships operating from outside the United States and sourcing new or repair cable from foreign factories or depots would still be permitted to conduct installation and maintenance operations within the U.S. territorial sea. CBP has previously held that the Jones Act’s coastwise trading restrictions do not apply to a situation where a foreign-flagged vessel loaded cable at a foreign depot, sailed and installed the cable in the U.S. territorial sea (or outer Continental Shelf, as CBP improperly asserts), and returned to a foreign port.³¹ [T]he fact that the cables will be laded foreign [Sweden] renders inapplicable the provisions of 46 U.S.C. App. § 883 [now recodified as 46 U.S.C. § 55101] inasmuch as this statute contemplates the transportation of merchandise between a coastwise point of lading and a coastwise point of unloading.³²

By impeding the conduct of undersea cable installation and maintenance activities from the United States except on coastwise-qualified cable ships (of which there are none), the CBP

³⁰ Customs Service Decision 79-230, 13 Cust. B. & Dec. 1314 (Oct. 16, 1978) (holding that repair cable laded on a cable vessel at one coastwise point and carried aboard for a three-year period could be offladed at a different coastwise port without violating the coastwise laws).

³¹ Customs Ruling Letter HQ 115322 (Apr. 16, 2001) (where a Dutch-flagged vessel loaded cable at a Swedish depot prior to its installation in Long Island Sound).

³² *Id.*

Proposal would thereby encourage offshoring of the U.S. undersea cable industry. Surely neither CBP nor the drafters of the Jones Act intended such a result.

Second, the CBP Proposal would harm U.S. economic and national security interests by jeopardizing timely repairs and rendering them more costly. Given the importance of undersea cables to the U.S. economy and national security, various federal agencies have over the last few years sought to ensure the continuity and security of communications on undersea cables, as well as more timely repair and restoration.

- The White House Office of Science and Technology Policy has sought to increase its situational awareness of undersea cables following damage to undersea cables following the Hengchun earthquake off Taiwan's south coast in December 2006 and following a series of cable cuts near Egypt and Malaysia and in the Persian Gulf in January-February 2008.³³ It instituted a near-realtime reporting system in collaboration with the Federal Communications Commission.³⁴
- CBP's parent agency, the Department of Homeland Security ("DHS"), has sought to minimize the threats of terrorist attacks on, and unauthorized access to, undersea cable systems by monitoring equipment and software used in initial installations and repairs (particularly foreign-manufactured equipment), contracts for system maintenance and security (particularly with non-U.S. persons), and

³³ Letter from Mark Stone, FCC Deputy Managing Director, to Kevin Neyland, Deputy Administrator, OMB Office of Information and Regulatory Affairs, OMB Control Number 3060-1116 (Apr. 10, 2008) (noting that "[t]he information requested herein is needed immediately in order to support Federal government national security and emergency preparedness communications programs, for the purposes of providing situational awareness of submarine cable system performance as well as a greater understanding of potential physical threats to the undersea cable systems."), *available at* www.reginfo.gov/public/do/DownloadDocument?documentID=66351&version=1.

³⁴ *Id.*

access to restoration messages and system status-reports (particularly by non-U.S. persons). These requirements have now been incorporated into the standard security agreement negotiated by DHS (and sometimes other agencies) with the owners of an undersea cable system connecting the United States with foreign points.³⁵

- The National Coordinating Center for Telecommunications (“NCC”)—part of DHS’s National Communications System—is a joint government-industry body that coordinates the initiation, restoration, and reconstruction of U.S. Government national security and emergency preparedness telecommunications services, both domestically and internationally.³⁶

The CBP Proposal would undermine these efforts by making it more difficult to use the appropriate repair materiel and cable-laying equipment when and where they are needed, all of which would make repairs more costly and less timely.

Third, the CBP Proposal creates significant regulatory uncertainty for the undersea cable industry by failing to address the Proposal’s inconsistency with CBP’s separate line of undersea cable rulings. The Proposal’s potentially confusing analysis would be difficult for particular customs districts to apply and would likely require myriad time-consuming and costly requests

³⁵ See, e.g., Agreement by and between DHS, American Samoa Hawaii Cable, LLC, and AST Telecom, LLC d/b/a Blue Sky Communications (Jan. 9, 2009) (executing security agreement for the American Samoa-Hawaii Cable System, which connects Hawaii with the Territory of American Samoa and the Independent State of Samoa), *available at* http://licensing.fcc.gov/ibfswweb/ib.page.FetchAttachment?attachment_key=687749.

³⁶ See NCC Program Information, www.ncs.gov/ncc/program_info.html; NCC International, www.ncs.gov/ncc/international.html.

for ruling letters.³⁷ These requests will, in turn, create operational delays that could further jeopardize U.S. economic and national security interests.

III. CBP'S EXTRATERRITORIAL JURISDICTIONAL ASSERTION CONFLICTS WITH U.S. LAW, U.S. TREATY OBLIGATIONS, AND CUSTOMARY INTERNATIONAL LAW AS OBSERVED BY THE UNITED STATES

The CBP Proposal improperly characterizes the Outer Continental Shelf Lands Act of 1953³⁸ and the Jones Act as extending the coastwise laws of the United States to all activities on the outer Continental Shelf.³⁹ This extraterritorial interpretation of these statutes is inconsistent with their express statutory language, U.S. treaty obligations, and customary international law as observed by the United States, which afford unique freedoms and protections to undersea cables and distinguish them from minerals exploration and exploitation (including pipeline activities), which are subject to regulation on the outer Continental Shelf. It would also inflict on the undersea cable industry the same harms described in part II.D above, but across a much greater range of operations, given the vast scope of the U.S. outer Continental Shelf. Consequently, CBP should clarify that any proposed revocation or modification of CBP letter rulings would apply to undersea cable-related activities, if at all, only within the three-nautical-mile territorial sea as specified in CBP's existing regulations.

³⁷ The CBP Proposal could also create conflicts with the treatment of particular items under the Export Administration Regulations.

³⁸ See Pub. L. No. 83-212, 67 Stat. 462 (Aug. 7, 1953) ("OCSLA 1953"), Pub. L. No. 93-627, 88 Stat. 2146 (Jan. 3, 1975) ("OCSLA 1975 Amendments"), Pub. L. No. 95-372, 92 Stat. 635 (Sept. 18, 1978) ("OCSLA 1978 Amendments") *codified at* 43 U.S.C. § 1331 *et seq.* (collectively, "OCSLA").

³⁹ CBP Proposal, 43 Cust. B. & Dec. at 57 n.1.

A. The Outer Continental Shelf Lands Act Extends U.S. Jurisdiction on the Outer Continental Shelf Only to Artificial Islands, Installations, and Devices Erected for the Purpose of Minerals Exploration and Exploitation

CBP's proposed jurisdictional assertion conflicts with the OCSLA's plain and unambiguous language. OCSLA grants no federal agency regulatory jurisdiction over undersea telecommunications cables on the outer Continental Shelf. By its terms, OCSLA pertains to the "exploration, development, and production of the minerals of the outer Continental Shelf."⁴⁰

In a section titled "Laws and regulations governing lands,"⁴¹ OCSLA explicitly extended federal jurisdiction of any agency and of certain enumerated laws to the outer Continental Shelf only with respect to regulation of a specific class of activities:

The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon *for the purpose of exploring for, developing, or producing resources therefrom*, or any such installation or other device (other than a ship or vessel) *for the purpose of transporting such resources*, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.⁴²

Thus, Section 1333(a)(1) provides that U.S. jurisdiction extends not over all artificial islands, installations, and other devices on the outer Continental Shelf, but only to two subsets of artificial islands, installations, and other devices: (1) those attached to the seabed and intended for exploring for, developing, or producing mineral resources, and (2) those intended for transporting mineral resources.

⁴⁰ 43 U.S.C. § 1332(4). *See also* H.R. Rep. No. 83-413, at 2-3 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2177 (noting that the Outer Continental Shelf Lands Act was passed to regulate the "leasing and development . . . of the oil potential of the Continental Shelf.").

⁴¹ 43 U.S.C. § 1333 ("Section 1333").

⁴² 43 U.S.C. § 1333(a)(1) ("Section 1333(a)(1)") (emphasis added).

Section 1333(a)(1) establishes the jurisdictional scope of Section 1333. And it forms the basis for a coherent statutory scheme that consistently limits the grants of regulatory jurisdiction to other agencies and the applicability of other laws in other subsections of Section 1333. Thus, Section 1333(a)(1) clearly provides that no U.S. Government agency or department—including the Coast Guard⁴³ and the Army Corps⁴⁴—has any jurisdiction or permitting authority on the outer Continental Shelf except with respect to two enumerated subsets of artificial islands, installations, and other devices intended for mineral resource-related activities. Section 1333(a)(1) further provides that National Labor Relations Act applies only with respect to two enumerated subsets of artificial islands, installations, and devices intended for mineral resource-related activities,⁴⁵ and that the application of Section 1333 with respect to artificial islands, installations, and devices intended for mineral resource-related activities is non-exclusive.⁴⁶ None of these grants of regulatory authority covers activities connected with the installation, maintenance, or repair of undersea telecommunications cables.

Undersea telecommunications cables are neither seabed nor subsoil of the outer Continental Shelf, nor are they artificial islands, installations, or devices erected for the purpose

⁴³ 43 U.S.C. § 1333(d)(1) (granting authority to the Coast Guard with respect to “lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the *artificial islands, installations, and other devices referred to in subsection (a)* of this section or on the waters adjacent thereto” (emphasis added)).

⁴⁴ 43 U.S.C. § 1333(e).

⁴⁵ 43 U.S.C. § 1333(c) (providing that the National Labor Relations Act applies to “any unfair labor practice, as defined in such Act [29 USCS §§151 *et seq.*], occurring upon any *artificial island, installation, or other device referred to in subsection (a)* of this section” (emphasis added)).

⁴⁶ 43 U.S.C. § 1333(f) (providing that the specific application of certain provisions of law to “the *artificial islands, installations, and other devices referred to in subsection (a)* of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended” (emphasis added)).

of exploring for, developing, producing, or transporting mineral resources. Consequently, undersea telecommunications cables on the outer Continental Shelf fall outside the permitting jurisdiction of the U.S. Government.

