



HQ H317289

March 25, 2021

VES-3-02-OT:RR:BSTC:CCR H317289 AMW

CATEGORY: Carriers

Mr. Michael H. Wray
Ms. Courtney Campion
Holman Fenwick Willan USA LLP
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Houston, Texas 77056

RE: Coastwise Transportation; Coastwise Towing; Scour Protection; 46 U.S.C. § 55102; 46 U.S.C. § 55111; 19 CFR § 4.80(b); 19 U.S.C. § 1625; 19 CFR § 177.12(b); Modification of H309186 (Jan. 27, 2021)

Dear Mr. Wray and Ms. Campion:

On January 27, 2021, U.S. Customs and Border Protection (“CBP”) issued Headquarters Ruling HQ H309186 to Great Lakes Dredge & Dock Company, LLC regarding whether the transportation of scour rocks from Canada and coastwise points in the United States and its territorial waters to the U.S. Outer Continental Shelf (“OCS”), would violate the coastwise laws. As explained below, this ruling modifies certain holdings in HQ H309186. This modification is not subject to the notice and comment provisions of 19 U.S.C. § 1625(c) because HQ H309186 has been in effect for less than 60 days; this ruling modifying HQ H309186 is effective immediately pursuant to 19 CFR § 177.12(e).

As described more fully below, CBP is modifying its holdings relating to scenarios A, B, C, E, F, and G, such that with this modification, CBP holds that the Jones Act does not apply to activity occurring at the pristine seabed on the OCS, which has been CBP’s longstanding position on the issue. Of course, once a coastwise point is established on the seabed of the OCS, the Jones Act will apply to transportation activity involving that coastwise point to the extent jurisdiction is extended to it by the Outer Continental Shelf Lands Act (“OCSLA”).

FACTS

The following facts are from your February 12, 2020 ruling request and supporting information submitted to this office on March 23, 2020. Your client, Great Lakes Dredge and

Dock (“Great Lakes”) has proposed to transport and unlade “scour protection” materials to protect wind turbine generator (“WTG”) foundations in conjunction with the construction of the Vineyard Wind Project located on the OCS off the southeast shore of Martha’s Vineyard, an island that is part of the State of Massachusetts.

The Vineyard Wind Project is described in the ruling request as an offshore wind energy farm that is expected to consist of approximately 84 WTGs. Each installed WTG will consist of a tower and nacelle unit attached to a monopile foundation that is embedded in the seafloor. Each WTG foundation will be surrounded by scour protection composed of rock or similar material, which will prevent sediment erosion and protect against increased seabed drag caused by the placement of the foundation. The scour protection material will be unladed at the WTG sites on the OCS in layers and at different phases of the WTG installation process. The radius of scour protection surrounding each monopile will be approximately 22-26 meters (72-85 feet) and one to two meters high (3-6 feet).

The ruling request states that a combination of coastwise and non-coastwise-qualified vessels will be used to install the scour protection material. Specifically, the non-coastwise-qualified, Netherlands-flagged M/V FLINTSTONE (the “Scour Vessel”) will be used to install scour protection throughout the Vineyard Wind Farm. The ruling request also states that the operation will take place between February 2023 and December 2023 and outlines seven potential scenarios, “A” through “G,” which describe how the scour protection may be installed. Some of the scour protection will be placed prior to the monopile being driven into the seabed, while other scour protection applications will occur after the monopile is put in place. The request also indicates that the Scour Vessel can carry enough material to place scour protection material at multiple sites before needing to replenish. Scenarios A through G, as described in your ruling request, are set forth below.

Scenario A: The scour protection material will be laden onto the Scour Vessel at the Port of Providence, Rhode Island and transported to the project site on the OCS. The Scour Vessel will then unlade the scour protection material onto the seabed prior to the installation of each monopile. After unlading each load of scour protection material, the Scour Vessel will return to the Port of Providence (or potentially another U.S. port) to lade additional scour protection material. This process will be repeated at each installation area within the project site.

Scenario B: The Scour Vessel will unlade a second layer of scour protection material after the initial layer of scour protection material is applied and the monopile is installed into the seabed. The scour protection material will be laded onto the vessel in the Port of Providence (or potentially another U.S. port), with periodic returns to the U.S. port to lade additional scour protection material as needed.

Scenario C: After the WTGs are fully installed and operational, scour protection material will be periodically reapplied as part of routine maintenance. Under this scenario, the Scour Vessel will again lade the scour protection material at the Port of Providence or another U.S. port, with periodic returns to the U.S. port to lade additional scour protection material as needed.

Scenario D: The Scour Vessel will unlade the scour protection material in the same manner and at the same locations during the installation phase and post-construction phase as described in scenarios A, B, and C, except that the scour protection material will be laden onto the vessel in Canada. The Scour Vessel will return to Canada to replenish the scour protection material as needed.

