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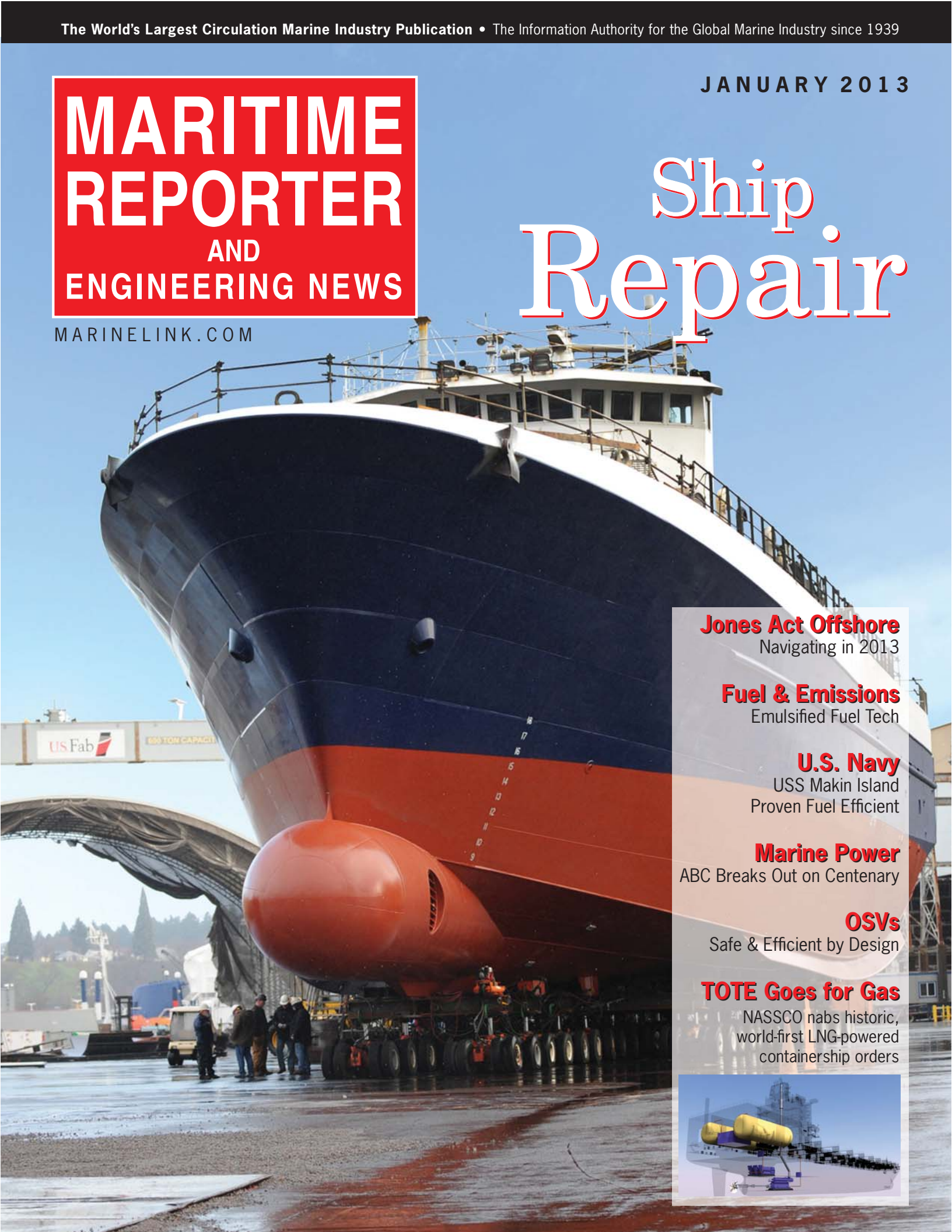

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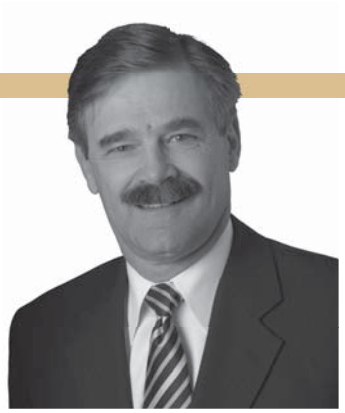

Navigating in 2013

Jones Act Offshore

By Jonathan K. Waldron and Jeanne M. Grasso

Following the hubbub created in 2009-2010 by U.S. Customs and Border Protection's (CBP) proposed modification and revocation of certain Jones Act ruling letters pertaining to offshore operations, all was relatively quiet in 2011-2012 with respect to Jones Act offshore issues. Indeed, in the aftermath of the tragic Deepwater Horizon incident in 2010, which included the implementation of more prescriptive regulatory and environmental requirements and a deepwater drilling moratorium, energy development offshore took a dive as vessels departed the Gulf of Mexico and headed for more friendly seas internationally. As time passed, however, memories faded, and the regulatory offshore energy regime became more stable. And now, the work is coming back to the Gulf—by all reports, the outlook is bright as we start 2013. However, one thing that appears to be lurking offshore is the tightening of the screws on Jones Act enforcement. This article will review recent developments that could adversely affect offshore operations in 2013 and the foreseeable future.

