Lozman and Safety Regulation of U.S. Outer Continental Shelf Activities

By Constantine G. Papavizas and Jarrod A. Rainey

I. Introduction

Among the effects the U.S. Supreme Court decision in *Lozman v. City of Riviera Beach*[1] may have is to reorder the regulation of "units," "facilities," "devices," "structures," "platforms," "mobile offshore drilling units" *and* "vessels" engaged in the exploration, development and production of offshore U.S. mineral resources. All those terms (and others, like "industrial vessel") have defined meanings that affect which regulatory regime applies and which federal government agency has primary authority to regulate the man-made object operating in U.S. waters. *Lozman* may have moved some of these objects from the "vessel" category to another category, like the "facility" category, and thereby affected how they are designed, constructed and inspected. Here, we introduce the existing federal safety regulatory regime for U.S. outer continental shelf (OCS) activities and briefly examine the effect *Lozman* may have on that regime.[2]

II. The U.S. OCS Safety Regulatory Regime

A. OCSLA

The Outer Continental Shelf Lands Act, 1953 (OCSLA)[3] forms the foundation of federal government authority and regulation of activities on the U.S. outer continental shelf. OCSLA applied federal law to "artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom."[4]

OCSLA was significantly amended in the Outer Continental Shelf Lands Act Amendments of 1978[5] particularly with respect to the application of federal jurisdiction. Specifically, the 1978 amendments struck "fixed structures" from the statute and replaced those words with "installations and other devices permanently or temporarily attached to the seabed" language thereby expanding the scope of OCSLA to floating objects and vessels.

The resulting language, as it continues to exist today, means that federal law applies "to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources."[6] Thus, OCSLA as amended applies to virtually every man-made object (or, arguably, *every* man-made object attached in some way to the U.S. OCS) operating in the U.S. OCS at least when the resources purpose is fulfilled.[7]

The legislative history indicates that the law was intended "to be applicable to activities on drilling ships, semi-submersible drilling rigs, and other watercraft, when they are connected to the seabed by drillstring, pipes, or other appurtenances, on the OCS for exploration, development, production purposes."[8] The 1978 amendments also provide that U.S. safety and manning standards apply to "any vessel, rig, platform, or other vehicle or structure ... for activities pursuant to this subchapter."[9]

---

[1] *Lozman v. City of Riviera Beach*, ___ U.S. ___, 133 S. Ct. 735 (2013).

[2] Our focus in this article is narrow and does not cover other potential facets of how *Lozman* might affect U.S. OCS activities such as the application of the seaman's Jones Act to floating man-made objects which is the subject of frequent litigation. *See*, *e.g.*, *Mooney v. W&T Offshore, Inc.*, No. 12-969, 2013 U.S. Dist. LEXIS 30091 (E.D. La. Mar. 6, 2013) (litigation over whether or not tension leg platform was a vessel based on *Lozman*).

[3] Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356(a)).

[4] OCSLA § 4(a), 67 Stat. at 462 (codified as amended at 43 U.S.C. § 1333).

[5] Pub. L. No. 95-372, 92 Stat. 629 (1978).

[6] 43 U.S.C. § 1333(a)(1).

[7] There is an argument to be made that the purpose qualification limits OCSLA's extension of U.S. jurisdiction, at least for the cabotage Jones Act, to oil and gas or other mineral resource related activity and not renewable energy related activity. *See* C. Papavizas and G. Morrissey, "Does the Jones Act Apply to Offshore Energy Projects?", 34 Tulane Maritime L. J. 377 (Summer 2010).

[8] H.R. Rep. No. 95-590, at 128 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 1450, 1534.

[9] 43 U.S.C. § 1356(a).

OCSLA itself does not define the key jurisdictional words such as "installation" or "device" leaving those refinements to the regulatory agencies.

B. Operations on the U.S. OCS

Since enactment of OCSLA, oil and gas exploration, development and production on the U.S. OCS, primarily in the U.S. Gulf of Mexico (GOM), has increased significantly.[10] As oil and gas exploration, development and production have become more sophisticated and have gone further off shore into deeper water, the man-made objects engaged in that activity have also changed. Several of the devices which have arisen to date in "vessel" litigation are semi-submersibles, spars, and tension-leg platforms (TLPs).

Semi-submersibles, also referred to as column-stabilized units, float upon several columns which are typically attached to pontoons or ring-shaped lower hulls. They are moored with lines which are attached to the seabed by large anchors or submerged pilings.

