



HQ H249186

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CATEGORY: Carriers

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RE: Coastwise Transportation; Towing; 46 U.S.C. §§ 55102, 55111, and 55112; 19 C.F.R. §§ 4.80 and 4.92

Dear Ms. Krumholz:

This letter is in response to your correspondence of January 7, 2014, with respect to the proposed towing of a vessel.¹ Our ruling is set forth below.

FACTS

[], as owner, and [], as operator, (collectively, the “owners”) previously moved a Mobile Offshore Drilling Unit (MODU) from U.S. territorial waters aboard a foreign-flag heavy lift vessel (HLV) to a foreign shipyard for the purpose of a drydock inspection and repairs and modifications. The first leg of the MODU’s voyage occurred as follows. The HLV entered U.S. waters in the vicinity of the location of the MODU, anchored, and ballasted down near the MODU. Once the MODU was positioned over the HLV, the HLV ballasted up, capturing the MODU on its deck. The MODU was then sea-fastened to the HLV, and the HLV proceeded to sail to the shipyard with the MODU where it arrived and was offloaded for drydocking. The owners anticipate that the MODU will commence its return voyage back to the United States in 2014. You request our

¹ In your request, you have asked this office for “confidential treatment” of the name of your client; the name of the vessel in question, including its planned movement, berthing, repair and operations. If this office receives a Freedom of Information Act request for your submission, CBP Regulations (19 C.F.R. § 103.35, et seq.) regarding the disclosure of business information provide that the submitter of business information will be advised of receipt of a request for such information whenever the business submitter has in good faith designated the information as commercially or financially sensitive information. We accept your request for confidential treatment as a good faith request.

advice with regard to three different scenarios proposed to facilitate the return of the MODU to U.S. territorial waters, as outlined below:

Scenario #1: The MODU sails back to U.S. territorial waters under its own power. The MODU will proceed directly to the dock at the U.S. arrival location and will use U.S.-flagged harbor assist tugs that have coastwise trade endorsements as required by 46 U.S.C. §§ 55111 and 55112, as applicable, to assist with the transit of U.S. pilotage waters and docking the MODU. Such assistance in the maneuvering of the MODU is required to ensure the safe docking of the MODU. The MODU may be temporarily moored at a position in U.S. territorial waters before it proceeds to the U.S. arrival location. If needed, the MODU will use U.S.-flagged vessels that have coastwise trade endorsements as required by 46 U.S.C. §§ 55111 and 55112, as applicable, to assist with the maneuvering of the MODU in U.S. territorial waters. Neither this temporary mooring location in U.S. territorial waters, nor the U.S. arrival location, would be the same as the departure location at which the MODU was loaded on the HLV.

Scenario #2: The MODU would sail back to a location outside of U.S. territorial waters under its own power, (“offshore location”) but would be supplemented with the assistance of one or more foreign-flag tugs, primarily for the purpose of providing increased overall transit speed and longer range. The tug(s) would also provide support if any assistance is needed during transit. The assistance to be performed by the tug(s) would be performed by attaching a towline to the MODU. The use of the tug(s) concurrent with the propulsion of the MODU would result in increased transit speed for the MODU and reduce overall fuel consumption. The tug(s) would be available to provide emergency assistance if necessary during the voyage.

Once the MODU arrives at the offshore location, the MODU would drop the towline(s) from the assist tug(s) and motor toward the U.S. arrival location under its own power. The MODU would then proceed to the dock at the U.S. arrival location and use coastwise-qualified tugs to assist with the transit of U.S. pilotage waters and docking the MODU to ensure the safe docking. As in Scenario #1, the MODU may be temporarily moored at a position in U.S. territorial waters before it proceeds to the U.S. arrival location. If necessary, the MODU would use coastwise-qualified tugs to assist with the maneuvering of the MODU in U.S. territorial waters. We note that neither this temporary mooring location in U.S. territorial waters, nor the U.S. arrival location, would be the same as the departure location at which the MODU was loaded on the HLV.