Scenario E: The scour protection material will be laden onto the non-coastwise-qualified, Panama-flagged BULK FRIENDSHIP (the “Bulk Carrier”) in Canada and transported to the project site on the OCS or an alternative site within U.S. territorial waters. After the Bulk Carrier arrives at the Project Site on the OCS or a site within U.S. territorial waters, the Bulk Carrier will anchor to the seabed and serve as a floating storage platform. The Scour Vessel will apply the scour protection material in the same manner and at the same locations as described in scenarios A, B, and C, except that instead of transporting the scour protection material from a U.S. mainland point of lading, the Scour Vessel will lade scour protection material from the anchored Bulk Carrier located within U.S. territorial waters or an installation site on the OCS and unlade the scour protection material on the seabed adjacent to a WTG structure.

Scenario F: In lieu of the Scour Vessel, a non-coastwise-qualified, foreign-flagged installation barge (the “Barge”) will be laden with scour protection material and towed by coastwise-qualified tugboats from the Port of Providence to the project site on the OCS to install scour protection material as described in scenarios A, B, and C above.

Scenario G: The Barge will be used as described in scenario F with the exception that it will be towed to the installation site on the OCS by *non-coastwise-qualified* tugboats to install scour protection material.

ISSUES

1. Whether the transportation of the subject scour protection material as described in each of the scenarios above violates the Jones Act, 46 U.S.C. § 55102?
2. Whether the use of non-coastwise-qualified and coastwise-qualified tugboats to transport a barge carrying scour protection material violates 46 U.S.C. § 55111?

LAW AND ANALYSIS

The coastwise law applicable to the transportation of merchandise, known as the Jones Act, is found at 46 U.S.C. § 55102,¹ and provides in pertinent part:

Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel—

¹ Formerly 46 U.S.C. App. § 883. See Pub. L. 109-304 (Oct. 6, 2006).

- (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
- (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The coastwise laws apply, in part, to points in the territorial sea, which is defined as the belt, three nautical miles wide, seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline.² In addition, Section 4(a)(1) of the Outer Continental Shelf Lands Act of 1953 (“OCSLA”), as amended by The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 9503 (2021), provides that the Constitution and laws and civil and political jurisdiction of the United States extend to:

- (i) the subsoil and seabed of the outer Continental Shelf;
- (ii) all artificial islands on the outer Continental Shelf;
- (iii) installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, *including non-mineral energy resources*; or
- (iv) any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources.³

(Emphasis added.)

Issue One: Transportation of Merchandise (scenarios A through E)

The Jones Act specifically prohibits the coastwise transportation of “merchandise” between coastwise points by non-coastwise qualified vessels. Pursuant to 46 U.S.C. § 55102(a): “[m]erchandise includes (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and (2) valueless material.” Prior CBP rulings have interpreted this definition of “merchandise” to include rocks and dredged material. *E.g.*, HQ 113219 (Oct. 17, 1994). As such, it is clear that the scour protection materials contemplated in the instant request are merchandise under 46 U.S.C. § 55102.

To determine if the proposed transportation occurs between coastwise points, we need to examine the points at which the subject scour protection material will be laden and unladen. CBP treats the seabed of the territorial sea differently from that of the OCS because of the narrower jurisdiction provided by the OCSLA. Within the territorial sea, U.S. sovereignty is unlimited. A country’s sovereignty beyond its territorial sea and over the OCS is more constrained, however, and in this situation is measured by the acts of Congress extending jurisdiction for specified purposes. In its application of the Jones Act, CBP interprets the OCSLA to provide CBP jurisdiction where there is an installation or device attached to the

² 33 CFR § 2.22(a)(2).

³ 43 U.S.C. § 1333(a)(1).

seabed serving a purpose as articulated in the OCSLA – the exploration for, or development, production, transmission, or transportation of resources. CBP previously has determined that jurisdiction does not reach activity occurring at the pristine seabed, where there is no installation or device attached to the seabed, and thus where for Jones Act purposes no coastwise point exists. CBP has held, however, that a coastwise point exists in the vicinity of an installation or device attached to the seabed of the OCS for a purpose articulated by the OCSLA. *See, e.g.*, HQ 116350 (Jan. 18, 2005) (relating to a “suction anchor...[in] the seabed of the OCS in the immediate vicinity of, and in direct relation to, an exploratory wellhead already in existence at that location”). Furthermore, CBP recognizes that the OCSLA contemplates construction activity to be part of the development of resources, such that an installation or structure need not be completed to be embraced by the OCSLA’s jurisdictional reach. 43 U.S.C. § 1333(l).

