REBUILDING VESSELS UNDER THE JONES ACT

(110–137)

HEARING

BEFORE THE

SUBCOMMITTEE ON
COAST GUARD AND MARITIME TRANSPORTATION

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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June 11, 2008

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Coast Guard and Maritime Transportation

FROM: Subcommittee on Coast Guard and Maritime Transportation Staff

SUBJECT: Hearing on Rebuilding Vessels Under the Jones Act

PURPOSE OF HEARING

The Subcommittee on Coast Guard and Maritime Transportation will meet on Wednesday, June 11, 2008, at 10:00 a.m. to receive testimony on rebuilding vessels under the Jones Act.

BACKGROUND

Purpose of the Merchant Marine Act of 1920

Section 27 of the Merchant Marine Act of 1920, commonly referred to as the Jones Act and presently codified at 46 U.S.C. 55102(b), limits coastwise trade (trade along the coasts of the United States) to vessels that were built in and documented under the laws of the United States; such vessels must be owned by American citizens. This provision was written to preserve an adequate U.S. shipbuilding and ship-repair industry, which is essential to national defense.

The Second Proviso of the Jones Act

Prior to 1956, U.S. law did not prohibit vessels that were rebuilt abroad from operating in the domestic trades. In 1956, Congress enacted the Second Proviso to the Jones Act to provide additional assistance to the shipyards of the U.S. by excluding vessels rebuilt in foreign yards from the coastwise trades. The Act authorized the Secretary of the Treasury to set regulations to carry out the purposes of the Act.

Initially, the Second Proviso stated that a vessel of more than 500 gross tons otherwise entitled to engage in the coastwise trade permanently lost the right to engage in that trade when it was rebuilt outside the U.S. The Proviso originally required the owner of a vessel of more than 500 gross tons documented in the U.S. to submit information regarding the circumstances of the rebuilding to the Secretary of the Treasury when the vessel was rebuilt outside the U.S. The Second Proviso was amended several times and now applies to all vessels engaged in the coastwise trade, ~~regardless of tonnage.~~

The Second Proviso did not define the term "rebuilt." Instead, it used a term that had been defined by the courts. Congressional reports cited with approval a Treasury Department Report memorandum which noted:

> The Supreme Court has adopted a definition of the term (which would be applicable), to the effect that a vessel is considered rebuilt if any considerable part of the hull of the vessel in its intact condition, without being broken up, is built upon.[1]

The Customs Service amended its regulations in 1957 to reflect the additions to the Second Proviso. The regulations stated a vessel would be considered "rebuilt" if "any considerable part of the hull in its intact condition without having been broken up is built upon or substantially altered."[2]

Shipping companies had at the time been circumventing the foreign rebuild ban by building complete sections of hulls, known as midbodies, in foreign countries, towing them to the U.S., and installing them in coastwise vessels. In 1960, Congress amended the Second Proviso "to close a loophole and enacted that vessels of foreign construction shall not be permitted to operate in the coastwise trades of the United States."[3] According to the accompanying Committee reports: "Shipbuilding officials in the country view with alarm the Customs ruling that foreign midbodies could be used in the rebuilding of domestic ships without forfeiture of coastwise privileges." The House and Senate Committees reported that the bill was "needed to close the above-mentioned loophole in the existing (1956) statute and to buttress our traditional national objectives affecting the coastwise trade and the shipbuilding industry."[4]

On October 6, 2006, the Second Proviso of the Jones Act was recodified by Public Law 109-304 as 46 U.S.C. 12101(a) and 12132(b) to conform to the understood policy, intent, and purpose of the Congress in the original enactments. It now reads:

> Section 12101
> (a) REBUILT IN THE UNITED STATES. -- In this chapter, a vessel is deemed to have been rebuilt in the United States only if the entire rebuilding, including the

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[1] This definition was found in *United States v. The Grace Meade*, 25 F. Cas. 1387 (E.D. Va. 1876) (No. 15,243), which decision was adopted by the Supreme Court in *New Bedford Dry Dock Co. v. Purdy (The Jack-O'Lantern)*, 258 U.S. 96 (1922).

[2] 22 Fed. Reg. 6380, 6381 (1957).

[3] H.R. Rep. No. 1887, 86th Cong. (2nd Sess. 1960). *See also* S. Rep. No. 1279, 86th Cong. (2d Sess. 1960) at 3.

[4] Id

construction of any major component of the hull or superstructure was done in the United States.

Section 12132
(b) REBUILT OUTSIDE THE UNITED STATES. -- A vessel eligible to engage in the coastwise trade and later rebuilt outside the United States may not thereafter ~~engage in the coastwise trade.~~

Coast Guard Determinations

From 1956-1996, the Coast Guard made determinations regarding whether construction on an existing ship constituted a "rebuild" on a case-by-case basis. To address court cases that resulted from a lack of consistency, the Coast Guard initiated a rulemaking and subsequently amended their regulations to clarify standards for vessel rebuild determinations in 1996.

Prior to April 1996, the Coast Guard's foreign-rebuild regulation provided that a vessel is rebuilt when any considerable part of its hull or superstructure is built upon or substantially altered. In April 1996, the Coast Guard amended the Code of Federal Regulations to clarify the standard for determining when work on a vessel performed outside of the U.S. constitutes a foreign rebuild.

The new provisions were intended to assist vessel owners and operators in making better business decisions regarding work to be performed on their vessels. In the Notice of Proposed Rulemaking that preceded adoption of the new regulations, the Coast Guard stated,

> The [then existing] rebuilt standard has been criticized as too subjective to provide guidance to vessel owners, who often must make critical business planning decisions with the outcome of a potential rebuilt determination by the Coast Guard in mind. The proposed guidelines, if adopted, would establish clear upper and lower thresholds relevant to rebuilt determinations and would provide for greater certainty to vessel owners making business decisions regarding work to be performed on their vessels.

After the implementation of the regulations, the greater of the weights of the steel added or removed from the vessel became the only relevant factor in determining whether a project involved a considerable part of the hull or superstructure. As a result, the Coast Guard does not utilize any additional information other than the comparative steelweight involved in the project to determine whether construction on a vessel involves a considerable part of the vessel's hull or superstructure.

Under Title 46, Code of Federal Regulations, Section 67.177, a vessel is deemed to have been rebuilt in a foreign yard when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States. The Coast Guard determines whether a vessel is rebuilt if the following parameters apply:

> Regardless of its material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel.

For a vessel of which the hull and superstructure is constructed of steel or aluminum—

(1) A vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight, prior to the work, also known as discounted lightship weight.

~~(2) A vessel may be considered rebuilt when work performed on its hull or superstructure~~ constitutes more than 7.5 percent but not more than 10 percent of the vessel's steelweight prior to the work.

(3) A vessel is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work.

There is not a requirement to submit a request to the Coast Guard for a preliminary determination if the planned work in a foreign shipyard is less than 7.5 percent of the vessel's steelweight. However, the regulations require a vessel owner to submit the required information whenever a vessel is altered outside the U.S. and the actual work performed versus the planned work is determined to constitute more than 7.5 percent of the vessel's steelweight.

With respect to the information submitted to the Coast Guard by the owner, the vessel and its equipment are subject to forfeiture if the owner of the vessel knowingly falsifies or conceals a material fact, or knowingly makes a false statement or representation, about the documentation of the vessel or in applying for documentation of the vessel.

<u>Coast Guard's Process for Letter Rulings</u>

Many vessel owners provide the Coast Guard with the required written information on the type of work they propose to complete in a foreign shipyard. Based on the information and calculations provided by the ship owners, the Coast Guard issues a preliminary rebuilding determination that states whether or not the proposed work will constitute a foreign rebuild.

It is the Coast Guard's position that a final rebuild determination cannot be made until the foreign work is completed. Recently, federal district courts have determined the preliminary rebuild determination letter issued by the Coast Guard is preliminary and not final agency action. Final agency action is not issued until the work has been completed in a foreign shipyard and the company submits their required information to the Coast Guard for a decision as to whether or not they exceeded the regulatory limitations.

If a shipping company or shipyard becomes aware of another company's preliminary application for rebuilding determination, they are unable to obtain information that was submitted along with the application. It's the Coast Guard's practice to release the preliminary determination, but not any supporting information until there is final agency action in which a Certificate of Documentation is issued with a coastwise endorsement.

Since the information is not releasable and the process is not transparent, a shipping company or shipyard is not able to file a suit against another entity until the work in a foreign

shipyard is completed, since the Courts do not have jurisdiction until a final agency action is determined.

United States Customs and Border Protection also enforces the Jones Act. Their rulings and letter opinions are a matter of public record and are posted on the internet.

JONES ACT COURT CASES

American Hawaii Cruises (Plaintiff) v Samuel K. Skinner (Defendants) and S/S Monterey Limited Partnership (Defendant-Intervenor)

In 1987, Monterey Limited Partnership (MLP) converted the *S/S Monterey* from a rusting cargo ship into a modern, fully-equipped passenger liner with the intention of operating the ship on cruises among the Hawaiian Islands. It had been modified in the United States and Finland. MLP sought guidance from the Coast Guard as to whether or not the work completed in the foreign shipyard would constitute rebuilding. In August of 1988, the Coast Guard found that the *Monterey* had not been "rebuilt" abroad and was eligible for the domestic trade.

American Hawaii Cruises and American Maritime Officers sought judicial review of that determination by suing under the Administrative Procedure Act. American Hawaii Cruises contended that the vessel had been rebuilt abroad and that the Coast Guard's decisions were unlawful, an abuse of discretion, and unwarranted based on the facts of the case. They alleged the rebuilding work done in Finland saved the owners approximately $25 million and that the arrival of the vessel in the Hawaiian cruise market diverted passengers to the *Monterey* that would have otherwise utilized one of American Hawaii's cruise ships.

Judge Joyce Hens Green for the U.S. District Court for the District of Columbia found that (1) although the Coast Guard cited its "rebuild" regulation in its rulings, it did not decide the case under that standard; (2) unlike its regulatory definition, the test the Coast Guard articulated was not a "permissible construction" of the Second Proviso; (3) the language of the statute did not suggest the test being used by the Coast Guard; (4) the Coast Guard pointed to nothing in the legislative history of the Second Proviso that would support the interpretation now adopted; and (5) the test used by the Coast Guard failed to take into account the language of the Second Proviso requiring that all "major components" be built in the United States.[5]

The court stated the Coast Guard's need to create a "de minimis" exception to a rule that has no precise contours suggested the formulation the Coast Guard embraced was far from adequate. For those reasons, the Court concluded that the structural/non-structural test by the Coast Guard is not a permissible construction of the Second Proviso. (For this determination, the Coast Guard considered non-structural work to be mere cosmetic and aesthetic changes and structural work to be building upon or substantial alteration of a considerable part of the hull or superstructure.)

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[5] *American Hawaii Cruises v. Skinner*, 713 F. Supp. 452, 465-468 (D.D.C. 1989) ("*Monterey*").

Finding the Coast Guard's decision unexplained and therefore unfit for judicial review, the District Court remanded the matter to the Coast Guard for further proceedings consistent with the court's opinion, and dismissed the civil actions.

Shipbuilders Council of America (Plaintiffs) v US Department of Homeland Security (Defendants) and Seabulk Energy Transport, Inc (Intervenor Defendants)

On March 11, 2005, Seabulk Energy Transport, Inc., which owns the *Seabulk Trader*, a tank vessel built in the United States to carry petroleum products in the coastwise trade, requested a preliminary determination from the Coast Guard regarding whether proposed work in a Chinese shipyard on the *Seabulk Trader* would result in a determination (1) that the vessel was "rebuilt" in a foreign shipyard under the Second Proviso to the Jones Act and the applicable Code of Federal Regulations and (2) that the vessel had its segregated ballast tanks installed outside of the United States under the applicable Code of Federal Regulations.

The proposed work involved installing internal bulkheads, or an "inner hull" throughout the vessel's cargo block and reconfiguring the vessel's existing ballast tank system. If the work was completed in a U.S. shipyard, the work was estimated to be likely to cost $30 million; Seabulk paid approximately $5 million to have the vessel altered in China.

Under the Oil Pollution Act of 1990 (OPA 90), the *Seabulk Trader* would have been unable to transport petroleum in U.S. waters after 2011 unless it was equipped with a double hull. Seabulk retrofitted the vessel in a Chinese shipyard in 2006-2007. Before having the work performed, however, Seabulk submitted estimates of the quantity of steel that would be added to the *Seabulk Trader* along with technical drawings of the new internal bulkheads to the Coast Guard for approval. On May 20, 2005, the Coast Guard issued a preliminary determination that the proposed work would constitute neither a foreign rebuild nor a foreign installation of segregated ballast tanks.

On May 8, 2007, Seabulk informed the Coast Guard that the work on the *Seabulk Trader* had been completed and advised them that the final weight of the components added to the Seabulk Trader constituted 8.15 percent of the vessel's pre-work steelweight and that the new bulkheads did not extend into the foremost and aft-most wing cargo tanks as originally planned. The cargo tanks had instead been converted into the vessel's ballast tanks. In the same letter, Seabulk requested that the Coast Guard issue a certificate of documentation with a coastwise endorsement. The Coast Guard issued the certificate on May 9, 2007.

Due to the proposed double-hull retrofit and the actual work performed involving the reconfiguration of the Seabulk Trader's segregated ballast tanks, there are two sets of relevant statutes and regulations pertaining to this case, including those dealing with rebuilding and those dealing with installation of segregated ballast tanks. The reconfiguration of the *Seabulk Trader's* segregated ballast tanks could potentially constitute a violation of the Port and Tanker Safety Act of 1978, codified at 46 U.S.C. 3704.

Plaintiffs Position

The plaintiff in this case, the Shipbuilders Council of America, which is an association of U.S. shipyards, alleged that the work on the *Seabulk Trader* completed in China could and should have been performed in the United States. Additional plaintiffs Crowley Maritime Corp and Overseas Shipholding Group, which are ship owners and operators, alleged the savings that Seabulk could realize by having the double-hull retrofit performed in China gave the company an unfair competitive advantage over other Jones Act vessels.

The plaintiffs claimed that the Coast Guard's determinations in this case were arbitrary and capricious, an abuse of discretion, and contrary to law under 5 U.S.C. 706(2)(A). They requested that the Court remand the matter to the Coast Guard with instructions to revoke the vessel's coastwise endorsement.

The plaintiffs claim the Coast Guard looked only to the amount of steel that was to be added to the *Seabulk Trader*, which ignored both the specific modifications made to existing structures on the vessel and the amount of steel removed from the vessel. The plaintiffs challenged this approach, arguing that if all the work was aggregated, the total steel work performed in China amounted to at least 9.44 percent of the vessel's steelweight.

In May 2008, the plaintiffs argued in Court that since the market is competitive, Crowley, Overseas Shipholding Group and other operators of Jones Act compliant tank vessels have sustained combined lost revenues of at least $12 million due to the unlawful operation of the *Seabulk Trader*.

Defendant's position

Seabulk Energy Transport contends that the Coast Guard's rebuild determination was not arbitrary and capricious or otherwise contrary to law and that the rebuild determination is consistent with applicable statutes because it is consistent with existing regulations.

They also argue that the plaintiffs cannot challenge the validity of the foreign-rebuild regulation because the limitation period for such a challenge expired long ago and that the statute requiring segregated ballast tanks on coastwise vessels to be installed in the United States does not apply in the context of the foreign double-hull retrofit issue at hand.

Seabulk requested a motion for stay and requested that the *Seabulk Trader* be allowed to continue operating in the domestic trade.

Coast Guard's position

The Coast Guard argues there is no subject matter jurisdiction over plaintiffs' claim that they misapplied the Second Proviso to the Jones Act because the term "rebuilt" is so broad as to preclude any meaningful judicial review of its decision that the *Seabulk Trader* was not rebuilt foreign.

Court Decision

On April 24, 2008, Judge Leonie Brinkema of the U.S. District Court for the Eastern District of Virginia ordered that the civil action by Shipbuilders Council of America be remanded to the Coast Guard with directions for the service to revoke the coastwise endorsement of the *Seabulk Trader.*

The Court disagreed with the Coast Guard's position that the *Seabulk Trader's* inner hull was not a major component because it was not a separable component that would be added to the hull. The Court also disagreed with their observation that the inner hull was not a separable component because it was constructed by adding steel, which was then built upon steel piece-by-piece. The Court found that this position was not persuasive and that the separable/inseparable distinction had not foundation in statute or regulation. The Court stated the manner in which the component is added to the vessel, piece-by-piece or wholesale is irrelevant to whether the component is considered major.

The Court found that the Coast Guard's separable/inseparable distinction will lead to arbitrary applications of the Jones Act. Also, the Coast Guard's vague separable/inseparable distinction, which was used to grant *Seabulk Trader* a certificate of coastwise eligibility, is likewise unfaithful to the text, history and purpose for the Second Proviso. For those reasons, the Coast Guard's decision was found to be invalid and was remanded to the agency for further proceedings.

Shipbuilder's Council of America, Inc. (Plaintiffs) v. U.S. Department of Homeland Security (Defendants) and Matson Navigation Company, Inc (Intervenor-Defendant)

This case, brought by Pasha Hawaii Transport Lines, LLC and Shipbuilders Council of America, involves a vessel operated by the Matson line.

On June 15, 2004, Matson requested a preliminary rebuilding determination by the Coast Guard for three of its vessels, the M/V *Mokihana*, M/V *Mahimahi*, and the M/V *Manoa* to covert the vessels from container ships to roll-on-roll-off (RoRo) vessels.

The vessels were to be altered partially in China and partly in the U.S. Matson paid approximately $10 million for the work completed in China and approximately $30 million for the work completed in the U.S.

The Coast Guard responded to Matson on June 23, 2004, stating the proposed alterations to be performed in China amounted to 6.7 percent of the vessels' steelweight, which was below the 7.5 percent regulatory threshold. Based on this information, the Coast Guard determined that the work would not result in a finding that the vessels had been rebuilt in a foreign yard and thus would not result in the loss of coastwise privileges for these vessels. Matson was cautioned by the Coast Guard that the decision was a preliminary determination based upon the estimates provided.

Herbert Engineering Corporation, which designed the garage to be placed on the three vessels, submitted a letter to the Coast Guard on April 25, 2005, seeking a preliminary rebuild determination to confirm its understanding that certain proposed work would be considered "outfitting" and would not be included in the steelweight calculations. The Coast Guard responded on June 8, 2005, by stating that one of the proposed alternatives would not be considered outfitting

and would be included in the steelwork calculations, which would increase the steelweight above 6.7 percent.

On October 26, 2006, Matson advised the Coast Guard that it decided to no longer pursue the proposed rebuilds of the M/V *Mahimahi* and the M/V *Manoa*. Matson sought another preliminary rebuild determination for the *Mokihana* stating the steelwork performed in China amounted to 8.1 percent of the steelweight, within the 7.5 – 10 percent range. Approximately a week later, Matson withdrew its request for a preliminary rebuild determination for the *Mokihana*.

On October 27, 2006, Pasha Hawaii Transport Lines, LLC requested that the Coast Guard reconsider Matson's original preliminary rebuild determination, suggesting that the total replacement work on the vessel exceeded 10 percent of the vessel's steelweight and that the Coast Guard should issue a final determination that the vessel was being rebuilt and advise Matson that all work should be completed in a U.S. shipyard in order for the vessel to maintain a coastwise endorsement.

The Shipbuilders Council of America submitted a similar letter to the Coast Guard supporting Pasha's request on October 30, 2006. The Coast Guard denied the requests for reconsideration on November 2, 2006.

On November 16, 2006, Pasha Hawaii Transport Lines and the Shipbuilders Council of America filed a suit challenging the Coast Guard's preliminary rebuild determination and sought an order vacating the Coast Guard's determination as arbitrary, capricious, and an abuse of discretion; a declaration that the vessels will be rebuilt in a foreign yard if the proposed work was performed on them and thus would no longer be entitled to a coastwise endorsement; an injunction enjoining the Coast Guard from issuing Matson a coastwise endorsement if the proposed alterations were completed in China; and a declaration that the Coast Guard's implementation of its regulations is inconsistent with the Jones Act. Specifically, the plaintiffs argued that in conducting rebuild determinations, the Coast Guard must consider the project as a whole with both the steelweight added and removed from a vessel in a foreign shipyard.

On April 13, 2007, Matson informed the Coast Guard that the work in China had been completed on the *Mokihana* and that the modification project resulted in a change in the gross and net tonnage. In this letter, Matson only sought a registry endorsement of the Certificate of Documentation, not a coastwise endorsement, therefore forfeiting their ability to be a Jones Act vessel. The company stated it would seek a coastwise endorsement after the final phase of the project was completed in a U.S. shipyard and before the vessel re-entered the domestic trade. The final phase of work was scheduled to being around May 14, 2007 in an Alabama shipyard.

The remainder of the work was completed on the *Mokihana* in an Alabama shipyard and Matson requested a final rebuild determination from the Coast Guard on August 13, 2007.

The Coast Guard issued a final agency action letter on October 23, 2007, stating after consulting the Coast Guard's Naval Architecture Division, the *Mokihana* had not been rebuilt and was eligible for coastwise privileges.

The oral arguments between the plaintiffs and defendants for a Motion for Summary Judgment will be heard on June 20, 2008.

GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) AND THE WORLD TRADE ORGANIZATION (WTO)

The General Agreement on Tariffs and Trade (GATT), signed in 1948, is a multilateral agreement regulating trade among about 150 countries. According to its preamble, the function of the GATT is the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis." The principal objective of GATT is to expand international trade by liberalizing trade so as to increase economic prosperity among all members.

GATT generally prohibits domestic manufacturing restrictions, such as the U.S. build requirement in the Jones Act. However, these domestic laws were grandfathered under the GATT as they were enacted on the date of the GATT agreement.

There is a concern that if Congress attempts to restrict the U.S. build/rebuild requirement by amending the Jones Act or directing the Coast Guard to amend their regulations to accomplish a certain set of standards, then there is a risk that the amendments will activate the GATT. If the issue is argued by other countries and the U.S. loses, the U.S. will be subject to trade sanctions until the U.S. build requirement of the Jones act is repealed.

PREVIOUS COMMITTEE ACTION

The Subcommittee on Coast Guard and Maritime Transportation has never previously convened a hearing on rebuilding vessels under the Jones Act.

WITNESSES

PANEL I

Rear Admiral James Watson, IV
United States Coast Guard
Director of Prevention Policy for Marine Safety, Security and Stewardship

Ms. Patricia J. Williams
United States Coast Guard
Director of the National Vessel Documentation Center

Panel II

Mr. John P. Love
Vice President
Pasha Hawaii Transport Lines LLC

Mr. Matthew Paxton
President
Shipbuilders Council of America

Mr. Michael G. Roberts
Partner
Venable LLP
on behalf of Crowley Maritime Corporation

REBUILDING VESSELS UNDER THE JONES ACT

Wednesday, June 11, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2167, Rayburn House Office Building, Hon. Elijah E. Cummings [Chairman of the Subcommittee] presiding.

Mr. CUMMINGS. This Subcommittee is called to order.

Today's hearing will enable us to closely examine a critical subject in United States maritime transportation, and that is the rebuilding of Jones Act vessels in foreign shipyards. I take this opportunity to thank Mr. Gene Taylor of Mississippi for his outstanding work in protection of the Jones Act, and I note that he personally requested this hearing to be held by the Subcommittee.

The vessels that ply the coastal trade in the United States providing service between domestic destinations must comply with the requirements of the Jones Act, meaning that they must be built in a United States shipyard owned by an American and crewed by Americans. Provisions added to the Jones Act in 1956 and known as the Second Proviso requires that these ships also be rebuilt in the United States shipyards. However, that 1956 action did not define the term ″rebuild″; and, by 1960, vessels were using United States shipyards to install middle sections called midbodies that had been built in foreign shipyards into Jones Act vessels.

In response, Congress revised the Second Proviso in an effort to close the loophole that allows the midbodies to be installed in domestic vessels. Not until 1996, however, did the Coast Guard issue regulations to clarify the specific standards that will be applied to determine whether a Jones Act vessel had been rebuilt in a foreign shipyard.

These regulations state, regardless of its material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel. For a vessel of which the hull and superstructure is constructed of steel or aluminum, a vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight prior to the work. Further, a vessel may be considered rebuilt when work performed on its hull or superstructure constitutes more than 7.5 percent but not more than 10 percent of the vessel's steelweight prior to the work. A vessel

is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work.

There apparently appears to exist a lack of clarity regarding what can be done to a vessel in a foreign shipyard within the parameters that have been established by these regulations. Specifically, there is confusion regarding what constitutes a major component of a hull or superstructure.

Further, there is also concern among some in the Jones Act trade that the standards that have been set forth have been inconsistently applied, particularly in terms of calculating vessel steelweight.

These issues have been the subject of several recent court cases, including one that examined a Jones Act vessel that was converted from a container ship to a roll-on/roll-off vessel. Part of the work on that vessel was completed in a Chinese shipyard and part was done in the United States. In this case, the Coast Guard did not count the amount of steel removed when making the calculation of steelweight to determine whether the vessel was still eligible for the coastwise trade. Rather, it counted only the amount of steel added.

Another case involved the installation in a Jones Act vessel of an inner hull, which essentially converted the vessel from a single hull to a double hull to meet the standards of the Oil Pollution Act of 1990. In this case, the Coast Guard determined that a second hull was not a major component of the hull or superstructure since the inner hull was not separable from the outer hull because of the manner in which it was constructed. In ruling on this case, a United States court stated that the manner in which a component is added to a vessel, whether piece by piece or wholesale, is irrelevant to considerations of whether the component is a major one.

In summary, one of the overarching issues we will examine today is the lack of transparency to this assessment process. Shipyards and vessel owners must continually submit Freedom of Information Act requests to the Coast Guard to find out what letter opinions the service has issued, because the Coast Guard does not post these letters on the Internet. We can do better.

In contrast, the Customs and Border Protection Agency posts its letter rulings regarding the transportation of merchandise under the Jones Act trade on the Internet so that the maritime industry can see their current interpretations. I find it difficult to understand how one can expect one to obey the law when they don't know what the law is.

Additionally, once someone has received a Coast Guard letter ruling it is difficult, if not impossible, to obtain the background information regarding how the Coast Guard came to the conclusion expressed in the letter. This makes it difficult for the Coast Guard to obtain the views of both sides of an issue before it makes a decision.

The issues before the Subcommittee today, the issues are very complex, but they are critical to ensuring that the provisions of the Jones Act are appropriately enforced and that all of the vessels certified for the coastwise trade are competing on a level playing field.

