



HQ H311603

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CATEGORY: Carriers

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RE: Coastwise Transportation; Undersea Cable Laying; 46 U.S.C. § 55102; 46 U.S.C. § 55103; 46 U.S.C. § 55109; 19 C.F.R. § 4.80; 19 C.F.R. § 4.80a.

Dear Ms. Huggins Jones:

This letter is in response to your June 3, 2020 ruling request on behalf of your client Global Marine Systems Limited (“GMSL”) regarding whether certain activities related to the installation of electric cable by a non-coastwise qualified vessel in U.S. territorial waters, as described below, would violate the coastwise laws. Our decision follows.

FACTS

The following facts are from your ruling request and supporting information received in our office on June 30, 2020, July 9, 2020, July 31, 2020, August 7, 2020, and August 14, 2020. Your client has requested U.S. Customs and Border Protection (“CBP”) determine whether certain operations related to the installation of electrical cable in U.S. territorial waters off the coast of Rhode Island would violate the Jones Act, 46 U.S.C. § 55102, and the Dredging Act of 1906 (the “Dredging Statute”), 46 U.S.C. § 55109.

You state the proposed operation is intended to replace a section of submarine power cable installed to service the Block Island Wind Farm. Specifically, a section of the original cable has become unburied and now requires replacement with a new cable lay. As such, GMSL has entered into a contract to remove a portion of the existing cable and install a new section of submarine power cable to replace the current landfall at the site. GMSL proposes to use the non-coastwise-qualified M/V GLOBAL SYMPHONY (the “vessel”), a dynamic positioned, cable installation and repair vessel, to perform the operation. The vessel will be laden with cable

segments in Portland, United Kingdom and navigate to U.S. territorial waters off of Block Island, Rhode Island. You have provided the exact coordinates for the cable lay operation, including the cable's landfall and connection points, both of which are located within U.S. territorial waters.

The project will occur in roughly two stages, which may be performed in sequence or simultaneously depending upon weather and sea conditions. These stages are roughly broken into the decommissioning and removal of the existing cable, and the placement and connection of a new cable segment.

Your request describes the first phase as involving the “decommissioning of existing cable.” After arriving at the project site, the vessel will deploy a work-class remotely-operated vehicle (“WROV”). (You state that the WROVs utilized by the vessel are “free-swimming with tracks available, if required.”) Initially, the WROV will conduct survey work to determine the location of the cable to be decommissioned. Next, the WROV will cut and collect the spent cable, removing the cable to the vessel for transportation to and disposal in the United Kingdom. The WROV will not place any new material on the seabed as part of the decommissioning activity.

Your request describes the second phase as the “cable lay” stage, in which the vessel will lay a replacement cable segment and connect it to the existing cable system. To begin with, the vessel will perform a “pull-in operation” to attach the new cable to a landfall point. The landfall point will be prepared prior to the operation by a separate contractor who will install a horizontal directional drilling (“HDD”) tunnel leading from the seabed to a land-sea manhole located onshore. This HDD tunnel will be fitted with a messenger rope and sealed with a water-tight cap. Once the HDD tunnel construction is complete, GMSL's U.S. subcontractor will attach a pull wire to a messenger rope inside the HDD tunnel. The vessel will then position itself at the HDD tunnel site and deploy the WROV. The WROV will remove the HDD tunnel's water-tight cap and drag the pull wire to the vessel; the pull wire will then be connected to the end of the replacement cable and pulled back towards the land-sea manhole via a winch deployed at the landfall point.

Once pull-in operations are complete, the vessel will pay out the cable on the seabed while moving away from shore and towards the connection site. In doing so, the cable, which will be stored on the vessel's deck in a rotating cable tank, will be paid out via a cable tensioner. The far end of the cable will then be attached to the pre-existing submarine cable. The two cables will be attached via a joint, which will be attached to the new cable onboard the vessel and paid out to the seabed with the remainder of the cable. You state that the cable joint will be housed within a corrosion-resistant casing and will employ compression ferrules for conduction connections, as well as a combination of tape and heat shrink for insulation reinstatement. After the cable is laid, the vessel will also deploy a trenching system to bury the subject cable, which will apply low ground pressure and jet plough technology to cover the newly laid cable.

Finally, although the majority of personnel necessary to support the project will originate in the United Kingdom and will remain on the vessel throughout the subject operation, you state that a limited number of personnel will join the vessel in the United States. These individuals will board a U.S. coastwise-qualified vessel at a U.S. port and transit to the project site, where

they will embark the vessel. After the project is completed, the vessel will return to the same geographic point at which the individuals boarded the vessel. The individuals will then disembark onto a coastwise-endorsed vessel, which will return them to the same U.S. port from which they originated.

