



Mark Hatfield

Vice President, Gulf of Mexico Business Unit

April 18, 2017

Mr. Glen E. Vereb
Director, Border Security & Trade Compliance Division
Regulations and Rulings, Office of Trade
U.S. Customs and Border Protection
90 K St. NE., 10th Floor
Washington, DC 20229-1177

Re: Comments of Chevron U.S.A. Inc. to U.S. Customs and Border Protection's January 18, 2017
Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points

Dear Mr. Vereb:

Chevron U.S.A. Inc. ("Chevron") appreciates the opportunity to submit the attached comments in response to the *Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points* ("Notice").

Chevron is a member company of the American Petroleum Institute ("API"), the Offshore Operators Committee ("OOC"), the Independent Petroleum Association of America ("IPAA"), the U.S. Oil and Gas Association ("USOGA"), the International Association of Drilling Contractors ("IADC") and the Louisiana Mid-Continent Oil and Gas Association ("LMOGA") (collectively, the "Joint Trades"). Chevron has participated in the development of comments submitted separately by the Joint Trades, and except as expressly stated otherwise, incorporates the Joint Trades' comments as though they were set forth herein.

The Notice proposes overturning 40 years of ruling letter precedent by revoking and modifying a significant but uncertain number of rulings applying the coastwise merchandise statute, 46 U.S.C. § 55102 (commonly known as the "Jones Act"), to offshore vessel operations and the movement of materials associated with oil and gas exploration and production activities on the U.S. Gulf of Mexico Outer Continental Shelf ("OCS"). If finalized, the Notice would substantially affect Chevron's interests as one of the largest producers of crude oil and natural gas on the OCS and one of the top leaseholders in the deepwater areas of the Gulf of Mexico. Chevron and its affiliated companies hold interests in more than 325 leases in the Gulf, more than 260 of which are located at water depths over 1,000 feet below sea level. Chevron has invested billions of dollars in acquiring leases, obtaining necessary approvals, and exploring and developing its leaseholds. And Chevron directly employs approximately 2,000 workers in Texas and Louisiana dedicated to its operations in the Gulf of Mexico. As such, we are quite concerned about this action, which seems to be hastily undertaken without due consideration of the potential impacts to the Gulf of Mexico oil and gas industry – including adverse impacts on U.S. jobs and the local, state, and national economies.

Chevron is not taking exception to the Jones Act. Chevron supports the proper application and enforcement of the Jones Act, a strong and stable domestic marine service industry, and a local economy that benefits from a robust offshore development program. In fact, approximately 98 percent of the vessels Chevron has hired for its offshore operations over the last five years are coastwise-qualified vessels. However, if the Notice is finalized, it will create significant uncertainty about the usage of highly-specialized vessels that are critical to the construction, installation, and operation of U.S. offshore oil and gas projects. The new and unprecedented restrictions will propagate confusion in a sector critically dependent on stability and certainty

for long-term capital investment, jeopardize substantial U.S. jobs, and harm U.S. employers. Further, the Notice, if finalized, would stifle innovation and technological advancements, which deepwater development requires.

Therefore, Chevron strongly urges Customs and Border Protection ("CBP") to immediately withdraw the Notice and undertake a review of the potential economic, safety, and environmental consequences of such an immediate and substantial policy shift. Thereafter, CBP should initiate a comprehensive notice and comment rulemaking in accordance with the Administrative Procedure Act ("APA"), which is published in the *Federal Register*, so that all stakeholders may thoroughly evaluate the potential impacts and fairly participate in a transparent process.

In conclusion, Chevron fully supports the development of a more workable, modern regulatory framework and welcomes the opportunity to work with CBP on providing long-term regulatory certainty to the oil and gas industry as well as its marine providers.

Regards,



Mark Hatfield

CC: Secretary John F. Kelly, U.S. Department of Homeland Security
Acting Commissioner Kevin McAleenan, U.S. Customs and Border Protection
Director John Michael "Mick" Mulvaney, Office of Management and Budget
Director Andrew Bremberg, Domestic Policy Council, Assistant to the President
Mr. Dominic J. Mancini, Office of Management and Budget, Office of Information
and Regulatory Affairs
Mr. Stephen Miller, Special Advisor to the President
Mr. Mike Cantanzaro, Special Assistant to the President, Domestic Energy
and Environmental Policy

EXECUTIVE SUMMARY

CBP's Notice, issued during the last two days of the Obama Administration, is procedurally, legally, and technically flawed and should be withdrawn. Chevron is particularly concerned that the process used by CBP to effect such a broad policy change is insufficient to allow for proper consideration of the economic, safety, and environmental impacts such a change may cause. The following highlights our key concerns:

- The Department of Homeland Security ("DHS") already determined after the 2009 notice that the changes embodied by the Notice require a notice and comment rulemaking and committed to initiating a rulemaking action to carry out this change.
- A notice and comment rulemaking under the Administrative Procedure Act ("APA") is the appropriate process to effect such a sweeping policy change, not Section 625 of the Tariff Act of 1930.
- The Notice is contrary to CBP's policy of informed compliance and shared responsibility because it fails to identify all the modified or revoked rulings and how each ruling has been modified, thereby increasing the uncertainty surrounding application and enforcement of the Jones Act.
- The Notice ignores many of the policies underlying the Outer Continental Shelf Lands Act ("OCSLA") – such as safety, efficient development of resources, and cross-agency collaboration – even though CBP relies exclusively (albeit incorrectly) upon OCSLA to extend application of the Jones Act to the OCS.
- The Notice violates multiple executive orders by failing to consider costs, safety, the environment, or the impact on energy production that implementation would cause.
- CBP fails to provide a reasoned basis for revoking 40 years of precedent upon which industry has relied to safely and efficiently develop the OCS, making CBP's action arbitrary and capricious, let alone imprudent.

Consistent with the concerns above, a recent API-commissioned study shows substantial potential economic impacts if the Notice becomes final. Specifically, this study projects the following if the proposed revocations are implemented:

- A loss of up to **30,000 jobs** in 2017 and average decreased employment of over **80,000 jobs** from 2017 to 2030.
- Between 2017 and 2030, decreased Gulf of Mexico offshore oil and natural gas spending by an average in the range of **\$5.4 billion per year**.
- An average reduction in oil and natural gas production in the range of **0.5 Million Barrels per day** from 2017 to 2030.
- An average annual loss of more than **\$4.3 billion of GDP** from 2017 to 2030.
- An average annual loss of more than **\$1.9 billion of government revenue** per year from 2017 to 2030.

The Notice creates significant uncertainty and may immediately and indefinitely stall near-term projects (along with associated hiring and spending plans) that have significant capital invested and have been planned for years. Therefore, Chevron requests that CBP withdraw the Notice so that a workable, modern regulatory framework can be developed with input from all impacted stakeholders.

DETAILED COMMENTS ON THE PROPOSED REVOCATION

PROCEDURAL AND LEGAL DEFECTS

The Notice Revives a Flawed 2009 CBP Notice That Was Withdrawn for Cause

CBP should withdraw the Notice and instead follow through on its prior commitment to initiate a notice and comment rulemaking. The current Notice simply seeks to resuscitate, with minor revisions, a similarly flawed 2009 effort, which was abandoned in the face of overwhelming opposition, as it was both procedurally and legally defective. Nothing has happened since 2009 – and CBP has provided no explanation to the contrary – that would make the same-type Notice any more appropriate in 2017. Specifically, on July 17, 2009, CBP published a notice (“2009 Notice”) similar to the current one, proposing to modify its position regarding what constitutes “vessel equipment” in connection with the application of the Jones Act to operations offshore. After extensive comment – much of it pointing out the extraordinarily negative economic impacts of the proposal – CBP withdrew the 2009 Notice and decided instead to initiate an advanced notice of proposed rulemaking. In explaining the reasoning for shifting to a rulemaking, the Deputy Director of the Private Sector Office of DHS acknowledged several facts, all of which remain true in 2017:

- “significant confusion and concern remains within the maritime industry regarding the state of the law;”
- a rulemaking is necessary “to allow for a full consideration of the potential economic impact of any change in CBP’s interpretation or application of the Jones Act;”
- “notice and comment rulemaking provides [DHS] with the most information on the economic impact of any decision by DHS on this matter;” and
- a rulemaking “affords the maximum public transparency into the Department’s decision-making process on this important issue.”

