



HQ H333956

September 14, 2023

VES-3-02-OT:RR:BSTC H333956 HKC

CATEGORY: Carriers

Jennifer A. Carpenter
President & CEO
The American Waterways Operators
801 North Quincy Street, Suite 500
Arlington, VA 22203

RE: Coastwise Transportation; Monopile Foundation; 46 U.S.C. § 55102; Modification of H328718 (July 17, 2023).

Dear Ms. Carpenter:

This letter is in response to your August 18, 2023 request for revocation¹ filed on behalf of the American Maritime Partnership, regarding ruling HQ H328718.² In your request for revocation, you raised three distinct arguments that H328718 does not provide the adequate information and clarity necessary for informed compliance. Upon review, we have modified HQ H328718 in part to clarify its holdings.

HQ H328718 is hereby modified as follows:

FACTS

The following facts are from the requestor’s November 25, 2022, ruling request.³ The requestor’s client,

[] is a party to a [] agreement with

¹ Email, Request for revocation of HQ H328718, dated Aug. 18, 2023.

² HQ H328718 (July 17, 2023).

³ The requestor has asked this office for confidential treatment of all information contained in brackets in accordance with the applicable CBP regulations at 19 C.F.R. 177.2(b)(7). It is our position that this information should be afforded business confidential treatment. If this office receives a Freedom of Information Act request for this submission, DHS Regulations regarding the disclosure of business information provide that the submitter of business information will be advised of receipt of a request for such information whenever the business submitter has in good faith designated the information as commercially or financially sensitive information.

[]. The requestor’s client proposes installing offshore wind turbine generators (“WTGs”) in federal waters using the [] or another similar non-coastwise-qualified vessel. The offshore WTGs would be spaced on average no less than [] nautical miles apart and no more than [] nautical miles apart. Based on current planning, subsea cable will have been laid in the lease area prior to the installation of the monopiles and no monopile will be installed closer than [] nautical miles to any laid cable.

To accomplish this, multiple monopiles will be loaded aboard a non-coastwise-qualified foreign-flagged installation vessel in a U.S. port. The installation vessel will sail to the federal lease area where it will install each monopile at a pristine seabed site while maintaining its position utilizing a dynamic positioning (“DP”) system, with the intention of remaining unanchored from the seabed. However, the requestor notes, the installation vessel may have to anchor at an installation site depending on weather conditions before it commences monopile installation operations at each site. The installation vessel is not a jack-up vessel. There will be no scour protection installed at any of these pristine sites prior to the installation of the monopiles. The installation vessel will not move other than for corrections for changing wind, current, and wave conditions during the monopile installation when in DP mode. Should a foreign-flagged jack-up vessel be utilized if the [] is unavailable, said jack-up vessel will jack up at the pristine work site prior to installing a monopile, and then jack down and sail to the next site to repeat the operation. Thus, the monopile will be the first installed item on the pristine seabed at each future WTG location. Scour protection will be installed by a separate, coastwise-qualified vessel following installation of each monopile. Once several monopiles have been installed, the foreign-flagged installation vessel will return to a U.S. port to pick up the next set of monopiles, and operations will be repeated until all monopiles have been installed.

ISSUE

Whether the process of installing monopiles described above using a foreign-flagged installation vessel would result in a violation of the Jones Act, 46 U.S.C. § 55102?

LAW AND ANALYSIS

The coastwise law applicable to the transportation of merchandise, known as the Jones Act, is found at 46 U.S.C. § 55102,⁴ 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) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and

⁴ Formerly 46 U.S.C. App. § 883. See Pub. L. 109-304 (Oct. 6, 2006).

- (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 generally apply 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. 33 C.F.R. § 2.22(a)(2). In addition, Section 4(a)(1) of the Outer Continental Shelf Lands Act of 1953 (“OCSLA”) (as amended) provides that the Constitution and laws and civil and political jurisdiction of the United States are extended 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.⁵

Accordingly, the OCSLA extends U.S. jurisdiction to installations and devices attached to the seabed of the OCS for the purpose of producing non-mineral energy resources such as wind energy.

