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U.S. Customs and Border Protection Decision Makes Substantial Changes Affecting the Offshore Industry

U.S. Customs and Border Protection (“CBP”) issued a significant decision on December 19, 2019, which will substantially alter how certain operations conducted by coastwise and non-coastwise vessels can be conducted offshore in the oil and gas and wind industries. The changes become effective on February 17, 2020. Stakeholders should examine this decision to determine how it will impact their operations.

NEW DEVELOPMENT

On December 19, 2019, CBP issued its decision in the Customs Bulletin entitled “Modification and Revocation of Ruling Letters Relating to CBP’s Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points” (the “Notice”). Available [here](#). The Notice clarifies CBP’s position on whether certain items constitute “vessel equipment,” which is not “merchandise” and may be transported by non-coastwise qualified vessels. The Notice also contains a section clarifying that “lifting operations” are not “transportation” within the meaning of the Jones Act. In short, the Notice eliminates previous erroneous decisions that allowed non-coastwise qualified vessels to transport items that should have been considered merchandise and not “vessel equipment” under the Jones Act. The Notice also returns CBP to the position that it held for decades that lifting operations may be conducted by non-coastwise qualified vessels.

BACKGROUND

In January 2017, CBP proposed a notice that would have overturned decades of precedent with regard to offshore operations potentially subject to the Jones Act. This notice, which was published in the CBP Customs Bulletin, proposed the modification of approximately 25 CBP rulings that delineated the difference between “equipment of the vessel,” the transportation of which does not implicate the Jones Act, and “merchandise,” which may only be transported by qualified vessels under the Jones Act. CBP withdrew this notice on May 10, 2017. Since then, regulatory officials engaged stakeholders in dialogue to resolve the issues raised in the notice.

The Notice also addressed issues related to lifting operations. Since at least 1983, CBP has held that a stationary, foreign-flag crane vessel may load and unload cargo as well as construct or dismantle a marine structure in compliance with the Jones Act. In 2012-2013, CBP issued what have become known as the “Koff Rulings” (HQ

H225102 (September 24, 2012); HQ H23542 (November 15, 2012); and HQ H242466 (July 3, 2013)), which held that any movement of a vessel, even a short distance, while a topside is suspended from its crane and off its central axis for safety reasons is a violation of the Jones Act because in the Koff Rulings, this movement of the vessel is interpreted by CBP as providing part of the transportation of the topside between two points in the United States.

CBP issued its proposed Notice on October 23, 2019. There were 37 commenters to the Notice. CBP responded to the comments it received and clarified some points, but there were no substantive changes between CBP's proposal and the Notice itself.

ANALYSIS

Vessel Equipment

Historically, CBP used a "Mission of the Vessel" concept to justify certain installation, repair, and maintenance work subsea. This concept was applied over broadly, which allowed non-coastwise qualified vessel to perform some of these activities that should have been reserved to Jones Act vessels. The Mission of the Vessel concept was revoked by the Notice and replaced with a new "Vessel Equipment" interpretation. Under this interpretation, the scope of vessel equipment includes items, which are "necessary and appropriate for the navigation, operation, or maintenance of a vessel and for the comfort and safety of the persons on board."

CBP stressed that if an item is necessary and appropriate for the operation or maintenance of a vessel, it is considered vessel equipment. The plain meaning of the term "equipment" includes "implements used in an operation or activity." In addition, CBP determined that other previously used rationale using the terms "foreseeability," "incidental" to an activity, "de minimis," or "unforeseen," can no longer be relied on to support an interpretation of vessel equipment. CBP stated that it will make determinations of specific items on a case-by-case basis and that the concept of paid out, not unladed as applied to pipelaying and cable laying were unaffected by the Notice.

Lifting Operations

In addition to revoking the Koff rulings, CBP also clarified its interpretation of lifting operations as distinct from transportation within the meaning of the Jones Act. Offshore "lifting operations" now include the lifting by cranes, winches, lifting beams, or other similar activities or operations, from the time that the lifting activity begins when unloading from a vessel or removing offshore facilities or subsea infrastructure until the time that the lifting activities can be safely terminated in relation to the unloading, installation, or removal of offshore facilities or subsea infrastructure. CBP reasoned that offshore lifting operations are distinct from transportation in that any lateral movement of the vessel or the item in the vicinity of the structure or facility where the item is being positioned or removed is merely subordinate to and a direct consequence of the lifting operations. CBP reasoned that this interpretation was necessitated by safety and practical concerns, including the physical demands of the lifting operations, the mitigation of risk to human life and health, and the avoidance of damage to the marine environment. CBP confirmed this interpretation applies to all offshore lifting operations and is not limited to heavy lifts. In addition, CBP rejected comments stating (1) that lifting operations contravenes the statutory language of the Jones Act, and (2) that there is no basis in law for defining transportation based on safety or practical concerns.

Lastly, CBP confirmed that any rulings preceding the Koff rulings on lifting, which determined that lateral movement constituted coastwise trade are modified to the extent contrary to this Notice.

Offshore Wind Energy Facilities

Several comments sought clarification regarding the impact of the Notice on the development of offshore wind energy facilities. CBP responded that any future interpretations by CBP on the application of the Jones Act to wind energy facilities or other activities will be in response to ruling requests based on specific transactions.

CONCLUSIONS AND RECOMMENDATIONS

The Notice alters CBP's interpretation of the Jones Act in two critical ways. First, it limits the items that may be considered "vessel equipment" and thus outside the scope of the Jones Act. The Notice also effectively returns CBP to its pre-2012 position that foreign-flag vessels may conduct lifting operations in U.S. waters. CBP makes the point that stakeholders should seek rulings as appropriate to address individual scenarios to confirm future operations can be conducted consistent with the Jones Act based on this Notice. Accordingly, stakeholders should review this Notice as applied to their operations before the effective date of February 17, 2020, and make changes to its operations as applicable.

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