HORNBECK OFFSHORE SERVICES, INC.

Service with Energy®

April 18, 2017

Via Electronic Mail: cbppublicationresponse@cbp.dhs.gov

Mr. Glen E. Vereb
Director, Border Security and Trade Compliance Division
Office of Trade, Regulations and Rulings
U.S. Customs and Border Protection
90 K Street, NE
Washington, DC 20229

Dear Director Vereb:

Hornbeck Offshore Services, Inc. (Hornbeck) submits these comments in response to the Proposed Modification and Revocation of Ruling Letters Relating to the Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points (Proposed Modification), published on January 18, 2017.[1] Hornbeck commends Customs and Border Protection (CBP) for taking this needed and important step to modify HQ 101925 (October 7, 1976) (formerly referred to as Treasury Decision (T.D.) 78-387) and to restore the definition of what constitutes vessel "equipment" as it relates to the transportation of merchandise under 46 U.S.C. §55102 (commonly referred to as the Jones Act).

In response to twenty-five private, unpublished letters sent to it over decades, CBP self-created exceptions to the Jones Act, contrary to the statute. These exceptions were made by CBP without any input from the affected community of U.S. shipyards, vessel owners and mariners or consideration of the harm inflicted upon them as a result of CBP's action. It is beyond question that the result of CBP's decades-long error has been significant lost jobs by U.S. citizen mariners and U.S. shipyard workers. Thousands of these jobs have been ceded to foreign companies and workers which used CBP's self-created exceptions to displace the U.S. domestic marine community. Recognizing its legal error, CBP now seeks to revoke or modify its letters, which will have the positive effect of protecting U.S. jobs and stimulating investment by U.S. ship owners. CBP has initiated this process, which follows 19 USC §1625(c), the mechanism Congress requires CBP to follow when it revokes or modifies its responses to private letters. In 2009 CBP attempted to take similar action to revoke these erroneous statutory exceptions. Under political pressure from foreign trade organizations and foreign ship owners and companies that use them, CBP withdrew its 2009 notice stating:

> a "new notice which will set forth CBP's proposed action relating to the interpretation of T.D. 78-387 [now HQ 101925] and TD 49815(4) will be published in the Customs Bulletin **in the near future**."[2]

[1] Customs Bulletin and Decisions, Vol. 51, No. 3, January 18, 2017, pages 1-19.
[2] Customs Bulletin and Decisions, Vol. 43, No. 40, October 1, 2009, pages 1-3.

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Relying on the Jones Act and CBP's announced intention to act in the "near future", Hornbeck and other U.S. ship owning companies like it, have collectively invested billions of dollars to build ships in U.S. shipyards. We are gratified that after nearly eight years of consideration, CBP has correctly concluded that only Congress can create exceptions to our Nation's laws. We are ready to invest more if the rule of law is upheld. We applaud CBP's institutional courage to admit its error and to fix it by standing up to powerful interests who want to protect the *status quo*. We recognize that the foreign interests that oppose this action have resuscitated the strategy they used in 2009, which is to say that CBP must follow an APA "rule-making" process to revoke its self-created statutory exceptions. By so doing they hope to delay action further and preserve for themselves illegal Jones Act exceptions. However, CBP is correct in following the 19 USC §1625(c) process that Congress has mandated, and none other. Rule-making procedures were not followed by CBP when it responded to private correspondence creating these exceptions and it is contrary to law and common sense to require such a process now in order to remove unauthorized exceptions that continue to hurt companies like Hornbeck and the U.S. workers we employ. This action by CBP is the first step it must take to ensure that the Jones Act is followed and enforced as written. Hornbeck, on behalf of its thousands of U.S. citizen mariner and shore-based employees, our U.S. shipyard partners and U.S. citizen investors, urges CBP to promptly adopt its Proposed Modification and to ensure that future letter rulings and enforcement actions are in accord with the views expressed in the Proposed Modification.

Below, Hornbeck sets forth why it supports the Proposed Modification and expresses its views concerning aspects of the Proposed Modification that deserve further consideration. Hornbeck is also a member of the Offshore Marine Service Association (OMSA), and endorses the comments submitted by that organization.

The Jones Act Requires CBP to Revoke or Modify Erroneous Letter Rulings

Federal agencies sometimes have discretion concerning application of a law. This is not one of those instances. As is discussed below, the text of the Jones Act requires CBP to revoke or modify letter rulings that do not follow the statute. While the Jones Act dates from 1920, the cabotage laws from which it came were enacted by the first United States Congress in 1789. Through the Jones Act and its predecessor statutes, Congress intended to ensure that the United States has available vessels to meet sealift needs, expert and experienced seafarers to operate U.S. flag ships in times of national emergency, and a modern shipyard industrial base that is critical to the Nation's military and economic security. In this sense, the Jones Act is, and always has been, a statute grounded in (1) a national defense policy of ensuring domestic shipbuilding and seafaring capacity and (2) a national commercial policy of ensuring a strong domestic maritime industry. This function is particularly important in the context of offshore oil and gas development on the OCS, given its importance to our Nation's energy security. Unlike many Federal laws for which the underlying policy can be discerned only from legislative history and other materials beyond the statute

itself, Congress plainly articulated the objectives and policy that underlie the Jones Act[3] as part of the statutory text. As codified, those objectives and policy are:

> (a) Objective.--It is necessary for the national defense and the development of the domestic and foreign commerce of the United States that the United States have a merchant marine--
>
> (1) sufficient to carry the waterborne domestic commerce … of the United States and to provide shipping service essential for maintaining the flow of the waterborne domestic … at all times;
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> (2) capable of serving as a naval and military auxiliary in time of war or national emergency;
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> (3) owned and operated as vessels of the United States by citizens of the United States;
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> (4) composed of the best-equipped, safest, and most suitable types of vessels constructed in the United States and manned with a trained and efficient citizen personnel; and
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> (5) supplemented by efficient facilities for building and repairing vessels.
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> (b) Policy.--It is the policy of the United States to encourage and aid the development and maintenance of a merchant marine satisfying the objectives described in subsection (a).