Regardless of whether undersea telecommunications cables are artificial islands, installations, or other devices attached to the seabed, they are not used for exploring for, developing, producing, or transporting mineral resources. Undersea telecommunications cables use coaxial cable or fiber-optics to transmit voice, fax, data, and Internet traffic between domestic and international points. As such, they remain outside the general jurisdictional scope of OCSLA (as defined in Section 1333(a)(1)).

B. U.S. Treaty Obligations and Customary International Law Afford Unique Freedoms and Protections to Undersea Cables Outside the Territorial Sea

CBP's assertion that OCSLA gives CBP general jurisdiction over activities conducted on the outer Continental Shelf would violate U.S. treaty obligations and well-established principles of customary international law expressly acknowledged by the United States. These obligations and principles afford unique freedoms and protections to undersea telecommunications cables—freedoms and protections that do not extend to energy-related activities.

Various international treaties dating back to 1884—to each of which the United States is a party—guarantee unique freedoms to lay, maintain, and repair submarine telecommunications cables, and restrict the ability of coastal nations to regulate them. On the high seas, various international treaties guarantee the freedom to lay submarine cables on the seabed⁴⁷ and to repair

⁴⁷ See International Convention for the Protection of Submarine Cables, Mar. 14, 1884, 24 Stat. 989, 25 Stat. 1424, T.S. 380 (entered into force definitively for the United States on May 1, 1888) (“1884 Convention”); Geneva Convention on the High Seas, arts. 2 & 26.1, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (entered into force definitively for the United States on Sept. 30, 1962) (“High Seas Convention”); United Nations Law of the Sea Convention, arts. 79, 112, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force on Nov. 16,

existing cables without prejudice.⁴⁸ In coastal areas, these treaties grant the freedom to lay submarine cables on continental shelves—notwithstanding any claim of a 200-nautical-mile Exclusive Economic Zone (“EEZ”)—and to repair existing cables without prejudice.⁴⁹ Within their territorial seas, coastal nations may impose reasonable conditions on submarine cables.⁵⁰

Coastal nations also have obligations to prevent willful or negligent damage to cables.⁵¹ And all nations “shall have due regard [for] cables [and] pipelines already in position.”⁵² Submarine cables are thus afforded a great degree of protection from regulation or interference by coastal nations, reflecting the vital role that submarine cables play in facilitating communications, commerce, and government.

By Presidential Proclamation, Presidents Reagan and Clinton expressly stated that the establishments of an EEZ and a contiguous zone, respectively, did not infringe on the high-seas

1994) (“UNCLOS”); 47 U.S.C. §§ 21 *et seq.* (codifying the 1884 Convention). Although UNCLOS has not yet been ratified by the Senate, the United States has long taken the position that UNCLOS reflects customary international law to which the United States adheres. *See* Pres. Ronald Reagan, *Statement on United States Ocean Policy*, 19 Weekly Comp. Pres. Doc. 383 (March 10, 1983).

⁴⁸ *See* High Seas Convention, art. 26.3; UNCLOS art. 79.2.

⁴⁹ *See* Geneva Convention on the Continental Shelf, art. 4, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311 (entered into force definitively for the United States on June 10, 1964) (“Continental Shelf Convention”); UNCLOS, arts. 58.1, 79.2 (providing that all nations may exercise high-seas freedoms in the EEZ, or on the continental shelf, of coastal nations—including the freedom to install, maintain, and repair submarine cables—provided they are exercised with due regard for the limited rights of a coastal nation to employ reasonable measures to explore and exploit its resources).

⁵⁰ 1884 Convention, art. 1; UNCLOS, art. 79.4. *See also* Comments of General Communication, Inc., NOAA Docket No. 000526157–0157–01, at 3-5 (filed Dec. 11, 2000).

⁵¹ UNCLOS, art. 113.

⁵² *Id.*, art. 79.5.

freedoms to lay and repair submarine cables.⁵³ And the U.S. Congress has never vested a federal agency or the states with any regulatory authority to suggest otherwise.

Although these treaties permit coastal sovereign nations to take reasonable measures respecting natural resource exploitation on the Continental Shelf, they bar nations from taking such measures with respect to submarine telecommunications cables, the construction and repair of which are not undertaken for natural resource exploration or exploitation.⁵⁴ These treaty provisions are reflected in the official position of the United Nations' Office of Legal Affairs of the Division for Ocean Affairs and the Law of the Sea, which states that:

[B]eyond the outer limits of the 12 nm territorial sea, the coastal State may not (and should not) impede the laying or maintenance of cables, even though the delineation of the course for the laying of such pipelines [but not submarine cables] on the continental shelf is subject to its consent. The coastal State has jurisdiction only over cables constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.⁵⁵

Thus, according to the United Nations, a coastal nation must forbear from imposing any restrictions on the installation or maintenance of submarine cables unless those submarine cables themselves are used for natural resource exploration or exploitation.

⁵³ See Presidential Proclamation No. 5030 (Mar. 10, 1983), 48 Fed. Reg. 10,605 (1983) (establishing the U.S. EEZ); Presidential Proclamation No. 7219 (Aug. 2, 1999), 64 Fed. Reg. 48,701 (1999) (establishing the U.S. contiguous zone).

⁵⁴ UNCLOS, art. 79.2; Continental Shelf Convention, art. 4. By Presidential Proclamation, Presidents Reagan and Clinton expressly stated that the establishments of an EEZ and a contiguous zone, respectively, did not infringe on the high-seas freedoms to lay and repair submarine cables. See Presidential Proclamation No. 5030 (Mar. 10, 1983), 48 Fed. Reg. 10,605 (1983) (establishing the U.S. EEZ); Presidential Proclamation No. 7219 (Aug. 2, 1999), 64 Fed. Reg. 48,701 (1999) (establishing the U.S. contiguous zone).

⁵⁵ "Maritime Space: Maritime Zones and Maritime Delimitations—Frequently Asked Questions" (Office of Legal Affairs, DOALS, U.N. Secretariat) (responding to Question #7, "What regime applies to the cables and pipelines?"), available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/frequently_asked_questions.htm.

Undersea telecommunications cables are not constructed or used to explore the continental shelf or to exploit natural resources on the outer Continental Shelf or in the EEZ. Unlike the presence and effect of facilities and personnel engaged in exploration and exploitation of oil and gas reserves, such as extraction and pipeline activity, the presence and effect of submarine cables on the continental shelf is incidental to the particular characteristics of the marine environment. Undersea cables require only a transit path, as compared with minerals development (which involves extraction of part of the seabed) or commercial fishing (which harvests fish stocks). A coastal nation is therefore prohibited under international law from regulating such submarine cables beyond its territorial sea, unless they unreasonably interfere with the coastal nation's legitimate natural resource rights on the continental shelf or in the EEZ.

C. The Jones Act Treats Undersea Cable-Related Activities Outside the Three-Nautical-Mile Territorial Sea as Foreign Commerce or Trade and Therefore Exempt from the Coastwise Trading Restrictions

CBP's proposed jurisdictional assertion also conflicts with the Jones Act itself, which treats undersea cable-related activities outside the three-nautical-mile territorial sea as foreign commerce or trade. "[T]he coastwise laws apply to the United States, including the island territories and possessions of the United States," with exceptions for certain enumerated U.S. territories.⁵⁶ They apply to "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."⁵⁷ Coastwise laws such as the Jones Act "generally apply to points in the territorial sea, defined as the belt, three nautical miles wide, seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline, in cases

⁵⁶ 46 U.S.C. § 55101(a).

⁵⁷ 46 U.S.C. § 55102(b).

where the baseline and the coastline differ.”⁵⁸ The scope of the “territorial sea” for Jones Act purposes—three nautical miles—is less than the general assertion of a 12-nautical-mile territorial sea by the United States.⁵⁹

The Jones Act requirements for use of coastwise-qualified vessels do not apply to activities that constitute “foreign commerce” or “foreign trade.”⁶⁰ This includes activities beyond, or extending beyond, the limits of U.S. jurisdiction but not necessarily in a foreign country.⁶¹ Undersea cable installation and maintenance activities conducted beyond the three-nautical mile limit constitute foreign commerce or foreign trade. As explained in part II above, even those activities conducted within the three-nautical-mile territorial sea would not be subject to the Jones Act’s coastwise trading restrictions, as they would not involve the transportation of “merchandise.”

D. CBP Should Clarify that Any Proposed Revocation or Modification of CBP Letter Rulings Would Apply to Undersea Cable-Related Activities, If at All, Only Within the Three-Nautical-Mile Territorial Sea Specified in CBP’s Regulations

To conform the CBP Proposal to OCSLA, the Jones Act, U.S. treaty obligations, and customary international law observed by the United States, CBP should clarify that any proposed

⁵⁸ Customs Ruling Letter HQ 114637 (Mar. 18, 1999); 46 U.S.C. § 55101; *see also* U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: Coastwise Trade: Merchandise*, at 4 (Jan. 2009), www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/merchandise.ctt/merchandise.pdf.

⁵⁹ 33 C.F.R. § 2.22.

⁶⁰ 46 U.S.C. § 109(a) (stating that “the terms ‘foreign commerce’ and ‘foreign trade’ mean commerce or trade between a place in the United States and a place in a foreign country”).

⁶¹ *United States v. 12536 Gross Tons of Whale Oil Ex the Charles Racine*, 29 F. Supp. 262, 267 (E.D. Va. 1939) (stating that “[t]here is a marked absence of evidence in the statute [the “between points in the United States” language recodified at 46 U.S.C. § 55102(b)] showing that the intention of Congress was to include in the inhibition such constantly changing and figurative points or places as our ships on the high seas and in the territorial waters of other nations”).

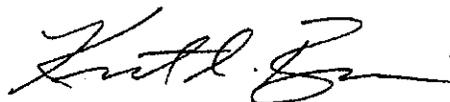
revocation or modification of CBP letter rulings would apply to undersea cable-related activities, if at all, only within the three-nautical-mile territorial sea as specified in CBP's existing regulations. At most, CBP may treat as U.S. coastwise points well heads, platforms, and structures that are temporarily or permanently attached to the seabed for purposes resource exploration or exploitation to the extent they are located on the outer Continental Shelf.

CONCLUSION

For the reasons stated above, Tyco Telecom urges CBP to reconsider and revise its Proposal with respect to undersea cables.