Scenario A, as outlined in your request, involves the transportation of scour protection material to a pristine location on the seabed. Your ruling request makes clear that there is no existing scour protection material, monopile, or other device or installation attached to the seabed at the time the scour protection material is delivered to the site where it will be placed on the seabed. Accordingly, at that time of first delivery, there is no coastwise point, and hence, no transportation of merchandise from one coastwise point to another. As a result, the Scour Vessel may transport the scour protection material to the installation location when that location is the pristine seabed, without violating 46 U.S.C. § 55102.

We note, however, that a coastwise point under 46 U.S.C. § 55102 will be created when the first layer of scour protection material is placed on the seabed. CBP previously has considered items such as debris or wreckage resting on the seafloor of the OCS to be “attached.” *See, e.g.*, HQ H287418 (June 19, 2017) (and rulings cited therein). Due to its role in securing and protecting a WTG unit used for the production of wind energy, we find that the subject scour protection material will be attached to the seafloor for the purpose of exploration, development, or production of non-mineral energy resources. As such, any subsequent transportation of merchandise to each scour protection area must be conducted by a coastwise-qualified vessel.

Scenarios B and C as outlined in your request, each involve the transportation of scour protection material between two coastwise points by the non-coastwise-qualified Scour Vessel. Scenario B involves the transportation of scour protection material from Providence, Rhode Island, to the OCS seabed adjacent to the pre-installed scour protection material and monopile foundation, an installation used to produce non-mineral energy resources.⁴ Scenario C involves the periodic transportation of supplemental scour protection material from Providence, Rhode Island, to the seabed near a completed monopile and its surrounding scour protection material. As a result, the proposed transportation in both scenarios B and C would be in violation of the Jones Act; a coastwise-qualified vessel must be used in these scenarios.

Within scenario B, your ruling request also inquires if the coastwise point established by the attached monopile extends to the outer edge of the scour protection. The answer is yes; the coastwise point is the monopile and its surrounding scour protection. *See, e.g.*, HQ 116350 (Jan. 18, 2005) (finding a coastwise point to exist in the vicinity of an existing installation or device

⁴ We once again note, however, that a coastwise point is created when the initial placement of scour protection materials is installed. As such, a coastwise point will exist at the site before the monopile is installed.

attached to the seabed). Furthermore, with respect to scenario B, your ruling request inquires if the movement of the Scour Vessel with the scour protection material laden thereon “between the monopiles” constitutes transportation between two coastwise points. The answer is yes, if merchandise is being transported from one coastwise point (*e.g.*, laden on board the Scour Vessel at Providence, Rhode Island, or one of the monopile sites) and unladen at a second coastwise point (*e.g.*, a second monopile site).

Scenario D, as outlined in your request, does not involve the transportation of scour protection material between two coastwise points. Instead, this scenario contemplates that the scour protection material will be laden onto the Scour Vessel at a Canadian port and unladen on the seabed of the OCS – whether at a pristine location or an established coastwise point. Because this scenario does not contemplate transportation between two coastwise points, it would not constitute a violation of the Jones Act.

Scenario E offers two distinct sub-scenarios, each of which also potentially involve various situations. As indicated above, the pristine seabed on the OCS is not a coastwise point, but, with the placement of scour protection material or a monopile there, the seabed location becomes a coastwise point. In both sub-scenarios, the scour protection material will be laden onto the non-coastwise-qualified Bulk Carrier in Canada before transiting to the United States. In the first sub-scenario, after arriving from Canada, the Bulk Carrier will anchor at a site within U.S. territorial waters to serve as a floating storage site. The Scour Vessel will then lade scour protection material from the anchored Bulk Carrier and either unlade it at a pristine site, or, a site where there is already scour protection material or a monopile. If the Scour Vessel is transporting and unlading the scour protection material at the pristine seabed on the OCS, such as in scenario A, above, there is no coastwise point to coastwise point transportation, and no violation of the Jones Act. If, however, there is scour protection material or a monopile already at the destination site, such as in scenarios B and C, then it is a coastwise point. Accordingly, the Scour Vessel would violate the Jones Act if it transports the scour protection material from the Bulk Carrier to the installation site.

In the second sub-scenario, the Bulk Carrier would be anchored at a location on the OCS. Prior CBP rulings have held that a vessel when attached (*i.e.*, anchored) to the OCS for a purpose as contemplated by the OCSLA, is a coastwise point. *See, e.g.*, Customs Service Decisions 81-214 and 83-52 (warehouse vessels anchored over the OCS when used to supply drilling rigs on the OCS); HQ 115217 (Dec. 7, 2000) (“Floating Offshore Service Facility” anchored to the seabed of the OCS to carry “necessary consumables and supplies to support deepwater [drilling] operations” is a coastwise point). Similarly, in the present matter, we find that the subject Bulk Carrier would become a coastwise point when anchored to the seabed of the OCS for the purpose of providing scour protection material to support the development and production of wind energy. Just as in the first sub-scenario, the Scour Vessel could lade and transport scour protection material from the Bulk Carrier and unlade that material at the pristine seabed on the OCS without violating the Jones Act. There would be, however, a violation of the Jones Act if a coastwise point has already been established at the installation site; in that case, the Scour Vessel would be transporting the scour protection material from one coastwise point (the anchored Bulk Carrier) to another (the established coastwise point on the OCS).

