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November 20, 2019

VIA U.S. MAIL

Lisa L. Burley, Chief
Cargo Security, Carriers and Restricted Merchandise Branch
U.S. Customs and Border Protection
Office of Trade, Regulations and Rulings
90 K Street NE, 10th Floor
Washington, DC 20229-1177

Re: **Proposed Modification and Revocation of Ruling Letters
Relating to Customs and Border Protection's Application of
the Jones Act to the Transportation of Certain Merchandise
and Equipment between Coastwise Points**

Dear Ms. Burley:

On behalf of the Fisheries Survival Fund ("FSF"), we submit the following comments regarding the U.S. Customs and Border Protection's ("CBP") proposed modification and revocation of ruling letters relating to application of the Jones Act to certain merchandise and vessel equipment that are transported between coastwise points.¹ These proposed modifications would place foreign-owned offshore wind energy companies at a unique advantage not afforded to the thousands of U.S.-owned maritime industries, including commercial fisheries. It would also jeopardize the countless job opportunities for domestic laborers who would otherwise benefit from the build-out of offshore wind facilities.

FSF represents the significant majority of full-time Limited Access permit holders in the Atlantic scallop fishery. Our members are home-ported along the Atlantic Coast from Massachusetts through North Carolina. As with many commercial fishing industries along the

¹ Customs Bulletin and Decisions, Vol. 53, No. 38 (Oct. 23, 2019), 12-124.

KELLEY DRYE & WARREN LLP

Lisa L. Burley, Chief
November 20, 2019
Page Two

East Coast, FSF's fishing interests are directly and significantly impacted by the development of offshore wind energy facilities. Rather than reflexively opposing wind farm development, FSF has been actively engaged in the public input process for the planning and development of offshore wind leases.

Among other things, FSF's participants and consultants serve on collaborative inter-industry wind energy *fora* at the state level in, among others, New York, Massachusetts, New Jersey, and Connecticut. FSF's participants and consultants participate actively in formal, public state task force meetings, where they work directly with the Bureau of Ocean Energy Management, the National Marine Fisheries Service, and offshore wind developers to seek to better understand the potential impacts of offshore wind development and to reduce the potential for such impacts on essential fish habitat, fish species, the scallop fishery, and the marine environment as a whole. FSF's own cooperative research funds are being used to explore matters such as the impact of wind farm construction and development on the scallop fishery.

Many of FSF's issues with this proposal have been previously voiced by the comment letter submitted on behalf of the commercial fishing industry at-large.² That letter expresses concerns over this proposal's attempt to circumvent the traditional rulemaking process, the overbreadth of this proposal's change to the definition of "vessel equipment," the potential impacts of this proposal on both national security and the marine environment, and the overall rushed nature of this proposal. We support and reemphasize all of the statements made in that letter regarding this proposal. However, there are other concerns we have chosen to highlight.

For nearly a century, commercial fishermen (including FSF members) have been required to utilize domestic manufacturing for the construction of their scallop vessels due to Jones Act requirements. Undoubtedly, it would be far more cost-effective to have these vessels fabricated abroad, but FSF members have remained in compliance with these regulations despite the additional costs, and we take pride in knowing that purchasing these vessels supports our domestic maritime industries and coastal communities. We also appreciate that these requirements are not unique to commercial fishing enterprises. It is unclear then, why our federal government is proposing modifications to these requirements which would allow foreign, largely state-owned wind energy developers to utilize foreign vessels for the rapid build-out of these offshore wind facilities. If fishermen are required to sacrifice their fishing grounds, and the ocean habitat is to be inalterably degraded by forests of wind mills, U.S. shipyard workers and the U.S. economy should at least receive some benefit.

Indeed, many of the proceedings which have occurred at the state and local level in identifying the potential impacts of these facilities were based on the premise that the offshore wind energy industry would reinvigorate struggling coastal communities by promoting the need

² See the Responsible Offshore Development Alliance's comment letter (submitted on November 13, 2019) (herein attached as "Exhibit A").

