



HQ H316313

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CATEGORY: Carriers

Mr. John Giffin, Esq.
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RE: Coastwise Transportation; Outer Continental Shelf; Wind Turbines; 46 U.S.C. §§ 55102 and 55103; 19 CFR §§ 4.80a and 4.80b; 43 U.S.C. § 1333.

Dear Mr. Giffin:

This letter is in response to your September 10, 2020 ruling request on behalf of your client Maersk Supply Services (“Maersk”) regarding whether the installation of wind turbine generators by a non-coastwise-qualified vessel on the U.S. outer continental shelf (“OCS”), as described below, would violate the coastwise laws.¹ Our decision follows.

FACTS

The following facts are from your September 10, 2020 ruling request and from communications submitted in relation to a prior ruling request submitted by Maersk regarding this transaction.² Your client proposes to transport and install wind turbine generator (“WTG”) units for a project organized by Vineyard Wind LLC (“Vineyard Wind”). You state that your client will transport and install multiple WTG units at two separate lease areas located on the seabed of OCS off the coast of Rhode Island and Massachusetts. The proposed transportation and installation of the WTG units will be conducted by coastwise-qualified tug boats that will be chartered on an as-needed basis and a coastwise-qualified barge, that will be built closer to the project start date (the “Tug and Barge”), and a non-coastwise-qualified, Danish-flagged jack up vessel (the “Jack Up Vessel”) that

¹ You have asked this office for confidential treatment of all information contained in brackets. If this office receives a Freedom of Information Act request for your submission, CBP Regulations (19 CFR § 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.

² CBP previously issued a ruling related to this transaction in HQ H309672 (July 15, 2020), but withdrew that ruling in HQ H312773 (Aug. 3, 2020) when it was determined that the exact coordinates of the installation sites had not been provided. You have resubmitted your request with documentation verifying the location of the subject project.

will be built in a foreign shipyard closer to the project start date. The project is currently scheduled to commence on [].

Prior to installation, the non-coastwise-qualified Jack Up Vessel will travel from a foreign port in [] to the first WTG installation site on the U.S. OCS, secure its retractable to the seabed, and jack up to installation height. After the Jack Up Vessel establishes itself at the installation site, the coastwise-qualified Tug and Barge will transport WTG components from a port in the United States (likely one of Bridgeport, Connecticut; Staten Island, New York; or Coeymans/Albany, New York) to the Jack Up Vessel, which will remain grounded on the OCS. The WTG components will be secured for transport on board the Barge in a []. Each WTG unit will consist of a tower (in one or more pieces), a nacelle, and three blades. The Jack Up Vessel will not transport WTG components between installation sites, but will carry certain installation tools as outlined below.

Upon arriving at the Jack Up Vessel, the Tug will push the Barge into a “notch” located on the Jack Up Vessel. The Jack Up Vessel will then raise the WTG components to its deck using []. In addition, there will be a second, [] on the deck of the Jack Up Vessel when the Tug and Barge arrive. Once the [] is placed on the deck of the Jack Up Vessel, the Jack Up Vessel will use its crane to lower the [] onto the Barge. The Tug will then pull the Barge clear from the Jack Up Vessel and the Tug and Barge will return to a U.S. port where additional wind turbine components will be placed in [] and transported to the Jack Up Vessel after it establishes itself at the next WTG installation site.

After receiving WTG components from the Tug and Barge, crewmembers onboard the Jack Up Vessel will utilize the vessel’s crane to install the WTG units onto pre-constructed turbine foundations. The Jack Up Vessel will remain stationary on the seabed via retractable legs throughout this process. Once each WTG is installed, the Jack Up Vessel will lower itself into the water and proceed to the next WTG location where it will secure itself to the seabed of the OCS, jack up to installation height, and repeat the same process.

Besides the wind turbine components, the Tug and Barge will transport additional materials from a U.S. port (likely one of Bridgeport, Connecticut; Staten Island, New York; or Coeymans/Albany, New York) to the Jack Up Vessel. These materials include: (1) a waste skip for waste generated by daily vessel operations; (2) provisions for the crew and spare parts for the Jack Up Vessel, which will be transported by the Barge in a separate container from []; and (3) a container holding all tools, materials, and consumables necessary for the mechanical completion and installation of each wind turbine. The latter category of tools, materials, and consumables will subsequently be transported by the Jack Up Vessel between installation sites and unladen at each WTG site by the installation crew. You have provided a comprehensive list of these items, which will include the following:

1. Bolt handling tools (*e.g.*, spanners and sockets, hydraulic hoses and pumps/powerpacks, toolboxes, and bolt grippers);
2. Hand tools (*e.g.*, torque wrenches, sockets, screwdrivers, cordless drills, pliers, clippers);
3. Containers and bags (*e.g.*, cleaning products, lifting bags, lashing straps, waste bags);
4. Personal protection equipment (*e.g.*, gloves, glasses, safety vests, hard hats, first aid equipment, harnesses and fall-protection devices, carabiners and other light connecting devices, ropes, and rope bags);

5. Hand washing material, rags and cleaning clothes, bags for dirty rags, biohazard bags, and other single-use items; and
6. Food and drinks for the installation crew.