Issue Two: Coastwise Towing (scenarios F and G)

Pursuant to 46 U.S.C. § 55111, except when towing a vessel in distress, only a coastwise-qualified vessel may do any part of any towing between coastwise points. Thus, wherein scenario F contemplates using coastwise-qualified tugboats to tow a foreign-flag barge between coastwise points, this scenario with respect to towing would not be in violation of 46 U.S.C. § 55111. Scenario G, however, contemplates using a non-coastwise qualified tugboat. As such, this non-coastwise qualified tug could not tow the barge from one U.S. coastwise point to another coastwise point. In scenario A, though, as indicated above, the pristine seabed location on the OCS is not a coastwise point; accordingly, the non-coastwise qualified tug could tow the foreign-flag barge to the location on the OCS where scour protection material will be placed at a pristine location on the seabed. Once that location is established, however, it becomes a coastwise point, and a non-coastwise qualified tug would not be able to tow the barge to that coastwise point, as would be the case in scenarios B and C.

Separate from the towing statute is the transportation of the merchandise, which is subject to the Jones Act. A coastwise transportation of merchandise occurs when merchandise is laden onto a barge at one coastwise point and unladed at a second coastwise point after the barge had been towed by a coastwise-qualified tug. *See, e.g.*, HQ H280574 (Apr. 28, 2017) (relating to the transportation via barge of a “power generation vessel” between coastwise points). Scenarios F and G contemplate using a foreign-flag installation barge in lieu of the Scour Vessel. This would be permissible under the circumstances of scenario A, where the scour protection material is transported to the pristine seabed on the OCS, which is not yet a coastwise point. However, as in scenarios B and C, the scour protection material will be laden onto the non-coastwise-qualified Barge at the Port of Providence (one coastwise point) and unladed at the installation site on the seabed in the vicinity of existing scour protection material or an installed monopile on the OCS (another coastwise point). Thus, the use of the foreign-flag installation barge that will be transporting the scour protection material between coastwise points, even though towed by a coastwise-qualified tug, would violate the Jones Act.

HOLDING

1. The transportation of the scour protection material between coastwise points in the United States (including points in the territorial sea and established coastwise points on the OCS) and the pristine seabed on the OCS, as described in scenario A in the FACTS section, would not be in violation of 46 U.S.C. § 55102.

The transportation of the scour protection material between coastwise points in the United States (including points in the territorial sea and established coastwise points on the OCS) and another established coastwise point on the OCS (*e.g.*, in the vicinity of existing scour protection material or a monopile), as described in scenarios B, C, and E in the FACTS section, would be in violation of 46 U.S.C. § 55102.

The transportation of scour protection material as described in scenario D, in which the merchandise will be laden in Canada and unladed at the project site, would not be in violation of 46 U.S.C. § 55102.

2. The use of either a coastwise-qualified or non-coastwise-qualified tugboat to tow a non-coastwise-qualified barge between a coastwise point in the United States (including a point in the territorial sea and an established coastwise point on the OCS) and the pristine seabed on the OCS would not be in violation of 46 U.S.C. § 55111 or 46 U.S.C. § 55102.

The use of coastwise-qualified tugboats to tow a non-coastwise-qualified barge between a coastwise point in the United States (including a point in the territorial sea and an established coastwise point on the OCS) and another established coastwise point on the OCS (*e.g.*, in the vicinity of existing scour protection material or monopiles) as described in scenario F would not be in violation of 46 U.S.C. § 55111; however, this would be in violation of 46 U.S.C. § 55102 insofar as the non-coastwise-qualified barge would be transporting the scour protection material between coastwise points.

The use of non-coastwise-qualified tugboats to tow a non-coastwise-qualified barge between a coastwise point in the United States (including a point in the territorial sea and an established coastwise point on the OCS) and another established coastwise point on the OCS (*e.g.*, in the vicinity of existing scour protection material or monopiles) as described in scenario G would violate both 46 U.S.C. § 55111 and 46 U.S.C. § 55102.

Accordingly, the holding within CBP Headquarters Ruling HQ H309186 (January 27, 2021), is hereby modified as stated with respect to the various scenarios as described herein and the holdings stated within this ruling. Any statements within HQ H309186 that are contrary to statements contained within this ruling shall be considered modified to be in accord with this ruling.

Sincerely,

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U.S. Customs and Border Protection