Finally, I would like to note that the Subcommittee invited both Seabulk and Matson Navigation, both of which are subject to litigation regarding the extensive work they have had done on their ships in China, to testify today. Regrettably, they declined our invitation. Without their testimony, I believe that it will be very difficult for the Subcommittee to decide on any statutory waivers of the Jones Act requirements that might be proposed for these companies if they should need them as a result of current court cases.

I look forward to the testimony of all of today's witnesses; and now I recognize Mr. Poe, who is standing in for our Ranking Member, Mr. LaTourette. Mr. Poe.

Mr. POE. Thank you, Mr. Chairman.

The Subcommittee is meeting this morning to review several recent Coast Guard decisions that have allowed Jones Act vessels to undergo nonemergency major structural work at foreign shipyards. In at least two instances, and perhaps several more, the Coast Guard has determined that these modifications do not qualify as rebuilding under Federal statutes and regulations. I am concerned about the process that has been used to make these determinations and the impacts the Coast Guard's decisions have been on the U.S. maritime industry.

Over the past century, Congress has acted many times to preserve and strengthen the Nation's shipbuilding capacity and domestic commercial fleet. These are for national security and economic reasons. The primary protections provided to the United States maritime industry include the statutes commonly referred to as the Jones Act. Under the Jones Act, all vessels engaged in United States coastwise trade are required to be owned by U.S. citizens, built in the United States and crewed by U.S. Merchant Mariners. The Act also provides that the rebuilding of a U.S. coastwise vessel must take place in the United States in a United States shipyard to maintain the vessel's eligibility to participate in the Jones Act trade. However, several vessel operators have recently entered into contracts with foreign shipyards to substantially modify U.S.-flagged, Jones Act-qualified vessels with the Coast Guard's apparent approval.

It is in our Nation's interests to have a robust domestic fleet and Merchant Marine, and I urge the Coast Guard to vigorously enforce U.S. law. However, we should not rely solely on the Jones Act to maintain a strong maritime industry.

I hope that the witnesses will share with the Subcommittee their thoughts on what American shipyards can do to better compete with their foreign counterparts and how we can encourage young people to enter the maritime trade.

I want to thank the Chairman for holding this important hearing and look forward to hearing from all of the witnesses, and I yield back.

Mr. CUMMINGS. Thank you very much, Mr. Poe.

Mr. Taylor.

Mr. TAYLOR. Mr. Chairman, let me thank you for the very aggressive and thorough job you are doing as Chairman, for the hearing you had on the 123-foot Bollinger class ships, for this hearing today.

The Coast Guard is a very honorable service, and on a day-to-day basis they almost always do the right thing. In the case of stretching those boats, somebody screwed up, and to date no one in that organization has stepped forward and said ″I screwed up″, which is completely contrary to what they teach every recruit every day. In the case of this, somebody screwed up. Somebody in the Coast Guard wasn't doing their job.

So what I would hope we would have as a result of today's hearing, I hope the Admiral or someone will step forward and tell us what the rules are. Who is supposed to enforce the rule? Who in the Coast Guard is responsible for enforcing this law that was obviously broken over in China? If they have adequate manpower, then who screwed up? If they don't have the adequate manpower to enforce the law, what are you going to ask for? And, above all, I hope I won't hear that the Coast Guard, similar to the Bollinger class screw-up, won't step forward and say, well, we gave that responsibility to the private sector and somebody let us down.

So, again, I want to thank you for having this hearing. I welcome the Admiral for being here. Again, I want to emphasize the vast majority of the time the Coast Guard does right thing. In this instance, they didn't. But we need to find out what went wrong. If there is a mistake that was made, let's correct it. If there is a loophole that has to be closed, let's do so. And I very much, again, appreciate you calling this hearing.

Mr. CUMMINGS. Thank you very much, Mr. Taylor.

Mr. LoBiondo.

Mr. LOBIONDO. Thank you, Mr. Chairman.

I join with my colleagues in thanking you for holding this hearing. Something that a lot of people take for granted with the Jones Act, but hopefully with this hearing we can emphasize the critical importance of what it means in terms to our overall economy, especially our maritime economy, and I think for homeland security. I think it is critical that these laws be enforced and not be open to such broad interpretation as we are dealing with and Mr. Taylor just referred to, which clearly something is very wrong. So I am very proud to join with most of my colleagues in very strong support of the Jones Act and thank you for bringing attention to this critical issue.

Mr. CUMMINGS. Thank you very much, Mr. LoBiondo.

Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman.

I want to thank you for holding this hearing and inviting these witnesses here to participate in this important discussion. I look forward to the testimony from the Coast Guard, from industry and advocacy groups to discuss the Jones Act and, most importantly, the Second Proviso of the Jones Act and determinations made by the U.S. Coast Guard relating to vessels rebuilt overseas.

As we all know, Congress enacted the Jones Act to protect the U.S. shipbuilding and ship repair industry. Congress amended the Jones act to provide assistance to shipyards here in the U.S. by excluding foreign rebuilt vessels from U.S. domestic trade. Without any question, the most important issue here is the Coast Guard's determination with respect to rebuild cases; and I am most concerned about the transparency of the existing process and what we

can do to ensure that U.S. companies which abide by the spirit of the Jones Act in the construction and rebuild of their vessels are not put at a disadvantage to companies which take their business overseas.

I want to thank the panelists for their participation, Mr. Chairman; and I yield back the balance of my time.

Mr. CUMMINGS. Thank you very much.

Mr. Larsen.

Mr. LARSEN. Mr. Chairman, I just want to thank you for holding this hearing as well.

I think most of what I wanted to say has been said. Just echoing all the comments about transparency, about the appropriate application of the Second Proviso and am looking forward to the Coast Guard comments about how they are going to help us help them make sure there is appropriate direction given to the application of the Second Proviso in the future.

Thank you.

Mr. CUMMINGS. Thank you.

I want to thank all of the panel for your brief opening statements. I really appreciate it.

We will now go to our witnesses.

The first witness is Rear Admiral James Watson IV of the United States Coast Guard. He is the Director of Prevention Policy for Marine Safety, Security and Stewardship.

Ms. Patricia J. Williams of the United States Coast Guard is Director of the National Vessel Documentation Center. It is my understanding that you will not be testifying, Ms. Williams? Or you will? Will you be testifying or do you have an opening statement?

Ms. WILLIAMS. I do have a brief opening statement.

Mr. CUMMINGS. All right. Before we get started, let me just say this, that the Full Committee has a rail bill, Amtrak bill on the floor of the House this morning. So from time to time I will be leaving and going to talk about that bill on the floor. So one of my colleagues will take Chairmanship during those periods, and other Members may have to do the same thing.

TESTIMONY OF PATRICIA J. WILLIAMS, DIRECTOR, NATIONAL DOCUMENTATION CENTER, UNITED STATES COAST GUARD; AND REAR ADMIRAL JAMES WATSON, IV, UNITED STATES COAST GUARD, DIRECTOR OF PREVENTION POLICY FOR MARINE SAFETY, SECURITY AND STEWARDSHIP

Mr. CUMMINGS. With that, we will hear from you, Ms. Williams. And thank you all for being with us.

Ms. WILLIAMS. Thank you. Good morning.

Mr. CUMMINGS. Good morning.

Ms. WILLIAMS. I am Patricia J. Williams, the Director of the National Vessel Documentation Center. The NVDC is a Coast Guard headquarters unit located in Falling Waters, West Virginia. I assumed the role of Director this past April upon the retirement of the former Director, Thomas L. Willis, but I have served as the second in command of the NVDC since its formation in 1995.

The NVDC, as you know, administers the Vessel Documentation Program, which includes foreign rebuild determinations. I have in some way participated in the definitive rulemakings of rebuild de-

terminations since 1992, when I assumed a role at Coast Guard headquarters. So I look forward to discussing this area of my responsibility with you today.

Rear Admiral Watson has the Coast Guard's opening statement.

Mr. CUMMINGS. Rear Admiral Watson.

Admiral WATSON. Good morning, Mr. Chairman and distinguished Members of the Committee. My name is Rear Admiral James A. Watson. I am Director of Prevention Policy at the Coast Guard. It is a pleasure to appear before you today to discuss the rebuilding of vessels under the Jones Act.

I would like to briefly explain our regulations and highlight the challenges of recent Coast Guard rebuild determinations.

Vessel rebuild determinations under the Jones Act are administered by the Coast Guard at the National Vessel Documentation Center. The National Vessel Documentation Center is the Coast Guard's only 100 percent civilian-operated command. Its mission requires the same day to day professionalism and connectivity with the maritime industry as other Coast Guard units. Its focus is to lawfully issue vessel documents and—excuse me, rather than carrying out the safety, security and environmental stewardship, as other Coast Guard units do in the mainstream.

The current regulations at 46 CFR 67.177 provide key tenets for foreign rebuild determinations. As detailed in these regulations, a vessel is deemed rebuilt foreign when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States.

In determining whether a vessel is rebuilt foreign, the following parameters apply: Regardless of its material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel. For a vessel of which the hull and superstructure is constructed of steel or aluminum, a vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of its vessel steelweight. A vessel may be considered rebuilt when the work performed on its hull or superstructure constitutes more than 7.5 percent but not more than 10 percent of the vessel's steelweight prior to the work. A vessel is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work.

The Coast Guard has attempted to steer a consistent path in applying these regulations despite challenges from a lack of express definitions in some areas. The term ″major component″ has not been expressly defined. Its addition as a parameter to the current regulation received no comment from industry when it appeared in the notice of proposed rulemaking in April of 1994.

Last year, the Shipbuilders Council of America filed a complaint in the District Court for the Eastern District of Virginia for a review of agency action and for declaratory and injunctive relief related to, in part, to the Coast Guard's application of these terms. This action followed the issuance by the Coast Guard on May 20th, 2005, of a favorable preliminary rebuilt foreign determination as to the Seabulk Trader and the Seabulk Challenge and the issuance of a Certificate of Documentation with a coastwise trade endorsement

to the Seabulk Trader on May 9th, 2007, following the completion of the work on that vessel in China.

On April 24th, 2008, the District Court for the Eastern District of Virginia issued an adverse decision on that challenge to the Coast Guard's determination to issue a coastwise endorsement to the Seabulk Trader. The court ordered the Coast Guard to revoke the Seabulk Trader's coastwise endorsement and remand the case back to the Coast Guard for further proceedings and consideration as to whether, one, a major component was added to the vessel in China; two, whether the foreign work exceeded the permissible steelweight thresholds; and, three, whether the work resulted in the installation of required segregated ballast tanks which must by law be installed in the United States if a vessel desires to maintain its coastwise privileges.

On Seabulk's request, the Court granted a temporary stay pending appeal of 60 days on May 9th, 2008, and directed the parties to begin negotiations on an appropriate appeal bond. The deadline for filing a notice of appeal is June 23rd, 2008. The Coast Guard is working closely with the Department of Justice on its next course of action in this case. And because the case is still in litigation, all other questions about it must be referred to the Department of Justice.

The way forward regarding any improvement to vessel rebuild determination will hinge on at least one of three types of actions. The first one, judicial action. Although the Coast Guard cannot discuss our specific recommendations or intended action with respect to an appeal of the decision in the Seabulk Trader, clarity could result from actions by the Court in this matter. However, with regard to action by the Court, generally speaking, it seems equally possible that clarity going forward from this or other judicial actions could be uncertain and might not necessarily resemble the intent of Congress.

Second type of action, agency action. The Coast Guard could propose new regulations. The rulemaking is a time-consuming process and, without any additional clear guidance from Congress, may continue a policy which is misaligned with congressional purpose and be subject to more judicial actions.

Third is legislative action. Congress could act to bring greater legislative clarity to the Jones Act. The Coast Guard would welcome such action. We have more than 50 years of experience with vessel determinations and are committed to working as extensively as necessary with Congress to garner more precise statutory context. The Coast Guard seeks to administer the Jones Act in good faith through consistent regulatory actions and vessel determinations. Additional legislative clarity would necessarily involve refinement of more precise definitions of statutory terms major component and considerable part.

Thank you for the opportunity to testify today. I look forward to discussing these and other facets of our responsibilities during today's hearing.

Mr. CUMMINGS. Thank you very much to both of you.

Admiral Watson, let me start with you.

As evidenced by today's hearing, there are lots of questions about the Coast Guard's interpretation of the Second Proviso of the Jones

Act and whether the United States ship owners are complying with the intent of the law. It appears that there is room for clarification of the Coast Guard regulations on this matter.

Does the Coast Guard, first of all, have the authority to revise its rebuilding regulations without further congressional action? In light of the concerns expressed about the Coast Guard's regulations by shipyards and operators and now again by the Court, a court of law, does the Coast Guard now plan to revisit its regulations?

Admiral WATSON. Sir, the Coast Guard has no plans to revisit the regulations at this time. We I think are not limited in proposing regulations related to this subject matter. We intend to obviously watch closely the outcomes of these judicial actions. And depending upon their outcome and whether or not there is any changes to the Jones Act itself legislatively, we would make a decision at that time.

Mr. CUMMINGS. Now that leads me to my next question. In your statement you said that the Coast Guard believes that additional legislative clarity is necessary, did you not?

Admiral WATSON. Yes, sir.

Mr. CUMMINGS. And you said that that would hopefully, hopefully improve the efficacy of the Second Proviso by clarifying the terms, quote, major component and, quote, considerable part, unquote. Has the Coast Guard looked into whether such an amendment may be found to be in violation of GATT, which could potentially result in sanctions being imposed on United States trade until the entire United States build requirement under the Jones Act is repealed? Why should we, therefore, risk a repeal of the United States build requirement when the Coast Guard can clarify its standards by regulations?

Admiral WATSON. Sir, with regard to GATT, that certainly is out of the Coast Guard's purview of expertise. What I know is that that statement you made is definitely something that needs to be considered. We feel that simply providing clarity and not expanding on or making changes to Jones Act but rather just clarifying to communicate the intent of Congress is in the safe area with regard to GATT. But that would be the Coast Guard's view on it only, and you would be better off to get advisement from the trade negotiators. And I think the issue is that there is consequences of not doing that.

So it is a balance of outcomes that need to be looked at, and we are experiencing right now the outcome of taking the purely regulatory route. These regulations just went into effect in 1996, and now we are involved in a lot of judicial actions. And the process, I would imagine for the business side, is at a standstill until all this can get resolved.

Mr. CUMMINGS. Certainly clarification is important. I think whenever anyone is in business they have to have clarity with regard to the law, not only because they want to comply but they also want to make sure that they can properly plan. Any business person will tell you that planning is of utmost importance. And all of this would certainly go into their consideration.

There is just two more questions, and then we will go to Mr. Poe.

Does the Coast Guard base calculations of steelweight, when assessing whether a vessel has been rebuilt in a foreign shipyard, on

the amount of steel that has been removed from a vessel and the amount of steel that has been added to the vessel, or does it base considerations on the greater of either the steel removed from the vessel or the steel added to the vessel, rather than the combined weight of such steel? And can you comment on this?

Admiral WATSON. Our policy is to use the greater, the second, the greater of the steelweight of the steel added versus removed.

Mr. CUMMINGS. Okay. Finally, the calculations and considerations related to rebuilding decisions, as we can see, are very complex. They involve decisions relating to the steelweight of the vessel, assessment of whether certain items constitute major components and the analysis of whether work being performed is applied to the hull and superstructure of the vessel. But, as we all know, during any construction process the scope of work changes to address, for example, unforeseen issues and to make improvements to the planned designs.

So my question is, do the owners submit to the Coast Guard a detailed list of proposed changes or discuss in detail the potential impacts of these changes on the rebuilding analysis? And what effort does the Coast Guard make to verify that the representations of the owners are accurate before making a final rebuild determination?

Admiral WATSON. The applicant is required to do all of the calculations with regard to the steelweight and all of the requirements to make a determination for Jones Act rebuild.

The Coast Guard is normally asked to make a preliminary determination, which is not a final agency decision but is something that was introduced in 1996, because it does give the business communities some information that hopefully they can rely on before they embark on a large project.

So at the Vessel Document Center the information is evaluated and a determination is made. The evaluation that is done by these companies is normally accepted as an accurate calculation.

We have in a number of cases, when there is reason to do so, sent all of that information, all of the detailed plans to our Naval Architecture Branch at Coast Guard headquarters, provide it to the structural engineers and Naval architects to do a complete duplication in terms of the calculations of what has been submitted and determined by the applicant. And that can be done at the preliminary determination and then again at the end of the process with the detailed information coming from the shipyard when the work is complete.

Mr. CUMMINGS. Did you have something to add, Ms. Williams?

Ms. WILLIAMS. Yes, sir, if I might.

When we issue a preliminary determination in a rebuild case, we caution the applicants that the work has to be done—that the rebuild determination, if favorable, applies only if work is done in conformance with what they have outlined in the detailed plan and the information provided to us up front. If the project changes dramatically from those submissions, they are required to resubmit. And we can at any point ask for additional information and further clarity, and an applicant can then make resubmissions.

The final action—the final action would result in a second—a final rebuild determination letter or the actual issuance of a Certificate of Documentation with a coastwise endorsement.

Mr. CUMMINGS. When you say ″change dramatically″, what do you mean? Who determines that?

Ms. WILLIAMS. Well, if the work has begun and the owners and the owners' agent determine that the scope of the work is going to change once they have begun a project, then it is incumbent upon them to notify the Coast Guard, just as they did voluntarily in requesting the preliminary rebuild determination.

Mr. CUMMINGS. So you don't do outside verification then?

Ms. WILLIAMS. No, sir, we do not.

Mr. CUMMINGS. All right. Mr. Taylor, I know you have a question, but I want to just go to Mr. Poe. Mr. Poe?

Mr. POE. Thank you, Mr. Chairman.

Thank you both for being here.

Section 12101 of Title 46 of the U.S. Code says a vessel is deemed to be rebuilt in the U.S. only if the entire rebuilding, including the construction of any major component of the hull or superstructure, was done in the United States. How does the Coast Guard define rebuilding? Either one of you or both.

Ms. WILLIAMS. Well, we defined it as it is spelled out in our regulations, is the vessel is rebuilt if any major component not built in the U.S. has been added to the vessel or if work exceeding 10 percent of the vessel's overall steel work is done outside of the U.S.

Mr. POE. What is the difference in rebuilding and repair?

Ms. WILLIAMS. There is no difference. It depends on the extent of the work. The percentages on a repair are considered in the calculation for a rebuild determination, as is any other type of work.

Mr. POE. So as far as the Coast Guard is concerned rebuilding and repair are synonymous?

Ms. WILLIAMS. They could be, sir, yes.

Mr. POE. Well, either they are or they aren't. Is repair a different word than rebuilding?

Ms. WILLIAMS. Well, if a repair reaches the extent of a rebuild in our definition of greater than 10 percent of the work or a major component added to the vessel not built in the U.S. Obviously, a repair would not necessarily fall in the category of a major component added. But if the extent of work done in a repair exceeds 10 percent, then it could result in a determination that the vessel has been in fact rebuilt.

Mr. POE. If a ship has a hull replaced, would you agree that that has to be done in the United States?

Ms. WILLIAMS. If the entire hull is being replaced?

Mr. POE. If the hull is replaced.

Ms. WILLIAMS. Yes, sir.

Mr. POE. You take the hull off, and you put another one on. That would be done in the United States?

Ms. WILLIAMS. To maintain its U.S.-built determination, yes.

Mr. POE. And instead of taking that hull off you put a hull on the inside of the existing hull to give the ship more life, or whatever reason, but you put it on the inside, would that have to be done in the United States?

Ms. WILLIAMS. It depends, sir. In a case of an inner hull, if the total—if the extent of work done exceeds the parameters of a rebuild, yes, it would be considered a rebuild at that point if it is done——

Mr. POE. I am trying to keep it pretty simple. You take the hull off, put another one on, you got to build it in the United States. If you leave the old bad hull on there and you put a hull on the inside like a lining, like we say in Texas, you know, you have a lining for your pickup bed—truck, you know, your truck that has a pickup, would you require that that new hull inside of the existing hull be built in the United States? Either it would have to be or it wouldn't have to be.

Ms. WILLIAMS. It depends on the method used to perform that work. In the case you are describing, if it is not done as a major component issue but that we are looking at the separable parts that were used to do that work in applying the tests of the 7.5 to 10 percent, then it could not—it could be determined not to have been a rebuild.

Mr. POE. Let's go to the opposite. You leave the hull on the ship and you put one on the outside of it. Would that have to be done in the United States?

Ms. WILLIAMS. Again, it would be dependent on the method of application.

Mr. POE. So you don't know? Is that what you are telling me?

I am just trying to see what the Coast Guard's position is. All things equal, you put it on the outside, generally would that have to be done in the United States or you would say that may not be a major component of the ship?

Ms. WILLIAMS. Well, a lot depends on the method of performing the work on the vessel. It is not as clear-cut as you described. If there were singularly a whole hull added to the vessel, that then would fall under a definition of major component.

Mr. POE. All right. Thank you, Mr. Chairman.

Mr. CUMMINGS. Thank you.

Mr. Taylor.

Mr. TAYLOR. Thank you, Mr. Chairman.

Admiral, I am reading your statement, and I am going to read selective parts of it back to you. This is from page 3. This is the second to last paragraph.

″There is no requirement, however, that vessel owners seek a preliminary determination before having foreign work done.″

I am going to skip down a few sentences.

″There is no requirement that a vessel owner seek a final determination after having foreign work done.″

What I read into that, and please correct me, is you are doing this on the honor system. That basically if I want to beat the system, if I want to take advantage of cheap foreign labor, still engage in the coastwise trade, I basically let you know that I am going to do some work, but I am not going to show you what it is. I am going to take it overseas, I am going to get my work done cheap, I am going to come back and do the Jones Act trade, and I don't even have to tell you what I did, just as long as I pay the fee for a new documentation?

And, again, given the screw-up on the 123s, and there is no nice word for it, eight ruined vessels, the Nation is out of $90 million, no one in your organization has stepped forward to say, you know what, I should have caught it. Nobody on the contractor side has stepped forward and said we screwed you. Just eight ruined vessels.

But I can tell you this. I have now become a master at hogging and sagging calculations. And I realize when you start chopping up a hull there are vulnerabilities that come out of that. So what you are basically telling someone is you can go chop up your hull overseas as long as you don't ask for permission up front. You can come back and say I did it, but it really wasn't much work. And you really can create a situation where your hull is now vulnerable as a result of the work you have done overseas, and it is going to be documented again by the Coast Guard, and no one is taking the time to see they have taken a safe vessel like the 110 and turned it into an unsafe vessel like the 123?

Have we got a situation now where we are encouraging that through the law? And I am going by your testimony. So please explain.

Admiral WATSON. Yes, sir. I would like to distinguish between the work that we do to certificate vessels and to ensure that they are in compliance with our safety standards.

In the case of these large vessels we are talking about, they are typically built to class society standards, and they are referenced through our safety regulations. And quite often there is an ABS surveyor or another class society surveyor that is attending that work in the shipyard, and there is a lot of correspondence between the Coast Guard and the surveyor.

Mr. TAYLOR. Is it an ABS's job to enforce American law?

Admiral WATSON. Sir, no.

Mr. TAYLOR. Particularly with regard to the Jones Act?

Admiral WATSON. No.

Mr. TAYLOR. Whose job is that, sir?

Admiral WATSON. With regard to the Jones Act, that is the Coast Guard and the Vessel Documentation Center.

Mr. TAYLOR. And have you at any point delegated that responsibility to the ABS?

Admiral WATSON. No, sir.

Mr. TAYLOR. Okay.

Admiral WATSON. But the processes of validating that there has been safe construction practices, the requisite amount of structural material being put in to prevent buckling and hogging and sagging, as you mentioned, and all of the other circumstances related to stability and environmental protection, that is all being done under our safety side. And the process of issuing a vessel documentation certificate is done by the vessel documentation side.

Mr. TAYLOR. Has your safety side talked to the documentation side or does the safety side take the attitude, okay, it is not going to create an oil spill even if they broke the law, so we won't tell these guys over in the documentation office?

Admiral WATSON. Well, the safety people are focused on safety and environmental protection; and when the Vessel Documentation Center needs that level of expertise to calculate steelweight and

the kinds of things that are necessary to make a determination for vessel documentation, they do go to those experts that can do those sorts of calculations.

But I think you accurately characterized the system for documentation. It does involve a certain amount of an honor system here. What you have in place is a very extreme penalty, and that penalty has been considered the motivator for honesty and compliance with the standard. And there is a lot of transparency in the competition, too, with regard to these issues of reconstruction in a foreign shipyard. Obviously, there is a lot of people in this room and there is people that go to the extent of actually the lawsuits.

Mr. TAYLOR. Mr. Chairman, if you will bide with me for a minute, Admiral, what I just find mind-boggling and what I think the average American will find mind-boggling is I have from time to time had constituents who have documented vessels call me up, and I am probably going to get the word wrong, but one of your regs says that a threshold coming off a deck going into a vessel I believe has to be six inches. And it makes sense. You catch a big wave, is to keep that wave from going in the cabin, flooding the engine room, possibly lose power and the boat capsizes.

And I think I had an instance where a constituent, it was five and three-quarter inches, Coast Guard wouldn't document it. He had to go back and do some carpentry work.

Again, rules are rules. How do you think that constituent would likely feel about seeing this vessel that was gutted in China, rebuilt in China, certified by the United States Coast Guard like nothing happened? Does that strike you as selective enforcement? Because it certainly strikes me as selective enforcement. Quarter of an inch here, a container ship converted to a railroad ship there and you guys can't catch it?

And so it leads to the question, is it that you are getting a message from the administration look the other way? Is it a lack of manpower? Is it a lack of expertise? Or, lastly, is it a lack of will within the Coast Guard?

Because I have actually had—I wasn't told this, but one of my staffers had a conversation with one uniformed Coast Guard officer who said something to the extent that the Jones Act is an antiquated law that ought to be off the books.

Now, number one, if it is on the books I would expect you guys to enforce it; and, quite frankly, I don't think the Coast Guard ought to be in the position of picking and choosing which laws they are going to enforce. And if that officer feels that way about the Jones Act then he ought to run for Congress and try to change the law. Until then, he ought to live by the law.

So what is it of the scenarios? Are you getting told by the administration don't enforce the law? Are you short on manpower? Or do you just don't give a flip in the case of enforcing this law?

Admiral WATSON. Sir, we feel like we have consistently enforced this law.

Mr. TAYLOR. That is not very consistent, Admiral. And we sent you these photos a long time ago. And it took the court case to do something about it. The Coast Guard didn't do anything about it until the courts did something about it. So why is that?