Respectfully submitted,

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16 August 2009

cc: Mark LeBlanc, Assistant Director, National Security and Emergency Preparedness,
White House Office of Science and Technology Policy
John J. Kim, Assistant Legal Adviser for Oceans and International Environmental and
Scientific Affairs, U.S. Department of State
Gregory Pinto, Director, Regulatory Coordination Office, U.S. Department of Homeland
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Rear Admiral Michael A. Brown, Deputy Assistant Secretary for Cybersecurity and
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Ms. Sandra L. Bell
U.S. Customs and Border Protection
Office of International Trade
Regulations and Rulings
Attention: Trade and Commercial Regulations Branch
799 9th Street, N.W., Mint Annex
Washington, D.C. 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:

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 July 17, 2009 (the "Notice" or "Proposal"). The DOF Subsea Group ("DOF Subsea") is a leading provider of essential offshore and subsea services to the oil and gas industry, and builds, owns, operates and charters a highly modernized and evolved fleet of Offshore Construction Support Vessels ("OCSV"). The design and construction of these vessels are the result of more than 20 years experience of offshore operations in support of oil and gas development activities and input from the various oil and gas operators we serve around the globe; many of whom are operators on the U.S. Outer Continental Shelf ("OCS"). DOF Subsea is also an active member of the International Maritime Contractors Association ("IMCA") and contributed to and supports IMCA's submission of comments to the Notice.

While DOF Subsea is not opposed to the intent of Title 46, United States Code, section 55102 (the "Jones Act"), and understands and respects the purpose for which it exists, we are concerned that U.S. Customs and Border Protection's ("CBP") proposed ruling modification goes beyond enforcement of this Act in offering protectionism to a genre of vessel within the U.S. merchant fleet that does not currently exist. Furthermore, in reliance upon 33 years of precedent, DOF Subsea and other such non-coastwise vessel operators have invested considerable resources into vessel development and build programs and entered into long-term agreements with clients for utilization of our assets. If it is CBP's intent to enforce the ruling modification as written, the pool of suitably specified vessels available to U.S. oil and gas operators would be severely

restricted, and as a direct consequence would most certainly significantly impede the U.S. oil and gas industry's ability to explore, exploit and produce oil and gas resources on the U.S. OCS.

SUMMARY OF ARGUMENT

- CBP should retract its proposal and retain the precedent upon which the industry has relied and strictly adhered to for over the last 30 years. CBP has appropriately adapted rulings to reflect new developments in a rapidly advancing technological field and must continue with this practice in order to secure the technological future of oil and gas development on the U.S. OCS. Furthermore CBP should acknowledge that much of technology that the industry relies upon comes from international sources and as such unavailability of this to the industry will result in catastrophic consequences to oil and gas production and development in the U.S. EEZ (Exclusive Economic Zone).
- CBP should ensure that in its enforcement of the Jones Act, the restrictions imposed thereupon are solely for the purpose of restricting the transportation of merchandise between coastwise points in its truest sense and not to limit the operations and activities of vessels engaged in oil and gas development. Furthermore, CBP should take a more reasonable approach to transportation incidental to a vessels operation.
- CBP should critically evaluate the current types of operations and activities on the U.S. OCS and the effects of its proposal upon such operations in terms of operational, environmental and safety impact.
- CBP should carefully consider the economic impact of the proposal and the catastrophic effect it poses in terms of the economic development of the U.S. oil and gas industry, U.S. reliance upon foreign-oil and international trade relations. Suitably qualified assets equipped to engage in ultra-deep water offshore construction support do not exist within the U.S. merchant fleet, if such non-coastwise qualified vessels were unduly restricted in their operation or rendered unusable for the missions for which they are designed there are no coastwise assets immediately available to take their place and oil and gas development and production could be shut down on the OCS.
- The industry has been afforded a 30 day period in which to comment on the proposed modification. Frankly, given the nature of the Proposal and the ramifications resultant thereupon, we respectfully request that CBP: (1) extend the comment period to facilitate more meaningful comment on the Proposal and its impact, (2) issue a document containing the revised provisions as a result of the comments received during the initial 30 day comment period (if it is the intention of CBP to issue a revised notice) with a further comment period on the proposed revisions, and (3) ultimately issue a final decision consistent with the following comments.

BACKGROUND

The Jones Act provides that 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 which is coastguard qualified¹. The Act states that transportation of merchandise takes place when merchandise is loaded (laden) at a point embraced within the coastwise laws "coastwise point" and unloaded (unladen) at another ("coastwise point") regardless of the origin or ultimate destination. Coastwise laws generally apply to points in the territorial sea.² However, Section 4(a) of the Outer Continental Shelf Lands Act of 1953 ("OCSLA") extends the laws of the United States 200 nautical miles from its coasts, to all parts of the OCS³ within the Exclusive Economic Zone (EEZ) of the United States. Accordingly, coastwise and navigation laws apply to production platforms, vessels/structures affixed to the seafloor (be that temporary or permanent) and wells.

'Merchandise' by definition includes goods, wares and chattels of every description⁴; merchandise owned by the U.S. Government, State or Subdivision of a State; and valueless material. In a 1939 Treasury Decision (T.D. 49815(4)), CBP carved out a distinction between items constituting merchandise and those constituting 'vessel equipment'. CBP has refined this distinction several times over the past 70 years to take account of technological innovation in oil and gas exploration and production. The ruling underlying CBP's last three decades of Jones Act interpretations, as applied to offshore energy projects, is T.D. 78-387. The ruling held that materials and tools necessary for the accomplishment of a vessel's mission did not constitute merchandise and their transportation by a foreign-flagged vessel was not a Jones Act violation.

EVOLVING TECHNOLOGY AND RELIANCE ON CBP RULINGS

Deepwater Oil and Gas Operators in the Gulf of Mexico ("GOM") have historically faced significant technological challenges in the development of lease blocks and the extraction of resources therefrom. As these development projects have continued to advance into even deeper waters on the shelf, the technological and engineering solutions required have become increasingly more complex and often require unique engineering solutions to overcome site-specific subsea conditions, which are not uniform across the shelf. Indeed the GOM is regarded worldwide within the industry as an area of innovation, research and rapid evolution in subsea development.

¹ A vessel that is built in, documented under the laws of, and owned by citizens of the United States, and which obtains a coastwise endorsement from the U.S. Coastguard (USCG) is referred to as "coastwise-qualified." Specifically, the term "coastwise-qualified vessel" means a U.S.-flag vessel having a certificate of documentation with a certificate of documentation with a coastwise endorsement under 46 U.S.C. § 12112.

² Territorial Sea defined as the belt, three nautical miles wide, seaward of the territorial sea baseline, and to points located in the internal waters, landward of the territorial sea baseline, in cases where the baseline and coastline differ.

³ Section 4 (a) OCSLA extends the laws of the U.S. 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 which may be erected for the purposes of exploring for, developing, or producing resources.

⁴ 19 U.S.C. § 1401 (c)

Such has been the rate of this technological evolution that it has become standard practice for Oil and Gas Operators, and the subcontract groups working for them, to seek rulings from CBP to ensure that contemplated operations on the OCS will not contravene any existing legislation. Over the years, CBP has issued a significant number of coastwise trade rulings which have formed the body of precedent that the industry has subsequently come to rely upon in the development of its activities. As equipment, vessels and the technology required for lease block development have advanced and evolved, CBP has accordingly adapted the rulings to reflect new developments in these areas and changes to operating procedures, particularly with respect to the definition of what constitutes vessel equipment.

T.D. 78-387 – TRANSPORTATION INCIDENTAL TO VESSELS OPERATIONS DOES NOT CONSTITUTE COASTWISE TRADE

In the Notice, CBP states its intention to strictly limit the definition of defining what constitutes "vessel equipment" by strictly interpreting T.D. 78-387 (the "1976 Ruling"), a landmark Treasury decision that has formed the basis for all subsequent rulings related to offshore deepwater development projects. It is our contention however, that the intent of the 1976 Ruling has been strictly and most often correctly interpreted over the 33 years since the decision was made.

The 1976 Ruling proposed the use of a foreign built vessel in the engagement of the vessel "in the construction, maintenance, repair and inspection of offshore petroleum related facilities"⁵ In the 1976 Ruling, CBP held that the "transportation by the vessel of such materials and tools as are necessary for the accomplishment of the mission of the vessel ...is not, generally speaking, an activity prohibited by the coastwise laws since such transportation is incidental to the vessels operations". The ruling also permits pipelay by a non-coastwise qualified vessel by nature of the modus operandi when pipe is installed subsea, namely that the pipe is "not landed but only paid out". This principle of "equipment necessary for the mission of the vessel", namely that equipment which is necessary for the operation of the vessel and the accomplishment of the vessels functions, has been the fundamental basis permitting non-coastwise vessels to move articles "necessary to the accomplishment of the mission of the vessel" between coastwise points for the last 33 years. It is our assertion that the stipulations and assertions made in the 1976 Ruling were correct and remain correct to this day. Further to this, we concur that the revocation of a 2009 ruling regarding the transportation and installation of a Christmas Tree (HQ 046137) is the appropriate action in light of the conditions stipulated in the 1976 Ruling regarding transportation of wellhead assembly's to a coastwise point on the seafloor. However, we do not see how the revocation of this ruling provides the grounds for the proposed revocation or modification of more than twenty rulings listed in the Notice, none of which are not consistent with the factual pattern in HQ 046137.

⁵ The activities listed included (i) pipelaying, (ii) repairing pipe, (iii) repairing underwater portions of a drilling platform, (iv) the installation and transportation of anodes, (v) transportation of pipeline burial tools and repair materials, (vi) installation and transportation of pipeline connectors and wellheads, (vii) installation and transportation of wellhead equipment, valves and guards, and (viii) transportation of machinery and production equipment.

Rather, the rulings CBP proposes to revoke or modify apply to the vessels' carriage of equipment that is necessary to the mission of the vessel in each case.

**EQUIPMENT NECESSARY FOR "OPERATION" OF A VESSEL IS
DIFFERENT FROM THAT REQUIRED FOR "NAVIGATION" AND
"MAINTAINANCE" OF A VESSEL**

The definition of vessel equipment as used by CBP in coastwise rulings has been based in part on 19 U.S.C. § 1309 which defines equipment as, "articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons onboard."

Vessel equipment has advanced significantly since the 1939 Treasury Decision, which carved out the distinction between vessel equipment and merchandise. Modern OSCV's have changed dramatically since 1939, not only in terms of technological development and specification, but also in the type of mission they are required to execute. CBP has correctly taken a position in its previous rulings that allows for such technological development. In asserting its intention to strictly limit the definition of equipment as per the 1976 ruling, CBP is essentially comparing apples to oranges and is ignoring the practicalities and current best practises of the offshore industry. The components involved in the operation of a modern day OSCV are the result of years of development and lessons-learned and are essential to the very purpose for which these vessels have been specifically designed.