This Congressional statement of objectives and policy could not be a more forceful directive to the various Federal agencies, including CBP, of the primacy Congress intended for merchant marine development to have as part of our Nation's critical infrastructure. When CBP is requested to interpret the Jones Act, it does not sit as a disinterested party. Rather, it sits as the Federal agency designated by Congress to fully and strictly enforce the Jones Act in compliance with the objectives and policies articulated by Congress. An interpretation that is erosive of the Jones Act is inimical to the policy and objectives of the Jones Act. If the question is a close one, CBP is duty-bound to answer in favor of protecting the policy and objectives of the Jones Act. In the Proposed Modification, CBP has properly recognized that it has given interpretations of the Jones Act that are inconsistent with the statute. Moreover, it has recognized that these erroneous interpretations have existed for decades. CBP has little leeway. Its obligation is to implement the policy and objectives of the statute, which in this case it can do only by utilizing the swiftest and most forceful means available in order to revoke or modify its erroneous letter rulings. We discuss later in this comment why CBP's use of 19 USC §1625(c) is the correct process to use.

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[3] 46 U.S.C. at 46 U.S.C. §50101 et seq.

The Jones Act is Clear and Unambiguous

Sometimes statutes are unclear. The Jones Act is not one of them. The Jones Act is very broad and very clear in its mandate. It leaves little room for Federal agencies to resolve ambiguities or to supply answers to areas left open by the statute's text. The Jones Act states in 46 U.S.C. §55102 that:

> … a vessel may not provide any part of the transportation of merchandise by water … between points in the United States to which the coastwise laws apply … unless the vessel (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 [of Title 46]…

The Jones Act defines "merchandise" broadly, and it includes "valueless" material. Moreover, the Jones Act construes "transportation" broadly. It includes "any part" of merchandise transportation that is by water, or by land and water between points in the United States to which the coastwise laws apply. Transportation also includes that which occurs directly between coastwise points, or indirectly through a foreign port.

The coastwise laws apply to points in the "territorial sea". For purposes of the Jones Act, the "territorial sea" is defined as the belt, three nautical miles wide, seaward of the territorial sea baseline. The Jones Act also applies to points located in internal waters of the United States, i.e., those landward of the territorial sea baseline. The Jones Act is also made applicable to the OCS by virtue of the Outer Continental Shelf Lands Act (OCSLA). When considering operations on the OCS, Federal agencies must consider the OCS as though it were an area of exclusive Federal jurisdiction located in a state and apply Federal laws, including the Jones Act, in the same manner. OCSLA states at 43 U.S.C. §1333(a)(1) that:

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

CBP regulations concerning the meaning of coastwise transportation, at 19 C.F.R. Part 4.80(a), are also clear:

> A coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ("coastwise point") is unladen at another coastwise point …

In the Proposed Modification, CBP has identified for modification or revocation 25 letter rulings. In none did CBP raise a question as to the clarity of the Jones Act or express that CBP's decision was based upon an ambiguity in the law that the agency was using its discretion to resolve. To the contrary, in each letter ruling, CBP quoted the clear language of the statute without remark. Accordingly, this process does not involve questions of statutory interpretation or agency discretion. This process concerns whether or not CBP followed the law. CBP has concluded, once in 2009 and again in the Proposed Modification that it did not. We agree. CBP's only option is to modify or revoke its erroneous letter rulings. That binary choice is the only subject upon which CBP has any discretion. We concur with CBP's election to modify HQ 101925 and to revoke the other 24 letters.

CBP Lacks Authority to Create Exceptions to the Jones Act or to Waive its Requirements

Only Congress can create exceptions to the Jones Act. There are eight. See, 46 U.S. §§55106 (merchandise transferred between barges), 55107 (empty cargo containers), 55108 (platform jackets), 55115 (supplies on fish processing vessel), 55116 (use of Canadian rail lines), 55117 (Great Lakes rail route), 55119 (Yukon River transportation), and 55121(b)(2) (certain Alaskan transportation). None of the letter rulings targeted in the Proposed Modification involve a statutory exception to the Jones Act. The Jones Act can be waived, but, in keeping with the statute's national security underpinning, only in the interest of national defense. See, 46 U.S.C. §501. None of the letter rulings targeted in the Proposed Modification involve a waiver that had been requested or that had been issued in accordance with statutory requirements.

The letters identified in the Proposed Modification were issued by CBP under its "carrier ruling" regulations. This mechanism is available to anyone wishing to obtain certainty from CBP as to whether a planned movement will violate the Jones Act.[4] Carrier rulings cannot create Jones Act waivers, exceptions or create new Jones Act policy. Those prerogatives belong to Congress alone. Nevertheless, CBP in the administration of carrier rulings has issued interpretations of the Jones Act which have had the effect of improperly creating administrative exceptions to it. In one letter alone, HQ 101925, CBP authorized the coastwise transportation of a broad array of merchandise using various theories that were extraneous to the text of the Jones Act and which CBP now acknowledges were tantamount to the creation of exceptions it was not authorized to issue.[5] The concepts used in HQ 101925 included, *transportation of merchandise incidental to a permissible operation, transportation of merchandise of de minimis value, foreseeability of the use of transported merchandise, merchandise transported as part of the vessel's mission and the equalization of pipe-laying with pipeline connectors*. None of these concepts are consistent with the text of the statute. Unfortunately, they are all self-created exceptions that go much further than any of the eight narrow exceptions created by Congress and are inconsistent with all of the statutory exceptions. Finally, these concepts and their proliferation and expansion in subsequent letters have done violence to the Jones Act's policy and objectives.

