Alert

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Jones Act Extended to the Pristine Seabed of the Outer Continental Shelf

In its first offshore wind ruling following amendments to the Outer Continental Shelf Lands Act (OCSLA) under the National Defense Authorization for Fiscal Year 2021 (NDAA), which amended OCSLA to clarify its application to offshore wind projects, U.S. Customs and Border Protection (CBP) seemingly resolved a long-standing dispute regarding the application of the Jones Act to the "pristine seabed" of the OCS.

The ruling letter, HQ H309186 (Jan. 27, 2021), centered on the transportation of "scour protection" materials to protect wind turbine generator foundations for the Vineyard Wind Project.

Unsurprisingly, CBP followed the NDAA-amended language of OCSLA to conclude that the Jones Act would be violated by several proposed scenarios involving the lading of scour by a non-coastwise qualified vessel at a U.S. point (either Port Providence or a vessel anchored in U.S. waters or on the OCS) and unlading of the scour at a monopile or wind turbine generator installed on the seabed of the OCS.

Of significant note, CBP went on to find (without reference to any prior decisions) that the Jones Act would also be violated by scenarios that involved lading of scour at a U.S. point (either Port Providence or a vessel anchored in U.S. waters or on the OCS) and unlading on the pristine seabed of the OCS prior to the construction of any offshore wind monopiles.

The seemingly straight-forward ruling belies years of controversy that underlie this issue and represents an apparent reversal in CBP's interpretation of OCSLA. Indeed, since at least 2012, the Offshore Marine Service Association (OMSA) has been arguing against CBP's long-standing position that the Jones Act does **not** apply to the pristine seabed of the OCS. The current dispute began with the issuance of HQ H205655 (March 20, 2012) in which CBP determined that the use of a non-coastwise-qualified Oceanographic Research Vessel, which was used to install seismic sensor nodes into the OCS seabed, did not violate the Jones Act. In response, OMSA petitioned CBP in September 2012 for revocation of the ruling, arguing that under the plain language of OCSLA "any location in the subsoil or on the seabed of the OCS is a coastwise point." OMSA's petition noted that "CBP has issued several rulings concerning the movement of merchandise to the seabed where it has **uniformly stated that there must be a 'device' or 'installation' on the seabed for there to be a coastwise point**" but asserted that "[t]here is no justification for such an interpretation." (emphasis added).

OMSA later advanced the same argument — that the Jones Act extended to the pristine seabed under OCSLA's plain language — in response to CBP's 2017 proposed revocation of various "vessel equipment" rulings. Still finding no relief, OMSA initiated a lawsuit against CBP in 2017, which again sought the revocation of HQ H205655, arguing in its complaint that "[g]iven OCSLA's plain language, the pristine seabed of the OCS is a coastwise point and thus transportation of merchandise to the pristine seabed is covered by the Jones Act." The case is still pending before the U.S. District Court for the District of Columbia.

While CBP's recent decision does not expressly revoke HQ H205655, it seemingly addresses and concedes OMSA's core issue by now acknowledging that the pristine seabed of the OCS is a coastwise point. The decision will likely have a significant impact on the methodologies employed by operators of non-coastwise qualified vessels involved in pre-construction OCS activities in the offshore wind and oil and gas industries. How CBP will reconcile this ruling with prior CBP rulings, and its position in pending litigation, is yet to be seen.

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