CBP appears to have issued the 2017 Notice as if the 2009 Notice and subsequent DHS conclusion that rulemaking is required never existed. The critical issues raised in the 2009 process – including the effects on a broad range of regulated parties, the unknown and potentially enormous economic impact, and the lack of transparency – are not even acknowledged, let alone remedied, in CBP’s latest issuance.

Notice and Comment Rulemaking Is the Proper Process

As CBP recognized in 2009, its *Customs Bulletin* process is not an appropriate procedure to create all-new, forward-looking regulatory mandates for the application of the Jones Act to the offshore sector. The mass revocation of ruling letters is not intended to address a particular single prospective transaction or interested party, rather it is a vehicle for a broad expansion of regulatory prohibitions aimed at the public at large.¹ Such a sweeping regulatory change clearly amounts to a legislative rule subject to the *Federal Register* notice and comment rulemaking procedures of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553.² CBP cannot avoid mandatory constraints on agency rulemaking power by repurposing the CBP ruling process, which is designed to provide narrow, case-by-case guidance on specific individual Customs transactions.

¹ See 19 C.F.R. § 177.1 (noting that “the Customs Service will give full and careful consideration to written requests from importers and other interested parties for rulings or information setting forth, with respect to a specifically described transaction, a definitive interpretation of applicable law, or other appropriate information. Generally, a ruling may be requested under the provisions of this part only with respect to prospective transactions.”).

² The APA establishes mandatory procedures that federal administrative agencies must use for “rule making,” defined as the process of “formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). “Rule,” in turn, is defined broadly to include “statement[s] of general or particular applicability and future effect” that are designed to “implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4).

Moreover, the timetable set forth under the *Customs Bulletin* process for the revocation and modification of individual rulings is incompatible with the broad scope of CBP's proposed policy changes.³ Given the far-reaching impacts of CBP's proposal, and the breadth and complexity of the legal, economic, operational, safety, and environmental issues implicated by the Notice, a thirty-day agency review and decision-making process is unreasonable and inappropriate for modification and revocation actions involving multiple rulings, as contemplated under the CBP Notice.

Additionally, in promulgating the Notice, while CBP has afforded the public with some notice of its contents, and a limited opportunity to be heard through the public comment process, CBP has only provided detail as to the modification of a single ruling. Twenty-four other rulings are being revoked with only a vague reference as to the meaning of such revocations. In addition, the Notice indicates that rulings not identified are also revoked if they have similar facts. The process utilized by CBP where one, partially-modified ruling is intended to revoke an unspecified number of rulings in unspecified ways is fundamentally unfair and unreliable, raising due process concerns.⁴ It is also outside the scope of CBP's statutory authority under 19 U.S.C. § 1625(c), which is limited to the modification or revocation of particular interpretive rulings or decisions and does not provide authority to promulgate legislative rules without following the procedures of 5 U.S.C. § 553.

CBP has for decades fostered widespread industry reliance based on years of relatively consistent interpretations of the coastwise laws, and that reliance has underpinned extraordinary long-term investments and spending by U.S. companies in vessels and infrastructure critical to the functioning of the country's offshore energy sector and overall economy, let alone provide substantial revenue to the federal government through royalties and taxes emanating from that sector's activities. In light of that critical reliance, CBP's actions in connection with the Notice – abruptly reversing course on its long-standing statutory interpretations, failing to undertake a fulsome economic analysis of its proposed action, failing to articulate a cogent legal or policy basis for the change, and employing inadequate procedures outside the mainstream of agency rulemaking – appear to be so cumulatively unfair and unjust as to rise to the level of a constitutional due process violation. The cure for this violation is an APA rulemaking with a full analysis of all potential impacts.⁵

The Notice Is Directly Contrary to CBP's Own Informed Compliance Principles

CBP has failed to meet its obligations under Title VI (Customs Modernization Act) of the North American Free Trade Agreement Implementation Act ("Title VI"). As stated in the Notice's preamble, Title VI introduced the concept of informed compliance and shared responsibility. In order to maximize compliance, the regulated community needs to "be clearly and completely informed of its legal obligations," and CBP cites these requirements as the underlying rationale for promulgating the Notice. However, by discarding decades of CBP precedent on which the industry has relied and providing almost no detailed guidance in return, this proposal does exactly the opposite.

CBP is only modifying one ruling, the 1976 Ruling. The remainder of its action involves the unexplained revocation and modification of an unspecified number of rulings. Specifically, the Notice lists 19 other rulings that would be revoked with a vague reference to "equipment of the vessel" without any indication

³ See 19 C.F.R. § 177.12 (stating that, "[i]n the absence of extraordinary circumstances, within 30 calendar days after the close of the public comment period, any submitted comments will be considered and a final modifying or revoking notice or notice of other appropriate final action on the proposed modification or revocation will be published in the Customs Bulletin.").

⁴ See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see also *Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir. 1970) (stating that government officials are "constitutionally bound to administer [administrative proceedings] in a manner consistent with established concepts of due process"). See *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (suggesting that, to be constitutional, "an adjudicative procedure as a whole [must be] sufficiently fair and reliable that the law should enforce its result"); *Brandt*, 427 F.2d at 56–57; c.f. *United States v. Sears, Roebuck & Co.*, 778 F.2d 810, 818 (D.C. Cir. 1985) ("[C]itizens may reasonably expect that their government will refrain from running circles around them.").

⁵ CBP is fully aware of this APA *Federal Register* process to solicit comments from the public, and there is precedent for following it here. In 2007, CBP proceeded to establish new criteria to determine whether non-coastwise qualified vessels are in violation of the Passenger Vessel Services Act ("PVSA"), which involves the coastwise transportation of passengers. In that case, CBP published its proposed interpretation and solicited comments in the *Federal Register*. 72 Fed. Reg. 224 (Nov. 21, 2007).

as to the specific details of what portions of the rulings would be revoked beyond saying that they are revoked "to the extent they are contrary to the guidance set forth in this notice." Moreover, CBP proposes to modify five more rulings to the extent they are contrary to the guidance set forth in the Notice, *even though the holdings and rationale contained in these five rulings are correct*. Finally, the Notice indicates that any other ruling ever published, even though not identified by CBP in the Notice, would also be revoked to the extent it is inconsistent with the guidance in the Notice. This makes it impossible to determine what CBP considers revoked, modified, or left intact or what CBP now considers to be a violation of the Jones Act.

The Notice generates more questions than it answers with regard to such items as the laying of pipe, umbilicals, flowlines, and cable, all critical offshore operations and activities. In this regard, the Notice indicates that CBP is not altering its long-time policy that pipe-laying is not coastwise trade, but then proposes to revoke rulings that address the transportation and installation of flowlines, umbilicals, and cable. How and why CBP proposes to draw a bright line, for compliance purposes, between very similar types of "laying" operations go completely unexplained and will result in disruption and confusion. Similarly, the withdrawal of key rulings related to cable laying and cable-laying equipment is puzzling, as CBP does not explain what it is trying to prohibit or provide the reasons therefor.