Admiral WATSON. Well, sir, what I was going to say is that that is a lot of work. There had been ships with a lot of work done for the last I guess 50 years. We have never had a program that is like we have for safety to do enforcement for the purpose of Jones Act, where we would actually go and be resident in a shipyard or be involved with doing the detailed plan review strictly for the purpose of doing Jones Act. So when I mentioned consistent, that is what I mean.

Now whether that is adequate, whether there is some changes that should be made in this area, that would be something that should be discussed. But I would say that we have been consistent both doing safety and doing our Jones Act determinations.

Mr. TAYLOR. How do you explain this, Admiral? What happened?

Admiral WATSON. What happened in that case is, first of all, I think there is an explanation that needs to be made about what constitutes the considerable part and what specifically is how we are currently defining "major component". And I think, you know, what you are seeing there is a combination of considerable part that was evaluated, added to that a lot of parts that were not considered to be structural, which looks like a lot of ship. But things like doors and ramps and bolt-on structures that are what we consider nonstructural are not considered as part of that considerable part. And then——

Mr. TAYLOR. Admiral, with all due respect——

Admiral WATSON. Yes, sir.

Mr. TAYLOR. —this ship was gutted. This ship was taken down to the bare hull and rebuilt. Are you going to tell me no one in the Coast Guard could recognize that? You couldn't take a kid out of Cape May and he couldn't make that determination?

Admiral WATSON. Sir, I believe that was one of the ships that we did take a close look at in our Naval architecture department. But it didn't add up to the greater than 10 percent rule that we have for——

Mr. TAYLOR. Thank you, Mr. Chairman. You have been very patient.

Mr. CUMMINGS. Mr. Taylor, I have given you a little extra leeway because you did ask for the hearing, and I hope the Members can appreciate that.

Just one thing, Rear Admiral, is a lot of this based on trust? I mean, I am listening and I am thinking that there must be a big trust factor, because it does not seem to be the kind of verification that I would think would be appropriate. And trust is nice, but I am just wondering when you are talking about millions upon millions upon millions of dollars, you know, sometimes people may find ways to get around our regs.

And I must tell you, in answer to Mr. Taylor's last question, too—this is just a second thing—it was very confusing. And it left for me sitting here thinking that if a ship is pretty much gutted, and this is where we end up, somebody's not doing something right. There is something awfully wrong with this picture. And it does concern me, and I think it will concern the rest of the Committee.

And I want to go back to his question, which you may answer now or throughout answering other people's questions, do we have a lack of manpower? Do we have a lack of expertise? Do we have

regulations that just need to be done over again because they are just not clear enough? Is legislative action necessary? If so, exactly what is that?

Again, we have to have clear meaning for these people who are in this business and so that we can make sure that the laws that we are putting forth are adhered to. There is no need for us to sit up and go through these changes if the laws are not going to be adhered to. And they must be administered in a consistent manner. Very important.

Mr. Larsen. You can answer that throughout the——

Mr. LARSEN. Thank you, Mr. Chairman.

Admiral, getting back to the preliminary determination process, you noted that the Coast Guard generally accepts as accurate the calculations that an applicant makes, but at times it goes to the Naval architect's office. What would trigger the Coast Guard sending plans to the Naval architect's office?

Admiral WATSON. Well, one of the triggers would be when we hear from other people in the industry. And we hear that on a regular basis. But if it is a close line issue, obviously, if there has been concerns in the past over these kind of projects and whether there is any doubt with regard to their ability to do accurate calculations, those would be some of the circumstances where we would choose to do that.

Mr. LARSEN. Do you have a formal process for that then or is it mainly hearing from folks from the outside that would cause the Coast Guard to sit down and make its own determination about whether or not to send this material over to the Naval architect's office?

Admiral WATSON. I don't think we have a bright line, if that is what you are looking for, where we would, you know, automatically send these plans to the Naval architects.

The people that we have at the Vessel Documentation Center are all civilians. They have been there a long time. They have done these cases for many years, and the system has been like that. And that is where I draw my statements that I think that there is consistency here.

There is a lot of variations in the projects, and some look pretty significantly different in pictures than others. But the evaluation and whether or not they go to the Naval architects is I think consistent by virtue of the people and the repetitiveness of their process at the Vessel Documentation Center.

Ms. WILLIAMS. Sir, I am sorry, if I might add to that.

Mr. LARSEN. Yeah.

Ms. WILLIAMS. We might—the NVDC might request a determination from the Naval Architecture Branch of whether work is actual structural to the hull or superstructure. That is without getting any feedback from any competitor or from the applicant. But if in our view, we are conducting our review, we have questions as to whether the work being done is in fact structural and it is work being done upon the hull or superstructure, we seek their advice in those instances.

Mr. LARSEN. Okay. My understanding is that somebody may apply for preliminary rebuild determination, but there is no requirement that they do that. Is that correct?

Ms. WILLIAMS. That is correct, sir. In their belief——

Mr. LARSEN. And why would they request it and why wouldn't they request it? And how many times—how many times do you get a request for final determination where you didn't have the preliminary determination?

Ms. WILLIAMS. They generally seek a preliminary. Because, as the Admiral alluded to earlier, the penalties for violating the rule are so severe such that they would submit to us their calculations so that we could confirm their understanding that they have not reached the level of rebuild. I don't know of any instance where we have been asked for a final determination where there has not been a preliminary determination.

Mr. LARSEN. Okay. You mentioned the penalties being severe. And I think if you were to ask the Seabulk Trader folks about the penalty, that was pretty severe and appropriate in my view. But has the Coast Guard ever done what the courts have done, pulling a coastwise endorsement?

Ms. WILLIAMS. Not for this purpose, sir, not that I am aware of.

Mr. LARSEN. So what severe penalties—when you talk about penalties being very severe, what penalties are you talking about?

Ms. WILLIAMS. I am talking about if the work exceeds the level that we determine is a rebuild greater than the 10 percent and they perform the work, then they are subject to losing the coastwise strait privileges.

Mr. LARSEN. And how many times has that happened?

Ms. WILLIAMS. There is one case, a Crowley case that I am aware of, where they did undertake the work without requesting any type of review because it was in the nature of an emergency repair in a foreign shipyard, and the work reached the level of I think greater than 25 percent. And they did in fact ask for a ruling, in which case we denied.

Mr. LARSEN. So then do you find that in most cases—if I may, Mr. Chairman, in most cases that the ship owners and operators are complying with the law? Is that your—would that be your determination?

Ms. WILLIAMS. We would think so, sir.

If I might, the vessel documentation process as a whole, everything we do at the National Vessel Documentation Center requires self-certification. When any applicant applies to document a vessel, whether it be new vessel or a vessel that is undergoing some changes, they certify it by virtue of their application that—for instance, to get a coastwise endorsement—that the vessel has been built in the U.S., which requires that all components, all major components of the hull and superstructure have been built in the U.S. and that the vessel has been entirely constructed in the U.S.

That is a self-certification. We do not verify on any application any of those facts. The circumstances that the Admiral was discussing earlier about compliance issues, the safety facet, there is verification. The Coast Guard employs folks who look at vessels for those purposes but not for purposes of verifying that every component that was put on a vessel was in fact of U.S. origin.

Mr. LARSEN. I understand the difference between checking out the vessel for safety. To be sure it floats when it leaves is something different than making sure it complies with the Jones Act.

I think we are all pretty clear we are talking about two different things there. And this is a hearing about the Jones Act.

Mr. Chairman, thank you very much. I would just like to note on the next panel I would like to hear a little bit from the next panelists about the preliminary rebuild determination process, its transparency, and this whole issue of self-certification. So just give them a heads up on that.

Thank you.

Mr. TAYLOR. [Presiding.] The Chair thanks the gentleman.

The Chair recognizes Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman.

I want to return to the general subject matter of the questioning that Mr. Poe was pursuing earlier, and it is the issue of when the Coast Guard and/or the NVDC have the capacity to exercise discretion. In the Seabulk case, it is pretty clear that the Coast Guard and the NVDC could have decided that the construction of a new inner hull was a major component of the ship's hull; and, in fact, ultimately, that was the thrust of the Court's decision.

Leaving aside the issue of whether or not the Court's decision was right, my question has to do with when the Coast Guard has the opportunity to exercise discretion, and you have that opportunity often, what principles guide that exercise? How do you make the judgment?

And again revisiting this decision, you made the judgment—or the judgment was made that the construction of an inner hull did not constitute a major rebuild. Court found the opposite. How does that process go forward and what principles guide you as you undertake these decisions?

Admiral WATSON. Yes, sir. There are two principles involved here. There is the consideration of whether this work is a major component, in which case we would be looking to see if it was a single component that was still structural and added to the vessel. An example of that would be like a bulbous bow, a new transom, a complete section of the superstructure, structural; and if it exceeds 1.5 percent of the weight of the vessel, excluding all of its fuel and engines and outfitting, then that would be rebuilt. That would be a determination that you can't sell coast-wise.

In the case of pieces and parts being put into a vessel, we have not considered that to be a major component. So were we to have done that, that would be inconsistent with our work historically, and that would be a change.

The other thing that we look for is whether there is metal that is added to the structural parts of the ship, built-up sections, replaced sections. This could include maintenance that we were talking about where we would replace steel, and that would also include the major components as well. If you add all of that up over the whole ship and that exceeds the 7.5 percent of that steel light ship, then we would start to consider that this could be a rebuilt case; and there is some discretion and there are other considerations when we are between 7.5 and 10 percent. If it exceeds 10 percent, it is definitely a rebuilt.

Mr. BISHOP. I guess the difficulty I am having—and I will confess to being a layman with respect to naval architecture—but it just seems that the Second Proviso of the Jones Act, the intent of it is

clear. It is to protect American shipbuilding and to not give an unfair advantage to those who have not engaged in shipbuilding in America.

And the construction of an inner hull, it strikes me, is a major retrofit of a vessel; and it just—I just don't understand why, if we have a law where the intent is clear and the activity undertaken by a shipbuilder at a minimum is subject to a choice, why that choice would not revert—why the finding would not be one that is supportive of the intent of the Second Proviso.

Admiral WATSON. Yes, sir. Maybe I could just talk a little bit about the history and how we got to this long-standing Coast Guard interpretation of the intent.

It was a case that occurred in 1960 where a clarification occurred with regard to this issue, and what was going on, there was a whole mid-body section was being floated into the United States from a foreign shipyard and then it was going to be put into a ship that was being rebuilt actually in a U.S. shipyard with this foreign major component.

So this first level of the determination of whether or not you are putting in a major component really relates back to the determination and the clarification that we got in 1960 that had to do with this actual major single component thing that could be floated from one shipyard to another and installed in this vessel as a rebuild. And there has never been any other determination on or clarity about major component. That has just been the long-standing thing. We have only been looking for major complete components that exceed 1.5 percent ever since then.

The changes that were made in 1996 as a result of the court cases then had to do with the establishment of these percentages for steel that is added onto structures and the definition of a considerable part but not major component.

Mr. BISHOP. Mr. Chairman, may I be given one additional question?

Mr. TAYLOR. Please.

Mr. BISHOP. Again, staying with Seabulk—and you just indicated that certain court decisions have informed further judgments made by the Coast Guard—in the Seabulk case the Coast Guard found that the separable/inseparable distinction that the Coast Guard was making would lead to arbitrary applications of the Jones Act. Do you foresee the Coast Guard now rethinking that separable/inseparable distinction so that there would be greater clarity going forward?

Admiral WATSON. Well, I think the Coast Guard is going to have to deal with the court's decisions; and I think it is going to be a little bit difficult for me to predict how we are going to do that.

One thing that comes to mind is that the Seabulk case is not the only case out there, and there are several cases, and it is possible that different judges could render different decisions on circumstances that are very similar. So then I don't know quite how we would write regs.

Mr. BISHOP. Mr. Chairman, thank you for allowing me.

Mr. TAYLOR. Thank you.

The Chair recognizes Ms. Richardson.

Ms. RICHARDSON. Thank you.

I think my colleagues have done a pretty good job about dealing with the specifics of the issue today. What I would like to do is I think talk about the bigger problem, which hopefully can get us to some resolution.

I am new on the Committee; and back in May we had a hearing of this group, a body of the Coast Guard National Transportation Safety Board Casualty Investigation Program, and at that time the Investigator General found that five out of six of your folks who were assigned to the marine casualty investigators in the sector of San Francisco were unqualified for these positions.

Further, in the report it stated—and that is why it is a good thing that Members stay around, so we can remember from one week to the next of what is said. In the report it said, in August of 2007, the Coast Guard issued a revised standard which both improved and detracted from the qualifications for marine casualty investigators. The Coast Guard improved the standards by updating the task that an investigator must perform to qualify for this position. These tasks include preparing for an investigation, initiating, et cetera.

Then we get to the key point here which is why we are here today: However, in August of 2007 the standard also removed the prequalification requirement as a whole for machinery and small vessel investigator, which, in essence, lowered the standard. Coast Guard personnel stated that knowledge in these speciality areas is essential to the ability of investigators to correctly identify the causes of marine casualties and issue appropriate safety alerts and recommendations. In our opinion removing this prequalification standard may negatively affect the qualifications and the capabilities of the Coast Guard marine casualty investigators.

Now, I realize that one is one issue and one is the other. But, sir, I have got to tell you also then when I look at the report of the testimony of Catherine Higgins, where they suggest that we were last here and we were fighting over who should have jurisdiction and you guys have done it over the years and that is why you still want it to do it, I have got to tell you—and I am going to summarize—what I recommend that this Committee do is that I think when we get a new administration we need to send a letter to the Department; and a complete reevaluation needs to be made of the jobs and qualifications and what the Coast Guard does.

With all due respect, sir, you are out there fighting a war. You are doing a whole bunch of things that many of us didn't anticipate you were going to have to do at this level, and hence we are having problems with marine accident investigations, we are having problems with this, and I really believe that you are stretched too far. And whether it is your inability to fight with the current administration to demand that you have appropriate personnel, I don't know what it is, but I believe it needs to be seriously looked at based upon your current involvement with the war efforts that we have. Maybe what you did previously in nonwar environments was okay, but I believe that we are just seeing holes in the ship all around us and it has got to change.

So what I am going to ask of our Chairman is that we do a letter, and I think we need to seriously reevaluate all of these different things that you are required to do and determine which ones are

the most critical, and the ones that you can't, maybe somebody else needs to do them. But this is not working.

Do you have a comment on that?

Admiral WATSON. The only comment I would like to make is that there really isn't a difference in the subject matter we are talking about here. It is an issue of clarity of a standard.

I think to characterize the people that we have at the National Vessel Documentation Center as having not the requisite experience and competence I think is really not the accurate characterization for this particular issue.

Ms. RICHARDSON. Well, you just had several Members here who went through questions and asked you, if you were completely redoing the hold, didn't you see it? Didn't you know? Didn't you understand? And there were serious concerns here of the ability to do the job.

Admiral WATSON. Well, in the process of issuing a certificate of documentation, there is no field visit to the ship. I mean, that was one thing that we absolutely agree with. This is a process that relies on honesty on the part of the applicant to do those calculations. And we don't have, in the course of every documented vessel, an inspector that goes out just for the purpose of doing the documentation evaluation. This is done at the Vessel Documentation Center with the information that is provided the same way it has been provided for years and years, and the people that we have there are very experienced. And it is really not an issue of training. It is an issue of standards and clarity of purpose on the part of the statute.

Ms. RICHARDSON. Well, what I would say as I close, because my time has expired, honesty only works if it is going all the way; and if it is not going all the way then obviously we need another process to deal with it. So what I am frustrated with is I sit on this Committee and in a couple months I have seen multiple instances where your operation has failed. So I am willing to give you the fact that I don't think necessarily the failure is solely that people don't want to do a good job or the people that are there aren't capable of doing the job. What I am saying is I think, with all the things you are doing, it seems to be a little too much.

So we either, one, need to get enough people there to do the job in a quality fashion or, two, we need to reevaluate all of what you do. But we shouldn't be fighting over, as we were just here, your saying that you wanted jurisdiction of another area when I see areas that you have jurisdiction over where it is not working. So at some point these pieces need to come together, and that is what I am concerned about.

Thank you.

Mr. TAYLOR. The Chair recognizes Mr. Poe.

Mr. POE. Thank you, Mr. Chairman.

Just to clarify, Admiral, isn't a field visit required before a Certificate of Inspection is issued?

Admiral WATSON. Yes, sir.

Mr. POE. So there is an inspection of the vessel?

Admiral WATSON. Yes, sir. It is an inspection related to the safety rules in 46 CFR.

Mr. POE. I just wanted to make sure that was clear.

Thank you, Mr. Chairman.

Mr. TAYLOR. The Chair recognizes Mr. Baird.

Mr. BAIRD. Thank you, Chairman. I thank our witnesses.

I don't know if you both have had a chance to look at the testimony of Michael Roberts, who I think is speaking on the second panel. Have you had a chance to look at that, by chance? I am not trying to blind side you here.

Admiral WATSON. I looked at it one time through, sir. But I will be happy to take questions.

Mr. BAIRD. What is intriguing to me is Mr. Roberts makes a number of points here about possible changes in the procedures of the NVDC, and I am just interested—to a layman they seem like reasonable ideas. What are the pros and cons of these suggestions from your perspectives respectively?

Admiral WATSON. I am trying to remember all the suggestions, but I noticed there were some that related to the——

Mr. BAIRD. Let me just summarize really quickly. And these are not hostile questions. They are concerned particularly about, basically, the confidentiality.

The closed nature of the NVDC determination process suggests that some of the procedures, changes should be public notice that an application has been filed, an opportunity for third parties to participate in the proceeding with appropriate restrictions to protect confidentiality of proprietary information, a reasonable opportunity for pursuing an administrative appeal within the Coast Guard, judicial review under the Administrative Procedures Act, and publishing and indexing of Coast Guard decisions on these issues.

As I read it, I think the premise is that others might want to have input into this and maybe offer a different perspective possibly than NVDC or the Coast Guard might determine. And, again, to a layman I should tell you who supports the Jones Act in principle and in its purpose, that makes some sense to me. But I——

Admiral WATSON. Yes, sir. And that is what I was recalling was in there, was mostly the transparency of the process. And I think we are looking very closely at adding to the process that when an application—when a determination is made, a preliminary determination or a final determination, that that letter that the Coast Guard produces could be made public and avoid the current practice of requiring a FOIA and then the time it takes to process that and—as long as there is nothing that we inadvertently—we would have to look at our letters more carefully to make sure we haven't violated someone's privacy or all the other stipulations in the FOIA.

One of the unintended consequences of changing to that sort of a process is that the overall process could be slowed down by adding this amount of information out so that there is a lot of dialogue that goes on. We could do that. It seems to be happening anyway. So if it could eliminate something else afterwards——

Mr. BAIRD. Litigation, for example.

Admiral WATSON. Yes, sir. That might be a net gain.

One thing that we cannot do, and this applies in all of our areas in working with the maritime industry—I spent 4 years in my career earlier doing plan review—is that you cannot release propri-

etary plans of one company to another company, and that is described very clearly in the FOIA. So one of the limitations that we may not be able to overcome that is suggested there is that they could have all of the information needed to evaluate this as a third party. The only way they could get that would be to go directly to the company that made the application and provided it all to us, because we are not at liberty to release any of that information.

Mr. BAIRD. Ms. Williams, do you care to comment?

Ms. WILLIAMS. Just to add to what the Admiral said is that we have already seen complaints about giving only our determination letter doesn't provide enough information that a third party would necessarily require to make any type of comment on our decision. So—and most of that information would be withheld under FOIA.

Mr. BAIRD. I think the challenge here is, to the extent you are empowered to make some of these consequential decisions, if there is not confidence in the intent of enforcing the law, then there is a need for a third-party review possibly.

And I want to close, I guess, by following up on the questions that Mr. Taylor raised.

The comments suggesting that laws that are in place are archaic or anachronistic leads one to wonder is that the role of the people in that division to make those assertions? And what are the consequences? If somebody is empowered, it would be a little bit like a police officer saying I just never really bought into the 70-mile-an-hour speed limit myself. You wonder if that is the role of the police officer or if their role is to enforce the 70-mile-an-hour speed limit, and what are the consequences of that happening?

In two senses, what are the consequences for the individuals who express such opinions? And, more importantly, what are the consequences to the public who are depending on such individuals to enforce the laws as they are written?

Do you care to comment on that.

Admiral WATSON. Sir, I have never heard anybody in the Coast Guard make that kind of comment. It is certainly not the position of the United States Coast Guard, and we do regret when our employees make comments like that. But it is impossible to control everybody's comments, and it is hard to say where that was heard. If someone is in an official capacity and they are going to make a speech, we do try to review our public comments by official people in the Coast Guard. We just would simply say, no, that is not the position of the Coast Guard; you can't say that.

If they were to have said it and it comes back to us, we would certainly look into the circumstances and whether we need to do something about that individual.

But, obviously, we don't condone that. Our purpose is to enforce the laws of the United States, and the Jones Act is a very important law.

Mr. BAIRD. I appreciate that.

I would just close by saying it is so important that the vast majority of the Members of the Congress of the United States support it and we support it because we believe in a strong domestic shipbuilding industry; and I think we would look unfavorably upon anybody who sought to undermine that, either overtly or covertly.

I thank the Chairman for his time.

Mr. TAYLOR. Thank you.

Ms. Williams, just a couple of questions; and I would invite either you or the Admiral to answer this. But a mistake was made. A major rebuild occurred. The Coast Guard signed off on it. You shouldn't have, and it took the courts to tell you, you made a mistake. So let us leave it at that.

What I am curious about is on this major rebuild. I really do think any kid coming out of Cape May would have said major rebuild. Who in your organization looked at that, and who signed off on it, and what is the procedure? Was it a civilian who made this call and a uniformed officer signs off on it? What is the procedure?

The second thing is—and I am trying to cut you some slack here. I do not have a law degree, and I realize that guys who don't have law degrees are making these calls every day. So I am going to read things to you. This is coming out of 46 CFR:

″A, regardless of material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel.″

And you drop down a little bit: ″A vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight prior to the work, also known as discounted lightship weight.″

Now, I am trying to cut you some slack. The guy who has worked on boats says a lot of this work could be curved welds, very slow, manually intensive, very expensive. Or if you just go by weight, a lot of that could have been straight. It could have been done by machine, pretty cheap to do.

Do the people in your organization look at the complexity of the work, have the technical expertise to go, ″that is going to be slow, painful, and expensive″ or ″that is quick and dirty″? Is that language confusing to you, or did it just automatically fall to the 10 percent rule?

And, again, I am trying to ask this because I want to solve this problem, and I am trying to figure out where the problem is. Is it lack of expertise within your office? Is it lack of guidance in the law? Is it lack of national will?

And, lastly and I sure hope the last one is way off, are you being leaned on by this administration or any administration not to enforce the law?

Ms. WILLIAMS. Sir, the process of making a rebuild determination is that an applicant submits in writing to us a very detailed explanation of the plant work. With that, they submit the calculations of the amount of steel work involved in the proposed modifications as compared to the total steel weight of the vessel. That information is processed at a very high level within our organization.

The NVDC is composed of about 101 persons, primarily paralegals, specialists, and some clerical staff. But the determinations and most recently—well, at least since the formation of the NVDC—Mr. Willis, who was the former director, and I made those determinations until we got a staff attorney; and the staff attorney, Mr. Willis and I consulted on all rebuild determinations made since his arrival.

Mr. TAYLOR. Just for clarification, so you personally were involved in the Mokihana?

Ms. WILLIAMS. Yes, sir. As a reviewer, yes, sir.

Mr. TAYLOR. And you did not consider that to be a major rebuild?

Ms. WILLIAMS. No, sir. One of the——

Mr. TAYLOR. Even after the photos were submitted to you?

And, again, I can see the difference between what they said they were going to do and the photos. So you made your determination based on their written testimony?

Ms. WILLIAMS. On their——

Mr. TAYLOR. On their written request?

Ms. WILLIAMS. On their written request.

Mr. TAYLOR. So what happened when the photos—because I know my office submitted to the Coast Guard these photos. What happened then? And the Coast Guard stuck to their story. This isn't a rebuild. What happened then?

Ms. WILLIAMS. As we applied the test, as we were trying to explain earlier as far as a major component or major components added to the vessel, we applied it in conformance with what we believe led to the addition of that terminology to the statute itself, is that separate and distinct portions of a vessel that exceeded 1-1/2 percent of the vessels overall steelweight were then added to the vessel. The work that was done on the Mokihana did not rise to that level in our estimation of how the work was performed on the vessel.

Mr. TAYLOR. Do you find the law that I just quoted confusing in any way?

Ms. WILLIAMS. No, sir, I don't.

Mr. TAYLOR. So you go by the 10 percent rule is what you are telling me.

Ms. WILLIAMS. Yes, sir.

Mr. TAYLOR. You are not looking at it as a major component. You are looking strictly at the 10 percent rule—

Ms. WILLIAMS. No, sir. We look at both portions of it.

Like I said, a vessel—if a major component—in the first provision under the rule, if a major component of the vessel, added to the vessel, was not built in the U.S. and was later added to the vessel, it could rise to the level of being a rebuilt.

There are two portions of this rebuild determination that we do in fact——

Mr. TAYLOR. But I am sensing that in no instance do you look at the complexity of the work, the value added of the work, that your fallback is the 10 percent rule, 10 percent of the steelweight?

Ms. WILLIAMS. Yes, sir.

Mr. TAYLOR. That is your quick and dirty——

Ms. WILLIAMS. Well, as far as how complex the work is and whether it is going to be quick and dirty, no, sir. We go with the overall calculations in either event.

Mr. TAYLOR. The second thing I have got to ask, I have been to shipyards in Korea and had total access; shipyards in Germany, total access; shipyards across the States, total access; shipyards in Denmark, total access. I visited one shipyard in the People's Republic, and I was assigned a goon who was in my face all day. I

am just curious. When your folks are in a Chinese shipyard, are they given total access to that yard?

Ms. WILLIAMS. None of the folks that work for the NVDC would ever be in a shipyard, sir.

Mr. TAYLOR. No one from the Coast Guard ever——

Ms. WILLIAMS. Not from the Coast Guard. From the National Vessel Documentation Center.

Mr. TAYLOR. I'm sorry, ma'am?

Ms. WILLIAMS. No one from the National Documentation Center would be in a shipyard.

Mr. TAYLOR. Ever?

Ms. WILLIAMS. That is correct.

Mr. TAYLOR. So you are strictly—again, then you are counting on the honesty of the applicant. No one is looking over the shoulder, never a spot check?

Ms. WILLIAMS. That is correct. And that is for all our applications, not just rebuild. Any application to document any vessel with us is based on a self-certification of the applicant.

Mr. TAYLOR. Okay. And the reason for that decision, is that dollars, limited budget? Is it manpower? Is it the way it has always—I am just curious.