[4] 19 C.F.R. Part 177.2(iv)
[5] Proposed Modification at 15 Subparagraph 2

Reliance Upon Carrier Rulings is Limited

Opponents of the Proposed Modification say that CBP's ability to correct its legal errors is limited because these opponents now rely on the letters targeted for modification or revocation. They have it backwards. CBP's regulations are clear that reliance is tempered by CBP's ability to correct its legal errors. As is discussed below, reliance beyond that which is allowed by the regulatory scheme in which the carrier rulings were issued is legally unsupportable. It is important to remember that the opponents of CBP's Proposed Modification lay in a bed of their own making. They elected to seek carrier rulings from CBP as a way to by-pass the need to use coastwise qualified vessels or to obtain statutory exceptions to the Jones Act for the coastwise movements of merchandise. Using CBP's regulatory scheme in 19 CFR Part 172.2 – 172.12, they convinced CBP to issue interpretations that were substantively incorrect and contrary to the Jones Act. They should not now be allowed to disavow the limitations that were inherent in the scheme they themselves elected to use, or wish to rely upon further. Doing so hurts only U.S. citizen companies such as Hornbeck, who did not use that scheme and who since 2009 have been saying that the letter rulings, issued without any input from the Jones Act community, are improper and injurious to their interests.

Neither applicable law nor CBP's regulations concerning revocation or modification of carrier rulings impede CBP's ability to revoke or modify such a ruling.[6] CBP's regulations show plenary authority to revoke or modify a letter ruling. They provide that - "[a]n interpretive ruling ... issued under this part ... *if found to be in error or not in accord with the current views of Customs*, may be modified or revoked by an interpretive ruling issued under this section."[7] What the regulations do expressly limit is the reliance of recipients of letter rulings and third-parties. The applicable CBP regulation entitled "Reliance on ruling letters by others" delineates the extent to which carrier rulings can be relied upon:

> [e]xcept when public notice and comment procedures apply under §177.12, a ruling letter is subject to modification or revocation by CBP without notice to any person other than the person to whom the ruling letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

The regulations say that the §177.12 notice and comment procedures apply if the carrier ruling has been in effect for more than 60 days.[8] So, up to 60 days from issuance, a carrier ruling can be modified or revoked immediately. After that time, the §177.12 notice and comment procedures apply. All of the carrier rulings sought to be revoked in the Proposed Modification are older than 60 days. So, parties may rely on these rulings, but such reliance is subject to CBP's broad right to revoke or modify pursuant §177.12's notice and

[6] Under 19 CFR Part 172.2(b) CBP issues three types of rulings – Tariff Classification Rulings, Valuation Rulings and Carrier Rulings. In the process for revoking these rulings, no distinction is made among them. All are eligible for revocation under Part 172.12, which implement 19 USC §1625(c).

[7] 19 C.F.R. Part 177.12(a)

[8] 19 C.F.R. Part 177.12(b) "Customs may modify or revoke an interpretive ruling ... that has been in effect for less than 60 calendar days by simply giving written notice of the modification or revocation to the person to whom the original ruling was issued ..."

comment procedures, which CBP is following. Reliance ends there. Parties can expect no more notice or process than that which CBP specified in the regulation, which is a 30 day opportunity for comment and 30 days of deliberation by CBP.[9] That's all. Reliance beyond that is irrelevant and unreasonable. If a third party intends to rely upon a carrier ruling beyond that period, it is incumbent upon such party to seek a carrier ruling of its own. Otherwise, it assumes the risk that CBP can issue a notice of revocation or modification as it has done now, and in fact notified the industry that it would do "in the near future" in 2009.

19 USC §1625(c) is the Correct Process for CBP to Follow in Order to Revoke or Modify

The regulations discussed above governing the manner in which CBP revokes or modifies carrier rulings implement a Congressional requirement, namely 19 U.S.C. §1625(c). The statute provides:

> (a) Publication. Within 90 days after the date of issuance of any *interpretive ruling* (including any ruling letter, or internal advice memorandum) or protest review decision under this chapter *with respect to any customs transaction*, the Secretary shall have such ruling or decision published in the Customs Bulletin or shall otherwise make such ruling or decision available for public inspection.
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> * * *
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> (c) Modification and Revocation. *A proposed interpretive ruling* or decision which would—
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> (1) *modify* (other than to correct a clerical error) *or revoke a prior interpretive ruling* or decision which has been in effect for at least 60 days; or
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> (2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;
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> *shall be published in the Customs Bulletin.* The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

Section 1625 applies to CBP's Proposed Modification and CBP must follow it and no other procedure to revoke or modify its interpretive rulings. First, CBP's activities involving the "navigation laws" – which

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[9] Indeed, CBP has already accommodated complaining parties by extending the comment period by 60 additional days, which is three times the notice period to which they were entitled by the regulation.

include the Jones Act - are "customs transactions". The term "customs transaction" was defined by the Customs Service in its July 30, 1975 regulations as follows: "A 'Customs transaction' is an act or activity to which the Customs and related laws apply." 40 Fed. Reg. 31928 (July 30, 1975). "Customs and related laws," in turn, is defined as follows: "as generally used in this part, [it] includes any provision of the Tariff Act of 1930, as amended (including the Tariff Schedules of the United States), or the Customs Regulations, or any provision contained in other legislation (*including the navigation laws*), regulations, treaties, orders, proclamations, or other agreements administered by the Customs Service." These definitions remain in effect today. 19 C.F.R. §177.1(d)(3); 19 C.F.R. §177.1(d)(5) ("The term 'Customs and related laws,' as generally used in this part, includes any provision of the Tariff Act of 1930, as amended (including the Harmonized Tariff Schedule of the United States), or the Customs Regulations, or any provision contained in other legislation (*including the navigation laws*), regulations, treaties, orders, proclamations, or other agreements administered by the Customs Service."). Congress is presumed to be aware of pertinent existing law when it enacts legislation. *See Cal. Indus. Prods., Inc. v. United States,* 436 F.3d 1341, 1354, 27 I.T.R.D. 2057 (Fed. Cir. 2006). Thus, it must be presumed that Congress incorporated into the existing version of 19 U.S.C. §1625, Customs' definition of "customs transaction" as it then-existed in the regulations, which includes activities under the "navigation laws". Carrier rulings involving the Jones Act issued by CBP are part of §1625's domain.