In addition, the revocation of rulings authorizing the use of remotely-operated vehicles ("ROVs") by non-coastwise-qualified vessels is inexplicable, both with regard to CBP's rationale and the scope of the apparent new interpretations on ROV operations, which are an indispensable element of any subsea infrastructure project. Similarly, CBP is silent on the scope of its apparent new interpretations on the use of well-intervention vessels and mobile offshore drilling units ("MODUs"), as well as on the movement and use of cement, chemicals, drilling mud, and fluids utilized by specialized vessels in the process of well construction and intervention. These day-to-day operations all raise unique legal and operational issues, which are critical to the offshore energy sector.

In summary, CBP's approach of revoking long-standing precedent without providing any detailed explanation of the impact and/or interpretation of the changes resulting from such revocations is in direct contravention of its own legal mandates related to "informed compliance" and "shared responsibility." It took 40 years and at least 25 ruling letters to establish the current state of CBP's interpretations, and it is impossible to re-develop this entire history by partially modifying only one ruling and generally stating that it applies to all prior rulings. The Notice should be withdrawn on this basis alone.

The Notice Relies on an Impermissible Statutory Interpretation at Odds with the Presumption Against Extraterritorial Application

The Notice's interpretation of the Jones Act to reach conduct on the Outer Continental Shelf ("OCS") amounts to an impermissible violation of the presumption against extraterritorial application. It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). That presumption prohibits extraterritorial application of U.S. statutory law "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect." *Id.* (quotation marks omitted). It applies "regardless of whether there is a risk of conflict between the American statute and a foreign law." *Id.* In short, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.*

The Jones Act has none. By its own terms, it "appl[ies] to the United States, including the island territories and possessions of the United States." 46 U.S.C. § 55101(a). Its operative provision concerning transportation of merchandise is similarly limited to transportation "between points in the United States." 46 U.S.C. § 55102(b). Accordingly, the Act's prohibition cannot be interpreted to reach extraterritorial conduct; instead, pursuant to the presumption against extraterritorial application, its language must be strictly construed to reach only truly domestic conduct.

A substantial portion of the conduct addressed by the Notice – in particular, the offshore installation or other use of certain materials – constitutes extraterritorial conduct outside the statutory reach of the Jones Act. U.S. statutory law, treaty obligations, and customary international law all distinguish between the territories subject to U.S. domestic laws like the Jones Act and waters that, by default, are not subject to U.S. domestic law. This is why it was necessary for Congress to enact OCSLA to apply U.S. law to conduct on certain OCS facilities. Because the Jones Act does not clearly and expressly authorize the regulation of conduct in such offshore operational areas, it cannot be interpreted to regulate such conduct. And such conduct is far removed from the “focus” of congressional concern” in enacting the statute, which was coastwise trade. *Compare Morrison*, 561 U.S. at 266–67.

The Notice Is Contrary to the Congressional Intent and Statutory Mandate under OCSLA

The Notice is directly inconsistent with the Congressional intent and the statutory mandate under OCSLA. Not only does CBP improperly rely upon OCSLA to expand the reach of the Jones Act, but (in doing so) it also disregards key OCSLA principles – including safety, environmental protection, technological advancement, and cross-agency collaboration.

CBP improperly expands the statutory mandate under OCSLA

The Jones Act prohibits non-coastwise vessels from transporting merchandise “between *points in the United States*.”⁶ Title 46 – which includes the Jones Act – explicitly and narrowly defines the term “United States” as follows:

In this title, the term ‘United States’, when used in a geographical sense, means the States of the United States, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands, and any other territory or possession of the United States.⁷

OCS facilities are not covered by that definition; and nothing in OCSLA (or any other statute) suggests that Congress intended to change the language or meaning of any laws that may be extended to OCS facilities. Thus, for purposes of Title 46, an OCS facility is not a point “in the United States” and an OCS facility is not a coastwise point.

Moreover, even if OCSLA did work to extend the Jones Act, CBP’s interpretation goes well beyond a reasonable application of the law. OCSLA states that federal laws are to be applied to activities on OCS facilities, not to all activities on the OCS (e.g., transportation between such facilities).⁸ This statutory text must be strictly construed in light of its specificity and the canon against extraterritorial application. CBP has consistently misquoted the legislative history on this key distinction. Congress noted that under OCSLA, “Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production.”⁹ In its rulings, citing to and purporting to quote this same language, CBP substituted the word “or” for the word “on” in interpreting OCSLA: “It is thus clear that Federal law is to be applicable to all activities or all devices in contact with the seabed for exploration, development, and production.” See, e.g., HQ 115185, (July 17, 2009); HQ115218 (July 17, 2009). CBP has misquoted this language in rulings dating back to 1993. CBP thus may have mistakenly misled itself to believe that Congress intended to extend federal law to “activities on” the OCS, rather than “activities on” OCS facilities.¹⁰

⁶ 46 U.S.C. § 55102 (emphasis added).

⁷ 46 U.S.C. § 114.

⁸ See 43 U.S.C. § 1332 (stating the policy of the United States is that “the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected”); see also 43 U.S.C. § 1333(a) (extending laws 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...”).

⁹ H.R. Rep. 95-590, at 128 (1977) (emphasis added).

¹⁰ Congress acknowledged in the legislative history for the 1978 amendment to OCSLA that CBP believed the Jones Act was extended through OCSLA, but Congress did not confirm this interpretation to be correct. See H.R. Rep. 95-1474, at 124 n.1 (1978)

The Notice ignores the Congressional intent behind OCSLA

Assuming OCSLA could expand the Jones Act to OCS facilities (that were never contemplated, or even possible, when the Jones Act was enacted in 1920), CBP should not interpret the Jones Act without considering the statute's underlying intent and purpose. OCSLA recognizes that the OCS is "a vital national resource reserve... which should be made available for expeditious and orderly development, subject to environmental safeguards...." 43 U.S.C. § 1332. To that end, under OCSLA, the declared policy of the United States, in part, is that:

[O]perations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.¹¹

Accordingly, in proposing policy changes, CBP must take into account safety procedures and environmental risks associated with offshore installation and repair operations and such changes must be implemented in a manner consistent with the Congressional intent and statutory language. As discussed more fully in the Joint Trades' comments, the Notice does not do this.

Moreover, OCSLA was amended in 1978 when the country faced an energy crisis that threatened not only the nation's economy, but also national security. "The basic purpose of [the amendments was] to promote the *swift, orderly and efficient* exploitation of our almost untapped domestic oil and gas resources in the outer continental shelf."¹² It is counter-intuitive then for Congress to have intended to restrict the use of vessels necessary to safely and efficiently exploit OCS resources through a statute that was otherwise intended to lessen regulatory constraints.

Further, CBP must coordinate with other involved agencies, particularly the Bureau of Safety and Environmental Enforcement and U.S. Coast Guard, to consider safety concerns associated with offshore installation and construction operations due to the non-availability of capable coastwise-qualified vessels and the proposed restrictions on foreign-flag vessels, and to ensure the proposed policy is consistent with those offshore safety and environmental regulations already implemented by other federal agencies.¹³ As Congress has noted, the intent behind OCSLA is that "in administering not only the [OCSLA] but also **any other act applicable, directly or indirectly, to activities on the [OCS]**, responsible Federal officials must insure that activities on the shelf are undertaken in an orderly fashion, so as to safeguard the environment, maintain competition, and take into account the impacts on affected States and local areas."¹⁴

Despite CBP's obligation to interpret and enforce the Jones Act consistent with the requirements of OCSLA, which mandates that offshore operations be conducted in a safe manner to protect the environment, life, and property, CBP's Notice disregards the plain statutory language and stated Congressional intent. It fails to take into account safety and environmental risks as established by other

(distinguishing between "present law" requiring application of coastwise laws to vessels operating between points in the United States versus "federal government application" and "present opinion of the Treasury Department" requiring vessels operating between points in the United States and fixed OCS platforms to be documented under United States laws); see also H.R. Rep. 95-590, at 129 (acknowledging CBP's determination that OCSLA extended the Jones Act and stating that "[t]his determination is under review").