Ms. WILLIAMS. It is the way it has always been. We document—we have a total of 350,000 documented vessels. About 35 percent of those would be commercial vessels, and I don't know what the actual——

Mr. TAYLOR. Again, Ms. Williams, deal with the practical. Today, out in the Gulf of Mexico, some Coasties are going to board a boat and say, ″Do you guys have any undersize snapper on board?″ And the folks instinctively are going to say, ″No.″ And they say, ″Do you mind if we look in your ice chest?″ So for something as simple as the size of a snapper, the Coast Guard is going to stop and see if someone is breaking the rules. You are telling me that no one is bothering to check on a huge project like this whether people are living by the rules?

Ms. WILLIAMS. Not for the purpose of issuing certificate of documentation——

Mr. TAYLOR. All right. I just wanted to get that on the record. Thank you for being forthright for us.

I don't have any additional questions. Does anyone else?

Again, thank you for being here. We have obviously got something that needs to be addressed. We very much appreciate your appearing before the Committee. You are excused, and we are going to call the second panel up.

The Committee is now going to hear testimony from our second panel including Mr. John Love, the Vice President of Pasha Hawaii Transport Lines; Mr. Matthew Paxton, the President of the Shipbuilders Council of America; and Mr. Michael Roberts, a partner on behalf of Crowley Maritime Corporation.

TESTIMONY OF JOHN P. LOVE, VICE PRESIDENT, PASHA HAWAII TRANSPORT LINES LLC; MATTHEW PAXTON, PRESIDENT, SHIPBUILDERS COUNCIL OF AMERICA; AND MICHAEL G. ROBERTS, PARTNER, VENABLE LLP, ON BEHALF OF CROWLEY MARITIME CORPORATION

Mr. TAYLOR. Mr. Love, we will take your testimony first, please.

Mr. LOVE. Mr. Chairman and Members of the Committee, my name is John love. I am a Vice President of Pasha Hawaii Transport Lines, and I appreciate the opportunity to testify before the Subcommittee on Coast Guard and Maritime Transportation.

PHTL is a U.S. Flag carrier that operates the JEAN ANNE, a U.S.-built vessel carrying roll-on/roll-off cargoes in the west coast and Hawaiian Islands trades. The JEAN ANNE is a state-of-the-art pure car and truck carrier delivered by VT Halter Marine in Mississippi in 2005. She meets all the requirements of the Jones Act.

As you know, the Jones Act requires that U.S. Flag vessels be built and rebuilt in the United States in order to retain domestic trading privileges. If a major component is added to a vessel in a foreign shipyard, it is rebuilt foreign per se. We knew this when we decided to build the JEAN ANNE at VT Halter and have no doubt that our competitors knew this as well. We also assumed that the Jones Act would be vigorously enforced. Yet the JEAN ANNE is now competing with at least two vessels rebuilt in Chinese shipyards.

The root of the problem begins with the fact that the decision-making process employed by the Coast Guard is a secret proceeding closed to the public. A typical application for a rebuild determination, contrary to the testimony that you heard here this morning, consists of a lawyer's letter with a vague general description of the project, even though the Coast Guard's regulations mandate submission of detailed information along with accurate sketches and blueprints.

In the Mokihana case, none of this happened. What was described here this morning by Admiral Watson and by Ms. William is a process as it should have been but not what actually happened.

To make things more difficult, the only way to obtain a copy of the Coast Guard ruling is to file a request under the Freedom of Information Act. Even when the ruling is finally obtained, it is difficult to ascertain just exactly what it is the Coast Guard has approved. There is no meaningful appeal process to headquarters, and disadvantaged shipowners have found that the only relief available is to file a complaint in Federal court.

I am going to digress a moment from my written comments here to address some comments by Admiral Watson and Ms. Williams.

On October 26 of 2006, we wrote a detailed letter to the Coast Guard describing the process and the project that Matson was undertaking at Nantong, China, on the Mokihana. Unbeknownst to us, the day before we submitted our letter the general counsel and senior vice president of Matson had submitted a letter to the Coast Guard telling the Coast Guard that the project was over 7-1/2 percent, not as originally presented to the Coast Guard, and confirming to the Coast Guard that now that they had detailed plans

and had entered into their shipyard contracts, the steel percentage was now accurately known.

What happened next is really incredible, and I am just going to turn to the administrative record from the Coast Guard.

Because as soon as Matson Navigation and the National Vessel Documentation Center became aware of our protest, Matson withdrew the letter admitting that the project was over 7-1/2 percent; and we received a one-sentence letter from Thomas L. Willis, Director of the National Vessel Documentation Center, saying, ″I refer to your letter of October 27, 2006, requesting reconsideration of the preliminary rebuild determination dated June 23, 2004, concerning Matson Navigation C-9 class vessels. In accordance with the provisions of 46 CFR, subpart 1.03, that action is no longer subject to review or consideration.″

So we were told to take a walk. That is the transparent process.

Not only is the procedural process flawed, but the decision-making process is flawed as well. While the rebuild determinations are inconsistent, there is one discernable trend. The Coast Guard's enforcement of the Jones Act has gotten increasingly lenient or nonexistent.

The Coast Guard's regulations purportedly use two tests to determine if a vessel is rebuilt, a major component test and a steel weight test. In recent rulings, the Coast Guard has written the requirement that major components be constructed in the United States completely out of the Jones Act. Rather than look at what is being added to the vessel overall, the Coast Guard has argued that it should look only at the weight of the largest piece of the major component. This approach has been soundly rejected by the Federal court in a recent case.

In another ruling, the Coast Guard held that a 265.5 ton deck added in China is not a major component because the heaviest piece lifted by the Chinese shipyard's crane was only 26.9 tons. This is obviously not what Congress intended.

The Coast Guard's implementation of the percentage steel weight test also shows an increased willingness to sanction foreign rebuilding. As further described in my written testimony, for example, the Coast Guard typically does not count outfitting when counting steel work, as outfitting has been historically defined as inventory, equipment, furnishing, and stores. Yet recently the Coast Guard has expanded this definition to include vehicle decks as outfitting on the ground that they are nonstructural steel work, although this distinction, the distinction between structural and nonstructural, was rejected by another United States District Court judge almost 20 years ago.

According to the Coast Guard and confirmed by the courts, preliminary rebuild determinations convey no legal rights. Applicants seeking a rebuild ruling have been aware for years of the increasingly lax enforcement of the Coast Guard. They have asked for rebuild rulings that they know would never be approved by an agency that is dedicated to enforcing the Jones Act.

Applicants who have obtained these rulings and who pushed the envelope took a calculated risk that it would be business as usual. Now that the courts are responding, these companies should not be bailed out by Congress. This would not be fair to those of us who

followed the rules and invested tens of millions of dollars and trust in U.S. Shipyards.

The problems at the Coast Guard are having ripple effects. Although we disagree with this approach, the Maritime Administration is following the Coast Guard in determining what constitutes a foreign rebuilding for purposes of the capital construction fund. This has resulted in sizable tax benefits for vessels rebuilt oversees in Chinese shipyards when the benefits were designed to encourage work in U.S. shipyards.

In addition, while some of these projects are clearly major conversions requiring environmental and safety upgrades, the Marine Safety Center, part of the Coast Guard, also appears to be following the rest of the Coast Guard and by doing so may be creating issues concerning U.S. compliance with international treaties. So the Mokihana, which was gutted in China, was found by the Marine Safety Center not to be a major conversion for safety purposes.

All of this adds up to putting us at a significant competitive disadvantage because we chose to play by the rules. The Jones Act was intended to create a level playing field. We ask that Congress take steps to encourage the Coast Guard to enforce the Jones Act by, amongst other things, making the rebuild application process completely transparent with input from all concerned, requiring the applicant to submit sufficiently detailed information in support of its application and conducting meaningful investigations.

In the case of the Mokihana, you have a 3-page letter from the general counsel and senior vice president of Matson with three paragraphs that comprise half a page that describes the project. You have a couple of crude renderings of the profile of the ship and 1 page of calculations that a U.S. Federal judge has characterized as the work of a 5th grader. That was the application to the Coast Guard that was approved.

Mr. TAYLOR. Mr. Love, we have been pretty generous. We gave you 10 minutes on your 5.

Mr. LOVE. Thank you, sir.

Mr. TAYLOR. Thank you very much.

The Chair recognizes Mr. Paxton.

Mr. PAXTON. Thank you, Chairman Taylor and Members of the Subcommittee for the opportunity for the Shipbuilders Council of America to testify at this important hearing. I am Matthew Paxton, President of the Shipbuilders Council of America, the largest trade association representing U.S. shipyards.

The SCA represents 31 companies that own and operate over 100 shipyards. They are located along the eastern seaboard, the gulf coast, the Great Lakes, the west coast, and Hawaii. SCA's members build, repair and maintain America's fleet of commercial vessels.

A core value of the SCA is to promote and protect the Jones Act, which requires vessels that operate the domestic trade to be built in U.S. shipyards and owned and crewed by U.S. citizens.

From the shipyard perspective, the Jones Act ensures that the U.S. maintains critical shipyard infrastructure and a skilled workforce that can build and repair the domestic Jones Act fleet that consists of over 38,000 vessels. These vessels were built in U.S. shipyards and represent an aggregate $48 billion investment.

However, over the last decade, the U.S. Ship repair industry has experienced a substantial decline in the amount of maintenance and rebuilding work on the Jones Act fleet. Increasingly, more Jones Act vessels are going overseas to perform major rebuild work. This work previously sustained the U.S. ship repair industry. The result has been significant downsizing of major ship repair facilities, loss of critical ship repair assets, closure of shipyards, and the outsourcing of skilled labor needed to maintain the domestic fleet.

This is not the first time the U.S. Shipyards have been faced with the loss of work on Jones Act vessels. In 1956, the Congress introduced a bill to add the Second Proviso to the Jones Act.

At that time, this Committee provided in its House report accompanying the passage of the Second Proviso bill the quote: ″With major developments in technology in recent years there have been instances of American-owned, American-built vessels which have been substantially rebuilt in foreign shipyards. This appears to be a gap in the law, which is clearly inconsistent with traditional policy.″

The ″gap in the law which is clearly inconsistent with traditional policy″ that exists today is the inconsistent application and enforcement of the foreign rebuild regulations by the Coast Guard. Simply put, the Coast Guard has failed to enforce the major component test of its own regulations in a core element in the Second Proviso.

In addition, the Coast Guard has never exercised its discretion to determine that a vessel has been rebuilt when foreign work projects involve between point 7.5 percent and 10 percent of a vessel's steelweight. Instead, with no analysis, the Coast Guard has simply implemented a de facto 10 percent steel work threshold test to determine whether a vessel has been rebuilt foreign. It is important to note to the Committee that a 10 percent total steelweight rebuilding is a large job, and U.S. shipyards can do it and very much want to do this work.

Further complicating the Coast Guard's regulations is the fact that the standards and tests for what counts in a foreign rebuild project are constantly changing. The Coast Guard once counted the total steel added and steel removed from a vessel. Now it only counts the greater of either the steel removed or added in calculating the 10 percent threshold test.

The agency determined that adding an entire hull to a single-hull vessel was not considered a rebuild. We have heard a lot about this today. The work, they concluded, was ″intrinsic to the hull itself″ and not a component; and they went on to further define this as saying this wouldn't be ″similar to the addition of decks added to the superstructure.″

However, in a subsequent ruling which involved the addition of several decks to the superstructure of a Jones Act vessel in China, the Coast Guard disregarded its previous analysis that decks are considered separable components and instead applied a new test that looked at whether or not any crane in the Chinese shipyard can lift a single component weighing at least 1.5 percent of the steelweight of the vessel. Upon determining the Chinese shipyard did not have cranes that could lift a component of this size, the Coast Guard determined no rebuilding took place.

The lift capacity of cranes in a foreign shipyard has nothing to with the Second Proviso. It serves only to frustrate congressional purpose, intent, and to prohibit the foreign rebuilding of Jones Act vessels.

The lack of enforcement of the Second Proviso by the Coast Guard has resulted in confusion and uncertainty not just for U.S. shipyards but across the maritime industry. Jones Act operators no longer have faith in what the capital construction costs are to operate in domestic trade. Is it rebuilding a new vessel in a U.S. shipyard, or is it rebuilding your Jones Act vessel in a Chinese shipyard?

The Shipbuilders Council of America supports the Jones Act and the consistent application of the Second Proviso. I recommend this Committee consider legislation to clarify the Coast Guard regulations to provide a transparent and predictable process so everyone in the maritime industry understands the standards for rebuilding Jones Act vessels. This clarification should take a common-sense approach to the identification of components of the hull and superstructure. A component should be looked at in its entirety, irrespective of its manner of installation.

The U.S. District Court for the Eastern District of Virginia recently remanded and revoked the Coast Guard's endorsement of a Jones Act vessel rebuilt in China because ″However the manner in which the component is added to the vessel, piece by piece or wholesale, is irrelevant to whether the component is major. Although a deck or a component of the hull can be added to a vessel as one discrete preconstructed structure, it surely can be added piece by piece, beam by beam, rivet by rivet. Shipowners could easily frustrate the entire operation of the Second Proviso.″

The SCA agrees with this assessment and believes the Second Proviso has effectively been written out of the Jones Act.

Thank you again, Mr. Chairman, for the opportunity to testify here today.

Mr. TAYLOR. The Chair now recognizes Mr. Roberts.

Mr. ROBERTS. Mr. Chairman and Members of the Committee, good morning. I am Michael Roberts with the law firm Venable, and I appear this morning on behalf of Crowley Maritime Corporation.

Crowley is a leading American shipping company based in Jacksonville, Florida. I have represented Crowley on maritime regulatory and policy issues since 1991 and have spent a large part of that time involved in Jones Act issues.

I want to compliment you for holding this hearing. It is a very important subject, and I feel a little bit like a member of the choir singing to the preacher here, but we have a Jones Act because we need an American maritime industry for reasons of national security.

Could we have cheaper ships and cheaper transportation if we left it up to the Chinese to take care of that? Of course. But Congress has said very clearly that you can't do that in American domestic markets, and to a large extent that is a reason that is how we maintain an American maritime industry.

The issue today concerns what it means to rebuild a vessel, what kind of work can be done on a Jones Act vessel in a foreign ship-

yard without disqualifying that vessel from domestic trades. It is very important to the industry that we get this right.

American shipping companies have been told essentially this: Build ships in the United States for domestic trade. Don't worry that those ships are much more expensive than ships built overseas. They will compete on a level playing field in our domestic trades. That is a risky proposition unless there is real confidence that foreign-built ships or foreign-rebuilt ships are in fact excluded from domestic trades; and, unfortunately, some recent decisions by the Coast Guard have undermined that confidence by letting foreign-rebuilt vessels into domestic trades.

I will quickly go over how this issue has come up in the tanker business.

When Congress passed the Oil Pollution Act of 1990 requiring the phaseout of all single-hold tankers, Crowley and other company OSG and other tanker owners had a tough decision to make. Do they start replacing tankers, building them in the United States or not?

Keep in mind that if they build the ships in the United States, the cost is going to be much higher. They are not going to be competitive in international trade from a capital cost perspective.

But Crowley did its analysis, lots of analysis on lots of different options, including retrofitting older U.S. tankers in U.S. shipyards, and decided that the economics worked out for building a series of new tank vessels in the United States. Crowley and OSG are in the middle of building programs that will run about a billion dollars for each company to build new tankers in the United States, about 29 of them altogether at this point for use in domestic trades.

In taking that step, these companies are not only complying with the Jones Act but they are making a very large financial contribution to American security interests by helping to keep U.S. shipyards active and modernizing. This is precisely what Congress asked the industry to do.

The other company in this scenario, Seabulk, didn't want to take the risk of building U.S. ships in the United States and felt it was just too expensive to retrofit older tankers in U.S. Shipyards, although other companies have done exactly that. So Seabulk asked its lawyers to send a letter to the Coast Guard. The letter described a basic double-hole retrofit project and argued that if Seabulk were to go ahead with the project in China, this vessel would nevertheless keep its Jones Act privileges.

Nobody knew anything about this letter except Seabulk and the Coast Guard. From what we can tell, the Coast Guard didn't dig into it very much, didn't ask the hard questions, and went on and issued a private letter ruling as Seabulk requested. While these rulings are not published, eventually it all came out not only that Seabulk had obtained permission for two retrofit vessels but that two other companies had obtained similar authority, for a total of 10 vessels that would be retrofitted in China with double holes. Those decisions, if implemented, would destroy the markets that Crowley and others had planned on when they made their investment decisions.

So, at that point, in April of 2007, Crowley filed a 25-page appeal to the Coast Guard Commandant giving the Coast Guard a chance

to clean up this mess, and we still haven't heard anything on that appeal.

When Seabulk——

Mr. TAYLOR. Excuse me, Mr. Roberts. For clarification, when did that happen?

Mr. ROBERTS. We filed an appeal in April of 2007.

Mr. TAYLOR. So 14 months.

Mr. ROBERTS. Correct.

Mr. TAYLOR. Would you be so kind as to send a copy of that to my office?

Mr. ROBERTS. I would be happy to do that.

Mr. TAYLOR. Sorry to interrupt.

Mr. ROBERTS. That is fine.

When Seabulk completed work on the first ship, the Coast Guard issued a coast-wise endorsement within 24 hours of the request and without looking further into it. This was finally the final agency action that we needed to take the matter to court. Crowley was joined by OSG and the Shipbuilders Council and the lawsuit against the Coast Guard.

You know the results of that lawsuit at this point. A conservative court in the Eastern District of Virginia reversed the Coast Guard's ruling on three different grounds. Seabulk has appealed that decision to the Fourth Circuit, and that is where things stand at this point.

And I would like to make two brief observations, if I may.

First, the practical effect of the Coast Guard's letter ruling dealt with one issue only, where the work could be done. By letting Seabulk do the retrofit work project in China instead of the United States, the ruling was like a discount coupon with two-thirds off the regular price. Crowley, OSG and others have been paying full retail price and contributing hundreds of millions of dollars to U.S. security by complying with the Jones Act; and yet the Coast Guard has rewarded Seabulk with a two-thirds off coupon for taking its ship to China. And that Chinese-American ship has put Crowley's vessels at a tremendous competitive disadvantage since its return.

My second point quickly gets to the procedures, and I can talk further about that during the Q&A, if you would like. But I genuinely believe that the issue is bad procedure and not bad faith on the part of the Coast Guard. And I think it has been echoed across the board here, and I will say that we have as an industry worked out at least to some level a set of procedures that I think would improve considerably on the process. And I would be happy to go over those if that would be helpful.

Mr. TAYLOR. Thank you.

Before I recognize Mr. Larson, I would like to at least get you three gentlemen's opinion on something.

I think the Admiral at some point said, we don't make the request to do work public because it contains proprietary information. I serve on the Armed Services Committee, and I can see where the plans to a nuclear submarine we probably don't want on the Internet. Plans for a rail launch to an aircraft carrier, we spent a lot of money to develop that, we probably don't want that on the Internet either. Would there be anything of a proprietary nature to a modification of the hull of any of the vessels of the companies you

represent that would trouble you being made available to the public? I have trouble believing that.

So, Mr. Love, I will start with you.

Mr. LOVE. The claims of confidentiality are completely spurious, Mr. Chairman.

Mr. TAYLOR. I am sorry. Could you speak up, sir?

Mr. LOVE. The claims of confidentiality are completely spurious, Mr. Chairman.

First of all, if you take the Mokihana as an example, it is a rebuilding of a C-9. To my knowledge, there are two other C-9s, both of them owned by Matson Navigation. So the plans for the conversion of the C-9 would not be very helpful to anybody else that I can think of in the industry.

Also, the concept and the process of building a vehicle carrier are well-known to everybody in the industry.

Mr. TAYLOR. Mr. Paxton, since you represent the shipbuilders, and I guess I am asking you on behalf of the shipbuilders, would you have a problem with Congress mandating that these proposed changes become public information? Because, again, with my limited knowledge, I can't see a modification to a hatch, adding a bulbous bow, adding a midbody section, I really can't see anything about that that would fall into the category of the requiring it be classified information.

Mr. PAXTON. Absolutely not, Chairman. We would support a great deal of process and transparency.

In case in point, we have bid on these projects. Our shipyards have bid on the double hulling. So information was made available to the extent that yards got to bid on these projects.

There may be some confidential aspects of it, but the fact of the matter is information is made available such that we could bid on these projects and we were told were too expensive before they headed off to China. So, absolutely not. We would support greater process, greater transparency, and very much so have worked with Mr. Roberts on the process of using the Federal registry as a way to put out comments on proposals to do extensive work on Jones Act vessels overseas.

Mr. TAYLOR. Mr. Roberts.

Mr. ROBERTS. Yes. I think the confidentiality has been used in a way that allows, potentially, manipulation of the process right now. And to take it a step further, not only do we not know that an application is filed, not only do we not see what an application says at any point in the process, but even when we go to court, the court reviews the decision under the Administrative Procedures Act which says that the agency record is the only thing you are supposed to look at. The agency record is what the applicant put in, so we have been through litigation now for over a year in the Seabulk case. We were extraordinarily fortunate in getting some information, but we have taken no depositions. We have gone no further than that. So the confidentiality works very much to the benefit of the applicant; and, as a consequence, naturally it tends to erode the Jones Act.

I would only say this. There may be engineering issues that are involved in a proposed project that a company has spent money on the architecture and wants to keep that confidential. That is not

unusual. That happens all the time. There are mechanisms, confidentiality agreements, protective orders, and so on so that the information can be disclosed to a limited extent as necessary to evaluate it but not broadcast to the world.

Mr. TAYLOR. Thank you very much.

The Chair recognizes Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

Mr. Roberts, in your testimony on page 4 I think you lay out five steps, if I am not mistaken, five possible changes to the procedures. I would like to ask a few questions specifically about those steps and then ask a question of their impact on something else.

First one is public notice that an application has been filed. By that do you mean a public notice that a preliminary rebuild determination has been requested from the Coast Guard?

Mr. ROBERTS. Yes. I think that would be appropriate. The preliminary rebuild application. Notice that it has been filed.

Mr. LARSEN. Notice it has been filed.

And then the opportunity for interested third parties to participate fully in the proceedings. How would then that manifest itself?

Mr. ROBERTS. That could be handled on the basis of a 30-day comment period, simply submit comments. If there is information that is submitted with the application, an interested party could obtain that information and then submit comments within 30 days.

Mr. LARSEN. Now getting this set for judicial review under the APA, is that something that would be a necessary step or is that—would that be an appeal step?

Mr. ROBERTS. The current process, virtually any agency action is subject to review under the Administrative Procedures Act, so that would continue to apply to these decisions.

Mr. LARSEN. All right. And then publishing and indexing of the decisions on these issues I think would be fairly important, given the fact that there is lots of talk of consistency, but I am not gathering that there is—there has been consistent application, it seems.

Mr. ROBERTS. No, Congressman. I think the fact that you can't even obtain the decisions without submitting a Freedom of Information Act request just tells you how untransparent the current process is.

Mr. LARSEN. The Coast Guard testified earlier about the—in response to my question about the triggers that exist to send something over to the Naval architect's office if there are questions. It seems to me that seems to be a fairly informal process, a—″loosey-goosey″ would be another term—loosey-goosey process. Are there triggers that would send something over to the Naval architect's office and do you have suggestions for what those ought to be?

Mr. ROBERTS. I am sure my colleagues may want to comment on that issue.

Mr. LARSEN. Sure.

Mr. ROBERTS. I would say that if you allowed public participation, participation of competitors and others who might have an interest in this, in a particular application, you will take care of a lot of those issues. I don't think very often—I don't believe very often that the information at the Naval Architecture Branch is going to necessarily decide the case or not. So I think the core is

getting the public involved. But I will defer to my colleagues on that.

Mr. LARSEN. Yeah. Mr. Paxton?

Mr. PAXTON. I think primarily it is one of maintaining some standards that are consistent. I think where the problem has evolved over time is—and I have a letter ruling here where the Coast Guard said we counted the total steel in and we counted the total steel out and you are below the 7.5 percent threshold so you are not rebuilt. And then 4 years later they said, well, now our test is that we have the greater of.

So I think process, a healthy amount of process, is absolutely necessary, is absolutely needed. But before we even get to that process we have got to know what the rules of the game are and that we are not constantly moving the goalpost for what counts. Separable versus nonseparable, that was cast aside when the court decided structural versus nonstructural wasn't something we could look at.

So I just think the Coast Guard—and I agree with Mike that the Coast Guard isn't trying to undermine this process. I think the Coast Guard has followed poor precedent after poor precedent that has got them to a point now where they are looking at crane-lift capacity to determine whether or not a vessel has been rebuilt.

So I would also recommend that we need to get the standards down first before we can have a healthy public process.

Mr. LARSEN. I need to ask a question before my time is up, and it has to do with the WTO and the GATT. Because there are concerns that have been expressed about making any major changes to the actual provision, the actual language of the law would trigger a WTO review. Because, as it exists, it is grandfathered in, but if you make changes you would have a problem moving forward.

So two questions. Is it your belief that if we made changes to the process as you are suggesting, would that trigger a review? And, second, if we were somehow able to get the Coast Guard to actually enforce the Second Proviso as we see it, which would apparently be different than it is being seen today, so the law wouldn't change, it would just enforce it as we see it, would that—do you believe that would trigger a review?

Mr. ROBERTS. I will answer that.

I think the answer to the first question is, no, that the WTO and the GATT grandfather provision applies to substantive rules. If we become more restrictive, then we run the risk of violating that grandfather provision. It has nothing to do with the procedures that are followed in making a determination whether or not this particular project complies or doesn't comply. So I think there is no risk at all from a GATT perspective to improve these procedures.

I think if the Coast Guard tightens its enforcement activities and makes determinations that are more consistent with, as you say, what Congress intended in the Second Proviso, again, I don't think that that would create a GATT problem. We are really clarifying and enforcing the law as it was written and it was meant to be enforced. And that is not becoming more restrictive, that is not legislating a more restrictive regime. So I think in both cases we should not have a problem on that.

Mr. PAXTON. And I would just add one part to that. The court case—the recent court case in the Seabulk matter threw into question all of this. Because the court clearly said there has been no analysis for any of these tests. There may be a test called counting the greater of either the steel removed or steel added, but you haven't done the analysis.

So I would pose that any clarification of the regs—and, again, just enforcement of the regs, the clear—what the Coast Guard has said. The Coast Guard has said through its letter rulings 1.5 percent is a major component. It said it in the Mokihana ruling, in that letter ruling. We just asked that they actually implement that and not try to skirt around it. So I don't think there would be any GATT violation, because we are actually trying to argue implement what you say.