Further, in the Proposed Modification CBP has made clear that motivating its proposed action is its conclusion that the letter rulings identified for modification and revocation are legally incorrect applications of the Jones Act. While 19 U.S.C. §1625 imposes no statutory limitation on CBP's authority to revoke, CBP's regulations allow an interpretive ruling's revocation or modification "if found to be in error or not in accord with the current views of Customs".[10] There is no question that CBP has made a determination that satisfies this internal requirement.

Finally, the Federal Circuit has confirmed that §1625 is the required procedure for revoking CBP letter rulings.[11] As this decision makes clear, adherence to §1625 is not optional. If CBP intends to revoke an interpretive ruling, it must follow the §1625 process and no other.

APA Rule-Making Would Be Harmful to U.S. Companies Whose Jones Act Interests Have Been Stripped

The opponents want to stop CBP from taking action by proffering an APA "rule-making" process as the appropriate vehicle that CBP should utilize, as opposed to the statutorily required §1625 process. In essence they argue that, taken in the aggregate, CBP's carrier rulings amount to policy and themselves "rules" that should only be undone as part of a "rule-making." It is an appealing but extremely flawed argument.

First, as discussed above, CBP's carrier rulings can be no more than what CBP's regulations say they are– interpretations subject to revocation or modification by CBP in accordance with the regulations under which they were issued. At its core, the argument being advanced is that over time, CBP's practice of issuing

[10] 19 C.F.R. Part 177.12(a)
[11] *California Indus. Prods. v. United States*, 436 F. 3d 1341, 1356 (Fed. Cir. 2006).

interpretations became something else - a piecemeal rule-making that resulted in a policy and body of rules that are relied upon and followed. But, as the opponents know well, there is only one way to create regulatory rules in the United States, and that is to follow the Administrative Procedures Act. When CBP was responding to letters sent to it by those who desired to craft Jones Act exceptions, the public – including the Jones Act community -- was given no say whatsoever into the content of CBP's responses, which the opponents now want to enshrine as having regulatory effect. As each letter was issued, there was no impact analysis performed or weighing of the harm to the domestic Jones Act community. The letters were requested privately and for years CBP's responses were shielded from the public realm. Even today CBP cannot produce many of the requests that were sent to it. The suggestion that private legal interpretations of the Jones Act are now a national Jones Act policy deserving of APA legal protection before it can be changed is disingenuous in the extreme. The United States Supreme Court has given CBP interpretive rulings no such importance –

> It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind ... Customs does not generally engage in notice-and-comment practice when issuing them, and their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties... The statutory changes reveal no intent to create a Chevron patchwork of classification rulings, some with force of law, some without. . . .[12]

Behind the calls for an APA rule-making process is something else: delay. The opponents hope to thwart CBP's statutory duty to follow the law by embroiling it in a regulatory process that is uncalled for. That delays the day of legal compliance, which is all these parties can hope for given their inability to square any of the letter rulings targeted in the Proposed Modification with the text of the Jones Act. In 2009, the same parties insisting upon a rule-making now, opposed CBP then by insisting that a rule-making process was called for. The opponents, among them, some of the largest and most sophisticated trade associations and businesses on the planet, could have pursued their interest in such a process if what they desired was something more than interpretations by the agency. Yet, in the intervening nine years they instead chose to rely on letters that the regulations say can be revoked, and which CBP said in 2009 it intended to revoke. Their arguments are disingenuous and if followed harm Hornbeck and other U.S. citizens by delaying further the proper administration of the Jones Act.

While opponents of CBP's proposed action will likely argue that pursuing an APA rule-making process will provide a broader opportunity for consideration of CBP's proposal, this endeavor is not one about how an agency will implement a law, which is what rule-makings are for. This endeavor involves purely the legal question of whether CBP correctly answered questions posed to it about the Jones Act in private correspondence. There is no other question to be decided and the APA's rule-making mechanisms are not designed for interpretive guidance. That is why the APA carves them out of its coverage.[13] It is difficult to understand what more could be achieved in such a rule-making process. A rule-making about what a statute

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[12] *United States v. Mead*, 533 U.S. 218, 234 (2001)
[13] 5 USC §553(b)

says still defaults to the plain meaning of the statute. The opponents appear to want a rule-making in order to litigate what they would like the statute to say. That debate already occurred in Congress. Using the APA to re-open the legislative process to create exceptions to the Jones Act is manifestly improper. Nor should the APA be hi-jacked in order to delay correction of CBP rulings that it says are contrary to law. As noted, these letter rulings did not go through a rule-making – or any notice and comment process - when issued. They were spoken into existence by CBP in response to a question. But for §1625, CBP could revoke them in the same way they were issued. But Congress has specified another process for CBP to follow, §1625. Requiring more would be arbitrary and capricious and work additional harm on U.S. citizens that comply with the Jones Act and have suffered economic harm from CBP's admitted error. Unlike when these letter rulings were being issued, all affected parties now have an equal opportunity to comment, just as they did in 2009. As important, no one is prevented from subsequently asking CBP for a new letter ruling to the extent new issues arise or clarification of CBP's position is required.