¹¹ 43 U.S.C. § 1332 (6).

¹² H.R. Rep. 95-590, at 53 (emphasis added).

¹³ See 43 U.S.C. § 1347(b) (Coast Guard shall require on drilling and production operations the use of the best available and safest technologies wherever failure of equipment would have a significant effect on safety, health, or the environment); see also 43 U.S.C. § 1347(f) (the Secretary shall consult and coordinate with the heads of other appropriate Federal departments and agencies for purposes of assuring that, to the maximum extent practicable, inconsistent requirements are not imposed).

¹⁴ H.R. Rep. 95-590, at 127 (emphasis added).

agency regulations, disregards and potentially limits use of proven safety equipment, technology, and procedures that have facilitated deepwater OCS activities over the past years, and ultimately poses a significant threat to offshore safety and the environment. Accordingly, this constitutes another critical reason why the *Customs Bulletin* process to modify and revoke decades' worth of precedent is completely inadequate.

The Notice Conflicts with Duly Promulgated Regulation

The Notice is unlawful because it conflicts with duly promulgated CPB regulation. It is an "elemental principle of administrative law that agencies are bound to follow their own regulations." *Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 371 (6th Cir. 2010) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)). And CBP regulations provide that "[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...." 19 C.F.R. § 4.80b(a). The Notice, however, avers that coastwise transportation takes place when materials laden at a U.S. point are installed or used for repairs at an operational location in U.S. waters.

This conflicts with the governing regulation because such materials are not "unladen," as the regulation requires. As explained in the Joint Trades comments filed in response to the Notice, such unlaying or installation of pipeline or other materials does not render them "unladen" because they have never been landed. That interpretation is also mandated by the statutory text, which limits the reach of the regulatory language "unladen at [a] coastwise point" to lands—viz. "the United States, including the island territories and possessions of the United States." 46 U.S.C. § 55101l. Any other interpretation of the regulation or the statute's domain would lead to absurd results because it would bar non-coastwise-qualified vessels from transport of all manner of materials that might be consumed or otherwise used offshore and never landed. In this respect, the Notice is both contrary to law and arbitrary and capricious.¹⁵

The Notice Must Be Immediately Withdrawn in Accordance with Executive Order Mandates

The Notice is clearly subject to Executive Orders 12866 and 13771,¹⁶ which set forth White House-led processes for evaluating the economic cost and other relevant impacts of new agency rules. While styled as a mass revocation of individual ruling letters, the Notice is effectively an agency statement of general applicability and future effect, which CBP apparently intends to have the force of law, ultimately designed to implement, interpret, or prescribe law and policy.

Given the broad economic impact of the Notice on the offshore energy sector as a whole, CBP's action clearly is a "significant regulatory action" under Executive Order 12866. As a result, CBP cannot lawfully implement its proposal until it completes the cost and benefit assessment required by Executive Order 12866. Specifically, CBP must assess, among other things: (1) the benefits anticipated from the regulatory action, (2) the costs to businesses and others in complying with the regulation and any adverse effects on the efficient functioning of the economy and private markets, including employment and competitiveness, as well as any adverse impacts on health, safety, and the environment, and (3) a quantification of these costs as well as feasible alternatives.¹⁷ The Notice fails to address, or even solicit comments on, these core issues.

Executive Order 13771 was recently released on January 30, 2017, by President Trump as one of his initial actions after becoming President, and it sets an even higher cost-savings barrier for agencies in promulgating new rules. It applies to "all agency statements of general or particular applicability and

¹⁵ The Notice's conflict with 19 C.F.R. § 4.80b(a), as well as the subject matter of that regulatory provision, is a further indication that any change in policy such as proposed in the Notice may only be accomplished through notice-and-comment rulemaking pursuant to the APA.

¹⁶ As noted in the Joint Trades' comments, Executive Orders 13211 and 13563, the Regulatory Flexibility Act, and the January 20, 2017 Regulatory Freeze Pending Review Memorandum all appear to require the same result that the Notice be withdrawn.

¹⁷ See section 6(a)(3)(C) of Executive Order 12866.

future effect designed to implement, interpret, or prescribe law or policy," not just those intended to have the force and effect of law. It also applies to agency guidance documents, as well as rulemakings, on a case-by-case basis.¹⁸ Specifically, Executive Order 13771 seeks, among others, to identify regulations that: eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; or that impose costs that exceed benefits.¹⁹ The Notice appears to be irreconcilable with the de-regulatory requirements of the new mandates of Executive Order 13771. The Notice fails to acknowledge, let alone assess or offset, the extraordinary economic cost that will come from the proposed expansion of Jones Act regulatory constraints.

Finally and critically, on March 28, 2017, the White House issued an Executive Order entitled "Promoting Energy Independence and Economic Growth" (the "Energy Independence Order"). The Energy Independence Order states that "[i]t is in the national interest to...avoid[] regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." The Energy Independence Order further states that the policy of the United States includes suspension, revision, or rescission of regulatory actions "that *unduly burden the development of domestic energy resources.*" (Emphasis added.) Given the results of API's commissioned economic study, which outline substantial impacts to jobs, production, and government revenues, CBP must withdraw the January 18th Notice in order to comply with the Energy Independence Order.

CBP's Proposed Modification and Revocations Are Arbitrary and Capricious

In issuing the Notice, CBP fails to meet its legal obligation to set forth a satisfactory justification for why this dramatic change in law and policy is justified after over four decades of relative consistency and reliance on long-standing Jones Act interpretations.

The APA authorizes federal courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). Under that standard of review, agencies must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

When an agency seeks to change a policy on which regulated parties have invested significant reliance, as the offshore sector has in this case, the agency's burden is heightened, and it must make a more compelling showing than it would have if it was starting anew. In *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Court explained that if an agency is changing policy it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" if its new policy "rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). It would be arbitrary or capricious to ignore such matters. In such cases, it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.

Evaluated against this standard, CBP's proposed policy change is arbitrary and capricious. As an initial matter, the Notice makes no attempt to determine the ultimate scope or consequences of its proposed policy change, including specifically which prior rulings it would revoke or otherwise affect. Indeed, the Notice concedes as much, providing a lengthy list of possibly inconsistent rulings that might be revoked or modified, in whole or in part, and acknowledging that there are surely others the agency has been unable to identify. As such, CBP simply has no way to evaluate the effects of its policy shift on the merits, to determine whether its new interpretation of the Act is a reasonable one, and to consider all important aspects of the problem before it. This is the height of arbitrary agency conduct, and the Notice, if finalized, would have to be vacated on that ground alone. See *Motor Vehicle Mfrs. Ass'n of U.S. v. State*

¹⁸ See Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs," available at

¹⁹ See February 24, 2017 Executive Order on Enforcing the Regulatory Reform Agenda.

Farm Mut. Auto. Inc. Co., 463 U.S. 29, 43 (1983) (agency action must be vacated where it has "entirely failed to consider an important aspect of the problem").²⁰

Moreover, the Notice simply disregards the facts and circumstances that were engendered by four decades of industry reliance on CBP's long-standing Jones Act interpretations. CBP ignored these facts and circumstances, as well as the likely impacts and implications of the policy change, even though these issues were presented to the agency comprehensively by a multitude of interested parties in response to the 2009 Notice.