KELLEY DRYE & WARREN LLP

Lisa L. Burley, Chief
November 20, 2019
Page Three

for steel fabricators, shipyard workers, and vessel crews, among others, to construct and install these facilities. This proposal makes such assertions and assurances of those domestic benefits now appear less than fully candid.

To be clear, FSF is not submitting this letter to oppose offshore wind energy development in its entirety. If there is a need for some form of modification to these requirements, those modifications should be narrowly tailored to meet those needs. Those changes should also go through the appropriate process (such as Congressionally-approved modifications or at least a rulemaking process), and they should consider the impacts on our domestic maritime industries and coastal communities in so doing.

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Thank you for the opportunity to submit these comments and for your consideration of these crucial issues. Please do not hesitate to contact us at any time if you require additional information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Frulla', with a long horizontal flourish extending to the right.

David E. Frulla
Andrew E. Minkiewicz
Bret A. Sparks
Counsel for Fisheries Survival Fund

EXHIBIT A



Responsible Offshore Development Alliance

November 13, 2019

Lisa L. Burley, Chief
Cargo Security, Carriers and Restricted Merchandise Branch
U.S. Customs and Border Protection
Office of Trade, Regulations and Rulings
90 K Street NE, 10th Floor
Washington, DC 20229-1177

Re: 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

Dear Ms. Burley:

The Responsible Offshore Development Alliance (RODA) submits this letter to express severe concern with the notice published by U.S. Customs and Border Protection (CBP) proposing to modify and revoke a number of ruling letters regarding certain merchandise and vessel equipment that are transported between coastwise points.¹

RODA is a membership-based coalition of fishery-dependent companies and associations with the mission of improving the compatibility of new offshore development with their businesses. Our approximately 170 members comprise major fishing community groups, individual vessels, and shoreside dealers operating in federal and state waters of the New England, Mid-Atlantic, and Pacific coasts.

For nearly a century (and even longer under earlier cabotage laws), fishermen have dutifully complied with the Jones Act. The proposed modifications would not hold offshore wind energy developers to the same standards, in violation of American principles and laws. RODA respectfully requests that CBP revoke the portions of the notice that propose modifications applicable to offshore wind energy development. Furthermore, if CBP intends to publish Jones Act interpretations relevant to these activities, it must only do so through a public rulemaking process and after conducting thorough interagency evaluations.

Background

Commercial fishing is among the oldest industries in the United States and serves as the historic and cultural backbone of coastal communities across the nation. It is also extremely significant to local, state, and national economies, generating over \$212 billion in sales and providing 1.7 million jobs

¹ Customs Bulletin and Decisions, Vol. 53, No. 38 (Oct. 23, 2019), 12-124.

annually.² A combination of factors has led to significant hardships in many fisheries over recent decades, but more recently many fisheries are becoming true success stories thanks to fishermen’s efforts and some of the most stringent regulations in the world. Among U.S. fish stocks, 91% are not subject to overfishing and 44 have fully rebuilt since 2000.³ The re-emergence of healthy fisheries has brought optimism to coastal communities—many of which are still struggling to recover from decades of regulatory catch reductions.

It is no surprise, then, that fishermen are alarmed at fast-paced plans to build and operate offshore wind energy facilities on their fishing grounds, which will curtail fishing operations and change the composition of fishery resources right as they begin to realize the benefits of years of quota cutbacks. If not planned correctly, these developments risk destroying these communities’ hopes of regrowth and survival.

To mitigate the foreseeable negative impacts, the widely promised economic benefits of offshore wind must accrue to the citizens who are displaced, and to U.S. coastal communities at large. For offshore wind energy-related operations that can be executed with existing American vessels and crew, this means delivering on promises to fully utilize those resources. For larger construction tasks for which there may not currently be qualified vessels, foreign-owned wind energy companies should contract with U.S. shipyards to build the necessary Jones Act-qualified boats. Substantially changing the law to the disadvantage of the domestic maritime industry—and introducing risk relating to national security and the environment—would be reckless and contrary to public interest.