Scenario #3: This Scenario would use the same set of facts as set out in Scenario #2, but the transit from the shipyard to the U.S. arrival location would include a mid-voyage refueling of the MODU at a position offshore and outside the territorial waters of a United States territory or possession. In such case, the towline from the foreign flag assist tug(s) would be dropped off the MODU outside of the territorial waters of the United States territory or possession whereupon the MODU would either standby for the return of the assist tug(s) or continue underway. The foreign flag assist tug(s) would enter into the territorial waters of the United States territory or possession to acquire additional fuel for both the tug(s) and the MODU. The assist tug(s) would then retain a portion and transport a portion of that fuel to the MODU for use by the MODU and would reconnect to the MODU until such time as the towline is disconnected from the MODU outside of U.S. territorial waters as previously described in Scenario 2 above. The MODU will at

all times during the refueling remain outside the territorial waters of the United States territory or possession.

ISSUE

Whether the proposed scenarios described in the FACTS section above to return the MODU to U.S. territorial waters following the foreign drydocking would be in violation of 46 U.S.C §§ 55102, 55111, and/or § 55112?

LAW AND ANALYSIS

Generally, the coastwise laws prohibit the transportation of merchandise between points in the United States embraced within the coastwise laws in any vessel other than a vessel built in, documented under the laws of, and owned by citizens of the United States. Such a vessel, after it has obtained a coastwise endorsement from the U.S. Coast Guard, is said to be “coastwise qualified.”

The coastwise laws generally apply to points in the territorial sea, which is defined as the belt, three nautical miles wide, seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline. See 33 C.F.R. § 2.22(a)(2).

The coastwise law applicable to the transportation of merchandise is 46 U.S.C. § 55102² which provides, in pertinent part:

(a) Definition. In this section, the term “merchandise” includes--

- (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and
- (2) valueless material.

(b) Requirements. Except as otherwise provided in this chapter or chapter 121 of this title [46 U.S.C. §§ 55101 *et seq.* or 12101 *et seq.*], a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel--

- (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
- (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 [46 U.S.C. §§ 12101 *et seq.*] or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The Customs and Border Protection (“CBP”) Regulations at 19 C.F.R. § 4.80 provide, in pertinent part:

- (a) No vessel shall transport, either directly or by way of a foreign port, any passenger or merchandise between points in the United States embraced within

² Recodified by Pub. L. 109-304, enacted on October 6, 2006.

the coastwise laws, including points within a harbor, or merchandise for any part of the transportation between such points, unless it is:

(1) Owned by a citizen and is so documented under the laws of the United States as to permit it to engage in the coastwise trade;

The coastwise towing statute, former 46 U.S.C. App. § 316(a) recodified as 46 U.S.C. § 55111³, provides, in pertinent part:

(a) IN GENERAL.—Except when towing a vessel in distress, a vessel may not do any part of any towing described in subsection (b) unless the towing vessel—

(1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and

(2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 of this title or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

(b) APPLICABLE TOWING.—Subsection (a) applies to the towing of—

(1) a vessel between ports or places in the United States to which the coastwise laws apply, either directly or via a foreign port or place;

(2) a vessel from point to point within the harbors of ports or places to which the coastwise laws apply;

CBP Regulations at 19 C.F.R. § 4.92 provide, in pertinent part:

No vessel other than a vessel documented for the coastwise trade, or which would be entitled to be so documented except for its tonnage (see § 4.80), may tow a vessel other than a vessel in distress between points in the U.S. embraced within the coastwise laws, or for any part of such towing.

The vessel escort operations and towing assistance statute, codified at 46 U.S.C. § 55112, provides, in pertinent part:

(a) IN GENERAL.—Except in the case of a vessel in distress, only a vessel of the United States may perform the following escort vessel operations within the navigable waters of the United States:

(1) Operations that commence or terminate at a port or place in the United States.

(2) Operations required by United States law or regulation....