Finally, you have provided a list of approximately 28 “installation crewmembers” who will be transported to the Jack Up Vessel for the purpose of assembling and installing the WTG units. The installation crew will be transported to the Jack Up vessel from a U.S. port onboard either a coastwise-qualified vessel or a U.S.-registered, operated and crewed helicopter. Following this, the Jack Up Vessel will transport the Installation Crew between WTG sites. Upon arrival at each WTG site, the installation crew will board the WTG by a gangway connected to the transition piece to complete the installation of each WTG unit. In addition, the installation crew will perform pre-installation tasks onboard the Jack Up Vessel, including regularly inspecting and maintaining lifting equipment to be used in the WTG installation.

ISSUES

1. Whether the transportation of the WTG components by a coastwise-qualified tug boat and barge from a U.S. port to an anchored, non-coastwise-qualified Jack Up Vessel located on the U.S OCS violates the Jones Act, 46 U.S.C. § 55102?
2. Whether the installation of the subject wind turbine generators by the non-coastwise-qualified Jack Up Vessel on the OCS violates the Jones Act, 46 U.S.C. § 55102?
3. Whether transportation of certain tools and material between coastwise points by the non-coastwise-qualified Jack Up Vessel violates the Jones Act, 46 U.S.C. § 55102?
4. Whether the transportation of the installation crew between coastwise points by the non-coastwise-qualified Jack Up Vessel violates the Passenger Vessel Services Act, 46 U.S.C. § 55103?

LAW AND ANALYSIS

The coastwise law applicable to the transportation of merchandise, known as the Jones Act, is found at 46 U.S.C. § 55102,³ 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.

³ Formerly 46 U.S.C. App. § 883. *See* Pub. L. 109-304 (Oct. 6, 2006).

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. 33 CFR § 2.22(a)(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 are extended 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.⁴

(emphasis added).

Accordingly, the OCSLA, as amended in 2021, extends U.S. jurisdiction to devices attached to the seabed of the OCS for the purpose of producing non-mineral energy such as wind energy.

Issue One: Whether the Transportation of the WTG Components between points in the U.S. and the Jack Up Vessel on the OCS on the coastwise-qualified Tug and Barge Violates 46 U.S.C. § 55102

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.” It is clear that the WTG components and [] contemplated in the instant request are merchandise under 46 U.S.C. § 55102.

To determine if the proposed transportation occurs between coastwise points, we must examine the points at which the subject merchandise 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 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*.”

As outlined in the request, the coastwise-qualified Tug and Barge will lade the WTG components and [] at a U.S. port and unlade them at the Jack Up Vessel, which will be attached to the seabed of the OCS. 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

⁴ 43 U.S.C. § 1333(a)(1).

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. HQ 115217 (Dec. 7, 2000). Similarly, in the present matter, we find that the subject Jack Up Vessel would become a coastwise point when attached to the seabed of the OCS for the purpose of installing or constructing a structure to be used for the production of wind energy.

Based on the foregoing, this portion of the transaction involves the transportation of merchandise between one coastwise point (a U.S. port) and a second (the Jack Up Vessel secured to the seabed of the OCS). Nevertheless, the scenario presented would not be in violation of the Jones Act because the Tug and Barge will be coastwise-qualified vessels.

Issue Two: Whether the Installation of the Wind Turbines Generators by the non-coastwise-qualified Jack Up Vessel Violates 46 U.S.C. § 55102

CBP has previously held that the use of a non-coastwise-qualified crane vessel to lade and unlade cargo or to construct or dismantle a marine structure is not coastwise trade and does not violate the coastwise laws, provided any movement of merchandise is effected exclusively by the crane and not by any movement of the vessel, except for necessary movement which is incidental to a lifting operation while it is taking place. See, e.g., HQ 116111 (Jan. 30, 2004) (ruling no transportation occurs where a stationary crane barge moored in place by four anchors picks up boulders from a coastwise-qualified supply barge and places them on the seabed to create a breakwater); HQ 115940 (Apr. 17, 2003) (ruling that a Panamanian-flag crane barge would not violate the Jones Act in using its crane to lift erosion-protection boulders from one barge and place them onto the ocean floor).

In the present matter, we find that the proposed installation of the subject WTGs, as outlined above, does not violate the Jones Act. In the facts you present, the components for each WTG will be laden onboard a coastwise-qualified barge and transported to the Jack Up Vessel, which will be affixed to the seafloor via its legs. The Jack Up Vessel will then raise the WTG components to its deck and, using its crane, and unlade the WTG onto the pre-installed foundation. The Jack Up Vessel will remain stationary for the duration of this process. This scenario is analogous to that considered in HQ 116111 (Jan. 30, 2004), in which CBP ruled that a non-coastwise-qualified crane barge moored in a stationary position may lift boulders from a coastwise-qualified vessel and place them onto the seabed. As such, the movement of the crane as contemplated by the facts does not constitute transportation and therefore, is not coastwise trade within the meaning of 46 U.S.C. § 55102 and 19 CFR § 4.80b(a).

