

Before  
U.S. CUSTOMS AND BORDER PROTECTION  
U.S. DEPARTMENT OF HOMELAND SECURITY  
Washington, D.C.

*In the Matter of*

Proposed Modification and Revocation of  
Ruling Letters Relating to Customs  
Application of the Jones Act to the  
Transportation of Certain Merchandise and  
Equipment Between Coastwise Points

**COMMENTS OF  
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION**

The North American Submarine Cable Association (“NASCA”), the premier U.S. submarine telecommunications industry organization, does not object to the proposal<sup>1</sup> of U.S. Customs and Border Protection (“CBP”) to modify or revoke certain letter rulings relating to CBP’s application of the Jones Act, 46 U.S.C. § 55102 (the “Jones Act”), to “vessel equipment” and the transportation of certain merchandise and equipment between coastwise points, but nevertheless urges CBP to revise certain elements of its proposals in order to preserve better the “paid out, not unladen” doctrine that CBP has otherwise stated it seeks to retain and to clarify the scope of vessel equipment.

NASCA understands that CBP has drafted its proposals to achieve its goal of eliminating

---

<sup>1</sup> Gen. Notice 19 CFR Part 177, *Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points*, 53 Cust. B. & Dec. 38 (Oct. 23, 2019) (“2019 Proposal”).

overbroad interpretations of “vessel equipment” without disturbing the long-standing policy that a non-coastwise qualified vessel does not violate the Jones Act to the extent material is “paid out, not unladen”—a policy essential to ensuring the deployment and timely repair of critical infrastructure, such as the submarine cables that carry 99 percent of U.S. intercontinental telephone, data, and Internet traffic. Moreover, unlike CBP’s 2017 proposal,<sup>2</sup> the 2019 Proposal would achieve CBP’s underlying objective while at the same time providing guidance on what qualifies as “vessel equipment” in the context of modern vessel operations—many of which do not involve the transportation of merchandise between coastwise points. At the same time, while NASCA does not object to the 2019 Proposal, NASCA urges CBP to improve it by: (a) modifying, rather than revoking, letter rulings 115311 and 115522, both of which include the “paid out, not unladen” policy; and (b) providing further guidance by including additional, concrete examples of qualifying “vessel equipment”—particularly vessel equipment that may be installed on the ocean floor.

In part I of these comments, NASCA provides background information on NASCA, the submarine telecommunications cables and cable ships owned and operated by NASCA members, and the importance to U.S. economic and national security interests of ensuring that submarine cable installation, maintenance, and repair activities remain beyond the scope of the Jones Act’s coastwise trading restrictions. In part II, NASCA discusses the 2019 Proposal as set forth in the Notice and suggests modifications to those proposals to ensure consistency and provide industry with greater clarity on the scope of “vessel equipment”.

---

<sup>2</sup> Gen. Notice 19 CFR Part 177, *Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment between Coastwise Points*, 51 Cust. B. & Dec. 3 (Jan. 18, 2017) (“2017 Proposal”).

## **I. BACKGROUND: NASCA AND THE SUBMARINE CABLE INDUSTRY**

### **A. NASCA**

NASCA is the principal nonprofit trade association for submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems operating in North America.<sup>3</sup> NASCA serves both as an advocacy organization and a forum for its members' interests. NASCA's members own and operate the vast majority of active submarine cable systems landing in the United States and support thousands of jobs in the United States.

### **B. Submarine Cables and Cable Ships**

Contrary to popular perception, approximately 99 percent of U.S. intercontinental telephone, data, and Internet traffic travels by submarine cable—a percentage that has only grown as capacity demands have increased. Submarine cables provide higher-quality, more reliable and secure, and less expensive communications than do communications satellites. The U.S. territorial sea, exclusive economic zone (“EEZ”), and Outer Continental Shelf (“OCS”) contain significant existing submarine cable infrastructure, and more is planned. According to the Federal Communications Commission (“FCC”), 76 licensed submarine cable systems currently traverse or soon will traverse these areas, and at least 8 more have been announced or are currently under construction.<sup>4</sup>

---

<sup>3</sup> NASCA's members include Alaska Communications System, Alaska United Fiber System Partnership (a subsidiary of General Communication, Inc.), Alcatel Submarine Networks, AT&T Corp., C&W Networks, CenturyLink, Edge Network Services Ltd., Global Cloud Xchange, Global Marine Systems Ltd., GlobeNet, GTT, OPT French Polynesia, PC Landing Corporation, Rogers Communications, Southern Caribbean Fiber, Southern Cross Cable Network, Sprint Communications Corporation, Tata Communications (Americas), SubCom, Verizon, Vodafone, and Zayo Group Ltd.

<sup>4</sup> See Federal Communications Commission, *Submarine Cable Landing Licenses at Licensed Cables*, <https://www.fcc.gov/research-reports/guides/submarine-cable-landing-licenses>.

