

In Headquarters Ruling HQ H329275 U.S. Customs and Border Protection (“CBP”) addressed whether the movement of wind turbine generator transition piece covers constitutes coastwise transportation under the Jones Act. The ruling hinges on the critical legal distinction between whether the transition piece covers were merchandise, which is subject to the Jones Act, or vessel equipment, which is outside the scope of the Jones Act.

The Project

HQ H329275 considered several scenarios where a non-coastwise qualified installation vessel (the “Jack-up Vessel”) would be used to remove transition piece covers (“TP Cover”) from wind turbine generators (WTG) located at different points on the Outer Continental Shelf (“OCS”). This phase of the project would occur after each WTG’s respective monopile foundation and transition piece¹ was installed at the project site by an unrelated vessel. The original installation vessel would leave a TP Cover atop each transition piece before departing the installation site for the next site.

The TP Cover is simply a canvas covering designed to protect the transition piece. The Jack-up Vessel will start from a foreign port and proceed to the first WTG installation site, attach itself to the seabed, and jack up to the required installation height. A separate coastwise-qualified tug and barge will arrive at the project site, laden with WTG tower, nacelle, and blade components.

At the WTG installation site, the Jack-up vessel will remove the TP Cover sitting upon the transition piece. The Jack-up Vessel will then install the WTG tower, nacelle and blades by lifting them directly from the coastwise-qualified barge to the installation site. Upon completion of the installation at the first WTG site, the Jack-up Vessel will lower itself into the water, disconnect from the seabed, and proceed to the next WTG installation site.

During removal operations, the TP Cover will be disassembled and/or damaged. Ultimately, the TP covers will either be recycled to manufacture new TP Covers or disposed of.

Is the TP Cover Merchandise or Vessel Equipment?

Because the proposed operations would occur on a federal lease on the OCS, the Jones Act applies under the Outer Continental Shelf Lands Act. In a Jones Act analysis, CBP considers whether the proposed operations involve transportation of merchandise between two coastwise points. Under prior CBP rulings, the installed monopiles and attached transition pieces are coastwise points.

A key legal issue was whether the TP Covers were merchandise or vessel equipment. Merchandise is broadly defined and may include “goods, wares, and chattels of every description” or even valueless material.²

It was argued that the TP Cover constituted vessel equipment, and was thus outside the purview of the Jones Act, because they protected the WTG tower segments during the installation process and were necessary for performing the Jack-up Vessel’s function of constructing WTGs. CBP rejected this argument and held that the TP Covers were merchandise.

In 2019, CBP clarified the term “vessel equipment,” which includes “all articles or physical resources serving to equip the vessel, including the implements used in the vessel’s operation or activity.”³ Although highly fact specific, CBP has further stated that vessel equipment are items considered “necessary and appropriate for the operation of the vessel,” are integral to the function of the vessel, and are carried by the vessel.⁴

CBP reasoned that the TP Covers were not vessel equipment because the TP Covers were not used by the Jack-up Vessel to install the WTG. Rather, the TP Covers were designed to protect each transition piece following original installation, which occurred before the Jack-up Vessel arrived at the project site.

¹ The transition piece is a tubular steel structure. The TP is the second part of a WTG, which is directly connected to the monopile foundation and the WTG tower.

² 19 U.S.C. § 1401(c); 46 U.S.C. § 55102(a).

³ *Customs Bulletin & Decisions* Vol. 53, No. 45, p. 88 (Dec. 18, 2019).

⁴ *Id.* at pp. 88-89.

Is There Coastwise Transportation?

Having determined that the TP Covers were merchandise, CBP next considered whether several proposed scenarios constituted “transportation.” Under the Jones Act, a vessel may not provide *any part of the transportation of merchandise* between U.S. coastwise points unless the vessel is a Jones Act qualified vessel.⁵

In several scenarios, following removal of the TP Cover, the Jack-up Vessel would move some distance (either with or without subsequently attaching to the seafloor) between WTG installation sites before transferring the TP Cover to a coastwise qualified supply boat for ultimate transport to a U.S. port. Alternatively, the Jack-up Vessel would transport the TP Covers to a U.S. port for disposal as waste. CBP held that these scenarios violated the Jones Act because a non-coastwise vessel cannot conduct any part of the transportation between two U.S. coastwise points.

CBP held that there was no Jones Act violation where the Jack-up Vessel offloads the TP cover onto a coastwise-qualified supply vessel prior to lowering itself into the water, detaching from the seabed, and departing the first WTG installation site.⁶ The supply vessel would then transport the TP cover to a U.S. port, which would be a coastwise point. In this scenario, the transportation between coastwise points would be performed by a Jones Act vessel.

Similarly, CBP held that there was no Jones Act violation where the TP Covers remain on the Jack Up Vessel post removal as it travels between WTG installation sites for ultimate offloading after the Jack-Up Vessel returns to a foreign port. Because this scenario involved transportation between a coastwise point and a foreign port, a Jones Act vessel was not required.

Conclusion

Headquarters Ruling HQ H329275 demonstrates that whether an item is categorized as vessel, equipment or merchandise materially impacts a Jones Act analysis. The ruling also illustrates the lasting impact of CBP’s 2019 vessel equipment clarification. From an operational perspective, HQ H329275 confirms that offshore wind projects will require a mix of Jones Act qualified vessels and foreign vessels.

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⁵ 46 U.S.C. § 55102.

⁶ CBP has consistently held that the use of a non-coastwise-qualified crane vessel to lade and unlade cargo or to construct or dismantle a marine structure is not coastwise trade.