



HQ H309186

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CATEGORY: Carriers

Mr. Michael H. Wray
Ms. Courtney Campion
Holman Fenwick Willan USA LLP
5151 San Felipe, Suite 400
Houston, Texas 77056

RE: Coastwise Transportation; Coastwise Towing; Scour Protection; 46 U.S.C. § 55102; 46 U.S.C. § 55111; 19 CFR § 4.80(b).

Dear Mr. Wray and Ms. Campion:

This letter is in response to your February 12, 2020 ruling request on behalf of your client Great Lake Dredge and Dock regarding whether the transportation of scour protection rocks on the U.S. Outer Continental Shelf (“OCS”), as described below, would violate the coastwise laws. Our decision follows.

FACTS

The following facts are from your February 12, 2020 ruling request and supporting information submitted to this office on March 23, 2020. Your client, Great Lake Dredge and Dock (“Great Lake”) has proposed to transport and unlade “scour protection” materials to protect wind turbine generator (“WTG”) foundations in conjunction with the construction of the Vineyard Wind Project located on the OCS off of the southeast shore of Martha’s Vineyard, an island that is part of the State of Massachusetts.

The Vineyard Wind Project is described in the ruling request as an offshore wind energy farm that is expected to consist of approximately 84 WTGs. Each installed WTG will consist of a tower and nacelle unit attached to a monopile foundation that is embedded in the seafloor. Each WTG foundation will have scour protection composed of rock or similar material, which will prevent sediment erosion and protect against increased seabed drag caused by the placement of the foundation. The scour protection will be unladed at the WTG sites on the OCS in layers and at different phases of the WTG installation process. The radius of scour protection surrounding each monopile will be approximately 22-26 meters (72-85 feet) and one to two meters high (3-6 feet).

The ruling request states that a combination of coastwise and non-coastwise-qualified vessels will be used to install the scour protection. Specifically, the non-coastwise-qualified, Netherlands-flagged M/V FLINTSTONE (the “Scour Vessel”) will be used to install scour protection throughout the Vineyard Wind Farm. The ruling request also states that the operation will take place between February 2023 and

December 2023 and outlines seven potential scenarios, “A” through “G,” which describe how the scour protection may be installed:

Scenario A: The scour protection will be laden onto the Scour Vessel at the Port of Providence, Rhode Island and transported to the project site on the OCS. The Scour Vessel will then unlade the scour protection onto the seabed prior to the installation of each monopile. After unloading each load of scour protection, the Scour Vessel will return to the Port of Providence (or potentially another U.S. port) to lade additional scour protection. This process will be repeated at each installation area within the project site.

Scenario B: The Scour Vessel will unlade a second layer of scour protection after the initial layer of scour protection is applied and the monopile is installed into the seabed. The procedure to unlade the scour protection will otherwise be the same as described in Scenario A (*i.e.*, transportation of scour protection from Providence to each WTG site).

Scenario C: After the WTGs are fully installed and operational, Scour Protection will be periodically reapplied as part of routine maintenance. The procedure to lade and unlade the scour protection will be the same as described in Scenario A.

Scenario D: The Scour Vessel will unlade the scour protection in the same manner and at the same locations during the installation phase and post-construction phase as described in scenarios A, B, and C, except that the scour protection will be laden onto the vessel in Canada. The Scour Protection vessel will return to Canada to replenish the scour protection as needed.

Scenario E: The scour protection will be laden onto the non-coastwise-qualified, Panama-flagged BULK FRIENDSHIP (the “Bulk Carrier”) in Canada and transported to the project site or an alternative site within U.S. territorial waters. After the Bulk Carrier arrives at the Project Site or a site within U.S. territorial waters, the Bulk Carrier will anchor to the seabed and serve as a floating storage platform. The Scour Vessel will apply the scour protection in the same manner and at the same locations as described in scenarios A, B, C, and D, except that instead of transporting the scour protections from either a foreign or U.S. mainland point of lading, the Scour Vessel will lade scour protection from the anchored Bulk Carrier located within U.S. territorial waters.