Submarine cables play a critical role in ensuring that the United States can communicate domestically and internationally, thus supporting the commercial and national security endeavors of the United States and its citizens. Submarine cables support U.S.-based commerce abroad, and provide access to Internet-based content, a substantial proportion of which is located in the United States, as evidenced by international bandwidth buildout. Submarine cables also carry the vast majority of U.S. Government traffic, as the U.S. Government does not generally own or operate its own submarine cable systems.

Submarine cables are laid and repaired by cable ships built specifically for cable-related operations and designed for covering vast distances during multi-month deployments. Cable ships are crewed by highly trained and experienced merchant mariners, submersible engineers, and cable operations staff. In the course of cable-laying and repair operations, the crew pays out cable from enormous holding tanks and splices in repeaters from special racks. These ships use a variety of remotely-operated vehicles, sea plows, lines, and grapnels for manipulating cable and repeaters beyond the ship. Since the traffic carried by these cables is vital to economic and national security, timely repairs are critical.

## **II. NASCA DOES NOT OBJECT TO THE 2019 PROPOSAL TO ALIGN CERTAIN LETTER RULINGS AND GUIDANCE WITH STATUTORY AND TREASURY PRECEDENT, BUT REQUESTS FURTHER CLARIFICATIONS**

### **A. The 2019 Proposal Would Eliminate Overbroad Interpretations of “Vessel Equipment” While Providing Clear Guidance on the Scope of that Term**

CBP proposes to modify a number of rulings that include overbroad interpretations of what constitutes “vessel equipment”, including HQ 114435, HQ 115185, HQ 115487, HQ 115771, HQ 116078, and further to revoke certain rulings, including HQ 115218, HQ 115311, HQ 115522, HQ 115938, and HQ H004242, that are contrary to the guidance in the 2019 Proposal. As CBP points out, the decisions in these rulings are based on concepts, such as

foreseeability, incidental transport, and the “mission of the vessel”, that expand the scope of “vessel equipment” beyond that of the relevant statute, 19 U.S.C. § 1309, and the 1939 Treasury Decision, T.D. 49815(4) interpreting that statute, which limited vessel equipment to items “necessary and appropriate for the navigation, operation or maintenance of a vessel and for the comfort and safety of the persons on board.”<sup>5</sup> NASCA does not object to the 2019 Proposal, both because CBP’s carefully tailored approach clearly retains a separate line of analysis, followed by CBP for decades, holding that material “paid out, not unladen” is not merchandise within the meaning of the Jones Act,<sup>6</sup> and further because CBP provides rational guidance as to what items are appropriately classified as vessel equipment.

CBP’s proposed modifications make clear that CBP intends to retain its long-standing line of decisions holding that cable laying and repair activities are not within the scope of the Jones Act to the extent material is paid out, not unladen, as such activities break the continuity of transport between two coastwise points. Unlike CBP’s 2017 Proposal,<sup>7</sup> the current CBP Proposal includes revised, redlined letter rulings that clearly leave that analysis intact. For

---

<sup>5</sup> 2019 Proposal at 16 (*citing* T.D. 49815(40)).

<sup>6</sup> *See, e.g.*, Customs Service Decision 79-321, 13 Cust. B. & Dec. 1481 (Dec. 12, 1978) (concluding that Jones Act does not prohibit use of a foreign vessel to lay pipe between points embraced by the coastwise laws of the United States because it is not landed as cargo but is only paid out in the course of the laying operation); Treasury Decision 78-387, 12 Cust. B. & Dec. 826 (Oct. 7, 1976) (same); *Am. Mar. Officers Serv. v. STC Submarine Sys., Inc.*, 949 F.2d 121 (4th Cir. 1991) (same). *See also*, Customs Ruling Letter HQ 112866 (Aug. 31, 1993) (ruling that laying of cable is not coastwise trade); Customs Service Decision 89-40, 23 Cust. B. & Dec. 617 (Dec. 2, 1988) (same).

<sup>7</sup> *See generally*, Comments of the North American Submarine Cable Association, *In the Matter of Proposed Modification and Revocation of Letter Rulings Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise Between Coastwise Points*, 51 Cust. B. & Dec. 1 (April 18, 2017) (opposing the 2017 Proposal in part because the proposals called into question the “paid out, not unladen” analysis).

example, CBP’s proposed modified version of HQ 101925 reaffirms the holding that “pipe repair operations concluded by a foreign-flag vessel could violate the Jones Act, but not if the materials used are ‘paid out, not unladen,’ or if the materials involved qualify as vessel equipment.”<sup>8</sup> Similarly, CBP’s proposed modified version of HQ 114435 holds that “the umbilicals and flowlines do not constitute merchandise under the statute because they are paid out, and not unladen.”<sup>9</sup> NASCA appreciates CBP’s careful efforts to ensure that its proposal to eliminate overbroad, invalid interpretations of “vessel equipment” does not inadvertently jeopardize this separate line of analysis, which is essential to ensuring continued timely deployment, maintenance, and repair of critical infrastructure, including submarine cables.