When applied to interpretations of the Jones Act, CBP's procedures for issuing and revoking interpretive rulings must be read in tandem with the text of the Jones Act, and in particular, Congress' instruction in the Jones Act itself as to the statute's "objectives" and "policy".[14] CBP's decisions in HQ 10925, and the many decisions that have cited it, relied upon it or expanded it, run afoul of the text of the Jones Act, its policy and objectives, and have created exceptions to the Jones Act that for decades undermined the U.S. merchant marine's ability to fulfill its mission with respect to the kinds of OCS operations addressed with in the Proposed Modification. Moreover, the several interpretations identified by Customs that mischaracterize merchandise as vessel equipment, also undermine the text of the Jones Act. Having concluded that these interpretations are erroneous, CBP must revoke or modify them immediately using the administrative process Congress has directed CBP to follow, 19 U.S.C. §1625(c). The Jones Act provides CBP no other alternative.

The Proposed Modification of HQ 101925 is Correct

In 1976 CBP issued its decision in HQ 101925. As is discussed below, the decision is legally wrong on a multitude of levels as it plainly ignored the text of the Jones Act and justified a wide variety of coastwise transportation activities by foreign vessels that have no basis in law. More troubling, this private decision incubated a colony of ruling letters that calcified its erroneous reasoning within CBP and which then departed even further from the statute and eroded nearly completely the privilege of coastwise transportation involving subsea OCS activities. Remarkably, in neither HQ 101925 nor the multitude of decisions that cite it, has CBP ever suggested that its decision was based upon the need to clarify an ambiguity in the Jones Act. The statute is clear, and CBP has never said otherwise. Indeed, in HQ 101925 and the many decisions citing it, CBP habitually quoted the statute, without complaint as to its clarity, only to ignore its text and self-create exceptions that are unhinged from the law or its stated policy and objectives.

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[14] Which are that the United States "have a merchant marine ... sufficient to carry the waterborne domestic commerce ... of the United States and to provide shipping service essential for maintaining the flow of the waterborne domestic ... at all times ... composed of the best-equipped, safest, and most suitable types of vessels constructed in the United States and manned with a trained and efficient citizen personnel ... and supplemented by efficient facilities for building and repairing vessels." 46 U.S.C. §55101

Beyond question, in order to rectify CBP's decades of error, the place to begin is to revoke or modify HQ 101925. As is discussed below, while we believe revocation of HQ 101925 would be appropriate[15], if not revoked, we agree with CBP's proposed modification of it, as it provides clarity to the trade community and reestablishes the rule of law, as opposed to statutory exceptions self-created by CBP, as the standard by which coastwise transportation will be evaluated on the OCS.

Action Relating to HQ 101925

HQ 101925 involved the use of a foreign barge from which diving operations would occur as part of construction, maintenance, repair and inspection of offshore petroleum related facilities including pipelines and platforms located on the OCS. The inquirer requested CBP's "advice" [16]as to 1) whether the installation, repair and servicing activities themselves would violate the Jones Act, and 2) whether as part of those activities, the foreign vessel could transport the articles listed below between coastwise points:

Items Allowed to be Transported to Coastwise Locations

Repair Pipe	Anodes	Pipeline Burial Tools
Pipeline Connectors	Repair Materials	Repair Tools
Salvaged pipe	Machinery and Production Equipment	Workover Rig
Wellhead Assembly	Valves and Valve Guards	

Ignoring the text of the Jones Act, CBP undertook an exercise of providing various justifications or conditions that would allow the coastwise transportation of the items by the foreign vessel, which included 1) reasoning that pipeline repair operations are equivalent to pipe-laying operations, 2) reasoning based upon the foreseeability of an item's use, 3) reasoning based upon whether an item was part of the vessel's equipment, 4) reasoning based on transportation ancillary to permitted activities, 5) reasoning based upon the value of an item, and 6) reasoning based upon the items relation to the vessel's mission. HQ 101925's flawed logic then was extended by CBP in subsequent ruling letters, in which the decision was cited, and its permissive rationale taken even further. For instance, in HQ 115218, CBP magnified its earlier error of allowing pipeline connectors to be transported by a pipe-laying vessel to now allow a pipeline connector to be transported by any vessel, so long as that vessel would also install the connector. In HQ 115487, CBP allowed the transportation of anodes, which it did not permit in HQ 101925, as well as various materials to be installed on the sea-floor variously described as "umbilical" materials on the basis that they were equipment of the vessel. In H004242, CBP removed its self-created de minimis value criteria to justify

[15] The reasons we believe the letter should be revoked are discussed in this comment under the heading "*Catchall Decisions Should be Revoked as Being Hypothetical*".
[16] The requestor's letter that HQ 101925 responded to has not been produced in a Freedom of Information Act request made by OMSA.

transportation of pipeline and wellhead repair equipment and materials and allowed the transportation of such equipment as wellheads by foreign vessels based upon the limitless notion that the items were related to the vessel's mission.

CBP's proposed modification of HQ 101925 is proper and we support it. CBP correctly dissects from its prior reasoning the various justifications and conditions that are not present in the statute and which when applied have the effect of creating exceptions to the Jones Act. HQ 101925 was widely cited by CBP in many subsequent letter rulings both to allow transportation consistent with its faulty reasoning and, as discussed above, to extend its flaws even further. Addressing HQ 101925 provides the offshore community a clear framework of how the Jones Act operates and diminishes the reliability of rulings that were based upon its former analysis. We are especially supportive of CBP's view on Page 15 of the Proposed Modification in which it acknowledges that the only exceptions to the Jones Act are those created by Congress and found in the statute itself, namely, 46 U.S.C. §§55106-55108, 55115-55117, 55119 and 55121. There are no others and CBP has no power to create them.

CBP has targeted for revocation HQ 108223, HQ 108442, HQ113838, HQ 115185, HQ 115218, HQ 115411, HQ 115522 and HQ 115771. As discussed below, we support revocation of all of these letter rulings which variously rely upon or expand the flawed reasoning contained in HQ101925 prior to its modification as now proposed.

