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

ON
WEDNESDAY, JUNE 11, 2008
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STATEMENT OF
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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 . . . .
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> 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. . . .
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> . . . 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.

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