There is an important distinction that must be made between equipment necessary to operate a vessel and that which is required to navigate⁶ and maintain a vessel. While equipment required to navigate and maintain a vessel are common components (i.e., gyros, GPS etc), which are found on a very diverse range of vessels types, the equipment required to operate a vessel is dictated specifically by the purpose for which the vessel was constructed. For example, the equipment required to operate an OSCV is significantly different from that required to operate a container ship. "Operation" is defined as: (i) the activity of operating something (ii) a process or series of acts especially of a practical or mechanical nature involved in a particular form of work⁷. The various components, controls and supplies carried by a modern day OSCV operating on the OCS are utilised and deployed in furtherance of a particular type of work. The subsea components that we utilise and mobilize on the OCS are routinely found on OSCV's⁸ and without them the mission of the vessel, namely the completion and commission of offshore subsea developments, cannot be achieved. There is a distinction to be made between large subsea structures of significant value versus the smaller "nuts and bolts" items which mate such structures together, making them operational, and which are of insignificant value in comparison. For example, while a Christmas

⁶ Navigation is defined as "the process of reading, and controlling the movement of a craft or vehicle from one place to another".

⁷ www.Wordnetweb.princeton.edu/perl/webwn

⁸ While such items are routinely found on OSCV's they are not permanently carried as part of the vessels complement, this is impractical and impossible due to such considerations as deck space and vessel stability.

Tree is not necessary to the operation of a vessel whose mission is to commission a subsea development, items such as subsea connectors arguably are. If subsea connections cannot be made, a field cannot be brought on-line, and therefore a vessel tasked with commissioning a subsea development would have failed to complete its mission.

THE EFFECT OF THE CBP PROPOSAL ON OCSV OPERATION ON THE OCS

If the CBP Proposal is adopted as written, it would have momentous impact on DOF Subsea's current offshore operations and our ability to continue to service oil and gas development projects on the OCS. Furthermore the Proposal leaves the future mode of operation for non-coastwise qualified vessels in the GOM unclear and in doubt.

DOF Subsea has long recognized that safety and environmental performance are a critical component to the future of deepwater development, and as such, has equipped its fleet with an array of hybridized equipment to ensure that these two criteria are met throughout the construction support activities undertaken by any of our vessels. As a direct result of this principle, our deep-water offshore vessels have evolved into modular, multi-purpose, multi-task platforms purposely designed for utilization in an array of IRM (inspection, repair and maintenance), survey and minor installation functions. It is impossible in terms of both the available space onboard and the safety and stability of a vessel to equip, as a permanent fit, all of the items that a multi-purpose OCSV conceivably may need in the course of completing the missions assigned to it. Each offshore development is unique with its own set of technological challenges, and as such, requires highly specialised and often unique engineering tools and solutions. Much of the equipment and resources are used to perform crucial tie-in activities, which bring oil and gas deposits on-line and ensure their delivery to shore based refineries. It is the standard practice within the modern-day industry for such equipment to come in modular style packages, which can be mobilized and demobilized from the vessel as the specific situation or set of circumstances dictates. Indeed, many offshore project scopes require that contingency equipment be carried by the support vessel should the original engineering plan not execute as planned. CBP's Proposal constrains those items which have historically been regarded as vessel equipment and will preclude the use of such a multi-purpose and highly responsive vessel on the OCS. Furthermore, CBP's Proposal would limit foreign-flagged vessels to activities with a single purpose, rendering the vessels' other capabilities useless. Finally, CBP's Proposal excludes the use of specialist tools and equipment necessary for both the commissioning and repair and maintenance of offshore oil and gas developments whilst also restricting the contingency options that the industry relies on to deal with all eventualities that may be faced in a given operation. Accordingly, we maintain and support the position that it should be the mission of the vessel that dictates which articles should be considered vessel equipment.

Oil and gas developments on the OCS have continued to advance into ultra-deep water, today on average offshore developments are being undertaken in upwards of 4,500 fsw (feet seawater). These ultra-deep waters present a complex set of technological challenges in terms of both above and below surface ocean conditions. Accordingly, vessels and equipment which are

utilised in these operations must be able to withstand harsh ocean environments in waters which are both deep and remote; operate under extraordinary pressures and temperatures; and resist corrosive elements. Much of the equipment that is integrated into our vessels is specifically designed to enable us to undertake installation and IRM in adverse weather and operating conditions and at extended ranges from shore support. Modern Dynamic Positioned Class 3 ("DP III") vessels are able to undertake complex installation activities with enhanced safety for both personnel and the marine environment even under harsh weather conditions. Ultra-deep prospects on the OCS are often remote and are at considerable sailing times and distances from the shore. As such, vessels working in these areas are required to carry multiple components integral to their mission to ensure unnecessary transit to and from the shore.

Diver operations are physically impossible in water depths exceeding 1,000 fsw, leading the deepwater industry to become almost completely reliant upon the ROV (Remotely Operated Vehicle) to support subsea installation and engineering tasks. Modern ROV's are a highly evolved combination of visualization, propulsion, manipulation, sonar and navigation systems and are regularly deployed from vessels to perform seabed mapping, seabed sampling and intricate engineering functions amongst other tasks. The vessels owned and operated by DOF Subsea have been conceived, designed and built as a platform for such ROV operations, with ergonomic custom built enclosed ROV hangars to provide safety and shelter for the crews operating and serving the ROV's. Furthermore, these ROV systems are permanently attached to the vessel, as well as controlled and directed from the vessel, they are never left or installed upon the seafloor of the OCS but instead always return to the mother OSCV to which they are attached. Thus, they are a fundamental part of the equipment required for the operation of the vessel in the ultra-deep water construction mode for which it has been designed. Indeed, ROV's are an intrinsic part of offshore construction support and are deployed in various configurations, in varying scenarios, for varying functions, and accordingly, in past rulings CBP has taken the position that ROV's are considered vessel equipment, as they by their very nature of operation are essential to the completion of the vessel's mission. Although CBP has indicated in its proposed modification to HQ 113841 that the use of an ROV onboard a cable laying vessel deployed to support this operation would remain permissible, it is unclear as to how ROV's may be treated in other scenarios particularly those where an ROV is required to undertake several very different functions in a single vessel deployment or is deployed from a non-cable laying vessel. As there is no foreseeable alternative to an ROV for subsea installation, repair, inspection and maintenance associated tasks (this being the full array of offshore construction support based activities), and if ROV's were to be re-classified as merchandise, DOF Subsea would no longer be able to operate its vessels for the purpose for which they have been designed and built (i.e., the support of construction on the ocean floor). Furthermore, ROV's cannot perceivably be utilized in a single task operation, as they are multi-purpose by their very design and operation; attempting to limit their activities to a single operation would significantly hinder their ability to support a construction project efficiently and expediently.

Seabed survey operations have also advanced significantly in the past decade. Where seabed mapping was previously undertaken by a surface support vessel with a towed array oil and gas operators are now utilizing Autonomous Underwater Vehicle (AUV) technology to undertake

this mission. The AUV is a self-propelled submersible, the operation of which is either fully autonomous or under minimal supervisory control. Navigation of the vehicle is controlled by an Inertial Navigation System (INS) housed inside the AUV. The vehicle is un-tethered and as such operates autonomously from the mother OSCV from which it will be deployed and recovered. The AUV is equipped with seabed mapping equipment and is utilized for site and block surveys and pipeline/umbilical route surveys and pipeline inspection surveys, at no time in its mission does it ever come into contact with the seafloor nor does it ever remove items/debris from the seafloor. Essentially an AUV is a vessel deployed and recovered from a mother vessel from a specialized handling system and as such is part of the vessel equipment. Due to its autonomous nature it is essentially a vessel in its own right and as such is equipped with nothing more than the equipment that it is required to operate it and navigate it.

Subsea operations in ultra-deep water are completely reliant on an array of subsea survey positioning equipment in order to ensure both the safe navigation of ROV's and AUV's but also to ensure that hardware such as pipelines and subsea structures are installed upon the seafloor within tight installation tolerances and also within the right-of-way routes granted to the oil and gas operators by the MMS (Mines, Minerals and Safety Agency). Such survey equipment includes devices such as acoustic transponders (aids to navigation) and water level recording devices which are placed in arrays on the seafloor during pre-lay survey phases and recovered at as-built phase; they are never left as permanent fixtures upon the OCS seafloor. The monitoring and communication equipment for these subsea sensors is hard fit into an OSCV and as such an integral part of the vessel furthermore the placement of these items due to the high accuracy required is undertaken in conjunction with these surface systems. Without these mission specific tools a vessel an OSCV is unable to operate within its designed activities as essentially it becomes blind and has no other means available to determine if operations are being conducted upon the correct areas of the seafloor and within the critical engineering tolerances required.

INDUSTRY OPERATIONAL AND SAFETY IMPACT

CBP's Proposal not only poses a significant threat to the economic prosperity of the U.S. oil and gas industry, but also jeopardizes the efficiency, expediency and safety of offshore operations on the OCS. Where previously the industry has been able to rapidly respond to the challenges of operating in such a dynamic environment offshore production and particularly development activities would as a consequence of the operational changes required as per the Notice be severely impeded and in some cases development potentially ceased altogether as suitable vessels, equipment, resources and techniques are sourced or built.

There is strong evidence to suggest that the GOM vessel market will be undersupplied during the next 5-6 years, in terms of both the anticipated strong level of activity within offshore exploration and development and the type of activity to be undertaken therein. The emergence of several key international oil and gas companies has the GOM region poised to experience noticeable growth in the ultra-deep water market over the next 10 years with a prolonged period of development activity set to commence around 2010. It is our understanding that IMCA, the

American Petroleum Institute (API) and others will be providing comments which will provide CBP with a much greater insight into projections for the industry. The offshore architecture required for subsea development in ultra-deep water (trees, manifolds, PLETs etc) is set to increase significantly in terms of dimension, weight and complexity as a dynamic of the extreme pressures and temperatures that they will be subjected to subsea. Consequently, installation vessels will be required with suitably rated lift and deployment equipment, of which the only currently qualified vessels are non-coastwise qualified. Indeed, the large proportion of vessels currently available within the U.S. fleet are at a markedly lower specification than the non-coastwise vessels operated by DOF Subsea and other companies of its genre.