And we are not putting in or amending the Second Proviso. The Second Proviso speaks to major components. So we would say enforce the law.

Mr. LARSEN. Mr. Love?

Mr. LOVE. We believe that the regulations are clear and that the statutory language is clear, and it is strictly a matter of enforcement.

Ms. Williams said that the Coast Guard gets very detailed information. But the administrative record in the case that I am involved in, for example, shows that there is no detailed information at all. And, in fact, even though the matter was eventually referred to the architectural division, there was no analysis done by the architectural division as was described here. So I think that the only issue is an enforcement issue.

Mr. LARSEN. Thank you.

Thank you, Mr. Chairman.

Mr. TAYLOR. Mr. Love, I would like to follow up on that last comment, because I think you have noticed that you are going to have a very favorable response, my gut tells me, from this Subcommittee. I can't speak for the Full Committee, can't speak for the full House, and I certainly can't speak for the other body. But I would think the skeptics would come back and say, well, it is just a temporary thing. This administration has chosen not to enforce the law.

So my question to you is, is that accurate? Is it something that is just unique to this administration or in your years have you seen a degradation on the part of the Coast Guard over time to enforce these laws?

Mr. LOVE. Firstly, I would like to note that over the last 10 years there has been, rough number, only 40 rebuild determinations, so an average of four a year.

My own personal opinion is that Mr. Willis, in charge of the Vessel Documentation Center and responsible for making these rulings, really acted on his own. And now the Coast Guard is defending the indefensible. There have been very intelligent determinations by the National Vessel Documentation Center over the years, but in recent years there was just a, let's say, a cultural predisposition by the single person who really could influence this whole process in finding some way in every case to justify avoiding the

application of the Second Proviso. So this is a process I think that could be easily fixed and would not involve the trade issues.

Mr. TAYLOR. Okay. Would anyone else like to comment on—again, is this something unique to the Bush administration that gets changed next January, or has there been a degradation over time that you have noticed regardless of who is in the White House?

Mr. ROBERTS. Mr. Chairman, my sense is that it is not a—it is too far down into the weeds to be something that the administration would likely have an involvement in. I really think that it is very technical, it is very complex, it is isolated, physically isolated in West Virginia from the main Coast Guard activity here in DC.

And I think, you know, I hate to be sort of Johnny One Note here, but I really do believe that the procedures are such that they inherently favor decisions that erode the Jones Act. The only people who go ask for these decisions are people who want to do work in foreign shipyards. Nobody else knows about those requests, and nobody knows about the decision. So the natural tendency, human nature, I believe is for the people to try and satisfy the people in front of you, who in these cases happen to be people who want to do work in foreign shipyards.

Mr. TAYLOR. This is coming from one of the staff. If you were allowed to comment, what would your reaction be to a notice that a shipbuilder proposed to—and I am quoting—install a double hull in a tanker in a foreign shipyard?

Mr. ROBERTS. Say it again? I am sorry.

Mr. TAYLOR. What would your reaction be to a notice, if such a thing was required, that a ship owner proposed to install a double hull in a tanker in a foreign shipyard?

Mr. ROBERTS. We wouldn't hesitate to say you can't do that. I mean, it is very—in our opinion, if you add a second hull to a vessel, a second hull is a major component of the hull. And so we would have no doubt——

Mr. TAYLOR. Let me turn that around.

Mr. ROBERTS. Okay.

Mr. TAYLOR. What is the penalty that you pay for living by the law? Has anyone calculated the cost advantage to lying on your application?

Mr. PAXTON. Lying on your application is the forfeiture of that vessel.

Mr. TAYLOR. If you are caught.

Mr. PAXTON. If you are caught.

Mr. TAYLOR. But, again, you have to, in effect, tell the Coast Guard that you lied on your application. Because no one is going to check you, unlike that Snapper boat captain today, who they are going to look in his ice chest and break out the tape measure over a fish. You could do millions of dollars worth of work in a foreign shipyard, and if you tell the Coast Guard we lived by the rules that is pretty well it, right? No one is going to check you. Even when you ask them to check on something that you think is suspicious, in effect they did not check, did they? It took a Federal court to get you some relief. Is that correct?

Mr. ROBERTS. That is correct.

Mr. LOVE. Mr. Chairman, if you take the case of the vessel that was gutted in China, for example, the gutting process, the removal process is very, very expensive. It is especially expensive if it is done in an environmentally responsible manner.

Mr. TAYLOR. Great point.

Mr. LOVE. All of the work on the hull on that particular vessel and the superstructure of the vessel, was done in China. You mentioned the curved welds, the heavy decks, all the heavy lifting was done in China.

What the U.S. shipyard was allowed to do was the straight welds, as you mentioned. They built a box. And the foundation for that box was all the work that was done in China. The access to that box was all of the work that was done in China.

So if you were to take the example of that container ship that was converted to a combination Ro-Ro container ship, I would say that a very high percentage of the expense of doing the hull job in the United States was the work that was done in China.

Mr. TAYLOR. Between environmental compliance, overhead welds, skilled welds, et cetera.

Mr. LOVE. What Mobile got as their part of the job was essentially steel modules that were lifted aboard the foundation, the lower garage that was built in China. So what you had was you had the demolition, so you took out the transverse bulkheads, you took out the holds, you took out the weather deck, the combings, the hatch covers, you took it right down to the frames, very, very expensive work. And now you are in that curved portion of the ship, and you are also doing the work that is the foundation for the upper garage. All heavy vehicles are supported on work that was done in China. The work that was done in the United States was solely concerned with the carriage of automobiles.

So the lion's share—if you look at it from a square footage basis, for example, they added over 200,000 square feet of vehicle storage on the vessel between the work that was done in the United States and the work that was done in China. More than 50 percent of that square footage was done in the United States. But that 50 percent—or over 50 percent—was much less expensive work than the work that was done in China.

Mr. TAYLOR. I would be curious to hear your reaction, and I realize that the easiest thing that could happen is for the folks in the bureaucracy to change their interpretation. I guess the most difficult would be congressionally mandated change to the rules. But what would your reaction be to a congressionally mandated change that did away with the 10 percent rule?

Because when you bring up environmental factors, when you bring up the skill of the work, all the other things that are involved, I personally believe that the 10 percent rule just doesn't work in today's society. But I am curious, on behalf of the shipbuilders, on behalf of at least one of the operators and a spokesman for another operator, what would be your reaction to the removal of the 10 percent rule?

Mr. PAXTON. The question is to just abolish the upper limit test and—the shipbuilders want a strict test, a test that looks at major rebuild projects. We understand that repair work goes overseas. But what we have a difficult time with is when large, big projects

are continually going overseas. So the 1.5 percent, that major component analysis that never is taken into place would prohibit a lot of work going overseas.

It is not just about ship repair. Crowley made a calculated guess—not a guess, a calculated decision based on the law that they are going to build new. So that helped the new build yards. But the rebuild yards could still do a lot of this work, the repair yards. So enforcement of the Second Proviso helps new construction and repair.

So I guess my question, for clarification, we want strong tests that enforce what the Second Proviso stands for. Maybe 10 percent is too high. I don't know. But clearly enforcing that first test, the 1.5, whatever it may be, major component test would prohibit a lot of work instead of getting into the vagaries of a 10 percent, what we are counting and not counting.

Mr. ROBERTS. I will give you my candid reaction when you offered that, and that is that I would be concerned about the impact under the WTO rules and whether that would violate the standstill provision if we eliminated the 10 percent test. And I am not sure how we would replace it. I guess it depends on what happens at that point.

But if we took the 10 percent test down to a 2 percent test or a 1.5 percent test, I would be very concerned about how that might be perceived under the GATT rules. But we are certainly sympathetic with the objectives.

Mr. LOVE. Mr. Chairman, the test is 7.5. There is just a discretionary allocation to the Coast Guard between 7.5 and 10. What the Coast Guard has done is they have moved the 7.5 to 10. They have become the legislators as far——

Mr. TAYLOR. I guess, Mr. Love, what I am looking for clarification is it takes—you know, Congress is asked by the American people to try to clean up the environment. Reacting to that request, they passed some fairly stringent rules on things like PCBs, like on sandblasting, what do you do with lead, what type of copper paints can you use on a hull that will cause the least harm to the environment, et cetera, et cetera. There is a cost associated with each of these things, whether it is the individual breathing apparatus for someone working around that or disposing of it properly. There is a cost associated with all that. And the people who live by the rules pay those costs.

I doubt any of those rules are followed in some of these foreign shipyards we are talking about, without naming names. So what I am getting at is, in addition to not only just the line of a weld but the difficulty of that weld, I am convinced that just weighing a portion of the hull is not a true reflection of the total cost of a change to a hull. It is nowhere near a true reflection.

And I guess what I am asking is we are looking for something more appropriate than this interpretation, and we would welcome your comments on that, whether you are comfortable doing it now or later.

Mr. LOVE. Yes, sir. I think, Mr. Chairman, just to define the scale of the issue, the Mokihana went to China to do the rebuilding, but since it was in China it also did its dry docking, it also did its sandblasting and coating of the hull, it also did numerous

repair projects around the vessel, all of which was lost to the U.S. shipyards because of the failure to enforce the Second Proviso.

Mr. TAYLOR. Thank you.

Mr. CUMMINGS. [presiding.] Mr. Love, you said something that was quite intriguing when I was coming in the door—and, again, I am sorry, we have got an Amtrak bill on the floor of the House, and it has some major provisions in with regard to my district in Baltimore. But you said something that really intrigued me when you were talking about Mr. Willis. What is his position?

Mr. LOVE. He was in charge of the National Vessel Documentation Center until Ms. Williams took over recently.

Mr. CUMMINGS. And that person has a lot of responsibility, huh?

Mr. LOVE. Yes, sir.

Mr. CUMMINGS. And they basically, based on what you said, you used the words ″acting on his own″, but they basically make a decision as to whether somebody meets the standard or not, work done on a ship meets the standard of the Jones Act or not. Is that right?

Mr. LOVE. That is correct.

Mr. CUMMINGS. Is it your understanding that is the way it is supposed to be, that a single person, civilian, is supposed to do that? Any of you. Any of you.

Mr. LOVE. I would think that that is the major issue that the Coast Guard should be addressing, which is oversight of these decisions.

Mr. CUMMINGS. Me, too. And I just think that when you have a situation—and this is not knocking Mr. Willis. It is not beating up on Ms. Williams. But, to me, if I have got one person making decisions that could determine whether a company makes millions of dollars, that is something that I wouldn't want. In other words, I wouldn't want it if I were the person making the decision, because I would want always to have somebody with me trying to help make those decisions and somebody to give some balance to what I am deciding.

But the other thing I wouldn't like is the invitation—not invitation, but the climate that is ripe with possibilities, not probabilities but possibilities of some wrongdoing. Not accusing anybody of anything. Just saying what I would prefer.

And, again, when you are talking about millions upon millions of dollars, and I take it that some of these decisions are kind of discretionary, are they not? Hello?

Mr. ROBERTS. Yes, they are.

Mr. CUMMINGS. Anybody. And so it seems to me that if you have a decision that does not favor, say, the losing party, and you have a lot of discretion in there, it seems like it would be almost impossible to have any type of true appeal. I guess you could have an appeal in a court, but it would be very difficult to prove. Is that a fair statement?

Mr. PAXTON. Yes, sir.

Mr. CUMMINGS. Speak up, please. Anybody.

Mr. Paxton, you look like you want to say something.

Mr. PAXTON. Absolutely, sir. I think you put your finger on it. I think the process is entirely one-sided, with no transparency. Not to defend the National Vessel Documentation Center, but they are out there in West Virginia. They are supposed to look at these doc-

uments and then decide on those—on the materials in front of them, whether or not this vessel can go overseas and do major work. Well, all the information given to that person is entirely geared from the standpoint of the person who in fact wants to go overseas and do the work and not build in the U.S. So the process is very dark and very one-sided. So I think this is where a lot of the problems exist. And, of course, the standards change over time to allow more and bigger jobs to be permitted overseas.

Mr. CUMMINGS. Now, Mr. Love, in your testimony, you state that you are competing against two vessels that operate at substantial cost savings after having been rebuilt in Chinese shipyards. Can you give us an estimate of the economic advantage these vessels have over yours?

Mr. LOVE. Yes, sir.

Firstly, we are talking about C9 vessels that were built 25 years ago with government subsidy. If my recollection is correct, the U.S. Government subsidized the building of these vessels to the tune of about $48 million each. They were not eligible to be in the Jones Act until they were in service for 25 years.

The vessels were designed to carry only containers. So we built a pure car-truck carrier on the analysis that there was no real Ro/Ro capacity to the Hawaiian Islands.

Now the C9 is taken to China. It is converted to a combination container-Ro/Ro ship, and it is now a formidable competitor of our vessel. And the price advantage, because of the nature of the work, which is something that Mr. Taylor was putting his finger on, and that is all of the demolition work that had to be done on this old ship, which is very costly in the United States for environmental reasons, safety reasons and the like and all of the work that had to be done in a very, very difficult area, with curved plate—visualize that the weather deck was removed from the vessel, the transverse bulkheads were removed from the vessel, the cargo holds, the combings, the hatch covers, everything. This is extremely expensive work. And then six decks were added in China.

And the length of the project is the length of a Coast Guard cutter. We talk about it being aft of the engine room casing, but we are talking about a garage that is 270 feet long. It was a monumental project, and it was done in the most inexpensive yard in the world. So we are very much disadvantaged by it.

Mr. CUMMINGS. And what does that yield with regard—I mean, if you just take—I know it is hard, but give me an estimate. How many jobs are you talking about and over what period? Jobs lost, American jobs lost.

Mr. PAXTON. Chairman, the loss in shipyard jobs is always hard to tell.

Mr. CUMMINGS. Yeah.

Mr. PAXTON. The fact of the matter is, over the 1990s, we saw a significant decline in our ship repair facilities. And a case in point is the west coast. If we look to the west coast, our ship repair and our ship build facilities have been harmed; and they are harmed because there are cycles in the shipbuilding industry. But what we see is the ship repair industry benefits from this work. This is work they can do. This is work they want to do.

Case in point, we used to have a dry dock that could dry dock the Alaska class tankers. We no longer have that dry dock. It was sold off to Barbados. That was on the west coast. These assets we lose.

These assets are protected, supposedly, by the Jones Act so we have the skill sets and we have the infrastructure to do this type work. But over time this eroding of the Second Proviso has led to more and more work that would go into those yards to go overseas. I couldn't put an exact number on the amount of lost jobs, sir, but I could tell you there is significant job losses and infrastructure loss.

Mr. CUMMINGS. Yes, sir. Mr. Roberts?

Mr. ROBERTS. I would just mention, Mr. Chairman, in the case of the double hull retrofit projects, Seabulk went to U.S. shipyards, got bids for that work. It came out in an article in 2006 and basically said it is just too expensive. We are not going to do it in the United States. And the figure they gave at that time is it would be three times more expensive to do the work in the United States than in China. And that—and in the case of these projects, $10 million spent in China, so you figure 30, $40 million in the United States to do each one of these ships. And that is the kind of capital cost advantage that they have over U.S. operators who comply with the law and build their ships in the United States.

Mr. CUMMINGS. And the main reason is labor costs? Of the difference?

Mr. ROBERTS. I think Matt can speak to that, but it is labor, it is environmental.

Mr. CUMMINGS. Right.

Mr. ROBERTS. It is Occupational Safety and Health Act, all those things, and standard of living, also.

Mr. PAXTON. Absolutely. Those are the cost points. And the U.S. shipyards aren't upset about paying those cost points. We want to pay those cost points. We are proud of our skilled labor force, and we point to them as being the best in the world. But the fact is in China they use bamboo scaffolding. They don't have any of the environmental or health standards that we are proud to meet and want to meet, and that is a cost point we don't want to ever give up. And we won't.

Mr. CUMMINGS. Okay. What I would like, and Mr. Taylor I think had said that he wanted you all to provide us with I guess, what, recommendations, Mr. Taylor?

Mr. TAYLOR. Mr. Chairman, I am convinced now that the 10 percent interpretation under the CFR is just not adequate in light of the environmental rules, the difficulty of the type of work. I mean, a one-foot weld, for example, on a straight line versus a one-foot weld in a circle, they are both one-foot of welding, but one is a heck of a lot more difficult from the other. One is a heck of a lot more expensive than the other. One done overhead is a whole lot more difficult than one done on deck. There is so many factors that the 10 percent rule does not take into account.

And, again, the more labor intensive, the more environmentally sensitive, the more expensive. And none of that is taken into account. And, obviously, the more labor intensive, the more environ-

mentally sensitive, it actually becomes an incentive for someone to take their ship overseas. It circumvents the intent of American law.

And so, for a lot of reasons, I think we need to revisit it. But I would hope we would revisit it in a way that makes sense to the shipyards and to the operators. So that is why I was asking for their guidance.

Mr. CUMMINGS. We would really appreciate you all getting back to us, say, within the next 30 days, considering all of the—I mean, your recommendations. It is a very complicated situation; and I realize that when you are dealing with complicated situations, trying to set strict rules is not easy. However, I think that if we are going to have standards those standards ought to be as clear as we can make them, and they should lend themselves to being able to be applied consistently. And so I would ask that you get to us and let us take a look at what you might present.

As you probably know, this Committee—Subcommittee and Committee looked into the administrative law judge system; and one of our concerns in that system was whether, when people walked in the door, did they feel that they had a fair shot. Period. Didn't want any advantage but didn't want disadvantages either. Everybody, fair shot.

And that is what I want to make sure happens here, that those who come before—and in a sense this is a decision-making body, although it is apparently one person—that they have a fair opportunity to present their case and be rendered a fair opinion.

And at this juncture I must tell you that I think you can have a situation where things are so confusing that you don't know whether you got a fair opinion or not. I think you can be in a situation where there is so much discretion that you are not sure whether you got a fair opinion. And there is so much discretion that it is almost impossible to appeal successfully something that—where the standards are not as clear as they should be.

Now, the question is whether we can actually create those standards. And as I have said many times, I believe if we can send a man to the moon we ought to be able to do some of these things on earth. That is, put these kinds of things in place.

But it does concern me, I got to tell you, when you have one person making these kind of decisions. I just think it just opens the door for things that I don't think anybody in the decision-making position would want to be in, particularly here. But be that as it may.

Mr. Taylor, did you have anything else?

Mr. TAYLOR. No, sir.

Mr. LOVE. May I make one comment to what you just said, Mr. Chairman?

Mr. CUMMINGS. Yes, Mr. Love.

Mr. LOVE. On the fairness of the process, on the Mokihana, when the preliminary rebuild determination was obtained from documentation center, the allegation was that the project was under 7.5 percent.

Mr. CUMMINGS. Was what?

Mr. LOVE. Under 7.5 percent of the discounted steelweight. When we filed our protest, contemporaneously with our filing of the protest there was a letter from the general counsel of Matson that I

mentioned earlier where he admitted that now that they had a more precise definition of the job that the discounted steelweight was over 7.5 percent. That letter was withdrawn by the owner of Mokihana when they became aware of our protest. And a year later, when the final rebuild determination was granted, theallegation was that the project was under 7.5 percent.

And I would like to make two points. One is that the letter written by the general counsel and senior vice president of the owner of the vessel that was withdrawn disappeared from the administrative record, and we only found out about it in a hearing before Judge Ellis in district court. And Judge Ellis ordered the Coast Guard to produce the letter. The Coast Guard produced the letter without the exhibit, and the exhibit was the smoking gun of it being over 7.5 percent.

The Department of Justice refused to give us the exhibit, and only when our attorneys were standing on the courthouse steps over in the Eastern District of Virginia did the Coast Guard finally produce the exhibit. And between the time of the original application for the preliminary rebuild determination and the granting of the final rebuild determination the job that was done in China grew dramatically. It was a much bigger job than was originally presented to the Coast Guard. Yet the steel percentage upon which the final rebuild determination was given went down. So there is just some inexplicable issues here.

Mr. TAYLOR. Mr. Chairman?

Mr. CUMMINGS. Yes, sir.

Mr. TAYLOR. Mr. Chairman, I would request that the Subcommittee request from the Coast Guard that letter. Because I think it goes very much to the heart of your concerns, everyone's concerns.

Obviously, somebody inside the Coast Guard not only apparently cut a sweetheart deal for somebody, then realized they got caught doing a sweetheart deal and they just tried to hide all the evidence. And it goes straight to your point this should not be happening, and we need an explanation from the Commandant of the Coast Guard how this was allowed to happen, what is being done to keep it from happening again.

Mr. CUMMINGS. Very well. We will take care of that. It is a wonderful suggestion, and we will take care of that.

Mr. Larsen, did you have anything?

Mr. LARSEN. I don't have any more questions, but I have a suggestion that we on the Committee contact the USTR's office, U.S. Trade Representative's office, to talk through some of these issues regarding the Jones Act and the Second Proviso and hear from them. And as well maybe the Ways and Means Committee folks, hear from them specifically, you know, what changes may cause us problems or what directions, more appropriately, may cause us problems and which directions won't.

Mr. CUMMINGS. Okay. Sounds good. Understand what we are trying to do as we move through here is trying to make sure that this process is fair and that the law is obeyed. It is nothing more, nothing less. And we want to do whatever is necessary to accomplish those goals.

I want to thank you all very much for your testimony. It has been extremely helpful.

Our Subcommittee tries to take the information we get and do something with it, not just let it sit on the shelf somewhere for another Committee to take it up 7 years from now. This is under our watch, and we are going to do the best we can to correct it. Because if it waited another 7 years, that means a whole lot of American jobs possibly, possibly have gone down the tubes, a lot of American companies are not getting what they are due. And that is a problem. That is a major problem.

So thank you, and this hearing is now called to a close.

[Whereupon, at 12:42 p.m., the Subcommittee was adjourned.]

SUBCOMMITTEE ON COAST GUARD & MARITIME TRANSPORTATION

"Rebuilding Vessels Under the Jones Act"

June 10, 2008 – 10:00 a.m.
Room 2167, Rayburn House Office Building

~~*Script of Chairman Elijah E. Cummings*~~

The Subcommittee will come to order [Gavel].

Today's hearing will enable us to closely examine a critical subject in U.S. maritime transportation – and that is the rebuilding of Jones Act vessels in foreign shipyards.

I take this opportunity to thank Mr. Taylor for his outstanding work in protection of the Jones

Act, and I note that he personally requested this hearing be held by the Subcommittee.

Vessels that ply the coastal trade in the United States providing service between domestic destinations must comply with the requirements of the Jones Act, meaning that they must be built in a U.S. shipyard, owned by an American, and crewed by Americans.

A provision added to the Jones Act in 1956 – and now known as the "Second Proviso" –

requires that these vessels also be rebuilt in U.S. shipyards.

However, that 1956 action did not define the term "rebuild" – and by 1960, vessels were using U.S. shipyards to install middle sections, called "mid-bodies," that had been built in foreign shipyards into Jones Act vessels.

In response, Congress revised the Second Proviso in an effort to close the loophole that allowed the mid-bodies to be installed in domestic vessels.

Not until 1996, however, did the Coast Guard, issue regulations to clarify the specific standard that would be applied to determine whether a Jones Act vessel had been rebuilt in a foreign shipyard.

These regulations state:

- Regardless of its material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel.

- For a vessel of which the hull and superstructure is constructed of steel or aluminum—

  - A vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight prior to the work.

  - Further, a vessel may be considered rebuilt when work performed on its hull or superstructure constitutes more than 7.5 percent but not more than 10 percent

of the vessel's streelweight prior to the work.

- A vessel is NOT considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work.

There currently appears to exist a lack of clarity regarding what can be done to a vessel in a foreign shipyard within the parameters that have been established by these regulations.

Specifically, there is confusion regarding what constitutes a "major component" of a hull or superstructure. Further, there is also a concern among some in the Jones Act trade that the standards that have been set forth have been inconsistently applied, particularly in terms of calculating vessel steelweight.

These issues have been the subject of several recent court cases, including one that examined a Jones Act vessel that was converted from a container ship to a Roll-on/Roll-off vessel.

Part of the work on that vessel was completed in a Chinese shipyard and part was done in the United States. In this case, the Coast Guard did not count the amount of steel removed when making the calculation of steelweight to determine whether the vessel was still eligible for the coastwise trade; rather, it counted only the amount of steel added.

Another case involved the installation in a Jones Act vessel of an inner hull, which essentially converted the vessel from a single hull to a

double hull to meet the standards of the Oil Pollution Act of 1990.

In this case, the Coast Guard determined that a second hull was not a major component of the hull or superstructure since the inner hull was not separable from the outer hull because of the manner in which it was constructed.

In ruling on this case, a U.S. court stated that the manner in which a component is added to a vessel – whether piece-by-piece or wholesale –

is irrelevant to considerations of whether the component is a major component.

In summary, one of the overarching issues we will examine today is the lack of transparency to this assessment process.

Shipyards and vessel owners must continually submit Freedom of Information Act requests to the Coast Guard to find out what letter opinions the service has issued because the Coast Guard does not post these letters on the internet.

In contrast, the Customs and Border Protection agency posts its letter rulings regarding the transportation of merchandise in the Jones Act trade on the internet so that the maritime industry can see their current interpretations.

Additionally, once someone has received a Coast Guard letter ruling – it is difficult – if not impossible – to obtain the background information regarding how the Coast Guard came to the conclusion expressed in the letter. This makes it difficult for the Coast Guard to

obtain the views of both sides of an issue before it makes a decision.

The issues before the Subcommittee today are complex – but they are critical to ensuring that the provisions of the Jones Act are appropriately enforced and that all of the vessels certified for the coastwise trade are competing on a level playing field.

Finally, I would like to note that the Subcommittee invited both Seabulk and Matson Navigation – both of which are subject to

litigation regarding the extensive work they have had done to their ships in China – to testify today. They declined our invitation.

Without their testimony, I believe that it will be very difficult for the Subcommittee to decide on any statutory waivers of the Jones Act requirements that might be proposed for these companies if they should need them as a result of current court cases.

I look forward to the testimony of all of today's witnesses and recognize the Ranking Member.

Statement of
Chairman James L. Oberstar
Hearing on
Rebuilding Vessels Under the Jones Act
June 11, 2008

Mr. Chairman, thank you for scheduling today's hearing to discuss vessel rebuilding under the Jones Act. I applaud you for holding this hearing to address an issue that needs to be evaluated and brought to the attention of Congress.

The Jones Act was written with the intention of supporting the American maritime industry by mandating that U.S. vessels that engage in coastwise trade be built and rebuilt in U.S. shipyards. After enactment of the Jones Act in 1920, shipping companies continued to find ways to outsource work on their vessels to foreign shipyards which is why Congress enacted the Second Proviso of the Jones Act in 1956. The Second Proviso has been amended several times over the years to close loopholes to the law. From recent court decisions, there still seem to be either loopholes in the law or loopholes in the application of the Proviso, which is what we are here to discuss today.