Spars are typically cylindrical structures designed to float on end with the most of the hull submerged. Like semi-submersibles, spars use conventional spread moorings allowing the facility to move several hundred feet in any direction in order to drill additional wells or for other functions.

Tension-leg platforms, as the name implies, are attached to the seabed through the use of several steel tendons under tension, which function to minimize vertical motions of the platform. Unlike conventionally moored semi-submersibles and spars, TLPs are not free floating and the tension of the mooring system results in practically no capability for horizontal movement.

C. Agency Responsibilities

The U.S. Coast Guard and the Minerals Management Service (MMS) (ultimately replaced by the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement (BSEE) in 2011) each have safety and other regulatory responsibilities over man-made objects operating on the U.S. OCS. Although each agency derives is authority essentially from the same statutes (such as OCSLA and the Clean Water Act) and they both have safety and environmental regulatory authority, they come at the subject of safety regulation from two directions.

The Coast Guard, as the agency responsible for certificating and inspecting vessels in general, approaches the safety issue in accordance with its long-standing vessel regulatory and experience background, even though it regulates both "vessels" and man-made objects that are not "vessels" per se engaged in U.S. OCS activities. BSEE, as the agency charged with safety and environmental regulation of offshore oil and gas exploration, development and production, approaches the safety issue with a focus on drilling and production activity. BSEE, like the Coast Guard, regulates man-made objects some of which are "vessels" and some which are not "vessels."

D. Agency Cooperation

Recognizing that the agencies have overlapping and intersecting responsibilities, they have long sought to cooperate and coordinate their shared oversight responsibility. In that regard, the agencies have entered into a series of Memoranda of Understanding (MOU) and Memoranda of Agreement (MOA). The MOUs have established frameworks for further cooperative activity and have contained overarching vision statements, while the MOAs have been more specific implementing agreements.

The most current version of the MOU was signed by the two agencies on November 27, 2012 and replaced the prior MOU signed September 30, 2004.[11] As the most current MOU states, it "is designed to promote interagency consistency in the regulation of Outer Continental Shelf (OCS) activities, facilities and units under the respective jurisdiction of" BSEE and the Coast Guard.

---

[10] *See, e.g.*, BSEE, Oil and Gas Well Drilling on Federal Offshore Leases Since 1960, *available at* http://www.bsee.gov/uploadedFiles/BSEE/Newsroom/Offshore_Stats_and_Facts/OCSDrilling.pdf (There were 2,720 total drilling wells and boreholes on federal offshore leases that were either active, suspended, completed, or plugged and abandoned in 1960; by 2006, that number increased to 58,375); G. Ed Richardson *et al.*, Deepwater Gulf of Mexico 2008: America's Offshore Energy Future 4 (2008) ("[D]eepwater oil production rose about 820 percent and deepwater gas production increased about 1,155 percent from 1992 to 2006.").

[11] Memorandum of Understanding between the Bureau of Safety and Environmental Enforcement – U.S. Department of Interior, and the U.S. Coast Guard – U.S. Department of Homeland Security (Nov. 27, 2012).

And, as with prior MOUs, the most current MOU is implemented via MOAs to be entered into over time.[12]

The existing MOA entered into on February 28, 2008 governing "Floating Offshore Facilities" provides a detailed table of responsibilities as between the agencies (then MMS) and the Coast Guard.[13] For example, the MOA provides that with respect to top-side structures on "floating offshore facilities," that the Coast Guard has responsibility for "structures relating to marine systems, lifesaving equipment, accommodations, crane foundations, and other appurtenances." The MMS (now BSEE) has responsibility for "all structural components related to drilling, production, completion, well servicing and workover operations."

The MOA defines a "floating offshore facility" as

1) a buoyant facility that is permanently or temporarily attached to the seabed of the Outer Continental Shelf (OCS), or
2) that dynamically holds position over the OCS and is attached only via flow-lines, umbilicals or similar connections ...