Adoption of the ruling modification will lead to greater inefficiency and security in offshore operations. If adopted, the modification would limit non-coastwise qualified vessels to installation activities on the shelf, which would result in "double handling" of equipment. A coastwise vessel would first be required to transport the item(s) in question to the job site, where they would have to then be loaded onto the installation vessel, and then deployed from the installation vessel subsea. Current best practice has been to minimise such double handling due the safety risks it inherently creates. Furthermore, transfer between vessels is dictated by weather conditions, and while non-coastwise qualified OSCV's have traditionally provided an extremely stable working platform (even in adverse weather) smaller supply vessels do not have the station keeping capability or heave compensating systems required to allow operations to continue, resulting in increased downtime, potential damage to or loss of the item transferred, the increased potential for vessel collision, and significant cost increase to development.

U.S. TREATY OBLIGATIONS

CBP's proposed ruling modification would most likely violate U.S. commitments under the World Trade Organization ("WTO") Agreement, the North American Free Trade Agreement ("NAFTA") and Free Trade Agreements ("FTAs") the United States has executed with 15 other countries.

The U.S. Senate ratified the WTO's General Agreement on Tariffs and Trade Uruguay Round ("GATT 1994") on December 1, 1994. One of the agreement's bedrock principles is National Treatment ("NT"), as articulated in GATT Article III. The NT requirement ensures that WTO members will not accord foreign companies less favourable treatment than it accords to its own, domestic companies. Although the United States obtained an NT exemption for the Jones Act in GATT 1994, Paragraph 3(a), the exemption is not absolute. Under the Jones Act exemption, the United States may not introduce legislation or regulations that decrease its conformity with GATT 1994. Thus, the Jones Act exemption effectively freezes U.S. protectionist measures at 1994 levels. CBP's proposed modification would significantly alter the interpretation of the Jones Act, barring DOF Subsea and other foreign-flagged vessels from providing many of the services that foreign-flagged vessels have provided for more than three decades. The modification would increase protectionism, decrease conformity with GATT 1994, and most likely place the

United States in breach of its WTO commitments. The breach could prompt complaints and retaliatory action against U.S. flagged vessels operating in the EEZ's of other WTO members.

In addition, the United States has taken NT exemptions for the Jones Act in its FTAs with Canada and Mexico and with 15 other countries. Specifically, the United States excepts cabotage services under NAFTA Annex II, but leaves unprotected IRM, installation and surveying services over the OCS. Similarly, the United States excepts cabotage services under Annex II of the Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR") but does not take an exception for IRM, installation and surveying services. These same exceptions are seen in every other of the United States' FTAs. The provisions prevent the United States from enacting legislation, issuing interpretations, or taking other similar measures that would discriminate against vessels which are flagged in FTA partner countries and that provide IRM, installation and surveying services. CBP's proposed modification would bar all vessels flagged in FTA partner countries from providing such services and would constitute a significant breach of U.S. treaty obligations.

ECONOMIC CONSIDERATIONS AND IMPACT

While CBP clearly states that pipelay vessels and that other installation activities consequential to pipelay will not be affected by the ruling Proposal, the agency has not considered that such vessels cannot economically be operated in such a capacity. Pipelay vessels, which are significantly more expensive to operate than smaller OSCV's, are restricted in their ability to maneuver and as such many of the ancillary installation activities that are required during a subsea development project are either impossible for them to undertake or take considerably more time and expense to execute this being the main reason why they have traditionally been supported by OSCV's. If foreign-flagged OSCV's are no longer available to the pipelay industry (the majority of whose vessels are all also foreign-flagged), offshore installation projects will become unprofitable for the industry to undertake and there is considerable risk that pipelay assets, including vessels, will be transferred to other overseas markets. As subsea pipelines are the only method of transportation of oil and gas from wells to platforms and shore based production facilities, a reduction in the availability of assets that can be utilized for their installation would obviously have a significant and detrimental impact on U.S. oil and gas production and its economy.

If it is CBP's intention to enforce the ruling modifications within 60 days of the closure of the comment period, with no transition period, the consequences for oil and gas production in the United States are potentially catastrophic. Considering that on average, construction of a vessel to the class and specification required to safely undertake installation and IRM activities in ultra-deep water is upward of 4-5 years and requires considerable capital investment, it would take many years for the industry to return to the level of current operations. Many projects would have to be postponed for significant periods while replacement assets and equipment were sourced and built. There is also the compounding issue of manning; the offshore industry already faces a significant shortage of qualified and experienced personnel. In the current climate offshore vessel crews and technical support personnel are multi-national. If they were required to be comprised of U.S. nationals only, it is extremely doubtful that the quantity and quality of personnel required

will be available, thus further limiting the number of vessels that can actually be operated in the GOM.

Oil and gas companies will undoubtedly seek to avoid CBP penalties enforced as a consequence of ruling violations. Many are currently locked into long-term agreements with foreign-flagged vessel owners and will most likely deploy these assets and the associated project costs to other areas of the world where they face fewer operational restrictions. With insufficiently equipped vessels available to them, oil and gas companies operating in the GOM may see a significant impact on their ability to maintain and repair existing infrastructure, resulting in operational fields being shuttered and losing production. Furthermore, with little to no competition in the U.S. market and a shortage of capable vessels, these oil and gas companies will inevitably seek to cut high development costs, cancel sanctioned projects and look to alternate areas of the world for development, while taking valuable personnel, experience and technology with them. A withdraw from the GOM by some of these companies would have far reaching negative consequences; U.S. energy development would be stunted, dependence on foreign oil would increase, and the businesses and thousands of jobs the industry currently supports along the Gulf Coast would be eliminated.

COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURES ACT

CBP's publishing the Notice in the Customs Bulletin and providing industry a mere 30 days to comment is arbitrary and capricious and does not meet the rulemaking notification and comment requirements of the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. The U.S. Supreme Court held that when agencies issue sweeping new interpretations, they must "examine the relevant data and articulate a satisfactory explanation for its action," *Motor Vehicle Mfrs. Assn of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983) (where the National Highway Traffic Safety Administration rescinding the requirement to install seatbelts or airbags in vehicles was found arbitrary and capricious). The Court clarified this holding in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), stating that the under the APA, "a reasoned explanation is needed [by the agency] for disregarding facts and circumstances that underlay or were engendered by the prior policy."

It appears that CBP issued the proposed modification, which would overturn more than 30 years of policy and prior rulings, without FIRST gathering fundamental information and input from interested parties necessary to objectively analyze the U.S. offshore oil and gas industry and produce an initial report. CBP has done so without regard to the sweeping negative impact the modification would have if adopted and without acknowledging the industry's significant expenditures, made in reliance on more than three decades of CBP policy. Moreover, CBP appears to have based its modification on the statements of a limited number of companies within a single trade association that seek greatly expanded market share. CBP is required to comply with the APA's rulemaking requirements and should therefore: (i) undertake a detailed review of the U.S. offshore oil and gas industry, (ii) analyze the modification's far-reaching negative consequences, and (iii) publish its proposed modification with greater clarity in the Federal Register. CBP's

Proposal has put the proverbial cart before the horse, abusing its obligation under the APA and case law to provide an informed, objective and clear process for rulemaking, and signalling its predisposition as to the result sought and politically pursued by the Offshore Marine Service Association ("OMSA").

CONCLUSION

In the final analysis there is no sound basis upon which for CBP to revoke over 30 years of precedent founded upon logical principles which reasonably reflect the evolution and significance of technology within the offshore oil and gas development industry. Industry has been diligent in the process of consulting with CBP to ensure that its activities do not contravene the Jones Act, it is reckless that due to one notable decision, that was indeed incorrectly made, that a fundamental doctrine relied upon by the entire industry should be overturned.

The Christmas tree decision was indeed incorrect and CBP's subsequent revocation is the appropriate action in line with the precedent contained in the 1976 Ruling. However, one incorrect judgement does not give sound reason to overturn more than 20 other decisions with factually different scenarios nor does it provide the grounds for a radical change in the interpretation of items classified as vessel equipment.

In its application of the Jones Act CBP should ensure that the restrictions imposed thereupon are solely for the purpose of restricting the transportation of merchandise between coastwise points in its truest sense and not to limit the operations and activities of vessels engaged in oil and gas development.

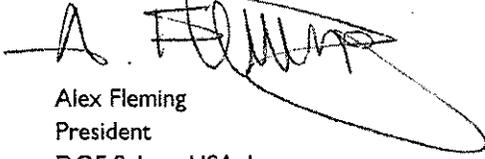
Accordingly based on the discussion and analysis herein we recommend that CBP take the following final action in any final decision rendered:

- Immediately retract the proposed modification and retain uphold the 1976 Ruling and precedent set thereupon.
- Where CBP does not agree to the retraction of the proposed modification DOF Subsea respectfully requests that the initial 30 day comment period be extended to a period of 12 months to allow both CBP and industry reasonable time in which to undertake thorough and meaningful evaluation of the impact of a such a ruling modification upon both industry and the national economy.
- In the event that CBP incorporates any industry comments into its proposed Modification and Revocation of Ruling Letters after the current comment period, DOF Subsea respectfully requests that CBP issue a revised Proposal and provide a second period in which industry and others can offer comments.

We appreciate the opportunity to provide these comments. If you have any questions or require further clarification on the comments contained herein, please do not hesitate to contact

me or my colleague, Sarah Dwerryhouse, at the contact information listed below or our counsel, Stuart Dye, who can be reached at (202) 457-7074 or via email at stuart.dye@hkllaw.com.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Alex Fleming". The signature is stylized and includes a large, sweeping flourish that extends to the right and then loops back under the name.

Alex Fleming
President
DOF Subsea USA, Inc.

CC: Stuart S. Dye, Esq., Holland & Knight LLP
Jonathan K. Waldron, Esq., Blank Rome LLP
IMCA

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August 17, 2009



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

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

Dear Ms. Bell:

TETRA Technologies, Inc. ("TTI") and its wholly owned subsidiaries, EPIC Diving and Marine Services, LLC ("EPIC") and TETRA Applied Technologies, LLC ("TAT") take this opportunity to comment on the Proposed Modification and Revocation of Ruling Letters Relating to the Customs Position on the Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points published on July 17, 2009 (the "Notice"). TTI, EPIC and TAT (sometimes collectively referred to as "TETRA") agree generally with the comments submitted to U.S. Customs and Border Protection ("CBP") by the American Petroleum Institute ("API") and the International Marine Contractors Association ("IMCA"), wherein those entities addressed substantive and procedural issues related to the Notice, and provided CBP with information as to the adverse effect the Notice would have on the oil and gas industry.