Issue Three: Whether Transportation of the Installation Tools and Material Violates 46 U.S.C. § 55102

Next, we consider whether the transportation of the tools and materials described in the FACTS above between coastwise points by the Jack Up vessel violates 46 U.S.C. § 55102.⁵

⁵ This section will not analyze whether [the “ ”] or the “waste skip” constitute merchandise. As noted above, these items will not be unloaded at multiple installation sites and will therefore not travel between two coastwise points.

Specifically, you state that the Tug and Barge will unlade the subject tools at the Jack Up Vessel; these tools will then be transported by the Jack Up Vessel and unladen at each WTG site (each a coastwise point) for use by installation crewmembers. As excerpted above, the Jones Act prohibits the coastwise transportation of “merchandise” by non-coastwise qualified vessels. Pursuant to 46 U.S.C. § 55102: “[m]erchandise includes (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and (2) valueless material.” As such, any cargo, regardless of value, is generally considered merchandise for the purpose of the Jones Act.

CBP has also held, however, that “vessel equipment” is not included within the general meaning of merchandise. “Vessel equipment” has been defined as portable articles, “necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on the board.” Treasury Decision 49815(4) (Mar. 13, 1939). Items considered “necessary and appropriate for the operation of the vessel” are those items that are integral to the function of the vessel and are carried by the vessel. This may include those items that aid in the installation and construction of offshore infrastructure. Whether such articles constitute vessel equipment is a fact-specific, case-by-case determination.

In the present matter, the Jack Up Vessel’s explicit function is to install the WTG units onto the seabed. In doing so, you have provided a comprehensive list of tools that will be unladen and used at the subject WTG sites, each of which is a coastwise point. The tools you described (*e.g.*, bolt handling tools and hand tools) will be used by the installation crew in physically installing and commissioning the subject WTG units. As such, these items are integral to the function of the vessel, which is to install and commission the subject WTG units. The remainder of the items (*e.g.*, containers and bags, personal protection equipment, food and drink, and hand washing materials) are necessary for the “comfort and safety” of the crewmembers performing the WTG installation. Accordingly, the tools and materials to be transported between WTG sites are vessel equipment and not “merchandise” under the Jones Act. As a result, no violation of 46 U.S.C. § 55102 exists if the subject materials outlined in the FACTS section are transported between, and used at, multiple installation sites.

Issue Four: Whether Transportation of the Installation Crew Violates 46 U.S.C. § 55103

The Passenger Vessel Services Act (“PVSA”), 46 U.S.C. § 55103, provides, in relevant part:

(a) In General. Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not transport passengers between ports or places 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.⁶

⁶ See 85 Fed. Reg. 36469 at 36471 (June 17, 2020) (updating penalties for 2020).

In the present case, the “installation crew” will be transported from the U.S. shore to the non-coastwise qualified Jack Up Vessel on the OCS aboard either a coastwise-qualified vessel or U.S.-registered helicopter. The installation crew will then travel onboard the Jack Up Vessel to each WTG site, disembarking by gangplank to perform installation and commissioning work on each WTG. The installation crew will also perform pre-installation tasks onboard the Jack Up Vessel, including regularly inspecting and maintaining the lifting equipment to be used in WTG installation. The ruling request states that the personnel fall into the following categories: supervisors, lifting operations crewmembers, and technical crew (*e.g.*, installation technicians, high voltage technicians). To the extent that the individuals will be engaged in any shipboard activities while traveling on the Jack Up Vessel between coastwise ports that would be “directly and substantially” related to the operation, navigation, or business of the vessel itself, as would be the case under the facts herein submitted, such individuals would not be considered to be passengers.⁷ Accordingly, we find that the proposed activities in this case are directly and substantially connected with the operation and business of the vessel, which is the installation of the subject WTGs. We therefore determine that the subject individuals are not “passengers” within the meaning of 46 U.S.C. § 55103 and 19 CFR 4.50(b).

HOLDING

1. The transportation of the subject WTG components onboard the coastwise-qualified Barge and towed by the coastwise-qualified Tug from a U.S. port to the Jack Up Vessel attached to the seabed of the OCS would not be in violation of 46 U.S.C. § 55102 because the transportation between coastwise points would be effected by coastwise-qualified vessels.
2. The installation of the WTG units by the Jack Up Vessel attached to the seabed of the OCS would not be in violation of 46 U.S.C. § 55102 because the foreign-flagged Jack Up vessel would remain completely stationary during the installation process.
3. The transportation of the subject installation tools and materials between WTG sites onboard the Jack Up Vessel would not be in violation of 46 U.S.C. § 55102 because such items, in this context, are not “merchandise.”
4. The transportation of the installation crew onboard the Jack Up Vessel between WTG installation sites attached to the seabed of the OCS would not be in violation of 46 U.S.C. § 55103 because they are directly and substantially related to the operation of the vessel.

Sincerely,

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