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Proposed Changes to U.S. Customs' Jones Act Interpretations Could Affect Certain Offshore Oil and Gas Construction and Repair Activities

By Marcella Burke, Andrew M. Stakelum, and Scott A. Greer*

The authors of this article discuss the U.S. Customs and Border Protection proposal to revise certain administrative rulings interpreting its Jones Act authority that could affect how oil and gas exploration and production companies in the Gulf of Mexico use foreign-flagged vessels.

The U.S. Customs and Border Protection ("Customs") has proposed revising certain administrative rulings interpreting its Jones Act authority[1] that could affect how oil and gas exploration and production companies in the Gulf of Mexico use foreign-flagged vessels, such as a crane barge used for heavy lifts to install a top-side or a vessel used for specialized repair operations. These proposals could be especially important for those engaged in projects to construct, decommission, or repair offshore facilities.

The notice[2] proposes to modify or revoke various administrative rulings that addressed whether certain activities involving the coastwise transportation of goods on vessels violate the Jones Act. Most importantly, these proposals would affect the oil and gas industry by: (1) expanding the ways in which a crane barge can laterally move during a lift before triggering the Jones Act; and (2) tightening the definition of "vessel equipment," which cannot be transported outside the scope of the Jones Act, to exclude certain repair-related or specialized operation items.

BACKGROUND

The Jones Act of 1920 promotes and protects U.S. shipyards and U.S. vessel operators by prohibiting the transportation of merchandise and passengers

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[1] 46 U.S.C. § 55102.

[2] https://www.cbp.gov/sites/default/files/assets/documents/2019-Oct/Vol_53_No_38_Title.pdf.

between two U.S. coastwise points in any vessel other than a vessel built in the U.S., flagged in the U.S., owned (75 percent) by U.S. citizens, and crewed (75 percent) by U.S. seamen. Coastwise points are all points within the territories, possessions of, and territorial waters surrounding the United States, including locations on the U.S. mainland and its islands.

With the 1941 discovery of oil and gas in U.S. offshore waters, the artificial islands created by the installation of offshore oil and gas facilities onto the seabed became U.S. coastwise points. Since that time, interpretation of the Jones Act's reach over various exploration and production activities involving vessels has become even more important to the oil and gas industry. This issue is especially significant for vessels transporting equipment and workers from Port Fourchon, which services 90 percent of the deepwater Gulf of Mexico oil and gas industry. Any of these trips in the Gulf of Mexico to offshore platforms or any vessel transportation related to oil and gas exploration, construction, operation, or repair activities must be assessed for Jones Act compliance.

Companies can ask Customs to determine in advance whether a proposed activity by a foreign vessel would violate the Jones Act. The resulting Customs ruling technically only applies to that party's specific activity and therefore it has no precedential authority. However, they serve as guidance for companies seeking to engage in similar activities and to Customs field agents enforcing the Jones Act. Despite their limitations, oil companies and service companies have long relied on these rulings when planning their projects.

CUSTOMS' PROPOSED REINTERPRETATION ALLOWS FOR GREATER LATERAL MOVEMENT BY A FOREIGN CRANE BARGE DURING LIFTING OPERATIONS

A prevalent and critical Jones Act issue in the Gulf of Mexico involves the use of crane barges. Whenever a crane barge lifts a topside from another barge onto a jacket or when it removes a topside during decommissioning and places it onto a barge, the crane barge's action must be assessed to determine if it is "transporting" merchandise and therefore subject to Jones Act restrictions. If so, the operator would need to use a Jones Act-certified crane barge to conduct those heavy lifting operations; but, currently they do not exist. The only heavy-lift barge cranes that can perform the work are foreign vessels.

The Jones Act drafters never contemplated offshore lifts—such technology was then unimaginable—and Customs' past efforts to apply the Jones Act to certain barge crane movements were overbroad and presented difficulties for the oil and gas industry. While Customs previously ruled that the movement of the topside via a swinging crane boom does not constitute transportation, it presented difficulties for industry by also asserting that any movement by the crane barge itself, other than incidental jostling movements due to wave action

or spinning of the barge on its axis, would constitute transportation subject to the Jones Act. As a result, the Jones Act has applied where a crane barge would move a short distance away from a jacket with its load to avoid striking the jacket, move laterally with its load so that it could safely place its load, or rotate on a fulcrum point with its load.

Customs proposes to adopt a revised interpretation that now allows for some additional movement of the crane barge, beyond spinning on its axis, during *lifting operations* without violating the Jones Act. Customs defines lifting operations to include:

> [T]he initial vertical movement of an item from a lower position to a higher position, and any additional vertical or lateral movement necessary (including incidental movement while lifted items are temporarily placed on the deck of the lifting vessel as necessary for the safety of certain lifted items, as well as surface and subsea infrastructure, and the vessels and mariners involved) to safely place into position or remove an item form the vicinity of an existing structure.[3]

In proposing this revised interpretation, Customs attempts to distinguish the Jones Act regulated transportation of items from an unregulated lifting operation. The proposed interpretation would give companies greater flexibility in planning complicated lifts without concern as to whether certain incidental or safety-related actions by a foreign crane barge might violate the Jones Act. This revised interpretation would eliminate the need to apply for Jones Act waivers in some cases when seeking to use a foreign crane barge in the Gulf of Mexico. This, however, would create a potential barrier to any future construction of the first U.S.-flagged crane barge capable of performing the same work. As a result, we expect Customs to receive comments for and against this proposed change.

CUSTOMS PROPOSES TO MORE NARROWLY INTERPRET "VESSEL EQUIPMENT"

The second key part of the Customs proposal would tighten a past Jones Act interpretation that had facilitated use of specialized foreign vessels in connection with some oil and gas repair activities and other specialized operations. This frequently occurring Jones Act issue is whether the items being transported are "merchandise" subject to the Jones Act or merely exempt "vessel equipment." Customs broadly defines and interprets the term merchandise, which can encompass almost anything—including "valueless material." As a result, Customs is frequently asked to determine whether certain items constitute

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[3] Customs Notice at 21.

vessel equipment such that their transportation by a foreign vessel would not violate the Jones Act. Many of these requests concern specialized vessels conducting specialized offshore oil and gas operations, such as pipeline installations and repairs, that were never contemplated when the Jones Act was originally enacted.

Customs defines vessel equipment according to its Tariff Act of 1930 definition: "[P]ortable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board." Customs proposes to revise eight rulings and revoke five other rulings that it contends relied on inappropriate concepts, such as whether the equipment at issue was "necessary for the accomplishment of the vessel's mission" or used "on or from" the transporting vessel, to improperly expanded this definition.

In proposing a revised interpretation, Customs notes that items "necessary and appropriate for the operation of the vessel" include "those items that are integral to the function of the vessel and are carried by the vessel." Customs recognizes these functions in the oil and gas sector to include, among others:

> [T]hose items that aid in the installation, inspection, repair, maintenance, surveying, positioning, modification, construction, decommissioning, drilling, completion, workover, abandonment or other similar activities or operations of wells, seafloor or subsea infrastructure, flowlines, and surface production facilities.[4]

The Customs proposal emphasizes that if an item is returned to and departs with the vessel and not left on the seabed after an operation is completed will be a factor (but not the determining factor) in determining whether the item constitutes vessel equipment.

Notably, the proposal would not alter the current interpretation that items that are "paid out" and not "unladen" are exempt from the Jones Act. Customs has historically held that the paying out, or unspooling, of pipe, cable, flowlines, and umbilicals is not considered coastwise trade in terms of the Jones Act. This favorable interpretation will continue to apply to riser and pipeline installations.

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[4] Customs Notice at 17.