By way of background, in July 2009, CBP proposed modifying or revoking 20 Jones Act rulings issued over a span of more than 30 years involving vessels transporting specialized equipment used by the offshore oil and gas industry. The rulings largely involved instances where CBP had made determinations as to whether certain items carried on those vessels would be considered "vessel equipment" or "merchandise." "Vessel equipment" and "merchandise" are two key terms of art for Jones Act interpretations—if an item is "merchandise," only a coastwise-qualified vessel may transport the item between coastwise points; if an item is "vessel equipment," a non-coastwise-qualified vessel may be used to transport the item between coastwise points or transport the item from a coastwise point and install the item at a different coastwise point. CBP's modification and revocation proposal came shortly after CBP's revocation of the now infamous "Christmas Tree" ruling earlier in 2009, in which CBP (originally) determined that a multi-function well head assembly called a "Christmas Tree" was vessel equipment and therefore could be transported from one coastwise point to another and then installed by a foreign-flag vessel. In its modification and revocation proposal, CBP stated that withdrawal of the "Christmas Tree" ruling was necessary pending further clarification of the definition of vessel equipment and a review of past rulings in which CBP determined certain items carried aboard a vessel were vessel equipment and not merchandise.

Amid much controversy regarding the appropriate means by which to overturn 30 years of precedent, CBP withdrew its modification and revocation proposal and then initiated a formal rulemaking in March 2010 using the Notice and Comment procedures of the Administrative Procedure Act. However, amid more controversy, this rulemaking was withdrawn by CBP and the Department of Homeland Security in November 2010.

Following the decision to withdraw the rulemaking proposal, it is interesting, especially in view of the controversy surrounding whether a particular item is vessel equipment or merchandise since the revocation of the 2009 "Christmas Tree" ruling, that there have been no ruling requests related to subsea installation involving the "equipment of the vessel"

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exception and thus no rulings have been issued by CBP involving the transportation of vessel equipment or merchandise to points on the OCS. Nor has CBP issued any further guidance on its own initiative to further clarify the definition of "vessel equipment" as it said it intended to do following the "Christmas Tree" ruling.

As a result, industry has continued to conduct subsea installation and repair operations offshore based on the fact that CBP's OCS-related rulings issued over the last 30 years remain valid as precedent. This presumption is justified because CBP withdrew all official notices that it was pursuing changes to its interpretation of Jones Act rulings. In addition, it has become clear in the last couple of years that some segments of industry have been hesitant to submit new ruling requests for fear that CBP would not follow existing precedent.

Fast forward to the present—the way to operate offshore could change in 2013 due to pressure on CBP "to enforce the Jones Act" from Congress and the domestic industry. Defining what enforcement of the Jones Act means in the context of offshore operations is difficult. Does it mean adhering to precedent will continue to be acceptable? Or does it mean that CBP will change its interpretation of the Jones Act on a case-by-case basis through enforcement actions rather than through a formal rulemaking? Alternatively, CBP could issue new guidelines to assist industry in determining what types of activities would be in conformance with current Jones Act rulings.

One new development is that some CBP Port Directors have started issuing penalty notices for alleged violations, with penalties ranging in the millions of dollars, relating to offshore subsea operations that occurred years ago—even before the revocation of the "Christmas Tree" ruling.

Another development is that at least one CBP Port Director had informed industry that every offshore subsea installation or repair project requires its own ruling covering the contemplated operations to demonstrate compliance with the Jones Act. Otherwise, if a company decides to carry out subsea installation and repair activities, even when such activities are squarely within the parameters and in conformance with numerous "equipment of the vessel" rulings issued over the years, CBP will issue a penalty for the value of the merchandise or the cost of the transportation, whichever is greater, which often will be in the millions of dollars.

This puts owners and operators in an untenable situation. If they request a ruling in advance (which is not required), they risk obtaining an adverse ruling, irrespective of prior precedent, as a result of the political pressure now surrounding interpretation of the Jones Act as it applies offshore. If they decide to move forward without a ruling, then the company subjects itself to a severe penalty action which they will have to defend through the CBP mitigation process.

This is no way for the U.S. government to establish policy and it is contrary to CBP's own policy of "Informed Compliance," which is supposed to make sure industry knows what to expect.

In short, fundamental fairness demands and it is incumbent upon CBP under its Informed Compliance policy to achieve consistency in interpretation of the Jones Act as it applies offshore—and not through ad hoc enforcement actions, especially when there is precedent supporting the activity in question. In addition, it is particularly troubling that CBP would initiate such a policy when the United States is only now starting to see a recovery in the oil and gas development regime in the Gulf of Mexico in the aftermath of the Deepwater Horizon and when the United States is still trying to get its sputtering economy back on track.

In conclusion, given these developments, it is incumbent for all those involved in the offshore oil and gas industry to work together to find a way forward to ensure that we do not unnecessarily put a substantial damper on offshore development when the United States is only now beginning to achieve energy independence.

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