(b) ESCORT VESSELS.—For purposes of this section, an escort vessel is—

(1) any vessel that is assigned and dedicated to assist another vessel, whether or not tethered to that vessel, solely as a safety precaution to assist in controlling the speed or course of the assisted vessel in the event of a steering or propulsion equipment failure, or any other similar emergency circumstance, or in restricted

³ P.L. 109-304 (October 6, 2006).

waters where additional assistance in maneuvering the vessel is required to ensure its safe operation; and

(2) in the case of a vessel being towed under section 55111 of this title, any vessel that is assigned and dedicated to the vessel being towed in addition to any towing vessel required under that section.

...

(c) RELATIONSHIP TO OTHER LAW.—This section does not affect section 55111 of this title.

Scenario #1:

In Scenario #1, the MODU would sail back to a U.S. coastwise point under its own power, after having been transported from a different coastwise point on the deck of a non-coastwise-qualified vessel. As we stated in Customs Service Decision (C.S.D.) 85-9 (Nov. 21, 1984), a vessel transported on another vessel is merchandise for purposes of 46 U.S.C. App. 883, the predecessor statute to 46 U.S.C. § 55102. “When a vessel is carried aboard another vessel, it assumes the character of merchandise whose carriage is governed by the same requirements applicable to any other category of goods.” HQ 113176 (Sept. 6, 1994). Therefore, the subject MODU is “merchandise” as contemplated by 46 U.S.C. § 55102 for that portion of its journey from the U.S. coastwise point of lading to the foreign shipyard. However, in this scenario the MODU will sail under its own power from the foreign shipyard to the U.S. arrival location. Accordingly, it would not qualify as “merchandise” for the purposes 46 U.S.C. § 55102 for that portion of its journey between the foreign shipyard to the U.S. arrival location.

It should be noted that C.S.D. 85-9 (Nov. 21, 1984) addressed the transportation of merchandise by vessel between coastwise points by use of what are known as dual-mode movements. We held in C.S.D. 85-9, that, because a vessel transported on another vessel was merchandise for purposes of the coastwise merchandise statute:

... the movement of a vessel on another vessel from a coastwise point to a foreign point or a point on the high seas where the vessel is removed from the carrying vessel is part of transportation of merchandise between coastwise points when the vessel is towed from the point of removal from the carrying vessel to another coastwise point. This is also true of such a movement when the towing portion of the movement comes before the carrying portion of the movement. The carrying vessel in this kind of movement must be coastwise-qualified. (Emphasis added.)

Upon examination, the facts of this scenario are distinguishable to those contemplated in C.S.D. 85-9. In C.S.D. 85-9, we held that the movement of a vessel on another vessel from a coastwise point to a foreign point where the vessel was removed from the carrying vessel and then towed onward to another coastwise point was considered coastwise trade. In the present matter, the subject MODU was carried from a coastwise point to a foreign point, the foreign shipyard. As the HLV that carried the MODU to the foreign shipyard was not coastwise-qualified, in accordance with C.S.D. 85-9, a violation of the coastwise merchandise statute would occur if the MODU were to be towed back to another coastwise point. Such is not the case as proposed in this scenario.

In HQ 110280 (Aug. 24, 1989), CBP addressed the applicability of the coastwise merchandise law⁴ to the transportation of yachts from Florida to the West Coast of the United States. In that matter, the yachts were to be loaded as on-deck cargo on a non-coastwise-qualified vessel in Florida and transported to Vancouver, Canada. At Vancouver, the yacht owners were to take delivery and the yachts would proceed under their own power to their respective home ports in California and Washington. We held that the proposed transportation did not violate the coastwise merchandise statute. CBP reasoned that because the transported vessel was not considered to have been “transported” between coastwise points, it was transported only from a coastwise point to a non-coastwise point and proceeded under its own power for the remainder of the movement.