The Transportation of "Pipeline Connectors" Between Coastwise Points is Not Permissible

In HQ 101925, CBP reasoned that because pipe-laying is a permissible activity, the transportation and installation of a pipeline connector by the pipe-laying vessel is also permissible. It is the position of CBP that transportation of pipe by a pipe-laying vessel is permissible because pipe is "paid-out, not unladen."[17] In HQ 101925, without any explanation, CBP conjoined onto the pipe-laying rationale an exception for pipeline connectors, so long as the connector is installed by the pipe-laying vessel. As proposed to be modified, CBP has correctly de-coupled pipe-laying, which involves a paid-out operation, from installation of pipeline connectors, which does not.[18] Pipeline connectors are merchandise and, when transported between coastwise points, a Jones Act qualified vessel must be used. In addition to correcting HQ 101925's faulty rationale concerning pipeline connectors, CBP proposes to revoke four decisions that permitted the coastwise transportation of pipeline connectors applying HQ 101925's faulty logic and then extending it. We agree.

HQ 115311 and HQ 115522 involved the use of a vessel that would transport and pay-out flexible pipelines and/umbilicals as well as transport and install risers and umbilical tie-ins described by CBP as part of the "connection apparatus". Relying on HQ 101925, CBP permitted the transportation of these "pipeline

[17] The rationale justifying CBP's conclusion that the coastwise transportation of pipe by a foreign vessel is permissible because the pipe is paid-out and not unladen is unclear to us. CBP does not propose to alter its view in the Proposed Modification.

[18] It is entirely possible that CBP's pipe-laying rationale itself is unsupported by the statute, but the Proposed Modification does not deal with that question, so, for the time-being we assume that transportation of pipe being paid out as part of a pipe-laying operation is permissible.

connectors" because the same vessel was installing the flexible flowlines and umbilicals using the paid-out method. Revocation of these letters is appropriate given CBP's intention to modify its reasoning that equates pipeline connector installation with pipe-laying.

HQ 115185 and HQ 115218 should also be revoked as they extend CBP's flawed logic even further. HQ 115185 allowed transportation of a jumper pipe approximately 85 feet in length, a hull mounted riser, approximately 200 feet in length and a steel catenary riser spool piece, 40 feet in length, all described by CBP as pipeline connectors, by a vessel that was not engaged in pipe-laying activity. In fact, CBP makes clear that the pipeline with which the pipeline connectors would connect were already laid. Similarly, HQ 115218 involved a flowline spool piece 75 feet in length described as a pipeline connector. Admitting that the spool piece connection "would entail a separate mobilization from the pipe-laying phase of the project", CBP allowed the foreign vessel to transport the pipeline connector under the cavernous justification that doing so was in furtherance of the vessel's mission. The justifications given in HQ 115185 and HQ 115218 are not only unhinged from HQ 101925's baseless theory that because a vessel can engage in pipe-laying it can also transport pipeline connectors, but they also demonstrate hostility to the text of the Jones Act itself by articulating a rationale that has absolutely no limit on its extent of permissiveness. Essentially, CBP erroneously held that coastwise transportation of anything can be allowed if connected to a vessel's mission of doing anything. That's not what the Jones Act says and CBP is correct to revoke letters that attempt to make it so.

The Transportation of Cement and Chemicals Between Coastwise Points is not Permissible

HQ 108223 involved the injection of cement and chemicals as part of well stimulation operations. CBP determined that because a foreign vessel can be used to blend these items and to inject them into a well formation, as doing do is not covered by a coastwise law, the vessel could also transport those materials between coastwise points, which is covered by a coastwise law, i.e., the Jones Act. While the decision does not cite HQ 101925, it reflects its faulty rationale that coastwise transportation which is incidental to another permissible activity is allowed. This self-created exception is simply absent from the statute and creates a near limitless exception for a vessel that engages in both transportation and a non-covered activity. CBP is correct to revoke this decision which has no basis in the statute's text.

The Mission of the Vessel and Ancillary Transportation Theories Are Not Exceptions Permitted by the Jones Act

CBP proposes to revoke HQ 113838, which dealt with subsea operations by dive support vessels similar to that described in HQ 101925 and HQ 108442, which dealt with lift-boats providing services at offshore platforms. The decisions invoked transportation ancillary to permitted activity and mission of the vessel rationale to justify the coastwise transportation of a veritable constellation of generally described items. Both decisions admit that the foreign vessels would transport the various items listed below from one coastwise point to an OCS coastwise point at which they would be consumed or installed.

*Items Allowed to be Transported to Coastwise Locations
As Mission of the Vessel or Ancillary Transportation*

Repair Materials	Structural Materials	Clamps	Pipeline Connectors
Repair Pipe	Pipe Repair Materials	Epoxy	Fittings
Plugs	Cargo Mats	Pipe-lay Consumables	Bridge Repair Parts
Flanges	Bolts/O-Rings	Sand bags/cement mats	Valve Assemblies
Pipeline Repair Clamps	Wellhead Repair Parts	Cement	Pipe-end Connectors
Termination skids	Piles		

The text of the Jones Act does not exclude from its coverage items that are transported between coastwise points as part of a vessel's mission or ancillary to another activity that is not covered by a coastwise law. The Jones Act says it covers "any part" of the transportation. That necessarily includes the transportation that occurs as part of the work in which a vessel is engaged, even if that work itself is not covered by a coastwise law. The items described above were all "left behind" at an OCS point. Irrespective of whether they were installed there, such as a pipeline repair clamp, or consumed there as part of the repair, such as cement, the items were transported to and left at a coastwise point.

The expansiveness of the items described above, which the flawed letter allowed to be transported between coastwise points, is perhaps the best evidence of why "mission of the vessel" and "ancillary transportation" analysis is erroneous. As noted, the Jones Act does not consider a vessel's mission among the statutorily allowed exceptions. Absent such an exception, none of the items variously listed in these letter rulings should have been permitted to be transported coastwise by foreign vessels and the letters are proper candidates for revocation on that basis.