One of the challenges is that the Congress did not precisely define the term "rebuilt" in the Second Proviso, and left it to be defined by the Coast Guard.

We are looking for consistency in the application of the regulations. Shipping companies should not be concerned that their competitors will have work done overseas at a substantially lower cost and have an economic advantage in the marketplace.

Conversely, shipowners who seek Coast Guard review of their proposed foreign work should be able to rely on the Coast Guard's determination before they go out and spend millions of dollars on project and then have their coastwise endorsement revoked because District Courts disagree with the Coast Guard's justification of their determination.

U.S. shipping companies should be investing their money in U.S. shipyards, providing skilled, hard working Americans with jobs. They should be able to count on not losing their jobs, as has happened to millions of other Americans, whose jobs were outsourced to another country.

I am very disappointed that Seabulk and Matson Navigation declined our invitation to testify today but chose to submit statements for the record. While I understand their concern about pending litigation, they should have been prepared to talk about nature of the work they had done on their vessels in China and the impact on their companies if their coastwise endorsements are revoked. Without that testimony, it will be very difficult for the Committee to grant a Jones Act waiver if their coastwise endorsements are revoked.

I want to thank our witnesses for being here today and look forward to your testimony.

Chairman Cummings, as always, I look forward to working with you and Ranking Members Mica and LaTourette during this hearing.

Thank you.

WRITTEN TESTIMONY OF
JOHN P. LOVE
VICE PRESIDENT
PASHA HAWAII TRANSPORT LINES, LLC

HEARING ON
"REBUILDING VESSELS UNDER THE JONES ACT"
BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND MARITIME
TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 11, 2008

John P. Love
Pasha Hawaii Transport Lines, LLC
Three Stamford Landing
68 Southfield Avenue
Suite 210
Stamford, CT 06902
(203) 276-5002

WRITTEN TESTIMONY OF
JOHN P. LOVE
VICE PRESIDENT
PASHA HAWAII TRANSPORT LINES, LLC

HEARING ON
"REBUILDING VESSELS UNDER THE JONES ACT"
BEFORE THE
~~COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE~~
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 11, 2008

Mr. Chairman and Members of the Committee, my name is John P. Love. I am a Vice President of Pasha Hawaii Transport Lines, LLC ("PHTL"). I appreciate the opportunity to testify today before the Subcommittee on Coast Guard and Maritime Transportation.

PHTL is a U.S. flag carrier that operates the JEAN ANNE, a U.S. built vessel carrying roll-on/roll-off ("Ro/Ro") cargoes in the coastwise trade between the U.S. West Coast and the Hawaiian islands. The JEAN ANNE is a state of the art pure car and truck carrier delivered in 2005. She was built at VT Halter Marine Shipyard in Mississippi specifically for the Hawaiian trade. The JEAN ANNE meets all of the requirements of the Jones Act.

When PHTL decided to build the JEAN ANNE, we assumed that the Jones Act, including the Second Proviso, would be vigorously enforced and that all shipowners would be obligated to comply with the same rules. In other words, we assumed that all vessels competing with the JEAN ANNE would be built and rebuilt in the United States. Yet, the JEAN ANNE is now competing with at least two vessels that operate at substantial cost savings due to their having been rebuilt in Chinese shipyards.

PHTL, together with the Shipbuilders Council of America, are plaintiffs in litigation currently pending against the Coast Guard in the United States District

Court for the Eastern District of Virginia regarding the conversion of a 25-year old, subsidy-built, pure containership in a foreign shipyard to a containership/roll-on/roll-off vessel. We have been forced to engage in this litigation because we have been unable to obtain any redress from the National Vessel Documentation Center or Coast Guard Headquarters.

The Second Proviso of the Jones Act requires that U.S. flag vessels be rebuilt in the United States in order to retain domestic (coastwise) trading privileges. Notwithstanding the current flurry of litigation by our company and others, we do not believe that the Second Proviso is "broken." However, the process for implementing it is.

The root of the problem begins with the fact that the decision making process employed by the Coast Guard is a secret proceeding closed to the public. No one knows when an application for a preliminary or final rebuild determination is filed. Moreover, the Coast Guard employs an *ex parte* procedure requiring minimal or no information from the applicant. As we have discovered recently, a typical application consists of a lawyer's letter with a vague general description of the project and one or two crude renderings of the vessel's profile.

Although the Coast Guard's regulations mandate detailed information -- accurate sketches or blueprints -- the Coast Guard does not require such submittals. There is little or no investigation of an application for a rebuild determination. It is our view that the Coast Guard typically rubber stamps the rebuilding request within days. As recent litigation involving rebuild determinations has revealed, often the project that is completed is not the project that was briefly described to the Coast Guard.

The rebuilding decisions also are not made available to the public. Unlike other federal agencies that oversee similar requirements, the Coast Guard does not publish its determinations. Instead, the only way to obtain these rulings is to file a request under the Freedom of Information Act ("FOIA"). As a result, competitors often do not know that a favorable rebuilding determination has been made until the project is uncovered by the press and, by then, work may be well underway.

Even when the rebuilding determination is finally obtained, it is difficult to ascertain just exactly what it is the Coast Guard has approved. The ruling letters are cursory, often only one or two pages long. The Coast Guard refuses to release the application and related documentation, citing commercial confidentiality under the FOIA. However, the administrative records in the cases under litigation have revealed that there is nothing commercially sensitive about this information. We have even had problems obtaining complete administrative records as we believe the Coast Guard has attempted to hide documents adverse to its decision.

There is little possibility of redress once the true scope of a project is finally known. By the time a competitor finally learns about a rebuild determination, the thirty day period for appeal has expired. In fact, this happened to us. We filed an appeal with the Coast Guard upon learning about a ruling, only to be told we were too late. Even if an appeal is timely filed within 30 days of the secret issuance of the preliminary rebuild determination, it is decided by the division that made the decision to begin with, the National Vessel Documentation Center. The director of the National Vessel Documentation Center in an interview with *Fairplay* publicly compared the rebuild issues to the automobile industry, claiming there is confusion over exactly what a U.S. vehicle is, noting that BMWs, Toyotas and even Mercedes are now built in

the U.S. The drawing of such an analogy to justify decisions allowing substantial vessel rebuildings overseas demonstrates a fundamental misunderstanding of both the Jones Act requirements and the clear intent of Congress mandating that coastwise eligible vessels be rebuilt in U.S. shipyards. The Coast Guard's headquarters in Washington appears to have abdicated all oversight adding frustration to the process, and in our case, forcing us to seek redress in the U.S. federal Court. Importantly, we are not alone.

Faced with this flawed procedure, competitors have found that the only relief available is to file a complaint in federal court. Obviously, that is an expensive and burdensome undertaking. One United States District Court Judge has called the Coast Guard's process a "mess." This Court severely criticized the Coast Guard for not seeking input from those opposing as well as seeking rebuilding determinations.

Not only is the procedural process flawed, but the decision making process is flawed as well. While the rebuild determinations made since the regulations were issued in 1996 are inconsistent, there is one discernable trend. The Coast Guard's enforcement of the Second Proviso has gotten increasingly lenient or non-existent.

For example, a major amendment to the Second Proviso was in 1960 when Congress added the requirement that any major component added to a vessel be constructed in the United States. While this was in response to a case where a midbody was added to a vessel, the Coast Guard has ruled correctly that this prohibition is not limited to midbodies, but includes other major components such as bulbous bows, decks and deck houses -- indeed anything over 1.5% of a vessel's discounted lightship weight ("DLW").

In recent decisions, however, the Coast Guard has written the "major component" requirement out of the Second Proviso. The Coast Guard has argued that the installation of new second inner hull on a single hull tanker to comply with Oil Pollution Act ("OPA") is not the addition of a major component because the hull is constructed "piece-by-piece" and no single piece weighs more than 1.5% of the DLW. This approach was soundly rejected by the Court earlier this year in the case of the *Seabulk Trader*. In another case, one we are involved in, the Coast Guard, departing from its previous precedents, held that a 265.5 ton deck added in China is not a major component because the heaviest piece lifted by the Chinese shipyard's crane was equal to .22% of the vessel's DLW. In other words, enforcement of the Second Proviso now rests on the lifting capability of the foreign shipyard crane employed in the construction of the major component. The method of construction rather than what was added to the vessel is now the determining factor. If the Coast Guard's logic is carried to its logical extreme, a midbody may be added in a foreign shipyard as long as it is constructed piece by piece or as long as the heaviest crane lift is less than 1.5% of DLW. We do not believe that this is what Congress intended.

The Coast Guard's regulations also set forth a percentage test of how much steel work can be performed on a vessel before it is considered rebuilt. Simply put, steel work under 7.5% of DLW is not a rebuilding, steel work between 7.5% and 10% of DLW may be a rebuilding, and steel work over 10% is a rebuilding *per se*. Although of paramount importance to its determination, the Coast Guard does not verify what the applicant claims to be the DLW, even if this is challenged.

The Coast Guard's implementation of the percentage steelweight test also shows an increased willingness to sanction foreign rebuilding. For example, there is work in

removing steel as well as in adding steel to a vessel in a foreign shipyard. Yet inexplicably the Coast Guard does not count both. It has announced a policy to count only the greater of the added or removed steel. Quite frankly, this makes no sense, particularly when a vessel is being converted where steel removed is not replaced, as opposed to undergoing a simple repair where steel is removed is replaced.

The Coast Guard typically does not count "outfitting" when counting steel work. Outfitting has been defined historically as inventory, equipment, furnishing and stores. Yet recently the Coast Guard has expanded this term to include "nonstructural" steel work -- although this distinction was rejected by another United States District Court Judge almost twenty years ago. The Coast Guard recently carried this newest approach to the ultimate extreme by classifying newly constructed Chinese auto decks as "outfitting." The Coast Guard does not investigate or question when applicants have abruptly reclassified "structural work" as "nonstructural" or "outfitting" to get below the 7.5% threshold.

The 7.5% test was meant to be the threshold when the regulations were adopted in 1996. The 7.5% to 10% range was to allow the Coast Guard some latitude if the foreign shipyard work did not change the dimension, structure or type of the vessel. In other words, the 7.5% to 10% range was intended to accommodate repair work, not major conversion work.

A review of the Coast Guard rulings since 1996 reveals that the Coast Guard has never found work in the 7.5% to 10% range to be a rebuilding. The real test is now 10% of DLW. This too has been properly criticized by the Court in the *Seabulk* case who has said if the Coast Guard wants to move the 7.5% threshold to 10% it should do so through notice and comment rulemaking.

The *de facto* 10% test, the piece by piece crane lifting approach, failure to count both added and removed steel, the characterization of steel work as "outfitting" or "nonstructural," and lax enforcement, have not surprisingly led to significant foreign rebuild projects, primarily in Chinese shipyards. A clear example of this is shown in ~~the attached photographs. The first picture is a pure container ship "gutted" in China~~ so that auto and heavy vehicle decks may be added to the vessel. The second picture shows this vessel after six levels of decks have been added in China comprising more than 100 days work. The Coast Guard ruled that this was not a rebuilding and this matter is now before the court. This case demonstrates the severe and unlawful competitive disadvantages to companies such as PHTL who played by the rules. Cases such as this have also had significant negative effects on our U.S. shipyards.

As recently held by a federal court, preliminary rebuild determinations convey no legal rights -- a position advocated by the Coast Guard in court. Rebuild applicants have been aware for years of the increasingly lax enforcement at the Coast Guard. They have asked for rebuild rulings that they know would never be approved by an agency dedicated to enforcing the Second Proviso. Applicants who have obtained these *ex parte* rulings without providing meaningful information to the Coast Guard and who "pushed the envelope" took a calculated risk that it would be "business as usual." Now that the Courts are responding, these companies should not be bailed out by Congress. These companies knew what they were doing in the foreign shipyards just as we knew the law when we decided to make significant investments in the domestic maritime trade. The Second Proviso would become meaningless if a company can knowingly rebuild its vessel in a Chinese shipyard and then be bailed out by Congress whenever a federal district court judge blows the whistle.

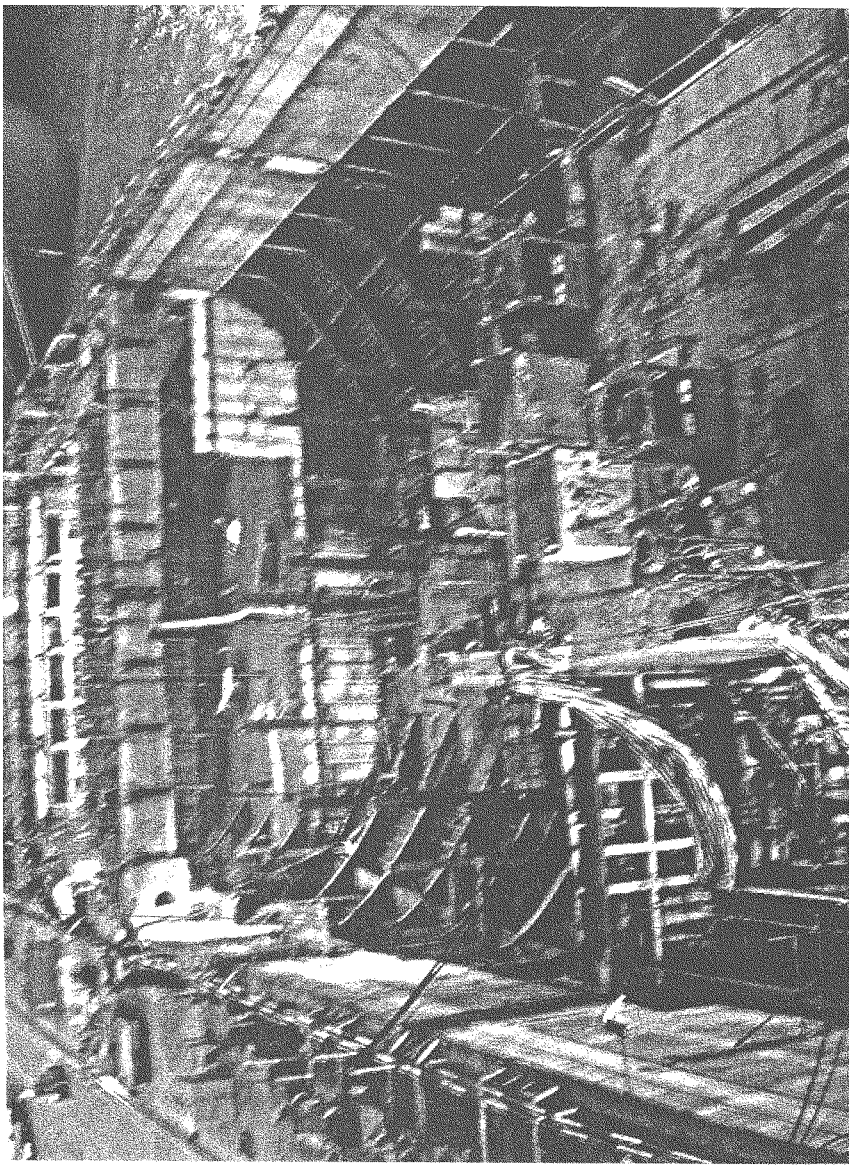
The problems at the Coast Guard National Vessel Documentation Center are having a ripple effect. Although we disagree with this approach, the Maritime Administration is following the Coast Guard in determining what constitutes a foreign rebuilding for purposes of the Capital Construction Fund. This has resulted in sizable tax benefits for vessels rebuilt overseas in China. In addition, while some of these projects are clearly major conversions requiring environmental and safety upgrades, the Marine Safety Center also appears to be following the lead of the National Vessel Documentation Center and by doing so may be creating issues concerning U.S. compliance with international treaties. All of this adds up to putting us at a significant competitive disadvantage because we chose to play by the rules.

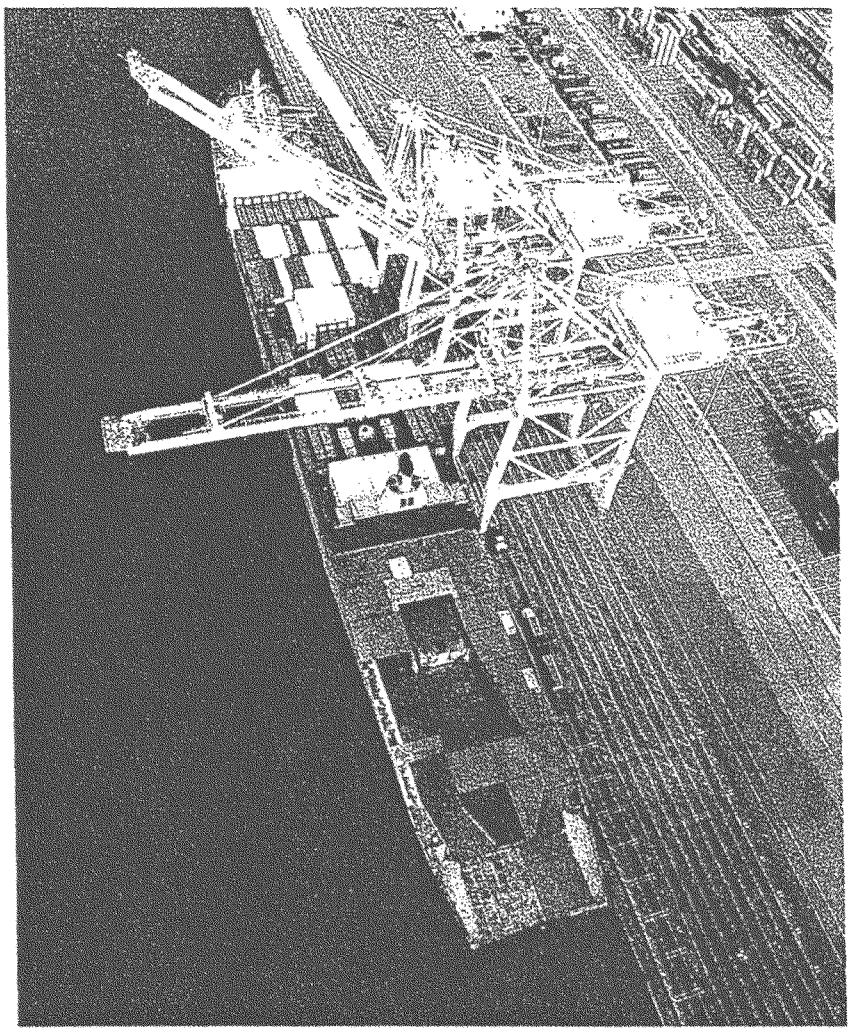
Despite our criticism of the Coast Guard, we believe that the process can be fixed. We ask that Congress take steps to encourage the Coast Guard to enforce the Second Proviso by:

- making the rebuild application process completely transparent
- requiring the applicant to submit sufficiently detailed information in support of its application
- allowing input from all interested parties
- thoroughly investigating each application
- publishing rebuild determinations online or making them readily available by facsimile
- enforcing the prohibition against the addition of major components
- counting added and removed steel in applying the percentage total
- counting all steelwork -- structural and nonstructural
- maintaining the 7.5% threshold, particularly in cases where the work is not limited to repairs

- providing a meaningful appeal process to headquarters in Washington, D.C.

Thank you again for the opportunity to testify today and I am happy to answer any questions you may have.





1455 F Street, NW
Suite 225
Washington, DC 20005
Tel: 202-772-5577 • Fax: 202-347-5464

Shipbuilders Council of America

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

On

Rebuilding Vessels Under the Jones Act

June 11, 2008
Room 2167 of the Rayburn House Office Building

Testimony of

Matthew Paxton
President
Shipbuilders Council of America
1455 F Street, NW
Suite 225
Washington, DC 20005
(202) 772-5577

Thank you Chairman Cummings and members of the Subcommittee on Coast Guard and Maritime Transportation, for the opportunity for the Shipbuilders Council of America to testify at this important hearing regarding the Rebuilding of Vessels Under the Jones Act. I am Matthew Paxton, President of the Shipbuilders Council of America, the largest national trade association representing the U.S. shipyard industry. The SCA represents 31 companies that own and operate over 100 shipyards that are located along the eastern seaboard, the Gulf coast, Great Lakes, west coast and Hawaii. SCA's member build, repair and maintain America's fleet of commercial vessels. These shipyards also constitute the shipyard industrial base that services and repairs Navy combatant ships and builds small and midsized vessels for the U.S. Coast Guard, U.S. Navy and other government agencies.

A core value of the SCA is to promote and protect the Jones Act, which requires vessels that operate in the domestic (coastwise) trade be built in the U.S. and owned and crewed by U.S. citizens. The policy for this nearly 200 year old law is extremely clear – it is in the best interest of our nation to maintain a merchant marine that is sufficient to carry its domestic water-borne commerce and also capable of serving as a naval and military auxiliary in time of war or national emergency, which is owned and operated under the United States flag by citizens of the United States and supplemented by efficient facilities for shipbuilding and ship repair.[1]

[1] Merchant Marine Act, 1936 (46 App. U.S.C. 1101).

From the shipyard perspective, the Jones Act ensures that the U.S. maintains critical shipyard infrastructure and a skilled workforce that can build and repair the domestic "Jones Act" fleet that consists of over 38,000 vessels. These vessels were built in U.S. shipyards and represent an aggregate $48 billion investment. Over the last decade, however, the U.S. ship repair industry has experienced a substantial decline in the amount of maintenance and rebuilding work on the Jones Act fleet. Increasingly more Jones Act vessels are going overseas (primarily China) to perform major rebuild work – work that previously sustained the U.S. ship repair industry. The result has been a significant downsizing of major ship repair facilities, closure of shipyards, and the outsourcing of skilled labor needed to maintain the domestic fleet.

This is not the first time that U.S. shipyards have been faced with the loss of work on Jones Act vessels. In 1956, the Congress introduced a bill to add the "Second Proviso" to the Jones Act. The Second Proviso clarified that rebuilding of Jones Act vessels is prohibited in foreign shipyards. The legislative history on the purpose of the Second Proviso was, "to assist the shipyards of the United States by making applicable to vessels rebuilt in foreign yards the historic policy of exclusion from the coastwise trades which has always been applied with certain exceptions to vessels constructed outside the United States."[2] Indeed, this committee in 1956 provided in its House Report accompanying the passage of the Second Proviso bill that –

[2] S. Rep. No. 2395, 84th Cong. (2d Sess. 1956) at 1.

> "With major developments in technology in recent years there have been instances of American-owned, American-built vessels which have been substantially rebuilt in foreign shipyards, and then have returned to operate in American coastwise trade. Even though these rebuildings have been so extensive as to completely change the character of the vessels. . . [t]his appears to be a gap in the law, which is clearly inconsistent with traditional policy. This bill is designed to close the gap and deny the right of vessels rebuilt abroad to operate thereafter in the domestic trade."[3]

Unfortunately, this "gap" has appeared again not in the law – the Second Proviso is plain in its reading and intended application – but in the regulations implementing the Second Proviso. The law under the Second Proviso states:

> No vessel which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in, or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States.[4]

Interpreting this provision of the Jones Act, the Coast Guard issued regulations in 1996 to determine when a vessel is rebuilt foreign and provided two tests:

> (1) a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the U.S. is added to the vessel; and
> (2) a vessel is deemed rebuilt when worked performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight; work below 10 percent to 7.5 percent is within the Coast Guard's discretion; and work done below 7.5 percent will not be deemed a rebuild.[5]

The "gap in the law, which is clearly inconsistent with traditional policy," that exists today is the inconsistent application and enforcement of these regulations by the Coast Guard to determine a foreign rebuild. The Coast Guard has simply not enforced

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[3] *See e.g.*, H.R. Rep. No. 2293, 84th Cong. (2d Sess. 1956) at 2.
[4] 46 U.S.C. § 883.
[5] 46 C.F.R. § 67.177.

the "major component test", the first test noted earlier. The Agency has articulated that it is "long-established practice of the Coast Guard, [that] only components added to the vessel which amount to 1.5 percent or more of the vessel's steelweight, prior to the addition, are considered major components."[6] However, when presented with a situation that a component, such as the addition of an inner-hull or a deck, the Coast Guard ignores the major component test and proceeds instead to the steel work calculation test (the second test noted above). By ignoring the major component test, the Coast Guard can allow for much bigger rebuild jobs to be done overseas, which of course is prohibited under the Second Proviso.

In addition, the Coast Guard has never exercised its discretion to determine that a vessel has been rebuilt when foreign work projects involve between 7.5 percent and 10 percent of a vessel's steelweight. Instead, with no analysis the Coast Guard has simply implemented a de facto 10 percent steel work threshold test to determine whether a vessel that has been rebuilt in a foreign shipyard. Since the regulations went in place in 1996, there has not been a single instance of the Coast Guard utilizing its discretion to prohibit a foreign rebuild project. Now, couple this with the fact that Coast Guard ignores the major component test, the clear indication from the Agency is it seeks ways to allow Jones Act vessels to be rebuilt in foreign shipyards in contravention of the intent and purpose of the Second Proviso.

[6] Coast Guard Final Rebuild Determination, M/V Mokihana, Oct. 23, 2007.

Further complicating the Coast Guard's regulations is the fact that the standards or tests for what counts in a foreign rebuild project is constantly changing. Under its 1996 regulations, the Coast Guard once counted the total of steel added and steel removed from a vessel. When rebuild jobs became increasingly larger, the standard put forth by the Coast Guard was to count the greater of either the steel removed or added in calculating the 10 percent threshold.

The Coast Guard's most recent determinations are simply baffling and show the extremes to which the Agency will go to permit extensive foreign rebuild work on Jones Act vessels. For instance, the Agency determined that adding an entire inner hull to a single hull vessel is not considered a rebuild or an addition of a major component because, "the work is intrinsic to the hull itself," and thus the Coast Guard "declined to characterize it as a separable component that will be added to the vessel similar, for example, to a bulbous bow or additional decks added to the superstructure." The addition of an entire inner hull is not a rebuilding under the clear language of the Second Proviso? This logic has effectively nullified an Act of Congress.

In a subsequent ruling which involved the addition of several decks to the superstructure of a Jones Act vessel in China, the Coast Guard disregarded its previous analysis that decks are considered separable components and instead applied a new test that looked at whether or not any crane in the Chinese shipyard could lift a single major component weighing at least 1.5 percent of the steelweight of the vessel. Upon determining that the Chinese shipyard did not have cranes that could lift one single

component weighing 1.5 percent of the vessel's total steelweight, the Coast Guard determined no major component was added and a rebuild could not possibly have taken place. The recommendation for foreign shipyards: invest in smaller cranes!