Similarly, in Scenario #1, the MODU was previously laden onto a non-coastwise-qualified vessel for transportation from a coastwise point (the lading point) to a non-coastwise point (the foreign shipyard). Upon completion of its shipyard work, it would proceed under its own power from a non-coastwise point (the foreign shipyard) to a coastwise point (the U.S. arrival location). Accordingly, we are of the opinion that the transportation of the subject MODU as described in the FACTS section above, would not violate 46 U.S.C. § 55102.

With regard to the applicability of 46 U.S.C. §§ 55111 and 55112 to Scenario #1, you state that the MODU will proceed under its own power directly to the dock at the U.S. arrival location and will use U.S.-flagged, coastwise-qualified harbor assist tugs to assist with the transit of U.S. pilotage waters and ensure safe docking. The MODU may be temporarily moored at a position in U.S. territorial waters before it proceeds to the U.S. arrival location. It is well established in maritime law that arrival at the port of destination terminates the voyage. See e.g. Otis v. Walter, 15 U.S. 18 (U.S. 1817), where the Supreme Court indicated that termination of the voyage occurred upon arrival at the port of destination or entry into another port, honestly, with a view to terminate the voyage; The General Chamberlain, 1872 U.S. Dist. LEXIS 247, 7-8 (D. Me. 1872) “The voyage on which a ship sails and for which her seamen are to be employed should be fixed and definite at the time of the ship’s sailing. The place of destination should be known at that time, and when it is reached, that voyage is complete and ended....” Section 4.0(f), CBP Regulations (19 C.F.R. § 4.0(f)) provides that “[t]he phrase ‘arrival of a vessel’ means that time when the vessel first comes to rest, whether at anchor or at a dock, in any harbor within the Customs territory of the U.S.” Accordingly, we are of the opinion that the voyage of the MODU from the foreign shipyard back to the United States will have terminated when it the vessel first comes to rest in any harbor within the Customs territory of the United States. The employment of U.S.-flagged, coastwise-qualified harbor assist tugs after that point to assist with the transit of U.S. pilotage waters and docking the MODU, or to assist with the maneuvering of the MODU in U.S. territorial waters, as necessary to reach the dock at the U.S. arrival location or temporary mooring location, would not constitute a violation of 46 U.S.C. §§ 55111 or 55112 under this scenario.

Scenario #2:

⁴ Then 46 U.S.C. App. 883, recodified as 46 U.S.C. § 55102.

In this scenario, the MODU will return from the foreign shipyard to a location outside U.S. territorial waters. The owners assert that during this movement, the MODU will travel under its own power but with the assistance of a foreign-flag tug(s). As stated by the owners, the purpose of the use of the tug(s) concurrent with the propulsion of the MODU would be to produce an increased transit speed for the MODU and reduce overall fuel consumption allowing for a greater range of transit. “Towage service is the employment of one vessel to expedite the voyage of another.” Sacramento Navigation Co. v. Salz, 273 U.S. 326 (U.S. 1927). “A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger.” The Mercer, 297 F. 981 (2d Cir. N.Y. 1924). “When a tug is called or taken by a sound vessel as a mere means of saving time, or from considerations of convenience, the service is classed as towage;...” The Flottbek, 118 F. 954 (9th Cir. Wash. 1902). In accordance with the language of Sacramento Navigation Co.; The Mercer; and, The Flottbek, *supra*, such “assistance” by the foreign-flag tug(s) would be considered towing, as the “assistance” would be for the purpose of expediting the MODU’s voyage and saving time. The fact that the MODU also provides part of the propulsion for this voyage does not change the fact that the service provided by the foreign-flag tugs would constitute towage.

The owners state that, prior to the MODU entering U.S. territorial waters, the towing lines of the tug(s) would be disconnected and removed, and the MODU would sail into U.S. territorial waters under its own power. The owners contend that this scenario is permissible because the MODU will cease to be transported under any dual-mode method of transportation at a non-coastwise point when it is disconnected from any towlines in international waters. It is contended that, because in Scenario #2, any towing or transportation of the MODU would cease when the towing lines were dropped outside of U.S. territorial waters, the use of vessels to position the MODU in U.S. territorial waters or, alternatively, the use of harbor assist tugs to assist with docking the MODU in the United States should be considered separate movements apart from the movement that commenced when the MODU was laden on the HLV in U.S. territorial waters.