   This term includes, but is not limited to, tension leg platforms, spars, semi-submersibles and shipshape hulls. For purposes of this MOA, the term does not include derrick barges, floatels, tenders, mobile offshore drilling units or floating offshore facilities covered by the Deepwater Port Act ...[14]

E. Coast Guard Regulations

Subchapter N of Title 33 contains the Coast Guard's regulations concerning U.S. OCS activities.[15] As stated in those regulations, the subchapter "applies to OCS facilities, vessels, and other units engaged in OCS activities."[16] Other Coast Guard regulations in Title 46 of the Code of Federal Regulations also have a bearing on vessels or other craft engaged in OCS activities.[17]

The broadest Coast Guard definitional category for man-made objects on the U.S. OCS is a "unit" which consists of "any OCS facility, vessel, rig, platform, or other vehicle or structure, domestic or foreign."[18] An "OCS facility" is "any artificial island, installation, or other device permanently or temporarily attached to the subsoil or seabed of the Outer Continental Shelf" engaged in defined outer continental shelf activities.[19] An "OCS facility" can be a "vessel," as the term includes "mobile offshore drilling units" when in contact with the seabed, or a "floating OCS facility" which is a "buoyant OCS facility securely and substantially moored so that it cannot be moved without special effort."[20]

Per the regulations, a mobile offshore drilling unit (MODU) cannot be considered a "floating OCS facility." A "floating OCS facility ... includes tension leg platforms and permanently moored semisubmersibles or shipshape hulls *but does not include mobile offshore drilling units and other vessels*."[21]

Correspondingly, a MODU is defined in Part 33 of the Code of Federal Regulations as "a vessel ... capable of engaging in drilling operations for exploration or exploitation of subsea resources."[22] The definition of a MODU in Part 46 of the Code of Federal Regulations where MODU inspection and certification requirements are established, adds to the Part 33 definition that a

---

[12] The first MOA under the 2012 MOU was entered into on April 30, 2013 regarding Safety and Environmental Management Systems (SEMS) and Safety Management Systems (SMS) (BSEE/USCG MOA: OCS-07).

[13] Memorandum of Agreement between the Minerals Management Service U.S. Department of Interior, and the U.S. Coast Guard – U.S. Department of Homeland Security (Feb. 28, 2008) (MMS/USCG MOA: OCS-04).

[14] Under the Deepwater Port Act, a deepwater port "means any fixed or floating manmade structure other than a vessel, or any group of such structures, that are located beyond State seaward boundaries and that are used or intended for use as a port or terminal for the transportation, storage, or further handling of oil or natural gas for transportation to or from any State ... ." 33 U.S.C. § 1502(9).

[15] 33 C.F.R. Subchapter N. The Coast Guard proposed sweeping changes to Subchapter N in 1999, but those have not yet been implemented. *See* 64 Fed. Reg. 68,416 (Dec. 7, 1999).

[16] 33 C.F.R. § 140.3.

[17] *E.g.* 46 C.F.R. Subchapter I-A (governing mobile offshore drilling units).

[18] Subpart N uses the term "platform" as well, but does not define it except with reference to whether it is manned or not.

[19] 33 C.F.R. § 140.10.

[20] 33 C.F.R. § 140.10.

[21] *Id.* (emphasis supplied).

[22] 33 C.F.R. § 140.10. U.S. Coast Guard, Navigation and Vessel Inspection Circular (NVIC) No. 4-78 states that "Mobile Offshore Drilling Units are recognized internationally through the Intergovernmental Maritime Consultative- Organization- as being 'special purpose ship' designed and operated to carry out an industrial function at sea." The NVIC is available at http://www.uscg.mil/hq/cg5/nvic/pdf/1970s/n4-78.pdf. In addition, NVIC 3-88 contains an attachment that cross-references the regulations pertaining to U.S.- and foreign-flagged MODUs. The NVIC is available at http://www.uscg.mil/hq/cg5/nvic/pdf/1988/n3-88ch1.pdf.

MODU must be "seagoing" and either self-propelled and 300 gross tons or more or non-self-propelled and 100 gross tons or more.[23]

One potential effect of *Lozman* is to move objects from the MODU (since an object must be a "vessel" to be a MODU) or "vessel" categories to the "floating OCS facility" category which excludes "vessels."

Subchapter N, for example,[24] varies its requirements depending on a "unit's" category as follows:

	OCS Facility	***MODU***	***Platform***	***Vessel***
Design and Equipment	X	X		X
Lifesaving Appliances		X	X	
Operations	X	X		X

The Coast Guard also has a definition for an "industrial vessel" which is relevant to the U.S. OCS. Such a vessel means "every vessel which by reason of its special outfit, purpose, design, or function engages in certain industrial ventures. Included in this classification are such vessels as drill rigs ...."[25] The regulation does not define what it means by "certain industrial ventures."[26] An "industrial vessel" is subject, for example, to certain structural fire protection requirements which otherwise might not apply.[27]

The Coast Guard has made adjustments in the past in response to new Supreme Court guidance on what constitutes a "vessel." Prior to the issuance of the decision in *Stewart v. Dutra Construction Company, Inc.* in 2005,[28] the Coast Guard commenced a change in policy for craft "routinely operated dockside."[29] The proposal resulted in a 2009 policy change taking into account *Stewart v. Dutra*.[30] By that new policy the Coast Guard ceased inspecting permanently moored "vessels" because "*Stewart* implies that a 'permanently moored vessel' is an oxymoron ...."