Moreover, the Notice fails to offer a coherent legal or factual explanation why the dramatic reversal of Jones Act policy is warranted at this time. The Notice simply states:

Many of the holdings in HQ 101925 are no longer applicable due to amendments made to 46 U.S.C. § 55102 (formerly 46 U.S.C. App. 883), the Outer Continental Shelf Lands Act, 1 and 19 C.F.R. § 4.80b(a), resulting in less consistency with 46 U.S.C. § 55102.

This bare assertion (with no further discussion in the Notice itself) is only amplified to some degree in the revised HQ 101925 (attached to the Notice as Attachment B), wherein CBP identifies the specific statutory changes that it believes now compel its proposed change in policy – the 1988 and 1992 amendments to the Jones Act that state that "[m]erchandise, includes (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and (2) valueless material." 46 U.S.C. § 55102(a). But that is a non sequitur: CPB never explains how or why these amendments require it to alter the treatment of materials that are not implicated by either amendment. CBP also references OCSLA as a basis for the change, but the Notice never explains why. In addition, CBP states that the Jones Act provision relating to transportation of merchandise, 46 U.S.C. App. § 883 was re-codified in 2006 at 46 U.S.C. § 55102, thus requiring a change in interpretation of the Jones Act.

There is simply no legal support for any of these statements. Neither the 1988 nor the 1992 amendments related to extending the Jones Act to material aboard vessels whose missions are offshore construction, maintenance, installation, or repair. Indeed, if Congress wished to revise long-standing CBP policy regarding the Jones Act offshore, it easily could have done so in those statutory updates, or at any time in the intervening 25 years since then. The rulings at issue in the Notice in no way were premised on a position that such material was merchandise owned by the United States Government, a State, or a subdivision of a State and/or valueless material. In short, the agency's central explanations for acting are sufficiently implausible as to render its action arbitrary and capricious.²¹

Furthermore, there is nothing in the 1978 amendments to OCSLA that relate to CBP's interpretation of merchandise or vessel equipment. The only section of OCSLA that CBP cites in the Notice is Section 4(a). But Congress specifically noted that the 1978 amendment to Section 4(a) was not meant to change the law.²²

Finally, the 2006 re-codification similarly does not justify a change in the interpretation of the Jones Act. The purpose of a re-codification is to restate various versions of law as a cohesive unit making changes in organization, style, and terminology. However, these changes do not lead to changes in result, or impair the precedential value of earlier interpretations. Rather, as a guiding principle, anyone interpreting the law after a recodification should assume that no change in result was intended.²³

²⁰ This defect cannot be remedied in a final ruling or decision. Even assuming *arguendo* the propriety of the 19 U.S.C. § 1625(c) procedure, CPB would have to publish a new proposed ruling under the terms of that provision.

²¹ This defect also renders CPB's action contrary to law. For the reasons described above, the two statutory amendments cited by CPB do not support its revised statutory interpretation.

²² H. Conf. Rep. 95-1474, at 80 (1978).

²³ Title 46 Recodification, 2006, Section-by-Section Explanation, pages 23–24.

CBP's other rationale for its policy shift is also unsupported. The Notice proposes to revoke decades of administrative precedent articulating the scope of "equipment of the vessel" in the precise context of offshore vessel operations based on CBP's new interpretation of a 1939 ruling (T.D. 49815(4)) that addressed the term "equipment of the vessel" under a different statute, the Tariff Act of 1930. Jettisoning 40 years of Jones Act rulings for U.S. offshore energy operations based on pre-war Tariff Act precedent is inexplicable.

TECHNICAL DEFECTS

The Effects of the Notice Are Far-Reaching and Unknown

The real-world impacts of the Notice are potentially extensive, stretching well beyond the situations described in the revoked ruling letters. If the Notice is finalized, this action could result in a significant interruption in exploration and development activities as well as future investment in the Gulf of Mexico. Some projects will not be able to proceed due to a lack of highly-specialized capability in the domestic fleet to meet the technical requirements of offshore development.

Industry relies on large, highly-specialized vessels to execute certain operations, and, in a number of cases, coastwise-qualified vessel capability is simply non-existent. For example, currently, there is no coastwise-qualified vessel that can install deepwater subsea pipelines, production flowlines, or umbilicals – all critical components of any production facility. Additionally, with respect to surface construction, only foreign-flag vessels have the capability to install/remove many topsides, steel catenary risers, platform anchor piles, tendons, and mooring lines.

CBP also proposes to revoke rulings involving well-intervention/stimulation activities. The rationale of this revocation could extend to well-intervention/drilling vessels and MODUs, all which are foreign-flag. There is virtually no coastwise-qualified vessel capability to perform this critical type of work. These vessels perform their work carrying three types of materials as follows:

- (1) *Well Bore Construction Consumables*: This includes such items as cement, mud/fluids, chemicals, and other materials that are "left" behind at a well.
- (2) *Materials used but not Left Behind*: This includes items such as casings and well head tubing that are used during the operations but are placed back aboard the MODU.
- (3) *Materials Remaining aboard the Vessel*: This includes the tool and drilling equipment of the vessel that are integral to the MODU and never leave the rig.

It is unclear how these materials would be categorized if CBP's proposal is adopted.

Equally concerning, potentially any deepwater-capable, non-coastwise-qualified, well-intervention vessel or MODU would have to drastically change its operations in order to accommodate the delivery of the materials discussed above. Furthermore, and typically, these operations are performed under a multi-well campaign. Thus, in theory, a vessel would have to off-load all of these items, move to the next well (which may only be 50 feet away), and have them re-loaded – possibly five, six or seven times. This makes no practical sense from a cost, safety, or environmental standpoint, taking into account that there is no coastwise-qualified vessel capability to perform drilling activities and insufficient coastwise-qualified vessel capability to perform intervention activities.

CONCLUSION

CBP has not promulgated extensive regulations guiding the application of the Jones Act to the offshore sector. Thus, the Jones Act regime has evolved almost exclusively through CBP's issuance of case-by-

case interpretive rulings pursuant to 19 U.S.C. § 1625 and 19 C.F.R. § 177. The offshore industry has relied on this body of administrative precedent for over 40 years. These rulings, while archaic, traditionally have been issued with due consideration of prior rulings and have provided industry with much-needed consistency, predictability, and guidance in planning operations and making investments. If CBP is going to periodically revisit and revoke or substantially modify prior rulings en masse, industry will no longer be able to plan for its projects, which take years to design and complete.

Long-term regulatory certainty and predictability is essential for operators, such as Chevron, to plan their business and support their investment. This Notice, by replacing at least 25 ruling letters spanning 40 years with one, partially-modified ruling letter, creates significant uncertainty and may put at risk projects and investments that have been planned for years. Accordingly, Chevron requests that CBP withdraw its Notice so that a workable, modern regulatory framework can be developed with input from impacted stakeholders.



United States Customs and Border Protection
2300 Pennsylvania Ave. NW
Washington, DC 20229

Shell Exploration and Production Company
150 North Dairy Ashford
Houston, TX 77079-1197
United States of America

Website: www.shell.com
Tel: +1 832 337 1743
Fax: +1 832 337 0063
Email: Bruce.Culpepper@shell.com

April 18, 2017

Subject: Shell Comments on Customs and Border Protection's (CBP) *Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points*, ("proposed modification" or "rulings") as issued by the Obama Administration on January 18th, 2017. (Customs Bulletin and Decisions, Vol. 51, No. 3.)