Scenario F: In lieu of the Scour Vessel, a non-coastwise-qualified, foreign-flagged installation barge (the “Barge”) will be laden with scour protection and towed by coastwise-qualified tug boats from the Port of Providence to the project site on the OCS to install scour protection as described in scenarios A, B, and C above.

Scenario G: The Barge will be used as described in scenario F with the exception that it will be towed to the installation site on the OCS by *non-coastwise-qualified* tug boats to install scour protection.

ISSUES

1. Whether the transportation of the subject scour protection as described in each of the scenarios above violates the Jones Act, 46 U.S.C. § 55102?
2. Whether the use of non-coastwise-qualified and coastwise-qualified tug boats to transport a barge carrying scour protection violates 46 U.S.C. § 55111?

LAW AND ANALYSIS

The coastwise law applicable to the transportation of merchandise, known as the Jones Act, is found at 46 U.S.C. § 55102,¹ and provides in pertinent part:

Except as otherwise provided in this chapter or chapter 121 of this title, 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 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The coastwise laws apply, in part, 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.² In addition, Section 4(a)(1) of the Outer Continental Shelf Lands Act of 1953 (“OCSLA”), as amended by The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 9503 (2021), provides that the Constitution and laws and civil and political jurisdiction of the United States extend to:

- (i) the subsoil and seabed of the outer Continental Shelf;
- (ii) all artificial islands on the outer Continental Shelf;
- (iii) 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, *including non-mineral energy resources*; or
- (iv) any such installation or other device (other than a ship or vessel) for the purpose of transporting or transmitting such resources.³

(emphasis added).

Issue One: Transportation of Merchandise (Scenarios A through E)

The Jones Act specifically prohibits the coastwise transportation of “merchandise” between coastwise points by non-coastwise qualified vessels. Pursuant to 46 U.S.C. § 55102(a): “[m]erchandise includes (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and (2) valueless material.” Prior CBP rulings have interpreted this definition of “merchandise” to include rocks and dredged material. *E.g.*, HQ 113219 (Oct. 17, 1994). As such, it is clear that the scour protection materials contemplated in the instant request are merchandise under 46 U.S.C. § 55102.

To determine if the proposed transportation occurs between coastwise points, we need to examine the points at which the subject scour protection will be laden and unladen. The Jones Act extends to points on 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. 33 CFR § 2.22(a)(2). The plain language of OCSLA Section 4, as amended by the 2021 NDAA, extends

¹ Formerly 46 U.S.C. App. § 883. *See* Pub. L. 109-304 (Oct. 6, 2006).

² 33 CFR § 2.22(a)(2).

³ 43 U.S.C. § 1333(a)(1).

U.S. law, to the physical subsoil and seabed of the OCS as well as “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, *including non-mineral energy resources.*”

Scenarios A, B, and C, as outlined in your request, each involve the transportation of scour protection between two coastwise points by the non-coastwise-qualified Scour Vessel. Scenario A involves the transportation of scour protection from Providence, Rhode Island to the undeveloped (*i.e.*, “pristine”) seabed of the OCS. Scenario B involves the transportation of scour protection from Providence, Rhode Island to the OCS seabed adjacent to a pre-installed WTG foundation, an installation used to produce non-mineral energy resources. Scenario C involves the periodic transportation of supplemental scour protection from Providence Rhode, Island to the seabed near a completed WTG. As a result, each of these proposed transportation scenarios would be in violation of the Jones Act.

Scenario D, as outlined in your request, does not involve the transportation of scour protection between two coastwise points by a non-coastwise-qualified vessel. Instead, this scenario contemplates that the scour protection will be laden onto the Scour Vessel at a Canadian port and unladen on the seabed of the OCS. Because this scenario does not contemplate transportation between two coastwise points, it would not constitute a violation of the Jones Act.

Scenario E offers two distinct sub-scenarios, both of which involve the transportation of merchandise between coastwise points. In both sub-scenarios, the scour protection will be laden onto the non-coastwise-qualified Bulk Carrier in Canada before transiting to the United States. In the first sub-scenario, after arriving from Canada, the Bulk Carrier will anchor at a site within U.S. territorial waters to serve as a floating storage site. The Scour Vessel will then lade scour protection from the anchored Bulk Carrier and transport it to the installation sites on the seabed of the OCS, returning to the Bulk Carrier to lade additional scour protection as necessary. Although the scour protection will originally be laden in Canada and unladen on the OCS, the subsequent transportation between one coastwise point (the Bulk Carrier, which will be located on a point within the territorial sea) and a second coastwise point (the seabed of the OCS) would be in violation of the Jones Act.