HQ 113838 is flawed for an additional reason. It differed slightly from HQ 101925 in that the items were to be transported from a U.S. port by a non-qualified vessel to a dynamically positioned (DP) vessel operating on the OCS. Ignoring the fact that the items it described would eventually be consumed or installed at the subsea OCS facility, CBP erroneously concluded that the transportation was permissible. But, the Jones Act provides otherwise. It applies to "any part" of the transportation of merchandise. Thus, the intermediate transfer to the DP vessel did not inoculate the coastwise movement which was completed when the items were consumed or installed at the OCS installation site.

The Jones Act Requires a Narrow Definition of Vessel Equipment

If an item is vessel equipment, then it is not merchandise and is not covered by the Jones Act. In the Proposed Modification, CBP determines that it has incorrectly characterized a wide array of items as vessel equipment. CBP proposes to use its decision in T.D. 49815(4) as the touchstone for its definition of vessel equipment. We do not disagree with this approach and note below that further support for CBP's position is found in the Jones Act's statutory scheme.

A review of CBP's decisions involving vessel equipment reveals three broad categories of items that CBP has allowed as vessel equipment. The first is uncontroversial and is captured in the description of items described in T.D. 49815(4). There is little argument that the vessel's propulsion system (sails in T.D. 49815(4)) is equipment of the vessel. The second category involves items on a ship used to perform the vessel's work and that remain with the ship as it moves from one location to another. These items are placed on the ship at varying degrees of permanency. Some are integrated with ship systems and may be on the ship for months or years. Others are modular and easily placed onto the ship and removed. Often, these items are owned by third-parties and are not operated by the ship's marine crew. The final category has involved items that are carried by the ship and through use or installation are left behind at a coastwise point once the vessel sails away. These items, which comprise the largest share of the decisions sought to be revoked, are never vessel equipment.

Things Left Behind by an Installation Vessel Are Never Vessel Equipment

The Proposed Modification seeks to revoke HQ 105644, HQ 110402, HQ 111889, HQ 112218, HQ 113841, HQ 114305, HQ 114435, HQ 115333, HQ 115938, and HQ 004242, which allowed the following items, all of which were to be part of a permanent offshore installation, to be classified as vessel equipment and therefore excluded from the Jones Act's coverage. These carrier rulings are manifestly erroneous and should be revoked. All of these items are merchandise within the plain meaning of the word and certainly within the expansive concept of merchandise in the Jones Act.

Items Held to be Vessel Equipment

Telecommunications Cable installed on seafloor HQ 105644, HQ 110402, HQ 114305 HQ 115333	Multi-well Template at Production Facility HQ 111889	Marine Riser at Production Facility HQ 111889	Cement, chemicals and other materials placed into well HQ 112218	Repair Pipe, HQ 004242
Wellheads, HQ 004242	Subsea Umbilical, HQ 113841, HQ 114435, HQ 115487	Subsea Pipeline HQ 114435, HQ 004242	Subsea Methanol line 115487	Wellhead Repair Materials, HQ 004242
Umbilical Uraduct HQ 115487	Platform Hang-off Clamp, HQ 225487	Pre-fabricated structural components, HQ 115938	Subsea Pipeline mattresses, HQ 225487	Subsea Electro Hydraulic Distribution Units, HQ 225487

Subsea Mud Mats, HQ 225487	Subsea Hydraulic Bridges and Flying Leads, HQ 225487	Infield Subsea Umbilical Termination Units, HQ 225487	Subsea Umbilical Terminations, HQ 225487	Subsea Stab and Hinge Overs, HQ 225487
Subsea Methanol Distribution Unit HQ 225487	Subsea Methanol line Flange HQ 225487	Subsea Methanol line cathodic protection anode HQ 225487	Platform compressors, HQ 115938	Platform generators, HQ 115938
Platform pumps, HQ 115938	Oilfield Equipment, HQ 115938	Platform decks, HQ 115938	Platform heliports, HQ 115938	Well-jackets, HQ 115938
Platform stairways, HQ 115938	Platform grating, HQ 115938	Platform handrails, HQ 115938	Platform boat landings, HQ 115938	

Not All Items Used by the Vessel or Its Crew are Vessel Equipment

CBP proposes to modify HQ 101925 with HQ H082215.[19] There, CBP proposes that "tools" being used to make repairs would be considered vessel equipment. We urge CBP to be cautious. The Jones Act's statutory scheme suggests that some items that have been used by or on the vessel to support its operation are merchandise. We know this because Congress enacted specific exceptions to the Jones Act to exclude certain kinds of vessel equipment from the Jones Act's coverage. For instance, as noted in the Proposed Modification, one of the exceptions to the Jones Act is 46 U.S.C. §55107. That provision excludes empty "cargo vans", empty "lift vans", empty "shipping tanks", equipment used with vans and tanks, empty "instruments for international traffic" and stevedoring equipment and material. All of these items appear to be items ordinarily used by cargo vessels as part of their normal operation. They are thought of as vessel equipment. Yet, Congress considered them to be merchandise and covered by the Jones Act. In order to facilitate their coastwise movement by foreign vessels, Congress created a specific exception for them.

The fact that the exception applies to items that are "empty" is significant. Once empty, these items are no longer useful in the vessel's operation. Accordingly, they are no longer vessel equipment, but merchandise. An item that was being used by the vessel might be vessel equipment during its period of use. However, once no longer to be used as part of the vessel's operation, it may not be transported coastwise because it is merchandise. This does not prohibit the use of the item. However, it would require that an item no longer in use be returned to the same location at which it was originally placed onto the vessel. Otherwise, the vessel will have transported the item, which is not vessel equipment, between coastwise points.

