**International Marine Contractors Association**
Improving performance in the marine contracting industry
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November 21, 2019

U.S. Customs and Border Protection
Office of Trade, Regulations and Rulings
Attention: Cargo Security, Carriers and Restricted Merchandise Branch
90 K St. NE., 10th Floor
Washington, DC 20229-1177

Re: Comments of the International Marine Contractors Association to U.S. Customs and Border Protection's October 23, 2019 *Proposed Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points* (the "Notice")

Dear Sir or Madam:

We write in support of the above-captioned Notice and to provide comments to U.S. Customs and Border Protection ("CBP") regarding these proposed actions. In sum, while we provide certain suggested improvements for CBP's consideration, the Notice is a great improvement with respect to regulation of the Coastwise Merchandise statute (commonly known as the Jones Act) as applied to offshore activities. Of importance, we commend CBP for taking this action to resolve a longstanding issue related to the application of the Jones Act to offshore lifting operations.

The contents of the Notice are the result of a long term and substantial consultation effort, between CBP and the regulated stakeholders, and largely is the product of consensus amongst parties with sometimes diverging interests. The International Marine Contractors Association ("IMCA") thus commends CBP for its efforts in these consultations and views the Notice as the culmination of this successful outreach to all stakeholders. As a result, the Notice provides the consistency and predictability in the regulatory environment that is needed for vessel operators, both domestic and foreign, and energy producers, both mineral and renewable, that are working on the U.S. Outer Continental Shelf ("OCS").

As discussed in more detail below, CBP proposes to adopt a revised interpretation of "Vessel Equipment" and "Lifting Operations." At the onset of IMCA's comments, it is important to note that the proposed changes not be viewed independently. If CBP were to adopt the Vessel Equipment interpretation, without simultaneously adopting the Lifting Operations interpretation as set out in the Notice, then this would result in a the currently flawed offshore Jones Act regime, remaining critically flawed and unworkable. The new interpretation of Lifting Operations will clearly allow non-coastwise qualified vessel to perform offshore lifting operations after an item is transported offshore by a coastwise qualified supply vessel without having to concern themselves with whether necessary movements for safety purposes constitute coastwise transportation. The issue with Vessel Equipment may have been "fixed," but without the new interpretation of Lifting Operations, the industry as a whole would suffer.

In this regard, IMCA has worked closely with other Trade Organizations, including the American Petroleum Institute ("API"), in providing these comments and IMCA generally supports the API letter submitted in support of this Notice. In particular, IMCA notes, the updated Calash Report attached to

the API letter, projects positive economic impacts as a result of the Notice, and if certain lifting rulings were not revoked by the Notice, and were expansively enforced by CBP, there would be substantial and widespread adverse effects on industry.[1]

## I. Background

CBP published the Notice on October 23, 2019, proposing to modify or revoke certain ruling letters previously issued by CBP. Comments are due by November 22, 2019. This Notice follows on an earlier process by CBP, when, on January 18, 2017, CBP published a proposed modification and revocation of certain ruling letters previously issued by CBP (the "2017 Notice"). CBP revoked the 2017 Notice on May 10, 2017 after numerous comments from affected parties objected to the substance and procedure of the 2017 Notice. Since the revocation of the 2017 Notice, CBP has engaged stakeholders in a wide-ranging consultative process that has shaped this Notice.

## II. IMCA and Its Interests

IMCA is the largest international trade association representing offshore, marine and underwater engineering companies supporting energy-related projects worldwide. IMCA has over 800-member companies promoting good practice consistent with internationally accepted standards, particularly in the areas of health, safety, environment, quality, efficiency, and technology. In that regard, standardization of technical, commercial, and uniform regulatory approaches helps achieve efficiency in a global market. IMCA monitors changes in U.S. legislation and regulations to keep its members informed. Moreover, IMCA's members include leading U.S. companies with a significant presence and employees in the United States.

## III. Lifting Operations

### *a. IMCA Strongly Supports CBP's Revised Interpretation for Offshore "Lifting Operations"*

IMCA heartily commends CBP for proposing a revised interpretation for offshore "Lifting Operations" to resolve a critical impediment to offshore operations and development that arose with the publication of three rulings that were issued between September 2012 and July 2013 (the so-called "Koff Rulings"). CBP proposes to apply this new interpretation to lifting operations going forward following the revocation of the three Koff Rulings. This is critical because offshore construction work involving lifting operations is not transportation subject to the Jones Act.