The information provided herein will be specific as to TETRA's operations in the U.S. Gulf of Mexico, and the potential effect that the Notice would have on those operations, which are vital to the exploration, development and production of oil and gas resources on the Outer Continental Shelf ("OCS").

TETRA agrees with API and IMCA that the proposed rule change seeks to overturn 30 years of ruling letter precedent, which the oil and gas industry has relied upon to invest millions of dollars in equipment for the exploration, development and production of oil and gas on the OCS, based solely on the fact that one trade organization, which represents a limited number of offshore companies in a specific sector of that industry, has asserted that CBP made a mistake in one recent ruling (the Christmas tree ruling), which CBP has already rescinded, thereby making the proposed rule change unnecessary.

Background Information on TETRA

TETRA Technologies, Inc. is a U.S. company, incorporated in Delaware, with a corporate headquarters in The Woodlands, Texas. The common stock of TETRA is publicly traded on the New York Stock Exchange under the symbol "TTI".

TAT is a geographically diversified oil and gas services company that provides niche products and services focused on the installation and decommissioning of offshore pipelines and platforms in addition to well abandonment.

EPIC provides commercial diving and related services in the U.S. Gulf of Mexico, related to platform and pipeline service, well service, plug and abandonment, underwater inspection, underwater construction and marine salvage.

TETRA'S Fleet of Foreign Flagged Vessels

TETRA currently operates one foreign flagged vessel in the U.S. Gulf of Mexico, the DB-1, which is a heavy lift barge. The DB-1 performs heavy lift services that include, but are not limited to, the installation of oil platforms, removal of oil platforms, the lifting of platform components up to 615 tons, and other similar heavy lift services to non-oilfield marine interests.

EPIC currently operates two foreign flagged dynamically positioned dive support vessels in the U.S. Gulf. The EPIC DIVER is a 220 foot DP-2 vessel which EPIC has operated in the U.S. Gulf since 2006. The EPIC DIVER has been an integral part of the exploration, development and production of oil and gas fields on the OCS. The EPIC DIVER contains a built-in six man saturation diving system rated to 1,000 feet of seawater and also has a hyperbaric rescue chamber installed for safe evacuation of divers under pressure.

EPIC also operates the ADAMS CHALLENGE in the U.S. Gulf. The vessel is owned by Adams Offshore and chartered by EPIC. It was constructed in 2009. The vessel is currently servicing downed platform and plug abandonment operations due to damage from Hurricanes Ivan, Katrina, Rita, Gustav and Ike. The ADAMS CHALLENGE is a 280 foot DP-2 vessel which has a 12 man saturation system rated to 1,000 feet of sea water and a hyperbaric rescue chamber for safe evacuation of divers under pressure.

The work currently being performed by the EPIC DIVER and the ADAMS CHALLENGE in the U.S. Gulf is vital to the expansion, maintenance and plug and abandonment sectors of the offshore oil and gas industry. These services include, but are not limited to the following: pipeline installations, pipeline assembly installations and inspections, hot tapping, operations on transmission pipelines, concrete mattress installations, subsea assembly installations, subsea wellhead installations, and pipeline plug and abandonment operations.

The Effect of the Notice on the Work Being Performed by TETRA's Foreign Flagged Vessels

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Some of the work that has typically been performed by TETRA's foreign flagged vessels may no longer be allowed if the Notice becomes final. There also are other portions of TETRA's work with these vessels that is unclear based on questions raised by the lack of clarity provided by the Notice.

TAT currently utilizes the DB-1 to perform heavy lift services offshore, including such services associated with the installation and removal of oil platforms. The proposed rule change raises questions as to the extent to which some of the equipment and materials utilized by TAT to perform these lift services with the DB-1 can be transported on the vessel due to the restrictive definition of "equipment of the vessel" contained in the Notice, which is contrary to years of previous CBP ruling letters, including TD 78-0387, on which the proposed rule change is supposedly based.

EPIC utilizes the EPIC DIVER and the ADAMS CHALLENGE for an assortment of offshore installation jobs. It is unclear which equipment and materials utilized by EPIC on these vessels, which are needed to support the work performed by those vessels, are considered "equipment of the vessel" based on CBP's erroneous interpretation of the term "equipment of the vessel" contained in the Notice.

If TETRA cannot transport the necessary equipment, supplies and materials for a job offshore on these vessels, then TETRA (or their customers) will be required to charter a second vessel for the limited purpose of transporting the equipment, supplies and materials to the job site since the vessels that are capable of performing this type of work are typically foreign flagged. Because a second vessel will need to be chartered, the cost of the project will increase, and no doubt be passed along to consumers in the form of higher oil and gas prices.

More importantly, the offloading of equipment offshore from another vessel would create unnecessary safety issues, particularly when taking into account adverse weather conditions and high seas.

TETRA made significant financial investments in the purchases of the DB-1 and the EPIC DIVER, as well as to charter the ADAMS CHALLENGE, based on years of CBP ruling letter precedent which allowed foreign flagged vessels to perform the very type of work for which these vessels are being utilized. CBP's attempt to clarify the analysis in previous ruling letters in order to reflect the true intent of the Jones Act will not only fail to serve that purpose but will result in a significant slow down in offshore production due to the lack of available vessels, increase the cost associated with offshore projects due to the need to charter a "second" vessel for purposes of transporting equipment, supplies and materials to the job site, and an overall increase in the price of offshore services due to the limited number of U.S. flagged vessels that are available to perform much of the work in which these foreign flagged vessels are engaged.

The Adverse Effect on U.S. Businesses and U.S. Jobs

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The proposed rule change will have an adverse effect on U.S. businesses and U.S. jobs due to the likelihood that many foreign flagged vessels operating in the U.S. Gulf will be relocated.

TAT employs 80 U.S. crew members on the DB-1. In 2008, the payroll costs for these employees was \$5,440,000.00. In 2009, the payroll costs for these employees is estimated to be \$5,700,000.00.

Additionally, the DB-1 is supported by a land based marine group consisting of 63 employees, all of which are U.S. citizens. These employees are based in Houma, Louisiana and The Woodlands, Texas.

In 2007 and 2008, the EPIC DIVER provided 181,000 working hours for U.S. citizens, with salaries totaling more than \$6 million.

The ADAMS CHALLENGE arrived in the U.S. Gulf in June. Since that time, it has provided 26 U.S. jobs. It is estimated that in 2009, the ADAMS CHALLENGE will provide U.S. workers with 69,000 man hours, equating to nearly \$2.16 million in salaries.

EPIC employs more than 20 management and administrative personnel who provide land based support for the operation of the EPIC DIVER and the ADAMS CHALLENGE in the U.S. Gulf.

Additionally, TAT and EPIC spend significant amounts in operating costs for the vessels, most of which, if not all, is spent in the U.S.

If TETRA is unable to continue to operate these foreign flagged vessels in the U.S. Gulf, then the significant amounts it pays in operating expenses for these vessels in the U.S. Gulf and the personnel that it employs in positions directly related to the operation of these vessels may be lost, thereby depriving U.S. businesses of income and U.S. citizens of jobs, which are much needed considering the current economic climate. There are not enough U.S. vessels to fill the void and work created if these foreign flagged vessels discontinue operating in the U.S. Gulf to absorb the operational cost and employment opportunities created by these foreign flagged vessels.

The clear language contained in T.D. 78-387 would allow TETRA to continue to operate its foreign flagged vessels in the same manner in which it is currently operating under the existing law.

CBP's attempt to correct previous ruling letters so as to be consistent with the ruling in T.D. 78-387 has resulted in restrictions on work that are significantly greater than the restrictions contemplated in T.D. 78-387 as written. For example, CBP maintains that the repair of pipelines may be performed from a foreign flagged vessel but that the materials necessary to perform the work must be transported on a coastwise qualified vessel. This is contrary to the language in paragraph (2) of 78-387, wherein it was explained that:

(2) Similarly, the Customs Service is of the opinion that for the purpose of the coastwise laws there is no distinction to be made between repairing pipe and the laying of new pipe. Therefore, the sole use of the work barge in repairing pipe is not a use in coastwise trade, and in view of the unique characteristics of pipelaying operations which take them out of the purview of the coastwise laws, **the transportation of pipe and repair materials by the work barge, to be used by the crew of the work barge in the repair of the pipeline, is also an activity that is not prohibited by the coastwise laws.** (emphasis added)

Furthermore, paragraph 4 of 78-387 provides that:

(4) . . . Since a foreign-built work barge may engage in the laying **and repairing** of pipe in territorial waters, in our opinion, the use of the vessel in the installation of pipeline connectors to offshore drilling platforms and subsea wellheads is likewise not a use in the coastwise trade. In addition, **the transportation of pipeline connectors** to be installed by the crew of the work barge incidental to the pipelaying operations of the work barge is not an activity by the coastwise laws.

It is clear that when the Customs Service rendered T.D. 78-0387, it intended to exempt vessels performing any pipelaying functions, as well as repairs to the pipeline, from the coastwise laws. Based on paragraph (4) above, the Customs Service obviously intended the term "pipelay operations" to encompass more than just the pipelaying work. This includes not only the performance of work but also the transportation of the materials necessary for the performance of work, including any items to be installed in connection with the pipelaying or pipe repair work. Accordingly, the installation of pipeline connectors, jumpers and other items that are essential to the function and operation of the pipeline should be encompassed within the reasoning set forth in T.D. 78-387, thereby allowing those items to be installed from a foreign flagged vessel as well as transported to the work site by the foreign flagged vessel, regardless of whether the vessel is performing the pipelay work or assisting in the repair of the pipeline. That is, the exemption of this activity from the coastwise laws is not limited to the vessel laying the pipe but also those vessels that are assisting in the overall operations required to lay the pipe, repair the pipe, or to install items that are essential to the function of the pipeline.

Additionally, in T.D. 78-387, the Customs Service held that materials and tools necessary for the accomplishment of the mission of the vessel were not considered merchandise. In numerous ruling letters following T.D. 78-387, the Customs Service has held that non-coastwise qualified vessels could carry articles between coastwise points as long as those articles were "fundamental to the vessel's operation" because the articles would be considered equipment of the vessel.