The Jones Act specifically prohibits the coastwise transportation of “merchandise” between coastwise points by non-coastwise-qualified vessels. The Jones Act sets forth that the term “merchandise” “includes ... merchandise owned by the United States Government, a State, or a subdivision of a State” and “valueless material.” *See* 46 U.S.C. § 55102(a). CBP additionally utilizes the definition of “merchandise” in 19 U.S.C. § 1401(c): “goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited, and monetary instruments as defined in section 5312 of Title 31.” Furthermore, by interpretations in its Jones Act administrative letter rulings, CBP has distinguished the transportation of “vessel equipment” from the transportation of “merchandise.” Here, the offshore transportation of monopiles would constitute transportation of merchandise.

The term “coastwise point” is not defined in the Jones Act itself. 19 CFR § 4.80b(a) references the term as follows: “A coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws (‘coastwise point’) is unladen at another coastwise point....” This includes all points within U.S. territorial waters (*i.e.*, landward points within three nautical miles of the territorial baseline) as well as limited extension to those points on the OCS that are captured by the jurisdictional provisions of the OCSLA. Unlike U.S. territorial waters, however, the extent of U.S. jurisdiction on the OCS is limited. 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

⁵ 43 U.S.C. § 1333(a)(1).

seabed serving a purpose as articulated in the OCSLA—the exploration for, development, production, transmission, or transportation of resources. 43 U.S.C. § 1333(a)(1).

CBP previously has determined that jurisdiction does not reach activity occurring on the pristine seabed of the OCS where there is no installation or device attached to the seabed, and thus for Jones Act purposes no coastwise point exists. *See, e.g.*, HQ 115069 (June 14, 2000) (noting a pristine site “is not considered to be a coastwise point”). Furthermore, in relation to the transportation of merchandise within and between such areas to which U.S. coastwise laws apply, the term “coastwise point” is interpreted narrowly. In this context, CBP has consistently determined that transportation of merchandise between different points in the same harbor, or even along the same pier, by a non-coastwise-qualified vessel results in a violation of the Jones Act, while a lading and unloading at the same point does not. *See, e.g.*, H169017 (July 25, 2017) (finding no violation where a non-coastwise-qualified vessel proposed to return cargo “to the same berth at the same terminal in the same U.S. port at which it was previously loaded); *see also*, HQ H036936 (Jan. 26, 2009) (stating that an “integrated facility” with “a cluster of wells that are 300 feet from each other” is “a location that has several coastwise points, much like a harbor with several piers and docks”).

To determine whether the proposed transportation occurs between coastwise points, we examine the points at which the subject monopiles will be laden and unladen. Regarding the point at which the monopiles are to be installed, the requestor stated that these will be no less than [] nautical miles from cable that previously has been laid on the seafloor. Furthermore, the monopiles will be the first item to be installed at the location. In CBP’s evaluation of the facts presented, CBP considers the location for monopile installation to be a pristine site prior to the installation of the monopile. As outlined in the request, the non-coastwise-qualified installation vessel will lade each monopile at a U.S. port (a coastwise point) and unlade each monopile at a point on the pristine seabed of the OCS (a non-coastwise point). Because the installation vessel is not transporting the monopiles between coastwise points, the proposed operations do not violate the Jones Act.

The requestor notes, however, that the installation vessel may anchor at a monopile installation site prior to monopile installation depending on weather conditions. The anchoring of the installation vessel on the OCS for the sole purpose of vessel safety due to inclement weather would not violate the Jones Act, so long as the vessel is no longer anchored when the monopiles are installed.