Since at least 1983, CBP has held that a stationary, foreign-flag crane vessel may load and unload cargo as well as construct or dismantle a marine structure in compliance with the Jones Act. CBP has consistently qualified this position from 1983 to the present by also holding that any movement of merchandise must be affected exclusively by the operation/movement of the crane and not by movement of the vessel, except for necessary movement which is "incidental to a lifting operation while it is taking place, including pivoting." With regard to this pivoting motion, CBP further restricted pivoting to the vessel's central axis starting in 2003.

[1] This updated 2019 Calash report (based on a review of the proposed action of this Notice) is in stark contrast to the 2017 CBP Notice to modify and revoke numerous equipment of the vessel rulings, and which did not propose a new interpretation of offshore lifting, which Calash estimated could, among other things, result in as many as 125,000 jobs lost by 2030 and cumulative lost GDP of $91.5 billion from 2017-2030.

As far as IMCA can determine based on its research, these ruling requests and resulting CBP rulings never discussed or acknowledged the movement necessary to safely conduct many lifting operations on the OCS. Specifically, virtually all lifting, or handling operations require a vessel to move to some degree to avoid dropping construction items onto the seabed that could damage sensitive subsea infrastructure and potentially lead to significant harm to the marine environment.

Apparently, CBP was never aware of these standard lifting procedures employed by industry for safety reasons, an issue which only came to light after publication of the Koff Rulings. In these rulings, CBP held that any movement of a vessel, even a short distance, while a topside is suspended from its crane and off its central axis for safety reasons is a violation of the Jones Act because in the Koff Rulings, this movement of the vessel is interpreted by CBP as providing part of the transportation of the topside between two points in the U.S. Thus, this series of rulings raised substantial concerns in industry that CBP enforcement of this interpretation would effectively ban all incidental movement associated with any lifting operation and consider it "transportation" within the meaning of the Jones Act, even though these operations have been conducted in this manner since the evolution of the crane technology associated with offshore lifting operations.

The Notice clearly recognizes that the interpretation as detailed in the Koff Rulings was wrong, overly restrictive, and did not accurately reflect the concept of coastwise transportation under the Jones Act. IMCA agrees with this assessment.

IMCA fully agrees with the proposed revised interpretation for offshore "lifting operations" and with CBP's interpretation of "transportation" for the purposes of Jones Act enforcement as delineated on pages 21 and 22 of the Notice. Thus, once CBP issues its decision following its review of the comments submitted, assuming it implements this revised interpretation of lifting operations, a non-coastwise qualified vessel may conduct lifting operations in accordance with this revised interpretation without violating the Jones Act. IMCA fully supports the Jones Act and the movement of component parts or materials to and from the point at which the lifting operations are conducted constitutes transportation subject to the Jones Act and must be conducted by a coastwise qualified vessel.

In addition, IMCA commends CBP for recognizing the realities that safety and practical consideration plays in its understanding of "lifting operations." As stated in the Notice, "[s]afety and practical concerns, including the physical demands of the lifting operations, the mitigation of risk to human life and health, and the avoidance of damage to the surface and subsea infrastructure in the lift operations area, allow for necessary lateral movement in the lift operations area, which does not constitute transportation." Notice at 21. As a safety and environmentally-focused organization, IMCA agrees with this reasoning. Using safety as a factor in determining whether certain movements are transportation or within the scope of a lifting operation is within CBP's authority to interpret application of the Jones Act.

The only comment that IMCA provides on the revised interpretation of lifting operations is for CBP to confirm that this revised interpretation applies to *all* offshore lifting operations, regardless of the size or requirements of a lift.