The Proposed Modifications Circumvent Mandatory Rulemaking Processes

Ruling Letters Carry Limited Authority

The notice proposes to modify or revoke various ruling letters, which are a tool used by CBP to “interpret[] and appl[y] the provisions of the Customs and related laws to a specific set of facts.”⁴ Notably, while the “principle of the ruling set forth in [a] ruling letter . . . may be cited as authority in the disposition of *transactions involving the same circumstances*,”⁵ “no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.”⁶

In contrast to the very limited authority contained in ruling letters, the Administrative Procedure Act (APA) sets forth a comprehensive, congressionally-mandated, and transparent notice-and-comment rulemaking process. One of the APA’s key elements regarding rulemaking transparency is that an agency must publish in the Federal Register “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted

² U.S. Department of Commerce, *Fisheries Economics of the United States 2016* (Dec. 2018).

³ NOAA Fisheries, *Status of Stocks 2017* (2018).

⁴ 19 C.F.R. § 177.1(d)(1).

⁵ *Id.* § 177.9(a) (emphasis added).

⁶ *Id.* § 177.9(c).

by the agency.”⁷ CBP itself has previously stated that formal rulemaking processes were appropriate when a matter under its deliberation “would impact a broad range of regulated parties, and the scope of potential economic impact of any change in existing practice is unknown.”⁸

Due to the highly case-specific nature of ruling letters, any CBP action that affects the maritime community or the public more broadly must follow the APA process.

The Notice Proposes a New Definition

The notice states that CBP’s intent is to “limit the concepts [in a line of rulings beginning in 1976] that contributed to the overbroad interpretation of what constitutes ‘vessel equipment.’”⁹ It correctly references Treasury Decision 49815(4) (Mar. 13, 1939) as the basis of the current definition, which characterizes “equipment” to include:

[P]ortable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board. It does not comprehend consumable supplies either for the vessel and its appurtenances or for the passengers and the crew. The following articles, for example, have been held to constitute equipment: rope, sail, table linens, bedding, china, table silverware, cutlery, bolts and nuts.

However, after citing the original definition, the notice overreaches a ruling letter’s authority by proposing to adopt an entirely new definition, which is without precedent:

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. These functions include, *inter alia*, those items that aid in the installation, inspection, repair, maintenance, surveying, positioning, modification, construction, decommissioning, drilling, completion, workover, abandonment or other similar activities or operations of wells, seafloor or subsea infrastructure, flowlines, and surface production facilities.

If the notice simply proposed a return to the 1939 language, it would meet its stated purpose and RODA therefore does not oppose that action.¹⁰ However, the inclusion of specific, previously un contemplated activities—and the materials for use in those activities—in the definition of “vessel equipment” amounts to a novel interpretation of statute. Moreover, the fact that this proposed definition specifically references brand new offshore activities is *prima facie* demonstrative that it is not simply an interpretation of Jones Act provisions regarding “transactions involving the same circumstances” and is therefore not fit for adoption through modification of existing ruling letters.

⁷ 5 U.S.C. § 552(a)(1)(D).

⁸ See 75 Fed. Reg. 21,811 (April 26, 2010).

⁹ Notice at 17.

¹⁰ RODA also takes no position on the various proposed modifications or revocations in the notice that are unrelated to this issue.

The Proposed Definition of “Vessel Equipment” Is Too Broad

As described above, the notice proposes a definition of vessel equipment that includes “items that aid in” a wide range of activities. That definition could be interpreted narrowly or expansively, but CBP provides little guidance to that end.