Shell Offshore Inc. ("Shell") and affiliates represent the largest operator and producer of energy in the United States Outer Continental Shelf (OCS), directly and indirectly supporting thousands of well-paying jobs in Louisiana, Texas, and across the United States. While global commodity prices, limited access to new acreage, and a challenging regulatory environment have negatively impacted the industry's options for domestic growth in recent years, Shell and its affiliates have remained interested in actively pursuing opportunities in the US OCS for both hydrocarbon and wind energy purposes.

Pertinent to this interest, Shell is reviewing the CBP's *Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points*, ("proposed modification" or "rulings") as issued by the Obama Administration on January 18th, 2017. (Customs Bulletin and Decisions, Vol. 51, No. 3.)

While the full impacts of the proposal to our American lines of business have not yet been and cannot yet be determined, it is certain and indisputable that the broad and reaching regulatory changes would disrupt planned operations and impose substantial costs upon offshore operators for which we

have had no ability to plan or prepare. The changes will also impact safety, delay offshore developments (and associated federal royalties), and could prevent wells from being drilled and major projects from being sanctioned. Shell respectfully submits that the process behind the proposed modification has not been adequately transparent or subject to appropriate review, and we therefore must request relief.

Shell broadly associates itself with and supports the formal comments filed by the American Petroleum Institute (API) and other signatory trade associations in opposition to the proposed modifications. This comment letter serves to supplement those documents and to further clarify and add Shell-specific context and analysis.

This document will discuss how the CBP's issuance of "proposed modifications" of binding rulings is an opaque, unilateral, and inappropriate means for making sweeping policy decisions. Unlike a legislative, rulemaking, or even judicial process, there has been no formalized opportunity or forum for meaningful debate, stakeholder engagement, testimony, dialogue, or even internal or inter-agency analysis of unintended consequences or cost-benefit. Instead, either sua-sponte or at the ex-parte urging of the private entities seeking to financially benefit from the rulings, CBP has resuscitated issues which have lay dormant for many years, unilaterally declaring a drastically different regime with no advance warning. The process CBP has used is a legally deficient process for the many reasons set forth here and in the API comments, but is also concerning on account of the vast uncertainty about what the new framework would still allow and would no longer allow with respect to use of non-coastwise qualified vessels, which play a crucial role in offshore development.

The regulated industry is entitled to a fair process that would add clarity, not more confusion, by stating in clear terms what a proposal's specific requirements would be, thereby allowing a mutual awareness and ability to accurately calculate likely effects. Because of this lack of clarity, it is extremely difficult to comment on the proposal. An open process would further provide a clear view into how regulated entities could swiftly come into compliance without risking fines, operational shut-ins, or severe project delays.

Given the confusion that abounds in applying the Jones Act to OCS activity, CBP should put generally applicable regulations in place rather than perpetuate the current system of interpretive rulings (which are sometimes not even issued when requested). Simply put, revocation of prior rulings is an inappropriate mechanism to administer a significant interpretative change, which will have significant consequences.

To this end, a formal rulemaking process would allow Shell and its industry peers to more clearly understand the impact on operations (and investment decisions) and expound on the massive and lengthy planning and assurance efforts associated with its operations at the level of precise detail necessary to illuminate these impacts to the agency. First, because the proposed modifications create uncertainty, it is difficult to provide specific comments on their uncertain impact, as would be the case where industry were invited to comment on a proposed rulemaking. Second, a rulemaking process would provide industry the opportunity to properly assess impacts and to base an interpretation of the Jones Act on those impacts. CBP appears to be taking the position that it is not required to consider a wide range of factors in applying the Jones Act to the offshore industry, but, for example, if application

of a Jones Act interpretation leads to absurd consequences and understanding of those consequences is critical to determining Congressional intent, then consideration of consequences is necessary to understand in interpreting laws. Statutory intent is highly relevant to any legal arguments here and must take the results of enforcement into account.

The interrelated factors of regulatory compliance, scheduling based on lease maintenance requirements, safety mandates, environmental protection, budgets, investment decisions and other considerations collectively drive the need for strict adherence to carefully crafted plans. Any sudden deviation from those plans, including prohibition from using contractors retained in reliance on decades of Jones Act policy, risks disrupting or compromising each of these critical elements. To our knowledge there has been no CBP assessment of the proposal's costs or impact on employment. Further, the proposal would create considerable uncertainty as to whether it applies to certain operations, which could lead to a state of paralysis, inactivity, and unavoidable citations.

Moreover, there is no official, consensus-based assessment as to whether or not the Jones Act fleet has the capability to perform all of the operations that could suddenly be reserved to the Jones Act fleet. And if there is no Jones Act vessel capable of performing work reserved for a coastwise vessel under the proposal, there are no viable mechanisms to permit the work because the statutory requirements for a waiver cannot likely be met. Capability assessment is certainly a serious and difficult issue which requires considerable time and dialogue, because one party's perspective on what amounts to a capable vessel for a given task often does not necessarily comport with another party's perspective on the same. The burden should rest on the government – or those interests pursuing regulatory expansion to benefit their businesses – to ensure and prove the proposed modifications are not mandating an activity which could be unsafe or otherwise not fit for purpose.

Shell has never called or advocated for any scaling back or repeal of the Jones Act and has supported employment and growth of the US shipbuilding industry at levels unmatched by most private sector enterprises. In general, local content is an integral and welcome element of our commitment to the communities where we live and work, which is why this set of proposed changes to the regulation trouble Shell so much. While the requirement for transporting merchandise in commerce between US ports is longstanding and understood, application of the Jones Act to the offshore exploration and production industry, an industry that did not exist at the time the Jones Act was enacted, requires a heightened level of understanding of how that industry operates. In our opinion, classifying minimal and inherent movement of an installation vessel while it is performing its mission to safely construct, maintain, repair, intervene in, or decommission topsides or subsea structure and infrastructure as "transportation" is a misapplication of the Jones Act with significant consequences. The facts show us that this proposal, when combined with prior CBP rulings disallowing movement during installation, will mandate use of a coastwise qualified vessel in instances in which there are no capable coastwise-qualified vessels for the activity. This approach will lead to the Jones Act directly causing the shutdown or delay of massive projects and other unintended consequences, such as net job losses including those in the maritime industry.

The overreaching proposed modifications at issue here directly risk being advanced and implemented in such a way as to result in the delay, cancelation, downsizing, or other compromise of the major projects which Shell hopes to bring forth in coming months and years. If that happens, the utility of the

Jones Act itself will be severely tarnished as the communities and stakeholders which depend on our continued investment will be impacted in a way which we cannot believe is intended by CBP, lawmakers who are supporting CBP's agenda, or the vessel owners advocating for these changes. We hope this discussion results in meaningful measures to reduce that likelihood.

Application of Prior DHS Determination of Rulemaking based on Significant Impact

This proposal represents the second attempt from the Obama Administration at this proposed modification. The first occurred shortly after President Obama took office in 2009 with CBP issuing rulings in a similar manner, without proper advance notice or opportunity to consider unintended consequences. The Department of Homeland Security (DHS) shortly thereafter found, that, owing to a "level of confusion and potential scope of impact that a change in law could have on important maritime industries, the Department of Homeland Security has decided to initiate a rulemaking action." DHS further stated that "notice and comment rulemaking provides us with the most information on the economic impact of any decision by DHS on this matter - including the impact on the U.S. energy industry and the U.S. maritime industry - and affords the maximum public transparency into the Department's decision-making process on this important issue." Notwithstanding any CBP attempt to differentiate the 2009 proposal from the 2017 proposal, this DHS statement is equally as true today as it was in 2009-2010, and Shell respectfully requests that this determination be applied today or, at a minimum, that CBP publicize any assessment (or acknowledge the lack of any assessment thus far) of impacts, including with respect to all of the issues raised herein and in the API comment letter.