*b. CBP Should Clarify that Only Its Revised Interpretation of "Lifting Operations" Will be Used in the Future*

CBP states in its Notice that it intends to "revoke or modify all prior rulings that are inconsistent with the proposed modifications and revocations." Notice at 12. To this end, CBP has correctly revoked

what has become known as the "Koff Rulings" (HQ H225102 (September 24, 2012); HQ H23542 (November 15, 2012); and HQ H242466 (July 3, 2013)). However, CBP states that it "does not intend…to revoke or modify its previous rulings upon which these three rulings relied."[2] This appears to be incongruous with CBP's intent to "revoke or modify all prior rulings" that are inconsistent with the Notice.

This is because these rulings have relied on the rationale that any movement of merchandise must be affected exclusively by the operation/movement of the crane and not by movement of the vessel, except for necessary movement which is "incidental to a lifting operation while it is taking place, including pivoting on a vessel's central axis." The phrase that movement must be "*effected exclusively by the crane and not by any movement of the vessel, except for necessary movement which is incidental to a lifting operation while it is taking place*" seems inconsistent with the CBP's interpretation of lifting operations unless CBP determines somehow that the term "*necessary movement which is incidental to a lifting operation*" under these previously issued rulings is within the scope of the new interpretation of "lifting operations." In addition, IMCA has identified several other rulings which rely on this same rationale that the Koff rulings relied on.[3]

To proceed with the Notice while permitting such rulings to remain as precedent could frustrate CBP's purpose in issuing the Notice. Accordingly, IMCA respectfully requests that CBP clarify that the language in the above-referenced rulings is not in conflict with or inconsistent with the new interpretation of "lifting operations" or act to modify or revoke these identified rulings. Such a step would help fulfill CBP's goals in issuing the Notice and meeting CBP's goals of informed compliance and shared responsibility.

IV. Vessel Equipment

IMCA supports CBP's revised interpretation of "Vessel Equipment." This proposed interpretation will correctly narrow the definition of vessel equipment which has been over broadly applied through numerous rulings issued incorrectly over decades based on erroneous rationale. These rulings allowed non-coastwise qualified vessels to perform operations which resulted in the transportation of certain merchandise which was incorrectly classified as vessel equipment.

The Notice remedies these errors by rejecting and revoking several erroneous rationales/concepts which allowed the transportation of certain materials which CBP should have classified as merchandise. In this regard, IMCA agrees with CBP that the analysis on whether the

[2] In this regard, CBP identified the following rulings that the Koff rulings relied on: HQ 111684 (June 26, 1991); HQ 115630 (March 25, 2002); HQ 115985 (May 21, 2003); HQ 116111 (January 30, 2004); HQ 116191 (April 15, 2004); and HQ 116680 (June 29, 2006). None of these rulings involved lifting operations on the OCS.

[3] These additional rulings are: HQ 106351 (November 1, 1983); HQ 108213 (March 6, 1986); HQ 109831 (November 14, 1988); HQ 111446 (March 11, 1991); HQ 112843 (September 23, 1993); HQ 226762 (February 28, 1996); HQ 113657 (September 21, 1996); HQ 113838 (February 2, 1997); HQ 113858 (April 4, 1997); HQ 114347 (September 18, 1998); HQ 115212 (November 16, 2000); HQ 115431 (September 4, 2001); HQ 115630 (March 25, 2002); HQ 115985 (May 21, 2003); HQ 116225 (May 6, 2004); HQ 116423 (March 25, 2005); HQ 116579 (February 8, 2006); HQ 116680 (June 29, 2006); HQ 116697 (July 25, 2006); HQ H046797 (December 12, 2008); HQ H235360 (February 6, 2013); and HQ H254385 (June 25, 2014). Of these rulings, HQ 111466, HQ 113657, HQ 114347, and HQ 115431 involved lifting operations on the OCS prior to issuance of the Koff Rulings. The first ruling addressing pivoting on a vessel's central axis was HQ 115985.

transportation of certain items is justified on the basis that there is a nexus to the "mission of the vessel," installation of an item is "foreseeable," is of "*de minimis*" value, whether work is performed "from a vessel," whether items are carried onboard "as a matter of course," or whether a transportation was "incidental" to an activity is not a valid basis for justifying such transportation.