You have clarified that the following individuals will embark the vessel in U.S. territorial waters:

1. Project Developer's Client Installation Manager: This individual is employed by the project developer and will have overall technical responsibility for the project. The individual will observe the project to ensure that GMSL's activities comply with the project developer's technical requirements and specifications.
2. Project Developer's Project Manager: This individual is employed by the project developer and will have overall responsibility for the commercial aspects of the project. The individual will observe the project to ensure that GMSL's activities comply with the project's commercial and contractual requirements.
3. Project Manager's Permit and Consents Manager: This individual is employed by the project developer and will have overall responsibility to ensure the project complies with all relevant environmental and protected species requirements. This individual will conduct Protected Species Observer ("PSO") training for the vessel's crew.

ISSUES

1. Whether the subject cable laying operation by the non-coastwise-qualified vessel violates the Jones Act, 46 U.S.C. § 55102?
2. Whether the subject cable burial operations by the non-coastwise-qualified vessel violates the Dredging Statute, 46 U.S.C. § 55109?
3. Whether the subject transportation of individuals onboard the non-coastwise-qualified vessel violates the Passenger Vessel Services Act, 46 U.S.C. § 55103?

LAW AND ANALYSIS

Generally, the coastwise laws prohibit the transportation of passengers or 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."

Issue One: Whether the Cable Laying Operation Violates 46 U.S.C. § 55102

First, we determine whether the proposed decommissioning and cable laying operations violate the Jones Act, 46 U.S.C. § 55102. 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.¹

The coastwise law applicable to the transportation of merchandise, the Jones Act, is found at 46 U.S.C. § 55102,² 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.

Pursuant to 19 U.S.C. § 1401(c), the word “merchandise” is defined as “goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited, and monetary instruments as defined in section 5312 of Title 31.” For purposes of the Jones Act, merchandise also includes “valueless material.” 46 U.S.C. § 55102(a)(2). The CBP Regulations promulgated under the authority of 46 U.S.C. § 55102 provide that a coastwise transportation of merchandise takes place when merchandise laden at a coastwise point is unladen at another coastwise point, regardless of origin or ultimate destination. 19 CFR § 4.80b(a).

First, we find that the cable decommissioning and recovery portion of the operation does not violate the Jones Act. As noted above, “merchandise” within the meaning of the Jones Act includes “valueless material.” And CBP has previously ruled that out-of-service cable resulting from a “cable clearance operation” constitutes valueless material and therefore falls within the definition of “merchandise” for purposes of 46 U.S.C. § 55102. *E.g.*, HQ 113927 (May 9, 1997). CBP has also ruled, however, that the retrieval of out-of-service cable and the transportation of that cable to a port or place outside the United States does not involve the transportation of merchandise between two points embraced by the coastwise laws. *Id.* As such, the proposed lading of out-of-service cable from the seabed within U.S. territorial waters and subsequent unloading at a port in the United Kingdom does not constitute transportation in violation of the Jones Act.

Second, we find that the proposed cable laying operations do not constitute “transportation” within the meaning of the Jones Act. CBP has long held that the sole use of a vessel in laying pipe or cable is not considered a use in the coastwise trade of the United States,

¹ 33 U.S.C. § 1362(8).

² Formerly 46 U.S.C. App. § 883. *See* Pub. L. 109-304 (Oct. 6, 2006).

even when the pipe or cable is laid between coastwise points. *See, e.g.*, HQ 115431 (Sept. 4, 2001), HQ 115333 (Apr. 27, 2001). The fact that the material is not landed as cargo but is only paid out in the course of the laying operation makes such operation permissible. *Id.* Further, since the use of a vessel in pipe or cable laying is not a use in the coastwise trade, a non-coastwise-qualified vessel may carry pipe or cable which is laid between such points. In line with these rulings, your request outlines a scenario in which the subject cable will be paid out from a rotating cable tank and deposited on the seabed with a cable tensioner. As such, the proposed use of the non-coastwise-qualified vessel to lay cable between coastwise points is not in violation of 46 U.S.C. § 55102.

Issue Two: Whether the Cable Burial Operation Violates 46 U.S.C. § 55109

Next, we determine whether the proposed cable burial operation is in violation of the Dredging Statute, 46 U.S.C. § 55109. Pursuant to 46 U.S.C. § 55109, only coastwise-qualified vessels may engage in dredging in the navigable waters of the United States, providing, in pertinent part:

[A] vessel may engage in dredging in the navigable waters of the United States only if—

- (1) the vessel is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade;
- (2) the charterer, if any, is a citizen of the United States for purposes of engaging in the coastwise trade; and
- (3) the 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

Dredging is defined as “excavation” by any means:

The word “excavate” is derived from the Latin word meaning to hollow out. Its common, plain and ordinary meaning is to make a cavity or hole in, to dig out, hollow out, to remove soil by digging, scooping out or other means. The common plain and ordinary meaning of the word “dredging” is the removal of soil from the bottom waters by suction or scooping or other means.³