Application of *Regulatory Freeze Pending Review*

Since the proposed modification's issuance, the White House Chief of Staff has issued the "*Regulatory Freeze Pending Review*" memorandum which is binding on any agency statement of general applicability and future effect "that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue." CBP has thereby been required to comply so that that such actions, including the proposed modification, are subject to an additional 60 days of "reviewing questions of fact, law, and policy they raise." There are additional requirements for rulemaking and/or consultation with the Office of Management and Budget (OMB) Director, depending on the outcomes of this mandatory review. That review must be completed and made public in its entirety before any further advancement of the proposed modifications, in order to accommodate whatever process the OMB might add.

Application of Executive Orders "*Reducing Regulation and Controlling Regulatory Costs*"

More recently, President Trump issued further Executive Orders entitled "*Reducing Regulation and Controlling Regulatory Costs*," directing that the "total incremental costs" of any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency," finalized this year "*shall be no greater than zero.*" (Emphasis added.) This order also explicitly requires that regulatory actions such as the proposed modifications be offset with the repeal of two separate and additional regulations, as a means to fully offset costs and burdens imposed by the new regulatory action. We

wonder and ask for clarity as to what corresponding regulations will be canceled, by CBP or some cooperating agency, in order to compensate for the burden on offshore operators proposed here. It is obvious that the outgoing administration was under no similar directive to rein in regulatory costs, but current agency staff cannot ignore the clear language of these Presidential mandates. When considering which regulations to either ease or repeal as a cost-offsetting means against the massive expenditures required to comply with the new rulings, CBP must take care to ensure that the relief be applied to the oil exploration and production firms which are the target of the costly regulatory action proposed. Naturally, CBP will need an accurate, evidence based, and auditable cost estimate to identify the target figure for cost reductions it must seek before any final outcome is published, implemented, or enforceable in any way. Again, a retraction of the proposed modifications in favor of a formal rulemaking preceded by workshops and an advanced notice of proposed rulemaking (ANPRM) would generate a reliable cost figure to compare against available cost offsets (which the current path will not).

Factors to be Considered and Assessed

Critically, it must be noted that many underlying circumstances have changed fundamentally since 2009. Operators are now taking a far narrower approach to the "equipment of the vessel" and other exceptions, using Jones Act compliant multi-purpose vessels for an increased percentage of operations and transportation of materials offshore on US coastwise offshore supply vessels. The other and larger distinction between then and now is the sustained downturn in commodity prices and industry activity, which is well known and documented. There is less work available in the US OCS than most would prefer, but that is owing to macroeconomic forces and not owing to flaunting of the law, in letter or spirit.

In theory, it *could be* physically possible for many of the proposal's new requirements to be met with Jones Act vessels under the proposed modifications. However, there has been insufficient time and dialogue to confirm such, and the imposing agency has taken no steps to provide such needed assurances. Presumably, CBP is confident that its proposal can be implemented without triggering large scale incidents of noncompliance or any operational shutdowns or delays. CBP should therefore share the supporting evidence for this confidence as soon as possible, so that impacted parties can comment on precise potential outcomes, rather than speculating on what new requirements will be implemented. This is the very purpose of rulemaking and stakeholder engagement, and one clear reason why the proposal should be withdrawn and subsequently reissued as an advanced notice of proposed rulemaking or, at a minimum, extended for whatever amount of review time is needed for a full and fair accounting and understanding of the requirements and impacts to be completed. If CBP and the proposal's other advocates are correct about its legal soundness, ease of compliance, and net policy value, then it would likely emerge from the additional process with its intentions met but also with a clearer and more seamless set of immediate compliance pathways.

Although this may take additional time, CBP cannot legitimately claim that there is some sudden urgency to finalize this hastily concocted proposal, given that 8 years have passed since a virtually identical proposal was retracted on the basis that the impacts were not properly assessed. This is clearly a case of an outgoing Administration attempting to force a radical change of policy while avoiding transparency, accountability, and proper consideration of relevant factors. We are not

aware of any oil and gas operators who had advance notice of the proposal. We are unsure which stakeholders CBP was actually engaged with, but it is unfortunate that the development of this proposal was executed without the input of the oil and gas community, who will be directly impacted. If any analysis of policy or cost/benefit impact ever occurred during this period while the rulings were under development, it must be made public and subject to appropriate debate and review. If such analysis did not occur, then it must occur before the rulings further advance. To neglect this step would render the Executive Orders meaningless, undermine the unmistakable goals and instructions of the Administration, and create a concerning appearance of complicity among CBP and proponents of the proposal.

Shell therefore submits that here, the value of an appropriate rulemaking, even if it extends changes to Jones Act interpretations by many months, would far exceed any value of more immediate imposition of these proposed modifications and would avoid value-destructive negative unintended consequences. The relevant industries on both the supply and demand sides of the issue would remain essentially unaffected in the immediate term, operating under the same rules as have been in place for several decades. The main difference would be that impacted operators would have the needed time, specificity, and clarity as to what the precise requirements will be, confirm which operations will remain unaffected, and will be able to assess and reasonably implement options for compliance. As previously mentioned, CBP has one opportunity to "get it right" because if the proposal is not well-clarified and results in an interpretation that CBP did not intend, there is no mechanism to course correct via Jones Act waivers.

Again, it is unfortunate that CBP and supporters of the proposal are willing to impart this level of uncertainty, placing the oil and gas industry in a high risk position in order to hastily move forward without engaging in meaningful impact analysis or an opportunity to discuss with the regulated industry.

Capacity

To better address the issues raised above, Shell notes specifically that it is not yet clear (but is necessary) for explorers and producers to know:

1. Which, if any, US Coastwise vessels are capable of performing heavy lifts with a load capacity of 1000 tons and hook height of 200 ft or greater.
2. Which, if any, US Coastwise vessels with tensioner capacity in excess of 500 tons and pipe carrying capacity of 1000 tons are capable of installing large diameter reeled pipe required for deepwater flowlines and pipelines.
3. Which, if any, US Coastwise vessels with a load capacity in excess of 1000 tons are capable of performing umbilical installation required for deepwater development.
4. Which, if any, US Coastwise vessels are capable of performing seismic operations on the US OCS.

5. Which, if any, US Coastwise vessels are capable of performing drilling operations on the OCS.
6. Which, if any, US Coastwise vessels are capable of installing large scale wind turbines in the OCS and laying transmission lines to shore at a scale in line with forecasted demand.
7. Which, if any, US Coastwise vessels are capable of the above activity while maintaining position in deep and ultra-deep water.

A critical point at issue in the rulings, and related to questions 2 and 3 above, is whether CBP intends to eliminate the usage of non-coastwise vessels for the purposes of pipeline, umbilical, and riser installation, as it modifies past rulings on the "equipment of the vessel" exemption for allowing such activity, creating uncertainty as to whether installation of pipe and umbilicals no longer fall under this longstanding exception. This puts ongoing and planned operations under a cloud of uncertainty, forcing oil and gas producers to live under a regime where it is unknown if a given operation is in compliance or not. If international vessels, constructed expressly for the purpose of laying deepwater pipeline and under contract to do so in the near term, are compelled to risk noncompliance and the suite of consequences thereto, it is uncertain that the associated projects can advance at all.