Rather, IMCA fully supports CBP's revised interpretation of what constitutes vessel equipment. Specifically, as based on the seminal Treasury Decision issued in 1939 – T.D. 49815(4) (March 13, 1939), the correct interpretation of the scope of vessel equipment is based on whether items are "necessary and appropriate for the navigation, operation or maintenance of a vessel and for the comfort and safety of the persons on board." Items considered "necessary and appropriate for the operation of the vessel" are those items that are integral to the function of the vessel and are carried by the vessel.

In this regard, IMCA fully supports the details of those activities which are integral to the function of the vessel as detailed by CBP on page 17 of the Notice. In addition, IMCA fully agrees that CBP correctly emphasized that the fact that an item is returned to and departs with the vessel after an operation is completed, and is not left behind on the seabed, is a factor that weighs in favor of an item being classified as vessel equipment.

IMCA agrees with CBP's revocations and modifications subject to the following comments:

- *HQ 108442 (August 13, 1986) - Notice at Attachment B.* IMCA considers the modifications in paragraph 7 inconsistent with the goals of the Notice (as discussed in more detail in the next section). Specifically, the Notice is not supposed to revoke or modify any rulings related to drilling or well operations. Consistent with this, CBP notes that "ruling letters HQ 112218 (July 22, 1992) and HQ 113137 (June 27, 1994), cited in the 2017 Notice, pertain to cement, chemicals, and other consumable materials, and remain in force." Notice at 13. To ensure consistency that all drilling and well related rulings remain in force, CBP should take action to address this point.

- *HQ H004242 (December 22, 2006) – Notice at Attachment U* – This ruling addresses (1) survey and inspection activities, well head and pipeline installations, and repairs, and (2) whether the removal of debris from the OCS would violate the Jones Act. IMCA's comments on the revocation of this ruling only pertain to (2) related to whether a non-coastwise qualified vessel may be used to transport debris from a damaged/destroyed facility on the OCS. Specifically, IMCA requests that CBP confirm whether it intends to revoke this aspect of the ruling which states that such debris cannot legally be perceived as attached to the seabed and thus would not be a coastwise point under the Jones Act as this issue was not discussed in the preamble of the Notice.

V. <u>Pipe/Cable Laying and Drilling Operations</u>

In discussing its proposed action to modify or revoke certain rulings in the Notice related to vessel equipment, CBP notes with respect to pipe repair operations that no violation would occur if the materials used are "paid out not unladed." Notice at 19. In addition, as noted in the section above, CBP is not modifying or revoking ruling letters HQ 112218 (July 22, 1992) and HQ 113137 (June 27, 1994), cited in the 2017 Notice, which pertain to cement, chemicals, and other consumable materials, and remain in force. Notice at 13.

While IMCA agrees with these statements, IMCA urges CBP to confirm/clarify in its final decision to implement this Notice that no existing pipe/cable laying or drilling rulings are affected by the action proposed in this Notice and that they remain in force. Accordingly, IMCA recommends that the following, or similar language, be included in CBP decision.

*To assist in making future determinations as part of this modification and revocation action, CBP has developed revised interpretations for Vessel Equipment and Offshore Lifting Operations. The revocation and modification of these 13 rulings is not intended to modify or revoke any of the rulings issued by CBP that are still in effect that address pipelaying or cable laying involving materials that are "paid out, not unladen," or drilling, completion, well workover, well operations, decommissioning abandoning activities, or other similar activities (i.e., Drilling/Well Operations Related Activity). Accordingly, as a starting point to any analysis that is done after these changes are promulgated, if the activity is a paid out, not unladen activity or a drilling/well operations related activity as reflected in current CBP rulings, the activity is not subject to the Jones Act.*

## VI. Conclusion

Subject to the comments above, IMCA commends CBP on a well-reasoned Notice that presents a path forward to ensure consistency and promote compliance in CBP's administration of the Jones Act. CBP's proposed revised interpretations of "Lifting Operations" and "Vessel Equipment" will facilitate compliance, encourage domestic energy production, and promote safety in U.S. waters. To this end, IMCA strongly supports this CBP process including the promulgation of CBP's decision to implement the Notice in the Customs Bulletin after reviewing comments provided by the public. After this process is completed and effective 60 days after publication, CBP should consider initiating a rulemaking under the Administrative Procedure Act to implement its decision to provide the full force and effect of law.

Yours sincerely,

Allen Leatt
Chief Executive