Pursuant to this latest "crane lift" analysis by the Coast Guard, a vessel can be rebuilt one crane lift at a time as long as no single lift is greater than 1.5 percent of the vessel's total steelweight. This twisting of the Coast Guard regulations effectively eliminates the prohibition in the Second Proviso against adding a major component to a Jones Act ship in a foreign shipyard.

The inconsistent application and changing tests and standards applied by the Coast Guard to allow larger rebuild and conversion jobs to go overseas has resulted in confusion and uncertainty not just for U.S. shipyards but across the U.S. maritime industry. Jones Act operators no longer have faith in what the true capital construction costs are to operate in the domestic trade. Is it building a new vessel in a U.S. shipyard or rebuilding your Jones Act vessel in a Chinese shipyard?

The Shipbuilders Council of America supports the Jones Act and the consistent application of the Second Proviso. I would recommend that this committee consider legislation to clarify the Coast Guard regulations to provide a transparent and predictable process so everyone in the maritime industry understands the standards for rebuilding Jones Act vessels. This clarification should take a common sense approach to the identification of "components" of the hull and superstructure. A component should be

looked at in its entirety, as Congress intended, when applying the Coast Guard's existing "major component" test, irrespective of its manner of installation. The U.S. District Court for the Eastern District of Virginia recently addressed this issue. Judge Brinkema noted in her decision to remand and revoke the coastwise endorsement for a Jones Act vessel rebuilt in China that –

> "...However, the manner in which the component is added to the vessel-piece-by-piece or wholesale—is irrelevant to whether the component is "major" ...Although a deck or a component of the hull can be added to a vessel as one discrete pre-constructed structure, it surely can be added piece-by-piece, beam-by-beam, and rivet-by-rivet. Shipowners could easily frustrate the entire operation of the Second Proviso simply by dictating the manner of installation"[7].

The Shipbuilders Council of America agrees with this assessment and believes the Second Proviso has effectively been written out of the Jones Act.

Thank you again for inviting the Shipbuilders Council of America to testify on this important issue for the Jones Act.

[7] *Shipbuilders Council of America, Inc. et al., v. U.S. Department of Homeland Security et al.*, Civil Action No. 1:07cv665 at 15-16.

HEARING BEFORE THE
COMMITTEE ON COAST GUARD AND
MARITIME TRANSPORTATION
REGARDING:
REBUILDING VESSELS UNDER THE JONES ACT

ON
WEDNESDAY, JUNE 11, 2008
2167 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

STATEMENT OF
MICHAEL G. ROBERTS

ON BEHALF OF
CROWLEY MARITIME CORPORATION

VENABLE LLP
575 7th STREET, N.W.
WASHINGTON, DC 20004
(202) 344-4365

STATEMENT OF MICHAEL G. ROBERTS
VENABLE LLP

ON BEHALF OF
CROWLEY MARITIME CORPORATION

I. Introduction and Summary

My name is Michael G. Roberts, and I am partner with the law firm Venable LLP. I am pleased to submit this testimony on behalf of Crowley Maritime Corporation (Crowley). Crowley is one of the leading shipping companies based in the United States. The company began operations with a single row boat in San Francisco Bay more than 115 years ago. Today, Crowley operates a fleet of more than 200 vessels on all coasts providing a diverse array of services in U.S. domestic and international maritime markets. Services include container shipping in domestic and Latin American trades; petroleum and chemical transportation services; logistics; ship assist and vessel escort services; ocean towing and transportation; marine salvage and emergency response; and other activities.

Crowley has invested billions of dollars over the years in vessels built in the United States that meet the requirements of the Jones Act. Crowley and another major tanker company, Overseas Shipholding Group (OSG), have been leaders in making the investment required to renew and upgrade the American domestic tanker fleet to meet the enhanced environmental requirements of the Oil Pollution Act of 1990 (OPA 90). Crowley began a program in 2002 which will involve an investment of about $1 billion in 17 new, state-of-the-art tank vessels being constructed at U.S. shipyards. This very substantial commitment of private capital is critically important in sustaining the

American maritime industry, and is exactly what Congress envisioned in passing OPA 90.

We commend the Subcommittee for conducting this hearing concerning the rebuilding of vessels serving U.S. domestic trades. The entire American maritime industry, including vessel owners, shipyards and workers, as well as their customers, benefit from rules that are clear, transparent, and enforced. More specifically, ship owners must have confidence that they can make the kind of investments that Crowley and OSG have been making without having the rug pulled out from under them. That can happen when the new vessels that Crowley and OSG are building are forced to compete with vessels that have a huge competitive advantage because they do not meet Jones Act requirements – and have a much lower cost basis – because the vessels are built or rebuilt in foreign shipyards. It is precisely that scenario that led Crowley, OSG and the Shipbuilders Council of America (SCA) to file suit against the Coast Guard last year.

The key point is that if American shipping companies have confidence that their decisions to invest in U.S. built vessels will not be undermined, the Jones Act works as intended, providing jobs to highly skilled American shipyard workers, maintaining and strengthening our defense industrial base, and keeping a viable and competitive merchant fleet operating in U.S. domestic trades. If ship owners do not have that confidence, however, the investments are not made, vessels are not replaced, and the American shipbuilding and ship operating industries suffer.

The authority to decide whether a vessel continues to meet Jones Act requirements after work is performed on the vessel in a foreign shipyard – whether the

work does or does not constitute a "rebuild" under the Second Proviso of the Jones Act – rests primarily with the National Vessel Documentation Center (NVDC), a subordinate agency of the Coast Guard. In some cases, NVDC must exercise judgment to decide whether or not a particular vessel meets the legal criteria necessary to qualify for a coastwise endorsement (which confers domestic trading privileges). Making that decision can involve a relatively complex analysis, and some of those determinations have generated controversy. Indeed, two rebuild determinations made by NVDC are currently in litigation.

We believe that the root cause of these controversial decisions lies in the procedures NVDC has followed in issuing them. The decisions are made in secret proceedings that involve only the party seeking permission to do work in a foreign shipyard. There is no mechanism for obtaining input from other interested persons. The decisions are not published and not indexed. The resulting process is susceptible to manipulation, and has produced a sort of underground body of vague case law that includes internal inconsistencies and a great deal of uncertainty, even for those who know about it. It also inherently favors decisions that erode the Jones Act.

These procedures were discussed at length by U.S. District Judge Brinkema of the Eastern District of Virginia at a May 9, 2008 hearing.

> Part of the problem here may be the way the process is done, and part of the problem may be the way the Coast Guard does things and why this stuff should be secret. From the public policy standpoint, it seems to me it would make sense that perhaps if it were more open, then this type of an issue wouldn't arise, because any arguments about the inadequacy of it could be fleshed out earlier rather than after the fact . . . .
>
> So why is the process secret? Why should it not be open for adversarial input? Because . . . if mistakes are being made by the agency or if the agency is doing things unchecked . . . the Hawaiian Cruise case, which was several years before

> this case, I think made it quite clear that Article III Courts were having problems with . . . the lack of specificity and clarity in the regulations, and clearly, both sides, those wanting to do the rebuilds and those who might have an interest in not having it done foreign, it seems to me their input would make the process better, and certainly this mess might not have occurred if there were a more open and public way in which this were done. . . .
>
> . . . Congress clearly, in my view, intended what it wrote in the Jones Act . . . and it seems to me that the agency that's implementing that statute has an obligation to Congress and to the public to make sure that when you make the determination that a rebuild is not a foreign rebuild, that that is something that has been carefully thought about and reasoned, and . . . on difficult questions, it's always a better decision if you've heard from disparate interests.

We agree completely with Judge Brinkema's observations. In doing so, we do not in any sense question the integrity or competence of the Coast Guard or NVDC. No public servant, no matter how diligent and capable, could be expected to field correctly all of the difficult questions NVDC gets without the benefit of input from all those whose interests are implicated by those questions. And it should be emphasized that the decisions can affect very directly and in a very significant way the economic interests of persons other than, and in addition to, the ship owner who is asking for the determination.

Crowley therefore respectfully asks that there be an overhaul of the procedures the Coast Guard follows in deciding whether certain vessels should have coastwise privileges. In those cases, the procedures should include: (1) public notice that an application has been filed; (2) an opportunity for interested third parties to participate fully in the proceeding, with appropriate restrictions to protect the confidentiality of proprietary information; (3) a reasonable opportunity for pursuing an administrative appeal within the Coast Guard; (4) judicial review under the Administrative Procedures Act; and (5) the publishing and indexing of Coast Guard decisions on these issues.

These suggestions parallel procedures followed in other agency proceedings

involving similar types of determinations. Obviously, not every request for documentation should trigger these procedures, and deciding which requests should be handled in this manner may involve a combination of objective criteria (*e.g.*, vessel size and use in commercial operations), and discretion on the part of the NVDC. While it may be a challenge to sort out which determinations should and should not be made under these procedures, the difficulty of drawing lines in this regard should not lead to the conclusion that no improvements are possible, or that the status quo is acceptable.

II. Discussion

A. The Jones Act

The Jones Act reflects an abiding policy of this country, rooted in our national security interests, to support the American maritime industry by reserving U.S. domestic trades to vessels that are owned, controlled, and crewed by U.S. citizens, built in the United States, and fully subject to U.S. laws. As stated by the District Court of the District of Columbia,

> Like all maritime nations of the world, the United States treats its coastwise shipping trade as a jealously guarded preserve. In order to participate in this trade, a vessel's credentials must be thoroughly American. The ship must have been built in an American shipyard and must be owned by American citizens. Moreover, it must not have trifled with its American heritage.

American Hawaii Cruises v. Skinner, 713 F. Supp. 452, 462 (D.D.C. 1989). The U.S. build requirement is a key part of the Jones Act, intended to help preserve an American shipbuilding and repair industry, which is an essential component of our national security industrial base.

Recognizing the importance of maintaining U.S. shipbuilding and marine repair capabilities, the Jones Act withdraws coastwise privileges from any vessel that has been "rebuilt" in a foreign shipyard. As currently codified, the so-called Second Proviso of the Jones Act states that a "vessel eligible to engage in the coastwise trade and later rebuilt outside the United States may not thereafter engage in the coastwise trade." 46 U.S.C. §12132(b). The statute does not identify the types of work that can and cannot be done in foreign shipyards. It instead lays out a strict standard that "a vessel is deemed to have been rebuilt in the United States only if the entire rebuilding, including the construction of any major component of the hull or superstructure, was done in the United States." 46 U.S.C. §12101(a).

B. The Coast Guard Regulations

The Coast Guard's regulations implementing the Jones Act rebuilding requirements establish that a vessel is deemed rebuilt foreign when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States. In determining whether a vessel is rebuilt foreign, the regulations establish that a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel. The regulations do not define what constitutes a major component.

Alternatively, for a vessel of which the hull and superstructure is constructed of steel or aluminum, a vessel (1) is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight, prior to the work, also known as discounted lightship weight; (2) may be considered rebuilt when work performed on its hull or superstructure constitutes more than 7.5 percent but not

more than 10 percent of the vessel's steelweight prior to the work; and (3) is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work.

C. *Coast Guard Preliminary Rebuilding Determinations*

A vessel owner may apply for a preliminary rebuilding determination from the Coast Guard before any actual work is done on the vessel. In order to do so, the regulations require a vessel owner to provide a written statement outlining in detail the work to be done and where it is to be performed; steelweight calculations for the work to be performed and the steelweight of the vessel; accurate sketches or blueprints; and any further information requested by the Coast Guard.

When the Coast Guard receives a preliminary rebuilding determination application, the information submitted by the applicant is handled in a confidential manner, as proprietary commercial information. When a determination is made, the determination is provided to the applicant and no other entity. No notification is provided to the public that an application has been submitted or that a determination has been made. The actual determination made by the Coast Guard is usually available under the provisions of the Freedom of Information Act, but the underlying application and information is typically withheld.

Under the regulations, even if a preliminary rebuilding determination has been obtained prior to the work on the vessel, the owner of any vessel that is altered outside of the United States and the work performed is determined to be more than 7.5 percent of the vessel's steelweight prior to the work, or which has a major component of the hull or superstructure not built in the United States added to the vessel, must submit information,

similar to that required to be submitted to obtain a preliminary rebuilding determination, within 30 days following the earlier of the completion of the work or redelivery of the vessel to the owner.

D. The Current Preliminary Rebuilding Determination Process

The process currently used by the Coast Guard to make preliminary rebuild determinations is one in which there is no public notice of the fact that an application for a preliminary rebuild determination has been filed, or the fact that a preliminary rebuild determination has been made. Everything is done confidentially between the applicant and the agency.

Attempts to obtain information by the public regarding preliminary rebuild determinations must be done through the Freedom of Information Act (FOIA). In instances in which information is requested under FOIA, typically the only document produced by the Coast Guard is the actual preliminary rebuild determination itself. All of the underlying documentation, including the application for the preliminary rebuild determination, is typically considered confidential commercial information that is exempt from disclosure under FOIA. For instance, in the *Seabulk Trader* case, a FOIA request was made asking for all information related to the preliminary rebuild determination made by the Coast Guard. Aside from the preliminary rebuild determination itself, the Coast Guard replied that it had identified 34 pages of documents responsive to the request, and it was withholding all 34 pages as exempted from FOIA.

As noted above, the Court in the *Seabulk Trader* case stated that it was troubled by the process utilized to generate preliminary rebuild determinations, particularly the secrecy of the process. The Court noted that, from a public policy standpoint, it would

seem to make sense that the process be more open. This would allow more information to be available to the Coast Guard in making the decision, and allow the possibility of potentially adversely affected parties, such as U.S. shipyards and Jones Act competitors, to have their concerns addressed early in the process, avoiding possible litigation. We agree with these concerns.

* * * * *

Thank you, again for the opportunity to appear before you today, and I look forward to your questions.

U. S. Department of Homeland Security
United States Coast Guard

Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CG-0921
Phone: (202) 372-3500
FAX: (202) 372-2311

DEPARTMENT OF HOMELAND SECURITY

U. S. COAST GUARD

STATEMENT OF

REAR ADMIRAL JAMES WATSON
DIRECTOR OF PREVENTION POLICY

ON THE

REBUILDING VESSELS UNDER THE JONES ACT

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEE ON COAST GUARD AND MARINE TRANSPORTATION

U. S. HOUSE OF REPRESENTATIVES

JUNE 11, 2008

Good morning Mr. Chairman and distinguished members of the Committee. It is a pleasure to appear before you today to discuss the rebuilding of vessels under the Jones Act. This statement discusses the current regulations and Coast Guard administration of rebuilding vessels under the Jones Act, and highlights the challenges of recent Coast Guard rebuild determinations.

As you know, the Coast Guard seeks to administer the Jones Act in good faith through consistent regulatory actions and vessel determinations. However, we believe additional legislative clarity is necessary to improve the efficacy and context of our agency's adjudicatory actions. This would necessarily involve refinement of the Second Proviso including more precise definitions of the statutory terms "major component" and "considerable part." I look forward to discussing these and other facets of our responsibilities during our session today.

Administration of Vessel Rebuild Determinations under the Jones Act

Vessel rebuild determinations under the Jones Act are administered by the Coast Guard primarily by regulations stipulated in 46 C.F.R. § 67.177. The regulatory standard in § 67.177 states that a vessel is rebuilt when "any considerable part of its hull or superstructure is built upon or substantially altered." While the wording of the regulatory standard has remained stable over the years, the Coast Guard's administration of the standard has evolved.

Prior to September, 1989, the Coast Guard evaluated whether work performed on a vessel constituted a rebuilding under the regulatory standard by focusing on whether the nature of the work was structural or nonstructural. In September of 1989, the Coast Guard issued a rebuild determination for work performed on the vessel MONTEREY. The MONTEREY determination explained that application of the Coast Guard's regulatory standard involved a two-step process. The first step was to identify the work which involves building upon or alteration of the hull or superstructure. Once the relevant work has been identified, the second step was to determine whether that work involved a considerable part of the hull or superstructure. If it did, then the vessel had been rebuilt.

However, the MONTEREY determination was challenged in court by a vessel owner and trade association and the matter was remanded. American Hawaii Cruises v. Skinner, 713 F.Supp. 452 (D.D.C. 1989), *appeal denied* 893 F.2d 1400 (U.S. App. D.C. 1990). The District Court determined the Coast Guard's regulatory definition of "rebuild" was a permissible construction of the Jones Act. However, the Court held that the structural/nonstructural test was not a permissible construction of the Jones Act. The Coast Guard had employed this test for many years. Nevertheless, the Court noted that the Coast Guard's approach was not subject to deference because it had neither been made contemporaneously with the statute nor applied consistently over time. The Court further felt there were no standards for it to engage in judicial review and the case was remanded to the Coast Guard with instructions to give further definition to the structural test.

The Coast Guard responded to the remand by seeking public input on the advisability of engaging in a rulemaking. Two public meetings were held (November 16, 1993 (58 FR 51298) and February 15, 1994 (59 FR 725)), both preceded by a notice in the Federal Register, the stated purpose of which was to obtain public input concerning whether the Coast Guard should undertake a rulemaking to develop clearer standards for vessel rebuild determinations, whether a negotiated rulemaking procedure would be appropriate, and to discuss challenges encountered under existing procedures, as well as potential solutions. Following the publication of a Policy Statement in the Federal Register (May 10, 1994 (59 FR 24060)), followed by a Notice of Proposed Rulemaking (April 5, 1994 (60 FR 17290)), the current regulatory standards contained within 46 C.F.R. § 67.177 were promulgated as a Final Rule (April 22, 1996 (61 FR 17814).

The current regulations at 46 C.F.R. § 67.177 provide, in relevant part, as follows:

"§ 67.177 Application for foreign rebuilding determination

A vessel is deemed rebuilt foreign when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States. In determining whether a vessel is rebuilt foreign, the following parameters apply:

(a) Regardless of its material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel.

(b) For a vessel of which the hull and superstructure is constructed of steel or aluminum –

(1) A vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight, prior to the work, also known as discounted lightship weight.

(2) A vessel may be considered rebuilt when work performed on its hull or superstructure constitute more than 7.5 percent but not more than 10 percent of the vessel's steelweight prior to the work.

(3) A vessel is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work."

As can be seen, the original standard --- that a vessel is deemed rebuilt "when any considerable part of its hull or superstructure is built upon or substantially altered" --- was retained. However, it was amplified clarified by the application of two separate regulatory parameters developed by Agency practice:

(i) Percentage parameters are applied to the calculation of steelwork performed on the hull or superstructure to determine whether, according to those parameters, a "considerable part" of the hull or superstructure will have been built upon; and

(ii) Proposals are examined to determine whether a "major component" of the hull or superstructure not built in the United States will be added to the vessel.

In addition, the current regulations codify the Coast Guard's past practice of allowing vessel owners to seek a preliminary determination of whether the proposed work would constitute a rebuild. There is no requirement, however, that vessel owners seek a preliminary determination before having foreign work done. If, the Coast Guard advises vessel owners who receive preliminary determinations that proposed foreign work does not constitute a rebuild, then those vessel owners must confirm and convey the completion of proposed work to the Coast Guard for determination of the status of the vessel's coastwise endorsement.

The Coast Guard also makes final determinations on applications from vessel owners. There is no requirement that a vessel owner seek a final determination after having foreign work done. However, vessel owners who have foreign work done are required to seek a new Certificate of Documentation and, if such an owner chooses to renew their coastwise trade endorsement, they are required to certify to the Coast Guard that their vessel has not been rebuilt foreign. Beyond loss of coastwise trading privileges, other severe penalties apply for providing a false certification, including total forfeiture of the vessel and potential felony criminal sanctions.

Challenges of Rebuild Determinations

Certain problems arising from lack of express definitions persist in the current regulatory scheme but the Coast Guard has attempted to steer a consistent path. For example:

In what might be called the "considerable part" parameter of the test, "steelweight" and "discounted lightship weight" are not expressly defined but have been interpreted to calculate the actual steel weight of the vessel, excluding machinery, fluids, furnishings and what are referred to as "outfit items", examples of which were published by the Coast Guard in the Notice of Proposed Rulemaking. Also, while the Coast Guard required applicants to calculate both the weight of steel proposed to be removed from the vessel as well as the weight of steel proposed to be added, it has based its determinations on the greater of the two. This represents a middle, yet conservative, course between those who would have the Coast Guard examine only the net effect of the removed and added steel and those who would have the Coast Guard aggregate the two.

Finally, determinations of steelweight falling within the range of 7.5% - 10.0% have been left to the discretion of the Agency so additional factors that may tend to justify the decision in a particular case (a non-exclusive list of possibilities for which were also published in the Notice of Proposed Rulemaking) may be taken into consideration. Since the Final Rule was promulgated in 1996, eight vessels with steelweight calculations exceeding 7.5% but less than 10% have been determined to not have been rebuilt (with an average steelweight percentage of 8.73%) for a variety of reasons related to the circumstances in each case.

It has perhaps been the "major component" parameter of the test which suffers the most from lack of express definition. This parameter refers to "major components" of the "hull" or "superstructure". The latter two terms are defined by regulation stipulated in 46 C.F.R. § 67.3, but the term "major component" has not been expressly defined. Moreover, even though not expressly defined, its use as a parameter to the current regulation received no comment from industry when it appeared in the Notice of Proposed Rulemaking. Nevertheless, the Coast Guard has looked for separately fabricated and identifiable items which are "added to the vessel" (as the regulation states). In so doing, the Coast Guard employed the same standard of 1.5% of discounted lightship weight as is employed in connection with U.S.-build determinations to determine whether any such components are major. It is worth noting as well that even though such a component may be determined by virtue of its steelweight not to be a major component, its steelweight is nonetheless factored into the other parameter of the regulation.

The following pertains to the recent decision by the District Court for the Eastern District of Virginia in the case of the vessel SEABULK TRADER. This case arose as a complaint by the Shipbuilder's Council of America for review of agency action and for declaratory and injunctive relief following the issuance by the Coast Guard on May 20, 2005 of a favorable preliminary rebuilt foreign determination as to the SEABULK TRADER and the SEABULK CHALLENGE, and the issuance of a Certificate of Documentation with a coastwise trade endorsement to the SEABULK TRADER on May 9, 2007, following the completion of previously described work in China. The work done to these vessels was precipitated by the requirements of the Oil Pollution Act of 1990, 46 U.S.C. § 3703(a) *et seq,* which required that the vessels be phased out of operation in 2011 unless an inner hull was constructed to form an OPA-90 compliant double hull.

On April 24, 2008, the District Court for the Eastern District of Virginia issued an adverse decision on that challenge to the Coast Guard's determination to issue a coastwise endorsement to the SEABULK TRADER. The Court ordered the Coast Guard to revoke the SEABULK TRADER's coastwise endorsement, and remanded the case back to the Coast Guard for further proceedings and consideration, as to whether (1) a major component was added to the vessel in China; (2) whether the foreign work

exceeded the permissible steelweight thresholds; and (3) whether the work resulted in the installation of required segregated ballast tanks which must by law be installed in the United States if a vessel desires to maintain its coastwise privileges.

On Seabulk's request, the Court granted a temporary stay pending appeal of 60 days on May 9, 2008, and directed the parties to begin negotiations on an appropriate appeal bond. The deadline for filing a notice of appeal is June 23, 2008. The Coast Guard is working closely with the Department of Justice on its next course of action in this case and, because the case is still in litigation, all other questions about it must be referred to the Department of Justice.

The parallels between the disposition of the Coast Guard's determination in the MONTERREY in 1989, which ultimately led to rulemaking, and the disposition of the Coast Guard's determination in the SEABULK TRADER in 2008 under that new rule, are certainly noteworthy even though it is not yet known where the SEABULK TRADER case may yet lead. In the former case, the Court rejected the "structural/nonstructural" test which had been applied for many years by the Coast Guard and found that the Coast Guard's approach was not entitled to deference. In the latter case, the Court found (referring in particular to its findings as to "major component") that this test, also applied for many years by the Coast Guard, had not been applied with a reasonable basis and that it was not entitled to deference.

FUTURE COURSES OF ACTION

Judicial Action
As previously mentioned, the Coast Guard cannot discuss its recommendation or intended action with respect to an appeal of the decision in the SEABULK TRADER. Perhaps clarity will result from actions by the courts in this matter. However, with regard to action by the courts generally, it seems equally possible that clarity of purpose going forward could be uncertain and might not necessarily resemble what the intent of Congress would likely be.

Agency Action
Similarly, as to a new rulemaking, such as was undertaken in the wake of the decision in the MONTEREY, it has been tried before, it is a laborious and time-consuming process, and, without clear and current guidance from Congress, may have little better prospect for resulting in a policy which is in line with Congressional purpose let alone acceptable to all competing interests. The two previous attempts at rulemaking have met with limited success.

Legislative Clarity
As aforementioned, the Coast Guard urges Congress to bring greater legislative clarity to the Jones Act. We have more than 50 years of experience with vessel determinations and are committed to working as extensively as necessary with Congress to garner more precise statutory context.

Thank you for the opportunity to testify today. I look forward to your questions.

HORIZON LINES

Robert S. Zuckerman
Vice President,
General Counsel and
Secretary
(704) 973 7012 Telephone

Admitted in New York
Not Admitted in North Carolina

Submission of Horizon Lines, Inc.
to the
Subcommittee on Coast Guard and Maritime Transportation
Committee on Transportation and Infrastructure
United States House of Representatives
Washington, D.C.
on
Rebuilding Vessels Under the Jones Act
June 24, 2008

On June 11, 2008 the Subcommittee held a hearing regarding determinations of whether a vessel that has undergone work in a foreign shipyard would be considered "rebuilt" outside of the United States within the meaning of the Jones Act. Horizon Lines, Inc. takes this opportunity to submit its views on this topic and respectfully requests that this submission be included in the record of that Subcommittee hearing.

Horizon Lines is the nation's leading Jones Act container shipping and integrated logistics company, operating 21 U.S.-flag vessels on routes linking the continental United States with Alaska, Hawaii, Guam, and Puerto Rico. All Horizon Lines vessels are U.S. citizen owned and crewed. Most of Horizon's vessels are Jones Act qualified.

Under 46 USC 12132, a Jones Act qualified vessel, if rebuilt outside of the United States, loses its right to operate in the U.S. coastwise trade. Thus, Horizon has a vital interest in rules governing determinations of whether work done on a vessel would constitute a "rebuilding" within the meaning of the Jones Act.

Many in the industry affected by the law in this area, at least as implemented, have complained that the law has not been clear. At the outset of its statement to the Subcommittee at the June 11 hearing, the Coast Guard wrote, regarding its "administration of rebuilding vessels under the Jones Act," that "additional legislative clarity is necessary to improve the efficacy and context" of the Coast Guard's determinations in this area.