While Shell has contributed data and analysis to the economic impact study which API has made available and should be taken very seriously, it bears emphasis here that specific cost forecasts stemming directly from these rulings can easily reach into the billions depending on how the proposal is interpreted. The highest costs would primarily be driven by the need for operators to contract and fund the construction of certain new vessels within the US, especially where such vessels would be the massive and highly specialized units capable of safely installing mooring systems, umbilicals, flowlines, and export pipelines in deepwater and ultra-deepwater applications. Shell would be aware if there were shipyards presently capable of building these vessels in the US; there are none. Hence, the outcome of the revocations could also be massive delays in addition to prohibitive costs, because in addition to the multi-year vessel constructions potentially forced by the rulings, there would be the need to construct or expand the requisite shipyards. CBP should return the status-quo pending a review of impact and clarification of the proposal.

Further, CBP should use this opportunity to assess whether Congress ever intended to apply the Jones Act to offshore construction activity and the carrying of equipment by construction vessels. For example, while it may not be correct to classify equipment to be installed subsea as "vessel equipment", it does not automatically follow that such equipment must legally be interpreted as "merchandise". In other words, CBP's "vessel equipment" exception, as applied to the oil and gas offshore industry, generated the correct result (acknowledgment that the Jones Act does not apply to materials carried offshore for installation), albeit for the wrong reason. Nothing in the Jones Act requires that all items be considered either "equipment of the vessel" or "merchandise".

CBP should also use this opportunity to more carefully consider other matters that impact the regulated community, but have not been addressed by CBP other than through periodic interpretive rulings, such as (i) the definition of coastwise point as applied to the offshore energy industry, (ii) whether the Congressional intent behind OCSLA was to expand Jones Act application to offshore construction

activities, (iii) whether it is legal for CBP to consider the OCS as being "in the United States" (which is the definition of a coastwise point), and (iv) whether relatively minor movement during installation is "transportation" under the Jones Act. In addition to the definition of merchandise, these are important questions for CBP to step back and consider in the context of a rulemaking. Otherwise, industry will be continuously subject to changing approaches to application of the Jones Act, rendering it difficult to commit hundreds of millions of dollars in developing projects given that a new interpretation could be implemented impacting a planned operation at any time, without warning, and without consideration of the effects. Whether or not an activity performed by a vessel is a Jones Act-covered activity is not determined by whether or not a coastwise qualified vessel is or might someday become capable of performing that activity. In other words, the Jones Act cannot be a moving target, based on whether a US vessel is capable of doing certain work. To argue otherwise would oddly suggest that Congress' intent in passing the Jones Act had little to do with the transport of merchandise, and instead was merely a blunt instrument with no limitations on its reach into all manner of maritime activity. CBP should use this opportunity to provide clarity, predictability, and consistency to its application of the Jones Act, rather than determine that a particular activity is not encompassed by the Jones Act today, but is tomorrow (or whenever a coastwise vessel comes into existence). CBP's approach, ostensibly under the guise of OCSLA, would actually frustrate OCSLA's clearly stated statutory purpose to bring about the expeditious and orderly development of American offshore energy resources.

Safety and Efficiency

Shell would add to and reemphasize the Trades' comments that in many cases, the mere alleged "capacity" of domestic vessels to take up activities forced by the rulings is not necessarily the operative or only question. Instead, CBP must address questions of a vessel's optimal fitness and design for a given task as well as questions of pure "make work" requirements to put vessels to use for purposes and activities never before required or contemplated.

The most troubling example is that, since the exemption for "equipment of the vessel" would now be so drastically narrowed and restricted under the ruling, deepwater Mobile Offshore Drilling Units (MODUs) (none of which in the world are Jones Act compliant) could suddenly be disallowed from moving from one drilling location to another unless they offload and reload certain materials. To be specific, if this were the case then the vessel would first have to offload all or most of its materials no longer deemed "equipment of the vessel" – potentially including cement, riser pipe, wireline units, mud logging equipment, bottom hole assembly equipment, well testing equipment, mud laboratory, directional drilling equipment, specialty drill pipe, casing running equipment, and remote operated vehicles (ROVs) onto some number of Jones Act vessels, move the empty drillship along with those vessels to the next drill site, and then reload the drillship again. The ability for a MODU to move between drilling locations during drilling efforts is fundamental to its mission and has never been so drastically restricted as described here. This creates needless safety exposure hours and easily adds millions to the cost of drilling each well, as many of the items listed above would be exceptionally difficult and time consuming to transfer between the MODU and other vessels at sea. This interpretation is a case of the Jones Act leading to unintended consequences, which Congress could not have contemplated or intended in the passing of OCSLA. The practical effect of this interpretation is that the additional days spent on the vessel-to-vessel transfers would not only incur costs to those transport vessels but also additional day-rate time paid to the MODU and contractor itself (the day

rates are owed regardless of whether drilling is ongoing). Shell's analysis estimates perhaps \$10M (as much as 10% of additional cost per well) of additional expenditure per well in this event, calling into question the economic viability of many projects. If some wells are forced to be passed up as a result, the US Treasury and taxpayer will be deprived of optimal production revenues and the communities will be deprived of the economic benefits of oil and gas developments.

If an exploration well is not drilled, the opportunity for a development following exploration success is likewise missed. This would amount to an absurd outcome, but one which could fall within the newly expanded scope of the rulings.

Conclusions

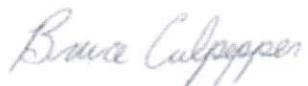
Shell applauds and welcomes the Trump Administration's renewed commitments to regulatory reform and American energy security – two policy goals which we have consistently supported and which we consider to be linked. Indeed, the residual level of regulatory burden already impacting federal energy development in the current system is not sustainable and is certainly in need of urgent attention; yet this emerging CBP proposal necessarily adds to that regulatory burden in a manner which is severe, surprising, and inconsistent with stated regulatory policy. This proposal suddenly emerged roughly 48 hours prior to the departure of the previous Administration, and unfortunately this indicates political motivations outside of the current Administration's policy goals and commitment to reasonable administrative procedure. Shell notes again that the White House has issued its regulatory reform orders for, among other reasons, precisely the purpose of carefully vetting and appropriately correcting unilateral, 11th-hour executive actions such as this.

Instead, we simply find that this major potential change has emerged so hastily and so devoid of administrative process that the exploration and production community will have no option but to invoke every tool at our disposal to seek additional extension, review, proper Jones Act interpretation, and correction. We hope that this comment period serves to prompt a retraction of the currently proposed modifications in favor of a deliberative, constructive discussion and analysis of the issues instead of further unilateral action or some adversarial response.

Shell has worked to maintain a strong presence in the Gulf of Mexico in spite of increasingly challenging circumstances in the regulatory, legal, and business environments, which in the past two years have very unfortunately combined to force regional staff reductions as well as project delays and cancelations. Yet, Shell remains the Gulf's largest producer and has hoped to maintain and grow the portfolio in the region – but this requires the ability to operate efficiently and under reasonable, stable rules. If the U.S. government is interested in facilitating a safe, secure, and diverse energy portfolio, policies for offshore hydrocarbon development must reverse recent trends and attract more investment relative to competing prospects. Currently, the combination of long return-on-investment timelines, exceptionally challenging deepwater operational needs, and our immovable commitment to safety of people and the environment leave little or no room for additional cost savings – while other theatres, especially onshore unconventional resources, are drawing major new commercial attention away from offshore activity.¹ Any new regulation which acts to compound the headwinds discussed here would

¹ <https://www.bloomberg.com/news/features/2017-03-21/big-oil-s-plan-to-buy-into-the-shale-boom>

serve none of the interests or goals espoused by this proposal's supporters – and in the long run is likelier to reduce opportunities to employ more US maritime workers. We hope that the very first decision which the new Administration takes to directly and specifically affect the American offshore energy industry is a decidedly collaborative and, on balance, helpful one. As thus far advanced, the current proposal is the opposite. We look forward to working towards resolution.



Bruce Culpepper
United States Country Chair
Shell Oil Company