Would Jones Act-exempt equipment include turbines, substation transformers, replacement parts, or meals for construction crews housed offshore? What about components of other ocean uses that may or may not even be anticipated at this time—foreign-owned aquaculture facilities, mining activities, and more? There is no question but that this lack of clarity would result in time-consuming litigation for years to come.

If interpreted broadly, the definition would clearly violate the purpose of the Jones Act. Its statutory purpose is “to encourage and aid the development and maintenance of a merchant marine” that is, among other objectives, “sufficient to carry the waterborne domestic commerce . . . and to provide shipping service essential for maintaining the flow of the waterborne domestic and foreign commerce at all times.”¹¹ Carving out a broad exemption for an entire new industry does nothing to aid the development of U.S. marine commerce. Quite the opposite; it jumps the gun by concluding that such waterborne activities cannot be undertaken by a domestic fleet before the U.S. government—or any private entities that we are aware of—have made any attempt to develop the capacity to do so.

Moreover, if this definition and its possible future interpretations are so far from the purpose of the Act, its adoption could not even be addressed through regulation and would require a deliberate Act of Congress.

The Proposed Modifications’ Implications to National Security and the Environment Require Analysis

In addition to serious equity and lost opportunity concerns, the actions proposed in the notice could have significant bearing on national security and environmental quality.

RODA’s members and staff are not experts in national defense. We do, however, know that there will be significant vessel traffic associated with the construction and operations of offshore wind energy facilities. During peak construction activity, there are predicted to be 46 vessels at any time in the area of the first proposed project alone (over a dozen areas, each containing several projects, are proposed to be constructed in the Atlantic and Pacific over the next 5-10 years).¹² At face value, the emergence of floating cities at sea—likely comprised entirely of foreign vessels and crew if this proposed definition of “vessel equipment” is adopted—poses obvious enforcement and monitoring concerns.

So, too, we are alarmed at the possibility of a massive influx of large foreign ships that may not comply with U.S. laws governing emissions, ballast, and vessel waste. For example, in late 2018, Congress passed the Vessel Incidental Discharge Act and the Environmental Protection Agency is currently

¹¹ 46 U.S.C. § 50101.

¹² U.S. Bureau of Ocean Energy Management, *Vineyard Wind Offshore Wind Energy Project Draft Environmental Impact Statement*, OCS EIS/EA BOEM 2018-060 (Dec. 2018), at 3-206.

conducting a rulemaking process to create national ballast water management standards to address the potential spread of aquatic invasive species in U.S. waters. While foreign vessels in the EEZ are technically required to comply with U.S. environmental laws, enforcement of these laws by the U.S. Coast Guard (USCG) poses extraordinary challenges due to the additional permissions needed to board non-U.S. flag vessels. Receiving the necessary permission can take days, during which a vessel can relocate or conceal activities.

Due to the gravity of these potential concerns, CBP should not amend the Jones Act or any of its relevant definitions until and unless it has consulted with USCG, the Department of Defense, the Department of State, EPA, and any other relevant agencies to fully and transparently evaluate the safety risks and environmental impacts associated with this scenario.

There is No Rush

The development of offshore wind energy in U.S. federal waters has exploded from a few small, speculative projects to a full-scale frenzy with an enormous proposed footprint in just a few short years. Many important consequences of this development have been overlooked or poorly planned. This was evidenced when the Administration recently delayed the first New England project over concerns that impacts to fisheries and the marine environment lacked sufficient analysis. As with other planning elements, application of the Jones Act to offshore wind energy activities should be considered carefully and deliberately in conjunction with the Bureau of Ocean Energy Management to ensure that maximum domestic benefits are achieved and unreasonable risk eliminated. CBP should take full advantage of the existing delay to rigorously evaluate the best means of doing so.

RODA and its member organizations thank you for your consideration of this request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Annie Hawkins".

Annie Hawkins, Executive Director

A handwritten signature in blue ink, appearing to read "Lane Johnston".

Lane Johnston, Policy Fellow

Responsible Offshore Development Alliance