CBP has long-held that the term “dredging” within the meaning of 46 U.S.C. § 55109, is “the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material.” *See* HQ 103692 (Dec. 28, 1978 published as Customs Service Decision (C.S.D.) 79-331); HQ 109108 (Nov.13, 1987); HQ 109910 (Jan. 26, 1989 published as C.S.D. 89-64). In contrast, CBP has also held that the use by cable-laying vessels of cable-burial devices employing a jetting action resulting in the emulsification of the seabed surrounding the cable does not constitute an engagement in “dredging.” *See, e.g.*, HQ 115646 (Apr. 12, 2002).

³ *Gar-Con Development v. State*, 468 So.2d 413 (Fla. App. 1 Dist. 1985); The International Maritime Dictionary defines a dredge as, “[a] vessel or floating structure equipped with excavating machinery, employed in deepening channels and harbors, and removing submarine obstructions such as shoals and bars.” De Kerchove, International Maritime Dictionary, Second Edition (1961), p. 241.

In the present matter, you have provided evidence that the trenching system deployed by the vessel will fluidize the seabed by use of pressurized water jets without the use a mechanical plow or cutter. This activity, as ruled in HQ 115646 (Apr. 12, 2002), is therefore not within the ambit of 46 U.S.C. § 55109. Accordingly, the proposed operation does not constitute dredging for the purposes of the Dredging Statute.

Issue Three: Whether Transportation of the Individuals Onboard the Vessel Violates 46 U.S.C. § 55103

Finally, we consider whether the transportation of the individuals described in the FACTS above constitutes a violation of the Passenger Vessel Services Act (“PVSA”), 46 U.S.C. § 55103.

As with the Jones Act, the PVSA applies 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.⁴ The PVSA 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.

Furthermore, 19 CFR § 4.80(b)(2) provides:

The penalty imposed for the unlawful transportation of passengers between coastwise points is \$300 for each passenger so transported and landed on or before November 2, 2015, and \$812 for each passenger so transported and landed after November 2, 2015 (46 U.S.C. § 55103, as adjusted by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015).⁵

In the present matter, you state the subject individuals will be transported via coastwise-qualified vessel to the cable laying vessel’s location in U.S. territorial waters, a coastwise point. The individuals will then be transported onboard the vessel as it conducts cable laying operations in U.S. territorial waters before returning to the same geographic point at which they boarded the vessel for disembarkation onto a coastwise-qualified vessel. CBP has previously ruled that the carriage of passengers entirely within U.S. territorial waters, even though the passengers disembark at their initial point of embarkation and the vessel touches no other coastwise point, is considered coastwise trade subject to the PVSA. *See, e.g.*, HQ H014892 (Aug. 17, 2007), HQ

⁴ 33 CFR § 2.22(a)(2)(2013).

⁵ *See* 85 Fed. Reg. 36469 at 36471 (June 17, 2020) (updating penalties for 2020).

113158 (July 21, 1994). As a result, we determine that this matter does involve coastwise transportation of individuals as contemplated in the PVSA.

In accordance with previous CBP rulings, workmen, or technicians transported between coastwise points are not classified as “passengers” within the meaning of 46 U.S.C. § 55103 and 19 CFR § 4.50(b) if they are required to be onboard to contribute to the accomplishment of the operation or navigation of the vessel during the voyage or are onboard because of a necessary vessel ownership or business interest during the voyage. *See, e.g.*, HQ H183157 (Sept. 2, 2011), HQ H168214 (May 26, 2011). In HQ 115487 (Nov. 20 2001), furthermore, CBP ruled that “contract management and field engineer personnel” onboard a vessel to “monitor the laying of...[u]mbilical and [m]ethanol lines” did not constitute “passengers” under the Jones Act.

In the instant case, you state that the individuals will join the vessel to supervise the installation operations and ensure they comply with various technical, contractual, or environmental requirements. We find that the proposed activities described in your request would be directly and substantially connected with the operation of the vessel and will be onboard because of a necessary business interest. 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 proposed cable laying operations by a non-coastwise-qualified vessel do not constitute “transportation” within the meaning of the Jones Act, 46 U.S.C. § 55102. Therefore, the proposed operation is not in violation of the Jones Act.
2. The proposed use of the trenching system to bury the underwater cable does not constitute “dredging” within the meaning of the Dredging Statute, 46 U.S.C. § 55109. Therefore, the proposed trenching operation is not in violation of the Dredging Statute.
3. The subject individuals are not “passengers” within the meaning of the Passenger Vessel Services Act, 46 U.S.C. § 55103. Therefore, the coastwise transportation of such individuals is not in violation of the PVSA.

Sincerely,

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