F. BSEE Regulations

BSEE's focus is the regulation of oil, gas, and sulphur exploration, development, and production operations on the U.S. OCS. Not surprisingly, BSEE's focus, therefore, is on man-made objects engaged in such operations which it refers to as "facilities."

BSEE has several slightly different definitions of a "facility" depending on the context.[31] In most instances, BSEE defines the term "facility" to mean "all installations permanently or temporarily attached to the seabed on the OCS" including "mobile offshore drilling units (MODUs) or other vessels engaged in drilling or downhole operations, used for oil, gas or sulphur drilling, production, or related activities." BSEE regulations do not define "installations" – which is one of the object words used in OCSLA. "Facilities" also include "all floating production systems (FPSs), variously described as column-stabilized-units (CSUs); floating production, storage and offloading facilities (FPSOs); tension-leg platforms (TLPs); spars, etc."[32]

Thus, from a BSEE perspective, all floating man-made objects (and man-made islands as well), whether "vessels" or not, are governed by the same set of requirements so long as they track the OCLSA jurisdictional definition of being "permanently or temporarily attached to the seabed on the OCS."

III. The Potential Effect of *Lozman* on the U.S. OCS Regulatory Structure

The Supreme Court in *Lozman* arguably re-ordered the judicial test for determining what is a "vessel" for federal law purposes. The Supreme Court applied the federal definition in the Rules of Construction Act, which defines a "vessel" as including "every description of watercraft or artificial contrivance used, or capable of being used, as a means of transportation on water." The Supreme Court held that capability of being

---

[23] 46 C.F.R. § 107.111.

[24] 33 C.F.R. Parts 143, 144 & 146.

[25] 46 C.F.R. §§ 2.10-25 & 90.10-16. The Coast Guard Application for Initial, Exchange, or Replacement of Certificate of Documentation; Redocumentation (CG-1258) has an "Industrial Vessel" box among others that can be checked in the category of "Primary Service & Horsepower" for vessels that are U.S. documented.

[26] The regulatory concept of an "industrial vessel" was created by the Coast Guard in 1968 to extend structural fire protection requirements to relatively small tonnage vessels, such as derrick barges and drill rigs, which routinely had on board 12 or more personnel. *See* 32 Fed. Reg. 795, 802 (Jan 24, 1967); 33 Fed. Reg. 1014 (Jan 25, 1968).

[27] *See* 46 C.F.R. § 92.07-1(b).

[28] Stewart v. Dutra Constr. Co., 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005).

[29] 69 Fed. Reg. 34,385 (June 21, 2004).

[30] 74 Fed. Reg. 21,814 (May 11, 2009).

[31] 30 C.F.R. § 250.105.

[32] 30 C.F.R. § 250.105.

used "as a means of transportation on water" depends on whether a "reasonable observer, looking to the [object's] ... physical characteristics and activities, would consider it to be designed to any practical degree for carrying people or things on water."

The majority opinion argued that this test was not based on "subjective elements, such as owner's intent" because it permitted consideration "only of objective evidence of a waterborne transportation purpose." In so doing, the Supreme Court pointed out that "[n]ot *every* floating structure is a 'vessel' " and that lack of self-propulsion "may be a relevant physical characteristic."

The test for whether an object is a "vessel" in U.S. OCS regulations is derived from the Rules of Construction Act because there is no different, supervening definition for that word in either the Coast Guard or BSEE regulations.[33] Indeed, where there is a definition, as there is in Subchapter N, it is word-for-word the same as the Rules of Construction Act.[34]

The existing regulatory regime already encompasses all man-made objects on the U.S. OCS whether fixed or floating when engaged in the exploration, development or production of oil, gas or other mineral resources. Because of that, *Lozman* does not appear to un-regulate any previously regulated object on the basis that it is now not considered a "vessel" whereas before it was considered a "vessel" (or vice a versa). All otherwise qualifying man-made objects are regulated whether they are "vessels" or not.

Similarly, BSEE regulations broadly define their applicability to encompass both "vessels" and "non-vessels" both of which are encompassed by the word "facility" so long as they are permanently or temporarily attached to the U.S. OCS seabed and otherwise engaged in exploration, development or production of the requisite resources.