Under the rationale of T.D. 78-387, and the 30 years of ruling letters following that 1976 ruling, TAT and EPIC would be allowed to transport equipment and supplies necessary for the performance of the work of their vessels, even work beyond what is described above as "pipelay

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operations.” This work includes heavy lift and subsea operations, often associated with the construction or decommissioning of offshore platforms and other installations. TAT and EPIC do not transport any items on the foreign flagged vessels that are to be installed or items that have been removed. Rather, the only items transported on these vessels are the equipment and supplies that are directly related to the performance of TAT’s and EPIC’s work. This equipment includes ROV’s, saturation systems and other dive related equipment mounted on these vessels for purposes of supporting dive operations, and equipment related to heavy lift operations. Such items are clearly considered equipment of the vessel as contemplated by the Customs Service in its 1976 ruling, and the numerous ruling letters thereafter, and would not be considered merchandise.

For the reasons discussed herein, TETRA respectfully request that CBP reconsider its proposed rule change. At the very least, TETRA request that the comment period be extended in order that the parties may fully evaluate the scope of the rule change and its potential effect on the oil and gas industry.

Regards,

TETRA Technologies, Inc.



Bass C. Wallace, Jr.
General Counsel



Wireless Maritime Information Solutions Made Simple

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U.S. Customs and Border Protection
Office of International Trade, Regulations, and Rulings
799 9th Street NW
The Mint Annex
Washington, District of Columbia 20229

To Whom It May Concern at the Trade and Commercial Regulations Branch:

About Our Company

BoatracS has been the leading supplier of wireless maritime information solutions since 1990. We serve over 400 commercial fleets, in the offshore, inland, fishing, and government markets. For over a decade, we've helped our customers reap significant cost savings by automating workflow and integrating their operations management.

We specialize in understanding the different needs of each of these key markets. This includes the offshore service vessel companies, whose workboats are contracted by exploration and production managers, as well as inland barge, tugboat, and towboat companies, with their river- and gulf-based operations. We also work with commercial fishing vessels and government-run vessels.

Our Clients

We have had the privilege of serving a number of distinguished maritime industry clients, including: Barry Graham Oil Services, LLC; C & J Marine; Canal Barge Co., Inc.; Delta Towing LLC; Devall Towing; Double Eagle, LLC; Florida Marine Transporters, Inc.; Foss Maritime; Global Industries; Graham Gulf; Ingram Barge Company; Inland Marine Management; K-Sea Transportation; Kirby Inland Marine, Inc.; L & M Botruc; LeBeouf Towing Co., Inc.; Magnolia Marine Transport Co.; Marquette Transportation Co., Inc.; Memco Barge Lines; Moran Towing; Offshore Oil Services, Inc.; Otto Candies, LLC; Reinauer Transportation; TECO Barge Line; and Warrior & Gulf Navigation.

These are the types of companies that would benefit from an issue pending before your agency now.

Regarding the July 17 CBP Proposal to Modify the Jones Act

On behalf of Boatracs and the companies we serve, I am submitting comments in strong support of your July 17, 2009 notice, regarding the clear applicability of the nation's coastwise laws to vessels carrying merchandise to domestic offshore oil and gas facilities.

We must ensure the long-term viability of the domestic maritime industry. This is why Boatracs strongly encourages all Federal efforts to ensure that cargo transported to offshore installations be carried on U.S.-flag vessels. Dramatically increasing business opportunities for American marine transport companies – and companies such as ours that serve them – will further support this end goal.

It is more important than ever that our own laws be interpreted in such a way that best benefits hard-working Americans in the Gulf Region – particularly given the state of the nation's economy.

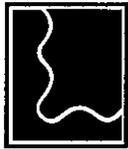
Thank you for the opportunity to share our comments with you. Please do not hesitate to call on us for additional information about our business.

Yours truly,

Kacey Tarbutton

Senior Account Executive / Boatracs

Louisiana



LAREDO
OFFSHORE
SERVICES, INC.

(94)

U.S. 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:

I am writing in strong support of your agency's July 17th proposal to ensure the use of Jones Act vessels to service the oil and gas industry in the Gulf of Mexico.

Laredo Offshore Services, Inc. operates a fleet of derrick barges and lift boats in the Gulf of Mexico, including the L/B Dularge Class 170 Lift Boat, the L/B Grand Class 145 Lift Boat, the D/B Illuminator Derrick Barge, the L/B Petite Class 150 Lift Boat, the D/B Mr. Two Hooks Derrick Barge, and the L/B Trinity Class 190 Lift Boat. In addition, Laredo Construction, Inc., established in 1981, provides offshore construction and maintenance services to the Gulf's oil and gas industry. Our Main Fabrication Yard is located in Galveston, Texas. We provide installation, maintenance, and modifications of all types of offshore structures; fabrication and offshore installation of structures including platforms, decks, well protectors, riser protectors, boat landings, navigation aids, etc.; hook-up of offshore drilling and production facilities; removal and salvage of all types of offshore oil and gas structures; plug and abandonment services for offshore oil and gas wells; and installation and removal of offshore caissons and flowlines in addition to our liftboat and derrick barge services.

We believe the U.S. Customs and Border Protection should expedite action to confirm that cargo transported to offshore oil and gas facilities must be carried by U.S. flagged vessels. Laredo Offshore would welcome the opportunity to utilize our fleet of vessels in an expanded capacity, particularly given the challenges facing our economy and the oil and gas industry, and urge your consideration of the tremendous economic benefits for U.S. companies in making such a decision.

Thank you for the opportunity to share our views.

Sincerely yours,

Mark Esteve

130 HOUSTON BLDG
DALLAS TEXAS TX 75207
PHONE (404) 422-1312 OR 422-1337



BARRY GRAHAM OIL SERVICE, L.L.C.

Post Office Box 982
Bayou La Batre, AL 36509
(251) 824-2774 • Fax: (251) 824-7958

95

August 3, 2009

The Trade and Commercial Regulations Branch
Office of International Trade, Regulations and Rulings
United States Customs and Border Protection
799 9th Street NW (the Mint Annex)
Washington, D.C. 20229

Dear Ladies and Gentlemen:

On behalf of Barry Graham Oil Service, a company that was formed in 1996 and operates utility boats and crew boats in the U.S. Gulf of Mexico, I am writing in support of your July 17th proposal about the use of Jones Act vessels to serve the oil and gas industry. My company operates the following vessels, and would welcome the opportunity to compete for additional business opportunities if your agency moves forward with the adoption of the pending proposal:

Utility vessels: Betty G, Celestine G, Grady G, Matt, Warren G, Mr. Joseph

Utility vessels/methanol tanks: Capt. Levert, Mr. Lannie, Mr. Vick, Ms. Pearl, Ms. Tami, Capt. John E. Graham

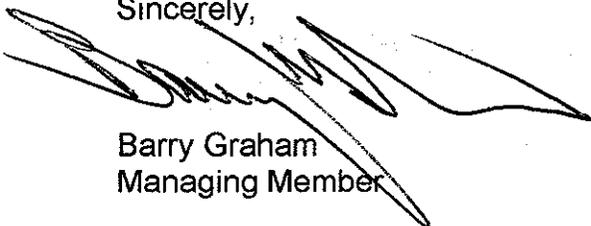
Crew boats: Ms. Joy, Ms. Jessica, Mr. Seaman, Ms. Ruby, Mr. John, Mr. Jacob, Capt. Glenn, Amethyst, Mr. Henry, Ms. Ramona, Ms. Bonnie, Ms. Katie

Our 24 vessels support operations for a broad base of customers engaged in the U.S. Gulf of Mexico's oil and gas industry. The fleet consists of 11 steel-hulled utility vessels, ranging from 110' to 145' in length, and 12 aluminum crew boats, ranging from 152' to 160' in length.

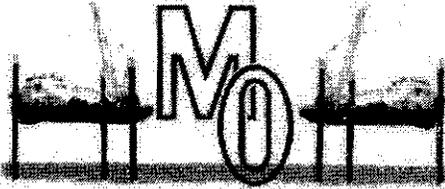
We have made significant investment in our fleet and firmly believe that the U.S. government should act quickly to ensure that cargo transported to offshore oil and gas facilities is carried in U.S.-flagged vessels. By ensuring that the Jones Act is properly interpreted and enforced, you can help preserve American jobs and encourage greater investment here at home. That will benefit everyone in the industry.

Thank you for considering our comments.

Sincerely,



Barry Graham
Managing Member



Montco Offshore, Inc.

Montco Offshore, Inc.
17751 Hwy 3235
Post Office Box 850
Galliano, LA 70354
Phone: 877-666-6826
Fax: 985-325-6795

3 Riverway
Suite 100
Houston, TX 77056
281-822-7157
281-822-6795

United States Customs and Border Protection
Office of International Trade, Regulations and Rulings
799 9th Street NW (the Mint Annex)
Washington, D.C. 20229

96#2

August 4, 2009

Dear Ladies and Gentlemen at the Trade and Commercial Regulations Branch:

Please consider these comments, submitted on behalf of the Louisiana-based Montco Offshore Inc., in support of your pending proposal to clearly call for using Jones Act vessels to serve the oil and gas industry. We are pleased with your having announced that foreign vessels may no longer transport merchandise from one coastwise point to another simply because it is installed there from the transporting vessel. Like others in our industry, we are strong supporters of the Jones Act and our livelihood depends upon its correct interpretation and enforcement.

Montco Offshore, Inc. was founded by the Orgeron family in 1948. Over its 60+ years in business, we have served the offshore energy industry with crew boats, ocean-going tugs, deck barges, supply boats, and liftboats. Today, Montco specializes in liftboats ranging in size from 145 feet to 245 feet, which provide the best quality and safety of service for customers requiring versatile elevating vessels/work-platforms.

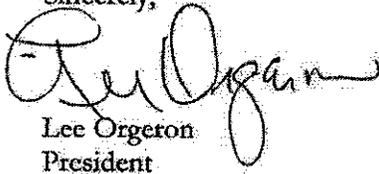
Currently, we own six liftboats and employ over 144 people. Our goal is to be the safest and most efficient liftboat operator in the industry. Montco is currently building two 235' ABS-Classed liftboats and is planning additional growth and expansion to keep pace with the ever-increasing demands of the offshore oil industry, as well as the emerging offshore wind energy industry. We are currently in the development stage, with expected construction to begin before the end of the year, of a 325' ABS-Classed liftboat.