In the second sub-scenario, the Bulk Carrier will lade scour protection in Canada and anchor at the project site, which is on the OCS. The Scour Vessel will again lade scour protection from the Bulk Carrier and transport it to the installation sites. The OCSLA Section 4 extends U.S. law to “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, including non-mineral energy resources.” Prior CBP rulings interpreted this language (which previously did not include a reference to “non-mineral energy resources”) to include “devices attached to the seabed of the OCS for the purpose of resource exploration operations, including warehouse vessels anchored over the OCS when used to supply drilling rigs on the OCS.” *See* Customs Service Decisions 81-214 and 83-52. We have also found that a “Floating Offshore Service Facility” anchored to the seabed to the OCS to carry “necessary consumables and supplies to support deepwater [drilling] operations” would become a coastwise point when anchored. Similarly, in the present matter, we find that the subject Bulk Carrier would become a coastwise point when anchored to the seabed of the OCS for the purpose of providing scour protection to support the development and production of wind energy. Once again, although the scour protection will be originally laden in Canada, the subsequent transportation between one coastwise point (the bulk carrier, which will be anchored to the seabed of the OCS) and a second coastwise point (either the “pristine” seabed of the OCS or the seabed adjacent to a WTG structure) would therefore be in violation of the Jones Act.

Issue Two: Coastwise Towing (Scenarios F and G)

Pursuant to 46 U.S.C. § 55111, except when towing a vessel in distress, only a coastwise-qualified vessel may do any part of any towing between coastwise points. Similar to scenarios A, B, and C, the scour protection will be laden onto the non-coastwise-qualified Barge at the Port of Providence (one coastwise point) and unladed at the installation site on the seabed of the OCS (another coastwise point). Under Scenario F, because all towing services will be provided by coastwise-qualified tug boats, this scenario would not be in violation of 46 U.S.C. § 55111. Under Scenario G, the Barge will be towed by non-coastwise-qualified tug boats. Because such towing would be provided by non-coastwise-qualified vessels, Scenario G would be in violation of 46 U.S.C. § 55111. Nevertheless, Scenarios F and G would each be in violation of the Jones Act. A coastwise transportation of merchandise occurs when merchandise is laden onto a barge at one coastwise point and unladed at a second coastwise point after the barge had been towed by a coastwise-qualified tug. *See, e.g.*, HQ H280574 (Apr. 28, 2017) (relating to the transportation via barge of a “power generation vessel” between coastwise points). Similarly, the use of the non-coastwise-qualified Barge as contemplated in Scenarios F and G to transport scour protection from Providence, Rhode Island to the seabed of the OCS would be in violation of the Jones Act.

HOLDING

1. The transportation of the subject “scour protection” between points on the OCS, the U.S. territorial waters and the U.S. points as described in Scenarios A, B, C and E in the FACTS section would be in violation of 46 U.S.C. § 55102.

The transportation of scour protection as describe in Scenario D, in which the merchandise will be laden in Canada and unladed at the project site, would not be in violation of 46 U.S.C. § 55102.

2. The use of coastwise-qualified tugboats to tow a non-coastwise-qualified barge between coastwise points as described in Scenario F would not be in violation of 46 U.S.C. § 55111.

The use of non-coastwise-qualified tug boats to tow a non-coastwise-qualified barge between coastwise points as outlined in Scenario G would be in violation of 46 U.S.C. § 55111.

Both Scenarios F and G would violate the Jones Act insofar as the non-coastwise-qualified barge would be transporting the scour protection between coastwise points.

Sincerely,

Lisa L. Burley
Chief/Supervisory Attorney-Advisor
Cargo Security, Carriers and Restricted Merchandise Branch
Office of International Trade, Regulations and Rulings
U.S. Customs and Border Protection