To this extent, we disagree with CBP's determination that containers used as exhibit halls on foreign flag barges could be offloaded at a location different than where they were placed onto the vessel. While CBP proposes to modify the exhibit hall decisions, H029417 and H0 32757, we disagree that their "holdings and

[19] Proposed Modification at p. 12, et seq. (Attachment B).

rationale are correct". Once the containers were no longer being used as exhibit halls, they became merchandise. The containers in those decisions would not qualify for the exception created by §55107, which specifically deals with containers. The same would be true of empty flow line or umbilical reels or other modular equipment and systems placed temporarily or installed on a vessel. Multi-purpose vessels utilized in OCS operations frequently have equipment used by the vessel on and off-loaded. Often these items are not owned by the vessel owner, but rather by third-parties. Once these items are no longer being used as part of the vessel operation, they are not vessel equipment and it is improper to allow off-loading at a place other than the original point. Otherwise the foreign vessel will have moved the item between two coastwise points, which violates the Jones Act.

In addition, CBP needs to give careful consideration as to how a tool is used. For example, some tools are used only on the vessel and never leave it. Other tools are placed on the sea-floor and left behind to be recovered by the vessel or another vessel on a subsequent voyage. We believe that that how and where a tool will be used is a significant consideration in whether it qualifies as "vessel equipment". Clearly, if the vessel can sail away without it, the item must not be necessary for the vessel's operation.

Catchall Decisions Should be Revoked as Being Hypothetical

CBP's regulations do not allow the issuance of interpretive rulings if the transaction or question is "essentially hypothetical in nature."[20] Five of the letters targeted for revocation contain language that is so generalized that the letters appear to be in response to hypothetical transactions, as opposed to a transaction that involved a specific vessel, specific merchandise and specific locations. These letters include HQ 113838, HQ 108442, HQ H004242, HQ 112218 and HQ 115938. In addition, HQ 101925 also appears, by its text, to have been in response to hypothetical scenarios for which a foreign vessel might be used.
OMSA requested pursuant to the Freedom of Information Act copies of all requests sent to CBP involving the letters to be modified or revoked in the Proposed Modification. CBP has made a partial return on this request. The letters sent to CBP in HQ 113838, HQ 108442, and HQ H004242 all describe generalized offshore operations and not specific planned work and voyages. These letters should never have been issued. While CBP has not yet provided the requests underlying HQ 112218, HQ 115938 and HQ 101925, the language used by CBP in those letters indicates that these rulings were also in response to hypothetical situations.

CBP's response to broadly worded hypothetical scenarios that allowed coastwise transportation by foreign vessels was improper, especially in light of CBP's obligation to administer the Jones Act in a manner consistent with its policy and objectives. Rather than advance those objectives, it accepted the invitation to reply to letters that were ungrounded by actual transactions and pronounced equally broad exceptions to the Jones Act.

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[20] 19 CFR Part 177.7(a)

Investment by Hornbeck

Significant challenges presented themselves following CBP's 2009 action. The financial crisis that began in 2009 was intensified for U.S. companies participating in OCS operations by the drilling moratorium imposed following the Deepwater Horizon tragedy in 2010. Despite these significant challenges, in reliance upon CBP's 2009 action and indications that it would address erroneous letter rulings in the "near future", Hornbeck and other U.S. companies took action to invest in Jones Act qualified vessels that would be capable of performing the kind of work on which CBP appeared to be focusing in its 2009 notice. Hornbeck alone has invested nearly a billion dollars in vessels capable of providing subsea support for construction and Installation, Repair and Maintenance (IRM) operations. OMSA has provided additional detail as to the vessels constructed and/or converted by other U.S. companies, which total 31 such vessels.

Hornbeck Offshore Jones Act Qualified Subsea Construction/IRM Vessels

Vessel Name	Jones Act Qualified	DP Notation	Crane Capacity (tonne)	Year Built/ Converted
HOS Warland	Yes	DP2	250	2016
HOS Woodland	Yes	DP2	250	2016
HOS Warhorse	Yes	DP2	250	TBD-2018
HOS Wild Horse	Yes	DP2	250	TBD-2018
HOS Bayou	Yes	DP2	150	2014
HOS Mystique	Yes	DP2	100	2008
HOS Ridgewind	Yes	DP2	70	2015
HOS Riverbend	Yes	DP2	Accom. Support	2015

Investment of this kind indicates that the policy and objectives of the Jones Act, i.e., a vibrant merchant marine represented by modern U.S. flag vessels, employment of U.S. mariners and utilization of U.S. shipyards, were upheld by the U.S. ship-owning community following CBP's 2009 signal to the regulated community that letter rulings were erroneous and that CBP intended to take action.

Conclusion

Hornbeck applauds CBP's effort to correct years of erroneous Jones Act interpretations and encourages CBP to adopt its Proposed Modification without delay. The situation which prevails today is contrary to CBP's policy of informed compliance with the customs and trade laws, which include the Jones Act. As the Proposed Modification makes clear, the trade laws impose on regulated community and CBP duties of informed compliance and shared responsibility. CBP correctly notes that "the trade community needs to be clearly and completely informed of its legal obligations." Unless CBP's proposal is adopted in the swiftest manner possible, the current situation of confusion and informed non-compliance will continue,

which is harmful to all constituents that deserve to understand the legal playing field in order to plan work and investment. Delay will hurt, not help, the cause of informed compliance and will also frustrate further the Jones Act's objectives and policy. Hornbeck strongly supports and thanks CBP for taking this long-awaited for positive action.

Sincerely,

Samuel A. Giberga
Executive Vice President, General Counsel
and Chief Compliance Officer
Hornbeck Offshore Services, Inc.

cc: Mr. Todd M. Hornbeck, Chairman and CEO
Hornbeck Offshore Services, Inc.

The Honorable Bill Cassidy, M.D.
United States Senate

The Honorable John Kennedy
United States Senate

The Honorable Steve Scalise
U.S. House of Representatives