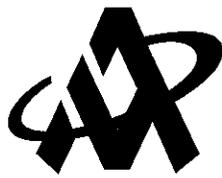
Since beginning our liftboat operations in 1978, Montco's mission has always been to provide our customers with leading edge innovative liftboats that are exceptionally maintained by our experienced and knowledgeable mariners. Over time, this combination has proven to be the best way to allow our customer's work to be completed in the most cost-effective, environmentally responsible, and overall safest manner for both our crew and the customers onboard.

We believe that the U.S. government should act now to make certain that cargo transported to offshore oil and gas, as well as other offshore energy facilities (including wind energy), is carried in U.S.-flagged vessels, such as ours. As we continue to make significant investments in our fleet despite a challenging economic climate, we would encourage the U.S. government to do everything in its power to support U.S. businesses.

Thank you for considering our comments.

Sincerely,


Lee Orgeron
President



MANUFACTURE

Alabama!

Making the best in Alabama!

97

August 4, 2009

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

**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**

To Whom It May Concern:

I am writing to you on behalf of Alabama's oil and gas industry and Manufacture Alabama. Manufacture Alabama is Alabama's only trade association representing exclusively the competitive, legislative and related interests of manufacturers. Manufacture Alabama represents a wide array of industry sectors including steel mills, chemical manufacturers, textile mills, the pulp and paper industry, shipbuilding and the oil and gas industry.

The oil and gas industry in the United States is vital to decreasing our dependence on foreign oil and vital to our economy. In particular, in the Gulf of Mexico, oil and gas exploration has brought in billions of dollars to Alabama and has contributed more than 200 million cubic feet of natural gas annually. Alabama's total consumption of natural gas alone is approximately 400 million cubic feet a year, three quarters of that for industrial use and electricity generation. That is why the proposed modification and revocation of ruling letters on the application of the Jones Act is of particular concern to the manufacturing industry.

If the U.S. Customs and Border Protection modifies and revokes ruling letters, that date back decades, pertaining to the application of the Jones Act and the transportation of merchandise and equipment between coastwise points, a disruption in the production and exploration of oil and gas in U.S. waters will occur. For instance, the oil and gas service industry use foreign-flagged vessels to deliver equipment, such as wellheads, risers, jumper pipes and tie-ins, to oil and gas offshore installation sites. Currently, there is an absence of U.S.-flagged Offshore Service vessels capable of installing this equipment to

401 Adams Avenue, Suite 710 • Montgomery, Alabama 36104

(334) 386-3000 • (334) 386-3001 fax

www.manufacturealabama.org

deepwater offshore installation sites. A number of proposed Modified Rulings changes the treatment of the above mentioned equipment to be treated as merchandise; in effect mandating the use of U.S.-flagged vessels. Due to the lack of U.S.-flagged Offshore Service vessels capable of installing equipment to deepwater offshore installation sites, the change in the rulings will force the service companies to cease operations altogether or find non-U.S. ports to base operations, which in effect will shut down oil and gas production and exploration for an extended period of time. In addition, U.S. Ports will lose the ability to host foreign-flagged Offshore Service fleets. This would have a negative effect on our nation's economy and our efforts to quickly develop and expand our domestic offshore energy resources.

The proposed modification and revocation of ruling letters pertaining to the Jones Act essentially overturns decades of precedent and promulgates new law. The duty of the Customs and Border Protection is not to make the law, but to interpret the law. Such changes would be better effected through the legislative process where the proposed changes would be fully transparent and in which the public interest is fully examined. The legislative process will allow Congress to explore the size and capabilities of the existing U.S.-flagged Offshore Service fleet and, if the law is to be changed, allow provisions for minimal disruption to the production and exploration of oil and gas before any new laws become effective.

In closing, I hope that you will reconsider the aforementioned modifications to avoid disruption in domestic offshore production and exploration and allow Congress the opportunity to review these changes and if necessary make new law.

Sincerely,



George N. Clark
President
Manufacture Alabama

L & M BOTRUC RENTAL, INC.

Offshore Supply Boats • USCG & ABS Approved



August 4, 2009

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

Dear Sir or Madam --

On behalf of L&M BoTruc Rental Inc., located in Golden Meadow, Louisiana, I am writing to you in support of the your recently proposed notice on the applicability of U.S. coastwise laws in carrying merchandise to domestic offshore oil and gas points. Specifically, this is in regards to the July 17, 2009 proposed modification notice to the application of the Jones Act.

My company operates one of the largest fleets of offshore marine transportation vessels in the Gulf of Mexico. We are one of the largest privately held supply boat companies and the sixth largest boat company on the Gulf Coast. Our ongoing preventive maintenance program ensures that our vessels are kept in excellent working condition, minimizes downtime, and has earned our company a worldwide reputation as a leader in the offshore marine transport industry.

We are now in our second generation of owners, and remain steadfastly dedicated to our customers, vendors, and employees. We would greatly appreciate your agency's support in promoting opportunities for American companies such as ours to serve more of the Gulf's oil and gas industry. We are substantially invested in our fleet, our employees, and the industry that needs us. We currently offer the domestic oil and gas industry 14 vessels, as follows --

- Four 180' X 38' X 13'6" Supply Boats (BOTRUC #19-22)
- Two 180' X 38' X 13'6" Triple Screw Supply Vessels (BOTRUC #33-34)
- Three 180' X 40' X 14'3" Supply Boat (C-TRUC #6-8)
- Two 191' X 46' X 15' Supply Boats (BOTRUC #38-39)
- One 196' X 38' X 13'6" Supply Boat (C-TRUC #3)
- One 225' X 38' X 14' Supply Boat (C-TRUC #5)
- One 235' X 38' X 14' Supply Boat (C-TRUC #4)

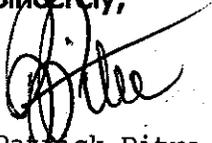
I strongly urge your immediate adoption of the proposal to ensure cargo transported to offshore facilities be carried by U.S.-flag vessels such as those listed above. Allowing this work to be done by foreign-flag vessels, operated by foreign workers,

SAFETY IS ALWAYS ON BOARD

runs counter to the very intent of the Jones Act. We need the U.S. Government to act quickly to help support American companies as we work to revitalize an economy struggling under one of the worst recessions in recent memory.

Thank you for the opportunity to share our thoughts. We look forward to a positive outcome that will support American workers.

Sincerely,



Patrick Pitre
Vice President
L & M BoTruc Rental, Inc.

Thompson



Thompson Tractor Company, Inc.
30950 State Highway 181
Spanish Fort, AL 36527
251-626-5100

99

United States Customs and Border Protection
Office of International Trade, Regulations, and Rulings
Trade and Commercial Regulations Branch
799 9th Street Northwest
The Mint Annex
Washington, District of Columbia 20229

Dear Sirs:

Regarding: Support for July 17, 2009 U.S.CBP Notice to Modify Jones Act Rulings

Thompson Tractor Company, founded in 1957, is one of our nation's premier Caterpillar distributors. We comprise over 1,000 technical and professional employees in Alabama, Georgia, and the Florida Panhandle. Our commercial marine engine division is consistently ranked among Caterpillar's very highest achievers, powering oil patch service vessels and other vessels built along our coastlines. While most of our competitors still use outside advisors for systems design, we've assembled a staff of experienced marine engineers with extensive seagoing, shore-side design, and shipbuilding experience. As a result, shipyard owners know they can count on us for total shipboard solutions as part of each sale.

On behalf of our employees and the hundreds of maritime companies we proudly serve, I am writing to you in support of your July 17, 2009 proposed notice. It is our understanding that it would properly apply United States coastwise laws such that any merchandise carried to domestic offshore oil and gas facilities must be U.S. Flagged. This is critically important to our nation's domestic maritime industry, as I'm sure many marine transportation companies have already mentioned to you.

We strongly urge Customs to adopt the interpretive rule as quickly as possible as a straightforward means of ensuring the long-term viability of the domestic maritime industry. It will also have the benefit of increasing business opportunities for American marine suppliers and securing jobs for our employees during a time of national economic distress.

Thank you for the opportunity to share our thoughts with you. Please do not hesitate to call on us for additional information about our business.

Respectfully submitted,

Richard R. Tremayne, Jr.
Marine Business Manager
Thompson Tractor Co., Inc.

ALABAMA

Birmingham
Anniston/Oxford
Attalla

Auburn/Opelika
Dothan
Huntsville/Decatur

Mobile
Montgomery
Shelby County

Thomasville
Tuscaloosa
Tuscumbia

FLORIDA

Crestview
Marianna
Panama City

Pensacola

GEORGIA

Albany
Atlanta
Augusta

Macon
Savannah

SCHOTTEL, INC.



Schottel, Inc.
190 James Drive East, Suite 100
St. Rose, LA 70087
http: schottel.com
Tel: 504.471.3439
Fax: 504.471.3443

August 7, 2009

U.S. Customs and Border Protection
Office of International Trade, Regulations and Rulings
ATTN: Trade and Commercial Regulations Branch
799 9th 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

To whom it may concern,

In a national climate that witnesses the exporting of so many businesses and industries out of the United States, I support the decision of Customs and Border Protection to uphold the original intent of the Merchant Marine Act of 1920, better known as the Jones Act. Schottel, Inc. has operated successfully in the U.S. coastwise trade since 1989. We have adopted the stringent yet necessary regulations that set our nation's merchant marine industry apart from other countries.

U.S. mariners and vessel operators have proven for decades the ability to fulfill the ever-changing needs of the country's maritime industry. The Jones Act ensures the United States will always have a safe, reliable, and economically efficient domestic transportation system. This cornerstone statute provides America the vital waterborne commerce it needs and deserves. It also protects the jobs of a highly trained workforce that supports all facets of the industry.

For too many years, our legal system has allowed individuals to interpret and bend the laws in favor of one's own benefit. Identifying what is considered "coastwise trade" and then requiring foreign entities to follow those laws has established a precedent. This action will protect the livelihood of thousands of American workers. It will ensure our nation's deeply rooted history in the global maritime trade continues to lead the way for other countries. For the sake of my companies and the thousands of dedicated workers they employ, I applaud this effort wholeheartedly.

Nils Moerkeseh, President
Schottel, Inc

A handwritten signature in black ink, appearing to read 'Nils Moerkeseh', is written over the typed name. The signature is stylized and somewhat cursive.