We have previously examined dual mode transportation in HQ 105149 (May 13, 1981) and HQ 105174 (June 1, 1981). In HQ 105149, we examined a proposed tow of a U.S. mobile drilling rig by a foreign tug between geographic points on the high seas, as part of an overall tow of the rig between points embraced within the coastwise laws. In that matter, a U.S.-flag tug was to tow the rig from a shipyard in Baltimore, Maryland, to a point on the high seas, where it was to be taken in tow by a foreign-flag and be towed to another point on the high seas in the Gulf of Mexico and there be taken in tow by a third, U.S.-flag tug and towed to a point in U.S. territorial waters near Corpus Christi, Texas. In HQ 105149, we ruled that the manifest object of the coastwise towing statute⁵ was to prohibit foreign tugs from towing American vessels for any part of an overall towing operation in domestic commerce. Our reasoning in that matter was that the phrase in the coastwise towing statute “or to do any part of such towing,” was clear and unambiguous, and that to view each tug’s segment of the overall tow as a separate and distinct voyage and not an integral part of the overall towing operation would render the subject phrase meaningless. We remarked that the intent of Congress in drafting the coastwise towing statute was that in no way did it want a foreign tug to be involved in any segment of the towing of an

⁵ Then Title 46, United States Code, § 316(a), since recodified at 46 U.S.C. § 55111.

American vessel from the beginning of its voyage at one coastwise point to its final destination at another such point.

We were given the opportunity to reconsider our prior ruling in HQ 105149 in HQ 105174 (June 1, 1981). In affirming our previous decision in HQ 105149, we remarked that it was clear that Congress did not intend to permit several foreign-flag tugs to perform coastwise towing which would constitute a violation if the towing were accomplished by one foreign-flag tow. To consider each segment of the proposed voyage as a separate tow, which was the premise of HQ 105149 and you, in effect, propose here, would have the effect of disregarding the statutory language which states that no part of the towing between coastwise points shall be by a foreign-flag vessel. Accordingly, we held in HQ 105174 that the proposed towing of a drilling rig for a part of its voyage between coastwise points by means of a foreign-flag vessel was a violation of the coastwise towing statute.

As in Scenario #1, we note that our position regarding movements of a vessel on another vessel from coastwise points to foreign points or points on the high seas where the vessel is removed from the carrying vessel and then towed onward to a different coastwise point is clearly stated in C.S.D. 85-9, *supra*. In C.S.D. 85-9, we modified our prior rulings in such cases, stating that, henceforth, such movement was considered coastwise trade. In the present matter, the movement proposed is the same as that discussed in C.S.D. 85-9, from a coastwise point (the point of lading in U.S. territorial waters) to a foreign point (the foreign shipyard) to a coastwise point (point of unloading in U.S. territorial waters). In accordance with C.S.D. 85-9, the use of the non-coastwise-qualified HLV to transport the MODU from the point of lading, a coastwise point, to the foreign shipyard would constitute a violation of the coastwise merchandise statute, 46 U.S.C. § 55102, if the MODU is later towed back to a different coastwise point.

The towing statute, 46 U.S.C. § 55111, provides, in pertinent part:

...a vessel may not do any part of any towing described in subsection (b) unless the towing vessel ... has been issued a certificate of documentation with a coastwise endorsement under chapter 121 of this title or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement. Subsection (a) applies to the towing of— (1) a vessel between ports or places in the United States to which the coastwise laws apply, either directly or via a foreign port or place; (Emphasis added).

