

US Customs and Border Protection (CBP) expanded its body of offshore wind energy rulings and held that the Jones Act did not prohibit a foreign flagged vessel from transporting and installing scour protection (i.e. rocks) on the bottom of the Outer Continental Shelf (OCS) during construction of wind turbine generator foundations (WTG). See HQ [H327710](#).

Transportation of merchandise between two US coastwise points requires a Jones Act-qualified vessel, which means that the vessel must meet stringent US built, US ownership and crewing requirements. The term “merchandise” is construed very broadly under the Jones Act and includes even valueless material.

In HQ [H327710](#), CBP considered whether under the Jones Act a foreign flagged vessel (the Scour Vessel) could apply rocks to WTG foundations at multiple points on the OCS during the construction of a wind energy farm. The operations at issue consist of the following activities: (1) rocks for the initial installation would be laden on the Scour Vessel in Europe and unladen at the project site on the OCS and (2) rocks for additional installations would be laden on the Scour Vessel in Canada and unladen at the project site on the OCS. In both scenarios, the rocks would be applied from the Scour Vessel to a “pristine” seabed.

The rocks would be laden on the Scour Vessel in either Europe or Canada, neither of which are coastwise points. Accordingly, CBP held that the Jones Act did not apply to the proposed scour operations.

Significantly, CBP did not expressly address whether the “pristine” seabed around each WTG foundation is a coastwise point. The determination of when a coastwise point comes into existence is critical to the application of the Jones Act and is often a hotly debated issue.

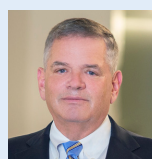
Shortly after the January 2021 OCSLA Amendment, CBP held in another scour protection ruling that the pristine seabed was, in fact, a coastwise point. See HQ H309186 (January 27, 2021). CBP’s ruling in HQ H309186 garnered significant industry attention.

Modifying the January 27, 2021, ruling, CBP changed course and held that a pristine seabed is not a coastwise point. [HQ H317289](#) (the Modification Ruling). Following the Modification Ruling, CBP issued additional scour protection rulings that follow the Modification Ruling. However, CBP has also held that the use of a foreign flag vessel to install scour protection on top of an existing layer of rock on the OCS would violate the Jones Act. See HQ 318758 and HQ H300962.

In some respects, CBP’s recent scour protection ruling is unremarkable since the rocks would be laden in either Europe or Canada. As such, there could not be two coastwise points, which is required for the Jones Act to apply.

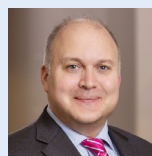
However, CBP’s silence on the pristine seabed is perhaps the more significant aspect of HQ H327710. CBP appears to have maintained its position that there is no Jones Act jurisdiction when an activity occurs at a pristine seabed where there is no installation or device attached to the seabed. If so, a coastwise point does not come into existence until after the first rock hits the ocean floor. Stakeholders should be guided accordingly.

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