The *Lozman* effect therefore may be elsewhere and in particular in potentially reordering which objects are considered "floating facilities" and which are considered "vessels" under Coast Guard regulations and in adjusting which parts of the regulatory regime must be complied with by which objects.

For example, safety management certification required pursuant 33 C.F.R. Part 96, applies only to "vessels." That certification, derived from the International Convention for the Safety of Life at Sea (SOLAS), 1974 and the International Management Code for the Safe Operation of Ships and Pollution Prevention (ISM Code), applies to vessels and MODU's, but not *per se* to floating facilities.[35]

The Coast Guard definition of a "floating facility" as one that is "securely and substantially moored so that it cannot be moved without special effort" appears to fit within *Lozman's* reasoning as objective evidence that the facility is not intended as a "means of transportation on water." If that were true, the *Lozman* test would be congruent with the division in the Coast Guard regulations between "facilities" and "vessels."

Such logic appears in *Mendez v. Anadarko Petroleum Corp.*,[36] a 2012 Fifth Circuit decision decided before *Lozman* but for which the U.S. Supreme Court denied certiorari after the *Lozman* opinion was issued. *Mendez* involved a SPAR-type floating gas production platform "permanently moored" to the seabed. Finding that the SPAR was theoretically capable of transportation but not practically capable, the court concluded colorfully (but not necessarily accurately) that the SPAR was not a "vessel" because disconnecting it from the sea floor "would make disconnecting a casino boat from the shore look as easy as unplugging a toaster."

Similarly, the court in *Warrior Energy Services Corp. v. ATP TITAN*,[37] decided after *Mendez* and *Lozman*, determined that a hybrid semi-submersible/SPAR was not a "vessel." In that instance, the court was similarly persuaded that the object was not practicably capable of transportation because of its moorings and the difficulties in moving the *ATP TITAN* (even though evidence was presented that it was designed to be

---

[33] *See, e.g.*, Stewart v. Dutra Constr. Co., 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005) (finding that definition of vessel at 1 U.S.C. § 3 was incorporated into Rules of Construction Act, so that definition applied to Longshore and Harbor Workers' Compensation Act (LHWCA) because LHWCA was silent regarding definition of vessel).

[34] 33 C.F.R. § 140.10.

[35] *See* 33 C.F.R. §§ 110 & 210.

[36] Mendez v. Anadarko Petroleum Corp., 2012 U.S. App. LEXIS 6405 (5th Cir. Mar. 26, 2012), *cert. denied*, 133 S. Ct. 979 (2013).

[37] Warrior Energy Servs. Corp. v. ATP TITAN, No. 12-2297, 2013 U.S. Dist. LEXIS 57269 (E.D. La. April 22, 2013).

moved periodically throughout its usual life carrying equipment when it was so moved).[38]

The court in *Warrior Energy* also determined that *Lozman* made no tangible difference to this analysis based on *Mendez* and other prior precedents. The court concluded that "*Lozman* and its emphasis on the impressions of a reasonable observer reinforce the Court's determination that the ATP TITAN is not a vessel."

This early decision applying *Lozman* to man-made objects in the U.S. GOM therefore appears to signal that there is not likely to be any change in the groupings of "facilities" and vessels" resulting from *Lozman*.

At the same time, variation among objects being utilized in the U.S. GOM is great and new mechanisms are likely to appear for exploring, developing and producing offshore mineral resources. Moreover, neither *Mendez* nor *Warrior* examined situations where a floating object is only temporarily attached to the seabed and moves periodically from site to site as occurred with the dredge in the case of *Stewart v. Dutra*. In those situations, the reasonable observer test may well have an impact in determining whether an object is a "vessel" or a non-vessel (facility).

IV. Conclusion

The safety regulation regime applicable to man-made objects operating in the U.S. GOM exploring, developing or producing mineral resources depends in part on a complicated series of overlapping definitions of what constitutes a "vessel." Early indications are that these definitions will not be affected by *Lozman*, but only time will tell if courts will utilize *Lozman* to alter the application of that safety regime.

*****

Constantine G. Papavizas is a Partner in the firm of Winston & Strawn LLP and the Chair of its Maritime Practice Group. Jarrod A. Rainey is an associate in the Maritime Practice Group of Winston & Strawn LLP. *The authors thank Timothy S. Bush for his helpful comments and suggestions.*

[38] The court noted that the ATP TITAN's Certificate of Inspection indicated that is in service as an "industrial vessel" but did not give that any weight in its opinion.