We (Horizon) also believe that greater clarity in this area is desirable, and take this opportunity to offer suggestions regarding clarification of the rules relating to rebuilding determinations by both the Coast Guard and the Maritime Administration.

Horizon Lines • 4064 Colony Road • Suite 200 • Charlotte, NC 28211 • 704.973.7000 • www.horizonlines.com

GATT Considerations

Before addressing areas for improvement, we note our understanding that the General Agreement on Tariffs and Trade (GATT) generally prohibits domestic manufacturing requirements, such as the Jones Act's requirement that a vessel be U.S. built (and if rebuilt, U.S. rebuilt) to operate in the U.S. coastwise trades. However, the Jones Act's provisions are grandfathered under GATT. It is our further understanding that if Congress were to amend the Jones Act's rebuilding requirements, either directly or through directive to the Coast Guard for regulatory action, in certain ways the United States could be subject to trade sanctions until the U.S. build requirement of the Jones Act is repealed. Any such turn of events would jeopardize the Jones Act, a pillar of U.S. maritime policy.

Horizon Lines strongly supports the Jones Act and would not wish to jeopardize it. However, we believe that clarification of requirements in the area of rebuilding and the Jones Act is possible without jeopardizing the Jones Act under the GATT. We are hopeful that the Subcommittee will pursue such clarification.

Areas for Clarification

Process. During the June 11 hearing the public witnesses were in general agreement that the process regarding Coast Guard vessel rebuilding determinations should be improved. Per the witnesses, features not available today that should be instituted include: notice to the public of requests for determinations; and providing rights to comment on such requests and to appeal determinations within the Coast Guard. We are in general agreement with such suggestions.

Substance. During the hearing at least one witness suggested that Congress take "steps to encourage the Coast Guard" that we are concerned would raise serious questions under the GATT and potentially jeopardize the Jones Act, such as counting all steelwork, structural and non-structural, in determining the extent to which the hull or superstructure has been replaced. We are concerned that any change that would represent more than a clarification of current law could jeopardize the Jones Act under the GATT.

Uniformity of Coast Guard and Maritime Administration Decisions. One topic that we did not see addressed at the June 11 hearing is consistency in the vessel rebuilding determinations of the Coast Guard and the Maritime Administration. The Maritime Administration (Marad) administers statutes other than the Jones Act that provide benefits only with respect to eligible U.S.-flag vessels. Of particular interest to Horizon Lines are the requirements under the Capital Construction Fund (CCF) statute, which is administered by Marad. Assuming reasonable substantive rules regarding rebuilding, the two agencies should utilize identical substantive tests. The overwhelming majority of container carrying vessels operating in the Jones Act trades are in the CCF, making consistency of Coast Guard and Marad rules in this area critically important.

In this regard we note for the Subcommittee a decision made by Marad on March 18, 2008 regarding a rebuilding determination issue. There, Marad noted that: "Relying on Coast Guard determinations in this area would serve the purposes of the CCF as well." * While Marad was not at that time announcing a rule of general applicability, but deciding an individual case, the decision indicates that an action by Congress to ensure greater uniformity in rebuilding determinations by the Coast Guard and Marad (at least as to the CCF) can be fairly viewed as a clarification of current practice.

Specific Suggestions for Clarification Attached

In 2007 Horizon Lines and a number of other carriers met with a number of shipbuilding interests in an effort to reach agreement on procedural and substantive clarifications relating to vessel rebuild determinations. An agreement was reached.

That compromise approach addressed such matters as: the definition of a major component; how to count steel; how to treat work in a foreign shipyard in an emergency situation (e.g., vessel disabled); identifying specific items that are part of the hull or superstructure of a vessel and identifying other items that are not.

Attached to this submission is the January 11, 2008 filing made by Horizon Lines in a Marad regulatory docket regarding rebuilding determinations. In that filing, including the attachment to it, Horizon Lines set forth specific language proposing process and substantive clarifications, in the Marad context, that are consistent with the multi-party agreement regarding Coast Guard rules.

We will not restate the provisions here but refer the Subcommittee to that attachment as a constructive compromise approach.

Again, however, it is of paramount importance that the Jones Act itself be preserved. To the extent that specific suggestions advanced here (or by others) would jeopardize the Jones Act, we would ask the Subcommittee to pursue alternate means of clarifying the rebuild determination process and rules.

Conclusion. Horizon Lines urges the Subcommittee to take action in accord with these comments and thanks the Subcommittee for its consideration.

****

Attachment (6 pages)

* Decision in Docket No. A-199 at page 8.

HORIZON LINES

January 11, 2007

Robert S. Zuckerman
Vice President,
General Counsel and
Secretary
(704) 973 7012 Telephone

Admitted in New York
Not Admitted in North Carolina

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590-0001

Re: Comments of Horizon Lines, Inc. in Docket No. MARAD – 2007 –0012, Determination of Foreign Reconstruction or Rebuilding of U.S.-Built Vessels That Participate in the Capital Construction Fund and Cargo Preference Programs

To Whom It May Concern:

This letter and attachment together shall constitute the comments of Horizon Lines, Inc. in the above-referenced docket.

Horizon Lines, Inc. is the nation's leading Jones Act container shipping and integrated logistics company. Through Horizon Lines, LLC, the company operates a fleet of 21 U.S.-flag vessels linking the continental United States with Alaska, Hawaii, Guam, and Puerto Rico. All Horizon Lines operated vessels are U.S.-flag and U.S. citizen crewed. Horizon Lines is a party to a Capital Construction Fund Agreement with Marad and has a strong interest in the subject matter of this docket.

In this docket the Maritime Administration (MARAD) has requested comment on the standards it should apply when determining whether, for purposes of the Capital Construction Fund and cargo preference programs, a U.S.-built vessel has been "rebuilt" or "reconstructed" in a non-U.S. shipyard. Notice and Request for Comment published at 72 Federal Register 64109 (November 14, 2007).

In the published notice MARAD noted that the issue of standards for rebuilding determinations is also applicable to a statute administered by the Coast Guard. MARAD has also invited comment on certain related procedural issues, such as public disclosure of rebuilding determinations and the rights of third parties to comment on rebuilding determinations.

These comments are filed by Horizon Lines, but the substance of these comments, embodied in the attachment to this letter, was developed by a coalition of vessel operators and shipyards that have been working together for some time to reach consensus with respect to issues such as raised by MARAD in this docket. These are sometimes difficult and contentious issues, and these comments represent a compromise between the carriers and the shipyards in an effort to achieve greater regulatory clarity that would be helpful to all. Originally, the context of these joint efforts was to reach consensus positions focused on legislation, and we did reach agreement with shipyards on a legislative

proposal regarding Coast Guard rebuilt determinations that was dated 9-7-07 and submitted to the Congress.

However, our principal concern is resolution of the substantive and procedural issues, whether through the legislative process or through the regulatory and administrative process.

Accordingly, we are pleased to recommend to MARAD the attached proposed regulatory language that closely tracks the text of the legislative proposal dated 9-7-07 that was jointly submitted to the Congress. The attached text includes limited editorial and clarifying changes from the joint carrier-shipyard proposal of September 7, 2007 principally to reflect that this is a regulatory, not a legislative context, and to reflect that this is a MARAD docket concerned with MARAD's statutory authorities (the draft legislative proposal concerned Coast Guard rebuilt determinations under 46 CFR 67.177).

In offering specific proposed language, we emphasize, however, that we consider it very important to achieve the greatest possible degree of consistency between MARAD and the Coast Guard as to rebuilding determination standards and related procedures. To say the least, it would be a missed opportunity if MARAD were to establish clear and positive rules in this area without corresponding regulatory action by the Coast Guard. Further, inconsistency in approach between the two agencies would create commercial uncertainty for industry and new issues of how to meet differing rules while preserving vessel eligibility for various statutory and regulatory purposes.

Accordingly, while we support MARAD adoption of the attached regulatory proposal, we also strongly recommend that MARAD contact the Coast Guard with a view towards having MARAD and the Coast Guard publish substantively identical proposed rules for comment, in the very near future, with a view towards prompt adoption of final rules, with the rules to be in accord with our recommendations. If the agencies could accelerate the process by going directly to an interim final rule in accord with our recommendations, and requesting comment on an interim final rule, that would be commendable.

Turning to the particulars of the attached recommendations, they address both the substance and process questions raised by MARAD in its notice. We do not attempt to paraphrase the proposed regulations here; the wording of the attachment speaks for itself.

Before closing, we do note that it is of particular concern to vessel operators that MARAD rules and practice not restrict the ability of vessel operators to secure vessel repairs (as contrasted with rebuilding or reconstruction work) in the most economically and operationally efficient way. We would strongly oppose any suggestions that MARAD may receive that repairs over a certain dollar threshold constitute a "rebuilding" or a "reconstruction". Fortunately, we believe that MARAD has recognized this distinction in the past. For example, in the CCF context MARAD has provided that a reconstruction involves an "improvement" to a vessel that "increases the vessel's competitiveness". See 46 CFR 390.9(b)(3). Also of note, in its Title XI regulations MARAD specified that repairs necessary to meet classification standards will not

constitute reconstruction or reconditioning. See 46 CFR 298.11(e). The draft regulations set forth in the attachment to this filing are consistent with that practice, ensuring that repair work is not transformed by regulation into rebuilding work and offering practical suggestions for determining what constitutes a rebuilding.

We thank MARAD for its consideration of these comments and the attachment and respectfully request prompt action in accord with our recommendations.

Respectfully submitted,

Robert S. Zuckerman
Vice-President and General Counsel

Attachment (draft regulatory language)
Note: The Attachment is an integral part of these comments

Attachment to Comments of Horizon Lines, Inc.
in
Docket No. MARAD – 2007 – 0012

This attachment sets forth proposed a proposed regulatory approach for the Maritime Administration in administering the "reconstructed" provision regarding vessels covered by a Capital Construction Fund agreement (see 46 USC 53501(2)) and the "rebuilt" provision regarding eligibility to carry preference cargoes (see 46 USC sections 55305 and 55314).

In filing these comments we defer to MARAD as to precise placement of the below draft regulatory provisions in title 46 CFR, provided that placement does not have unintended substantive implications due to interaction with other provisions.

Proposed Regulatory Language

Sec. ____ Rebuilt and Reconstructed Vessels

(a)(1) As used in this section, a "rebuilt" vessel shall mean a "reconstructed" vessel within the meaning of chapter 535 of title 46, United States Code and shall also mean a "rebuilt" vessel within the meaning of 46 USC sections 55305 and 55314.

(2) Regardless of its material of construction, a vessel is deemed rebuilt when a "major component" of the hull or superstructure is added, or the vessel has its configuration substantially altered, outside the United States. The term "component" shall include the structural portions of the inner or outer hulls, ballast tanks, transverse and longitudinal supporting bulkheads, permanent cofferdams, structural portions of the wheel house, pilot house, crew berthing areas, cargo area boundaries, main decks, factory floors, factory decks, container racks, bulbous bows and other structural items. "Component" does not include cell guides, engines, bow thrusters, pumps and other machinery, hatch covers, outfitting, and other non-structural items.

(3) A component is deemed a "major component", and thus this subsection applies, whenever the weight of the steel added in connection with a discrete functional component (not counting steel removed) exceeds 1.5 percent of the vessel's discounted lightship weight. The steel considered in connection with each discrete functional component shall include all structural items used in adding that component. A separate 1.5 percent limit shall apply to each discrete functional component covered by this subsection. The steel work involved in any discrete functional component that weighs 1.5 percent or less of the discounted lightship weight shall count toward to the steel work limit provided in subsection (b)(1).

(b) For a vessel of which the hull and superstructure is constructed of steel or aluminum –

(1) A vessel is deemed rebuilt when work performed on its hull or superstructure, counting both structural steel removed and structural steel installed, exceeds 10 percent of the vessel's steelweight prior to the work, also known as discounted lightship weight.

(2) Steel work on the hull and superstructure in a foreign shipyard shall not be considered under subsection (a), and shall not count toward the 10 percent limit under subsection (b)(1), if –

(A) the work is performed during a regulatory dry docking, and the work is required by the Coast Guard or a Coast Guard-approved classification society in order for the vessel to retain its regulatory classification or is otherwise considered routine maintenance or repair; or

(B) is performed as a result of accident, casualty, or Act of God resulting in the vessel being required to be taken to its nearest safe port for repairs.

(3) Steel that is temporarily removed in order to gain access to an area where work will be performed and that is replaced after the work has been performed shall not count towards the 10 percent steel work threshold.

(c) Final Rebuilt Determinations. The owner of a vessel currently entitled to a coastwise, Great Lakes, or fisheries endorsement, which is altered or to be altered outside the United States, and when the work performed or to be performed (not including work covered by subsection (b)(2) of this section) may approximate the maximum amount of work permitted under subsection (a) or (b)(1) of this section, may file a written application for a rebuilt determination with the Maritime Administration. The application shall include the following information:

(1) A written statement outlining in detail the work to be performed or that has been performed, and naming the facility at which the work will be performed or was performed;

(2) Calculations showing the actual or comparable steelweight of the work on the vessel, the actual or comparable steelweight of the vessel, and comparing the actual or comparable steelweight of the work to be performed, or that has been performed, to the actual or comparable steelweight of the vessel;

(3) Accurate technical specifications and drawings describing the work; and

(4) Any further submissions requested by the Maritime Administration.

The application for final rebuilt determination may be filed either prior to work being performed in a foreign shipyard or within 30 days following redelivery of the vessel to the owner or owner's representative. Within 30 days of receiving the application the Maritime Administration shall issue a final rebuilt determination and publish it's ruling in the Federal Register. If a final rebuilt determination is issued prior to work being performed in a foreign shipyard, within 30 days following redelivery of the vessel, the owner must file with the Maritime Administration any updates to the information previously provided in paragraphs (c)(1) – (c)(4) to reflect work actually carried out. If the Maritime Administration finds that work actually carried out materially deviates from work previously described, any rebuilt determination issued prior to work being performed shall not be binding.

(d) Preliminary Rebuilt Determinations. A vessel owner may apply to the Maritime Administration for a preliminary rebuilt determination by submitting:

(1) A written statement applying for a preliminary rebuilt determination, outlining in detail the work planned and naming the place(s) where the work is to be performed;

(2) Calculations showing the actual or comparable steelweight of work to be performed on the vessel, the actual or comparable steelweight of the vessel, and comparing the actual or comparable steelweight of the planned work to the actual or comparable steelweight of the vessel;

(3) Accurate sketches or blueprints describing the planned work; and

(4) Any further submissions requested by the Maritime Administration.

(5) Within 30 days of receiving an application for a preliminary rebuilt determination, the Maritime Administration shall rule on the application and publish it's ruling in the Federal Register.

(e) Any person may appeal the issuance or denial of a preliminary rebuilt determination or final rebuilt determination made within the Maritime Administration to the Maritime Administrator by submitting an appeal within 30 days after a determination has been published in the Federal Register. All information considered by the Maritime Administration in issuing its decision shall be made available within 5 business days to the person submitting the appeal, subject to appropriate measures to protect the confidentiality of any proprietary information. The person appealing the determination may supplement its appeal within 15 days of its original filing. The Administrator shall rule on the appeal within 45 days of the date the appeal is originally filed. The Administrator's ruling on an appeal of a final rebuilt determination shall be the final agency action.

(f) A vessel that otherwise would be considered rebuilt within the meaning of this section shall not be considered to be rebuilt as a result of work on the vessel when the work is performed in a shipyard outside the United States, and either –

(1) the Maritime Administrator determines that the work is necessitated by an accident, casualty, or emergency that has rendered the vessel unable to navigate safely on its own power to a shipyard in the United States that is capable of doing the work. The Administrator shall approve or deny an application requesting such a determination within 30 days of receipt; or

(2) the Maritime Administrator, after due diligence, determines that no shipyard in the United States has the intent to, or is capable of, performing, the work required. Determinations of shipyard capability shall include an assessment of the yard's technical expertise, past work experience, and physical capacity of the yard's facilities. The inability to begin work on a vessel within one year of the date requested by the vessel operator shall result in a determination that no shipyard in the United States has the capability of performing the work required. The Maritime Administrator shall approve or deny an application requesting such a determination within 60 days of receipt.

(g) The owner of any vessel that is eligible to engage in the coastwise trades and upon which work has been performed at a shipyard outside the United States shall submit a report to the Maritime Administration within 30 days following redelivery of the vessel to the owner or the owner's representative. The report shall include the information required on the U.S. Department of Homeland Security, Bureau of Customs and Border Protection Form CBP 226, Record of Foreign Vessel Repair or Equipment Purchase, and be made available to the public upon request.

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BEFORE THE

COAST GUARD AND MARITIME TRANSPORTATION
SUBCOMMITTEE

COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE

UNITED STATES HOUSE OF REPRESENTATIVES

REBUILDING VESSELS ENGAGED IN COMMERCE BETWEEN U.S. PORTS

COMMENTS SUBMITTED BY

MATSON NAVIGATION COMPANY

JUNE 11, 2008

Matson Navigation Company – New Ship Construction

Matson Navigation Company has operated Jones Act qualified American built, American registered, American crewed, and American owned ships between the U.S. West Coast and Hawaii since 1882. Matson's fleet consists of 13 line haul ships that operate between the Pacific Coast of the United States and Hawaii. Three additional self sustaining barges distribute interstate cargo among Hawaii's Neighbor Islands. For all of the 126 years of its existence, Matson has demonstrated a record of active defense and support for every aspect of the Jones Act, including the Second Proviso, which is the subject of today's hearing.

Four of Matson's newest containerships were built in Aker Philadelphia Shipyard, a member of the Shipbuilders Council of America ("SCA"), in 2003, 2004, 2005, and 2006 at a cost of over $500 million. Together with a fifth containership, these five vessels depart the West Coast, call first in Honolulu, continue westbound another 3300 miles to deliver cargo to Guam, and then another 1600 miles to China. In the Chinese ports of Ningbo and Shanghai, these five coastwise qualified vessels compete directly with the mega-foreign flag fleets of the world for eastbound imports into the United States. This is the first time in decades that new American built ships have been operated in the mixed domestic/foreign commerce of the United States.

Matson Navigation Company – History of Ship Repair

Since November 2006, Matson has been besieged by lawsuits and regulatory challenges mounted by the SCA and one of Matson's competitors in the West Coast Hawaii trade, Pasha Hawaii Transport Lines. Their lawsuit alleges that the Coast Guard approved more overseas work on a coastwise qualified Matson ship than the Second Proviso permits and, therefore, that vessel's eligibility to operate in the Hawaii trade should be revoked. Secondly, SCA and Pasha argued to the Maritime Administration that foreign work on nine Matson ships should disqualify them from carrying cargo preference merchandise and from participating in the Capital Construction Fund (CCF) tax deferral program.

In addition to Matson's recent expenditure of over $500 million on new construction in Philadelphia, Matson also spent over $100 million on ship repairs performed in the United States since 2001. In addition, Matson routinely performs more than 95% of all its voyage repairs in U.S. ports, utilizing 100% U.S. labor.

The penalty for rebuilding a ship in a foreign yard is that the offending vessel is disqualified from operation in coastwise trade. The high capital cost of building a ship in an American shipyard makes U.S.-built vessels commercially uncompetitive in the foreign trades. Disqualification of a U.S. built vessel from domestic operation, therefore, will likely result in the commercial obsolescence of that vessel.

In view of this considerable financial risk, in every instance before having any significant foreign steel work performed, Matson has requested Coast Guard review of the project and the issuance of a "preliminary determination" that the proposed work would not

exceed permissible limits. This review requires submitting plans and drawings to the Coast Guard and responding to questions about the material from Coast Guard personnel.

Matson is compelled to minimize its costs within the bounds of the law, which may involve looking at a foreign alternative for vessel work. To do otherwise would be a disservice to our customers and shareholders and put Matson at a competitive disadvantage with other carriers operating in the domestic trades.

Many American shipyards, including several yards that are members of the SCA, are themselves engaging in the use of lower cost foreign built vessel components for new build construction. The simple fact is that no one involved in this highly complex area of Jones Act ship construction and repair should be pointing fingers. Doubtless, American yards have engaged in these foreign arrangements either in the good faith belief that they are permitted under the Jones Act, or after the Coast Guard has reviewed the facts and concluded that the foreign activity is within permissible Jones Act limits. The point here is that the limited use of foreign shipyards and foreign built vessel components is authorized by the regulatory agency charged with enforcing the Jones Act, is widespread, has complex financial implications, and has the potential for profound international repercussions.

Legislation and the "Rebuild" Standard

This is a highly technical subject and any attempt by Congress to delineate the line that separates permissible foreign repairs from impermissible foreign rebuilding must be approached with extreme caution. Rebuild determinations are complex and must be evaluated by experts on a case-by-case basis.

During 2007, Matson and other Jones Act carriers met several times with SCA to explore the development of possible legislation that would address various Second Proviso concerns. All participants approached these discussions with a constructive attitude, but no final agreement was reached. Of the several sticking points, one issue is particularly troubling to Matson. That is, over the course of these discussions it became increasingly clear that putting into words a meaningful, objective definition of the term "major component of the hull or superstructure" that can be applied to all situations is very difficult.

To do so requires naval architecture expertise. The current Coast Guard rebuild regulations were finalized in 1996 after during a three year rule making process and have been applied over the last 12 years. Any legislative attempt to redefine "major component of the hull or superstructure" should be accompanied by a rulemaking where technical experts from industry can make their arguments to technical experts from the government. Only through this process will a definition be produced that will provide the greatest level of predictability for all affected interests.

Conclusion

For its entire 126 year history, Matson has defended the Jones Act and it fully supports the Second Proviso's limits on foreign rebuilding. Before undertaking foreign work of any significance, Matson has disclosed its plans to the Coast Guard and received the Coast Guard's preliminary approval before proceeding.

If Congress decides to intervene in the administration of the Second Proviso, it should proceed with extreme caution. As mentioned above, Matson and other affected carrier and shipbuilding interests have already invested significant effort in drafting proposed legislation. Matson is prepared to work with the Members of this Subcommittee, or as directed by the Subcommittee, in a good faith effort to resolve continuing concerns.

Thank you for considering the views of Matson Navigation Company.

**STATEMENT OF KENNETH ROGERS, PRESIDENT OF SEABULK TANKERS, INC.
CONCERNING REBUILDING COASTWISE VESSELS**

**FOR THE
SUBCOMMITTEE ON COAST GUARD & MARITIME TRANSPORTATION
2167 RAYBURN HOUSE OFFICE BUILDING**

Wednesday, June 11, 2008

Mr. Chairman, Seabulk Tankers, Inc. appreciates this opportunity to provide its views on this important issue of vessel rebuild determinations under the Jones Act. Seabulk Tankers operates a fleet of eight U.S.-flag tankers, providing marine transportation services for petroleum products and chemicals moving in the U.S. domestic trade and elsewhere. It also manages, from time to time, ocean-going vessels on behalf of third parties. Seabulk Tankers, Inc. is the parent company of Seabulk Energy Transport, Inc. and Seabulk Petroleum Transport, Inc., the owners, respectively, of the motor tankers *Seabulk Trader* and *Seabulk Challenge*, both of which have been retrofitted with double sides outside the United States.

Seabulk is a U.S. citizen qualified to operate vessels in the U.S. coastwise trade and fully supports the national security and defense interests reflected in the coastwise laws. It has always meticulously observed both the letter and the spirit of those laws. Seabulk would not have had its vessels retrofitted with double sides outside the United States if it had any doubt that the project would comply with those laws. And, indeed, consistent with those laws and the regulations implementing those laws, Seabulk sought and obtained the Coast Guard's specific and express determination that completion of the project would be consistent with the coastwise laws and would not jeopardize the Seabulk vessels' coastwise eligibility. Seabulk proceeded with the project in reliance on that determination.

More specifically, Seabulk followed the regulatory process set out in 46 C.F.R. § 67.177(g) and obtained a preliminary rebuilt determination in which the Coast Guard advised

that the proposed work on the vessels, if performed outside the United States, would not constitute a rebuilding resulting in loss of coastwise eligibility. This process is designed to permit a vessel owner, before investing millions of dollars in a project, to obtain the Coast Guard's assurance that the project will not adversely affect its vessel's coastwise privileges. Seabulk followed this process, obtained the Coast Guard's determination that if the project was performed in substantial compliance with the proposal (which it was) the vessels' coastwise eligibility would not be jeopardized. And following completion of the project, Seabulk submitted a report of the completed work and the Coast Guard reissued the vessels' certificates of documentation with a coastwise endorsement.

The Coast Guard issued its rebuilt determination to Seabulk in May 2005, eighteen months before the work was actually begun. That determination became a matter of public record, subject to disclosure under the Freedom of Information Act, at that time. Indeed, Crowley Maritime Corporation made a request for such disclosure soon after the Coast Guard issued its Seabulk determination and the Coast Guard released that determination to Crowley in September 2005. The determination was also reported publicly in August 2006 when it appeared on the web site of Maritime Business Strategies LLC. Not until April 24, 2007—19 months after Crowley learned of the project and long after Seabulk had invested $20 million in, and commenced work on, the project—did Crowley make its objections to the Coast Guard's interpretation of the applicable statute and regulations known by appealing the Coast Guard's determination to the Commandant. Even later, in July 2007, Crowley and others brought suit challenging the Coast Guard's determination in the United States District Court for the Eastern District of Virginia.

On April 24, 2008, the court rejected the Coast Guard's interpretation of the statutes and regulations relevant to its Seabulk determination and directed the Coast Guard to revoke the *Seabulk Trader*'s coastwise endorsement. Seabulk has appealed that decision to the United States Court of Appeals for the Fourth Circuit, arguing that the district court erred both in rejecting the Coast Guard's interpretations and in directing the revocation of the *Seabulk Trader*'s coastwise endorsement.

Seabulk understands that this subcommittee may consider legislation that would define more specifically what modifications can and cannot be performed outside the United States. Seabulk offers no position on the merits of such a proposal. Seabulk strongly believes, however, that any change in the law, whether through legislation or judicial interpretation, should not be applied so as to penalize Seabulk or any other shipowner who has sought, received, and relied on a formal Coast Guard determination that a foreign modification would not disqualify its vessels from the coastwise trade. Such retroactive application of new law would be fundamentally unfair where advice was sought and obtained from the appropriate administrative agency and then relied upon in making the modifications. For that reason, any amendments to the existing foreign-rebuild statute and regulations should expressly provide that any work previously performed outside the United States in reliance upon and in accordance with a Coast Guard determination under 46 C.F.R. § 67.177(g), as it now stands, will not affect a vessel's eligibility for a coastwise endorsement.

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