NASCA further supports CBP’s guidance for determining whether equipment qualifies as “vessel equipment”. This guidance accurately reflects the reality that certain vessels perform functions wholly unrelated to the transportation of merchandise between coastwise points. In particular, the 2019 Proposal states:

Items considered “necessary and appropriate for the operation of the vessel” are those items that are integral to the function of the vessel and are carried by the vessel. These functions include, *inter alia*, those items that aid in the installation, inspection, repair, maintenance, surveying, positioning, modification, construction, decommissioning, drilling, completion, workover, abandonment or other similar activities or operations of wells, seafloor or subsea infrastructure, flowlines, and surface production facilities. CBP also emphasizes that the fact that an item is returned to and departs with the vessel after an operation is completed, and is not left behind on the seabed, is a factor that weighs in favor of an item being classified as vessel equipment, but is not a determinative factor.<sup>10</sup>

---

<sup>8</sup> 2019 Proposal, Attachment B.

<sup>9</sup> 2019 Proposal, Attachment H. *See also* CBP’s proposed modifications to HQ 115487 at Attachment L.

<sup>10</sup> CBP Proposal at 17.

This discussion provides rational guidance on the scope of “vessel equipment” in the context of modern vessel operations, guidance that is supplemented by the modified rulings (in particular, HQ 116078, HQ 113841, HQ 114435, and HQ 115771). CBP’s guidance makes clear that not all vessels in U.S. waters function to transport merchandise between coastwise points: certain vessels function to perform the tasks necessary for the deployments, maintenance, and operation of critical infrastructure (such as the ROVs used by the umbilical- and flowline-laying vessels at issue in HQ 114435, HQ 113841, and HQ 115771) or mitigate environmental harm (such as containment boom, absorbents, and other equipment carried by the oil containment vessel at issue in HQ 116078). NASCA agrees with CBP that the equipment used in performing these and other functions not relating to the transport of merchandise is appropriately classified as vessel equipment.

**B. NASCA Urges CBP to Improve the 2019 Proposal by Modifying, Rather than Revoking, HQ 115311 and HQ 115522 and by Providing Further Concrete Examples of Qualifying Vessel Equipment**

While NASCA generally does not object to the 2019 Proposal, it urges CBP to improve it by (a) modifying, rather than revoking, HQ 115311 and HQ 115522, both of which rely, in part, on the “paid out, not unladen” policy; and (b) providing further guidance on the scope of “vessel equipment” that may be left behind on the seabed.

First, it is unclear why CBP proposes to revoke, rather than modify, HQ 115311 and 115522. Both rulings address scenarios in which flowlines and umbilicals lines are paid out from the installation vessels, and in both CBP stresses that “Customs has long-held that the laying of cable between two points embraced within the coastwise laws of the United States is

not coastwise trade.”<sup>11</sup> Accordingly, because the flowlines at issue in the rulings are, like cable, “paid out, not unladen”, CBP concluded that a foreign-flagged vessel may conduct the activity without violating the Jones Act.<sup>12</sup> As CBP clearly does not intend to alter this analysis, NASCA sees no reason for CBP to revoke, rather than modify, these two rulings.

Second, NASCA urges CBP to provide additional guidance with respect to the scope of “vessel equipment” that may be left behind on the seabed. While the 2019 Proposal leaves open the possibility that some such equipment may qualify as “vessel equipment”, it provides no concrete examples, through modified letter rulings or otherwise. Even if CBP does not have sufficient facts before it in the context of a particular letter ruling to make such a determination, it could provide guidance through hypothetical scenarios. By doing so, CBP would provide industry with more clarity—and thus reduced uncertainty—as to what equipment or supplies would qualify as “vessel equipment” even if left behind on the ocean floor.

---

<sup>11</sup> 2019 Proposal, Attachments R and S.

<sup>12</sup> *Id.*



## CONCLUSION

For the reasons stated above, NASCA generally supports CBP's Proposal, but urges CBP to modify, rather than revoke, HQ 115311 and HQ 115522 and to provide additional guidance with respect to the vessel equipment that may be left behind on the seabed.

Respectfully submitted,



Kent D. Bressie  
Colleen Sechrest  
HARRIS, WILTSHIRE & GRANNIS LLP  
1919 M Street, N.W., Suite 800  
Washington, D.C. 20036-3537  
+1 202 730 1337  
kbressie@hwglaw.com

*Counsel for the North American  
Submarine Cable Association*

November 22, 2019