You argue that the holding of Customs Ruling HQ 110280, *supra*, should be applicable to Scenario #2. In HQ 110280, Customs held that its rulings regarding dual-mode transportation did not apply because the yachts were not considered to be transported when they proceeded under their own power from Canada to their home ports in the United States. However, the facts of HQ 110280 are distinguishable from those proposed in Scenario #2. In HQ 110280, the yachts completed their journeys under their own power; while, in Scenario #2, the MODU would receive “assistance” from foreign-flag tugs in order to produce an increased transit speed and reduce overall fuel consumption allowing for a greater range of transit. As discussed above, such “assistance” is considered towage. Accordingly, the owners’ reliance upon HQ 110280 is misplaced.

Accordingly, we are of the opinion that the use of non-coastwise-qualified tugs to tow the MODU during its' return to U.S. territorial waters from the foreign shipyard would violate 46 U.S.C. § 55111, even though the towlines would be dropped outside United States territorial waters by virtue of the language "...any part of any towing..." found therein. Even though the towing activity would cease before the vessel entered U.S. territorial waters, the fact that part of the towing was accomplished by non-coastwise-qualified tugs would render the towing violative of 46 U.S.C. § 55111 in this dual mode scenario because the towing would have been "via a foreign port or place."

With regard to the vessel escort operations and towing assistance statute, 46 U.S.C. § 55112, you state that, after dropping the towlines outside U.S. territorial waters, the MODU would proceed to the dock at the U.S. arrival location and use coastwise-qualified tugs to assist with the transit of U.S. pilotage waters and docking the MODU to ensure the safe docking. As in Scenario #1, the MODU might be temporarily moored at a position in U.S. territorial waters before it proceeds to the U.S. arrival location. If necessary, the MODU would use coastwise-qualified tugs to assist with the maneuvering of the MODU in U.S. territorial waters. We note that this temporary mooring location in U.S. territorial waters would not be the same departure location at which the MODU was loaded on the HLV.

The provisions of 46 U.S.C. § 55112 require that only U.S. vessels are permitted to conduct operations that commence or terminate at a port or place in the United States. The proposed U.S. arrival location would constitute a port or place in the United States for the purposes of § 55112. As you stipulate that all vessels that would be used within U.S. territorial waters to assist with the transit and docking the MODU would be coastwise-qualified, no violation of 46 U.S.C. § 55112 would occur.

Scenario #3:

You state that the facts of this scenario would be the same facts as set out in Scenario #2, but the transit from the foreign shipyard to the U.S. arrival location would include a mid-voyage refueling of the MODU at a position offshore and outside the territorial waters of a United States territory or possession. The foreign-flag assist tug(s) would enter the territorial waters of a U.S. territory or possession to acquire additional fuel for both the tug(s) and the MODU. The tug(s) would then transport a portion of that fuel to the MODU for use by the MODU and would reconnect to the MODU until such time as the towline is disconnected from the MODU outside of U.S. territorial waters as previously described in Scenario 2 above.

Under Scenario #3, the transportation of the subject MODU would also violate 46 U.S.C. §§ 55102 and 55111 for the same reasons discussed in Scenario #2. Likewise, the use of coastwise-qualified tugs to assist with the maneuvering of the MODU in U.S. territorial waters would not violate 46 U.S.C. § 55112, for the same reasons discussed in Scenario #2.

HOLDINGS

Scenario #1: The transportation of the subject MODU as described in the FACTS section above, would not violate 46 U.S.C. §§ 55102, 55111, and/or 55112.

Scenario #2: The transportation of the subject MODU as described in the FACTS section above, would violate 46 U.S.C. §§ 55102 and 55111. However, the activities described in the FACTS section above would not violate 46 U.S.C. § 55112.

Scenario #3: The transportation of the subject MODU as described in the FACTS section above, would violate 46 U.S.C. §§ 55102 and 55111. However, the activities described in the FACTS section above would not violate 46 U.S.C. § 55112.

Sincerely,

Lisa L. Burley
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Office of International Trade, Regulations and Rulings
U.S. Customs and Border Protection