Anchoring of the installation vessel to the seabed to aid its installation activity, even if due to inclement weather, would result in a violation of the Jones Act. Here, the installation vessel would be attached to the OCS via the anchor for the purposes of exploring for, developing, or producing resources, including non-mineral energy resources.⁶ Therefore, such

⁶ *See* H036016 (Aug. 29, 2008) (discussing the anchoring of a drilling vessel: “... since the drilling vessel would be attached to the seabed of the OCS for the purpose of ‘exploring for, developing, or producing resources’ from the OCS, the vessel would constitute a coastwise point. The vessel would be considered to be attached to the seabed of the OCS while engaged in drilling operations and while at anchor before or after engaging in drilling at that location... Consequently, any vessel transporting merchandise or passengers between the drilling vessel, while it is attached to the seabed, and any other coastwise point must be coastwise-qualified”); H109817 (Nov. 14, 1988).

anchoring would establish the installation vessel as a coastwise point while the attachment exists and result in a violation of the Jones Act once the monopiles are unladen at the vessel.⁷

In the alternative, you propose utilizing a foreign-flagged jack-up vessel to complete each monopile installation. The jack-up vessel with the monopiles aboard will travel to each installation site, where it will jack up to perform the installation. The use of a foreign-flagged jack-up vessel to transport monopiles between a U.S. port and an installation site on the OCS would violate the Jones Act, because a second coastwise point is established once the jack-up vessel attaches itself to the seabed for the purposes of monopile installation. Consequently, merchandise would be laden at one coastwise point (the U.S. port) and unladen at another coastwise point (the jacked-up vessel).

However, use of a foreign-flagged jack-up vessel to conduct monopile installation would not violate the Jones Act so long as a coastwise-qualified supply vessel is utilized to transport the monopiles between the U.S. port and the jacked-up vessel, in accordance with prior CBP rulings.⁸

CBP notes that while the installation vessel's attachment to the seabed establishes a coastwise point during the time of that attachment, which could be temporary, once the monopiles are installed that establishes a more "permanent" coastwise point that would exist after the installation vessel is no longer attached to the seabed. Accordingly, because each monopile would be a coastwise point, no other merchandise, if laden at another coastwise point, could be transported and unladen at the monopile other than by a coastwise-qualified vessel.

Finally, AMP requests that CBP disclose certain elements of information redacted as business confidential in H328718, for the purposes of informed compliance. The requestor had originally asked that CBP treat various facts submitted, to include party names, vessel names, and facts relating to the density of monopiles at the offshore site, as business confidential. The requestor noted that due to the competitive nature of the offshore wind installation market disclosure of such information could cause their client substantial harm in its competitive position with respect to the installation of monopiles. CBP accordingly granted this information business confidential treatment in line with CBP regulations⁹ and longstanding practice. We note that the Trade Secrets Act prohibits federal agencies from disclosing business confidential information.¹⁰ Upon review and reconsideration, CBP maintains its original position on redacting the information that the business submitter considers to be business confidential information.

Accordingly, we decline to modify H328718 to disclose information the requestor deems business confidential.

⁷ As indicated above, a coastwise transportation of merchandise occurs when merchandise laden at one coastwise point is unladen at another coastwise point. 19 CFR 4.80b(a).

⁸ See, e.g., H328865 (Feb. 14, 2023); H327590 (Dec. 16, 2022); H316313 (Feb. 4, 2021).

⁹ 19 C.F.R. 177.2(b)(7).

¹⁰ 18 U.S.C. § 1905.

HOLDING

The transportation and installation of monopile foundations from a U.S. coastwise point to a pristine seabed site on the OCS by a non-coastwise-qualified, dynamically positioned installation vessel would not violate the Jones Act so long as the installation vessel is not anchored or attached to the installation site.

The transportation and installation of monopile foundations by a non-coastwise-qualified jack-up vessel from a U.S. coastwise point to a pristine seabed site on the OCS where the jack-up vessel attaches itself to the seabed would violate the Jones Act.

The use of a non-coastwise qualified jack-up vessel to install monopile foundations at a pristine seabed site on the OCS would not violate the Jones Act, so long as the jack-up vessel is not transporting these monopile foundations from another coastwise point.

EFFECT ON OTHER RULINGS:

HQ H328718, dated July 17, 2023 is hereby MODIFIED.

This modification decision is not subject to the notice and comment provisions of 19 U.S.C. § 1625(c) because HQ H328718 (July 17, 2023) has been in effect for less than 60 days.

Sincerely yours,

Charles R. Steuart
Director, Border Security and Trade
Compliance Division
Office of Trade, Regulations and Rulings
U.S. Customs and Border Protection