



HQ H274002

April 13, 2016

VES-3-18-OT-RR:BSTC:CCR H274002 RMC

CATEGORY: Carriers

Brian P. Devine
Norton Rose Fulbright US LLP
666 Fifth Avenue, 31st Floor
New York, NY 10103-3198

RE: Applicability of U.S. Coastwise Laws to a Proposed Floating Power Plant

Dear Mr. Devine:

This is in response to your letter dated February 29, 2016, in which you request a ruling under 19 C.F.R. § 177 on behalf of your client [] as to whether a proposed floating electrical power generation plant would be subject to the U.S. coastwise laws.¹

FACTS:

You describe the proposed power plant as “a purpose-built floating power generation barge designed to produce and deliver electric power to consumers via a shore-based electrical transmission or distribution system.” The power plant will receive [] fuel through a pipe connected to the shore and use that fuel to generate electric power. That electric power will then be transmitted through hard-wired cables to onshore facility where it will be distributed through the onshore electricity grid or to land-based structures. In addition to the fuel pipe and hard-wired electricity transmission cables, an access bridge for personnel and equipment and a water pipe will connect the power plant to the shore.

¹ In your request, you asked for confidential treatment of the name of your client and certain sensitive technical and financial details about the proposed power generation barge. If this office receives a request Freedom of Information Act 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.

The power plant will be “indefinitely moored to the shore” through permanent mooring structures that will vary depending on the mooring location. As the power plant will have no motor or other way to propel itself, it will need to be towed into place by a tugboat or similar vessel. Once in place, you expect that the power plant will be relocated “once every 15 to 20 years, if ever” because of the “high costs of obtaining permits and installing the plant-to-shore infrastructure.” Nonetheless, you state that the power plant might be relocated for shorter periods on rare occasion.

[] In addition to the electricity-generation equipment, the power plant will also be equipped with an office, a control room, an employee locker room, a machine shop, and a small storage area for spare parts.

Like a traditional vessel, the power plant will contain ballast tanks for stability. It will also have a raked hull and have the necessary attachment points to facilitate towing.

Unlike a traditional vessel, however, the power plant will not be manned by a navigation or marine engineering crew. Instead, the power plant will be operated by land-based workers who will rotate on and off the power plant in standard work shifts. The power plant thus will not have any residential accommodations that would allow workers to stay aboard overnight. Moreover, although the power plant will have ballast tanks for stability, it will not have navigational features such as navigational lights, positioning equipment, radar, marine radio communication equipment, propellers, or a rudder. It also will not be fitted with water-tight portholes, but instead with windows typical of on-shore industrial facilities. Lastly, the mountings for the power plant’s engines will be spring packages that are suitable for onshore facilities but potentially unsuitable for the roll, pitch, and other motions that vessels encounter on the water.

In sum, you describe the power plant as “nothing more than a floating electric power generation facility.”

ISSUE:

Whether the proposed power plant is a “vessel” such that it will be subject to the Jones Act.

LAW AND ANALYSIS:

The Jones Act, at 46 U.S.C. § 55102, states that “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 was built in the United States, documented under the laws of the United States, and owed by United States citizens. The only issue in this case is whether the proposed power plant is a “vessel” for purposes of the Jones Act.

Although the Jones Act does not define the term “vessel,” the Rules of Construction Act at provides a definition of “vessel” for all federal laws. *See* 1 U.S.C. § 3; *Stewart v. Dutra Constr.*, 543

U.S. 481, 490 (2005). Under 1 U.S.C. § 3, “[t]he word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” The proposed power plant will thus be considered a “vessel” for purposes of the Jones Act if it is either “actually used” or “capable of being used” as a means of transportation over water.

The Supreme Court has clarified that a watercraft need not be primarily used for maritime transportation in order to qualify as a vessel under 1 U.S.C. § 3. To the contrary, the statutory phrase “capable of being used . . . as a means of transportation over water” merely requires a “practical,” rather than “theoretical,” capability of maritime transport. For example, in *Stewart v. Dutra Constr.*, 543 U.S. 481, 490 (2005), the Court held that a dredge that was capable of limited self-propulsion through manipulation of its anchors and cables was a “vessel.” Although the primary purpose of the dredge was to dig a trench underneath Boston Harbor for the Ted Williams tunnel, it moved itself and the workers aboard it every two hours by manipulating its anchors and cables. The dredge also had “a captain and crew, navigational lights, ballast tanks, and a crew dining area.” *Id.* at 484. The dredge was thus “not only ‘capable of being used’ to transport equipment and workers over water—it *was* used to transport those things.” *Id.* at 495.

The Court distinguished the dredge in *Stewart* from watercraft that had been permanently moored or that were “otherwise rendered practically incapable of maritime transport.” *Id.* at 494. For example, in *Cope v. Valette Dry Dock Co.*, 119 U.S. 625 (1887), the Court held that a floating dry-dock that had been moored in the same place for 20 years was not a “vessel.” The floating dry-dock was thus a “‘fixed structure’ that had been ‘permanently moored,’ rather than a vessel that had been temporarily anchored.” *Cope*, 119 U.S. at 627. Similarly, in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. (1926), the Court held that a wharfboat that was used as an office, warehouse, and wharf was not a “vessel.” The wharfboat’s connection to the shore “evidence[d] a permanent location” through four or five cables securing it in place and connections with the city’s water, electric light, and telephone systems. *Evansville*, 271 U.S. at 22.

Unlike the dredge in *Stewart*, the watercraft in both *Cope* and *Evansville* were not practically capable of transporting people, freight or cargo from place to place. Neither the dry-dock in *Cope* nor the wharfboat in *Evansville* moved “from place to place” or was “used to carry freight from one place to another.” *Evansville*, 271 U.S. at 22. “Simply put, a watercraft is not ‘capable of being used’ for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.” *Stewart*, 543 U.S. at 495.

While Supreme Court precedent made it clear that self-propelled watercraft that actually transport people and things over water are vessels, and that permanently moored structures are not, the Court recently offered additional guidance for “borderline cases where ‘capacity’ to transport over water is in doubt.” *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013). In *Lozman*, the Court held that a “a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the [structure’s] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.” *Id.* at 741. Under this test, the owner’s subjective intent to use the structure for maritime transport is irrelevant. The analysis

focuses instead on the “objective manifestations” of the structure’s “purpose,” namely, the “physical attributes and behavior of the structure.” *Id.* at 744-45.

The Court in *Lozman* applied this reasonable-observer test to a “house-like plywood structure with French doors on three sides” and concluded that it was not a “vessel” under 1 U.S.C. § 3 because:

But for the fact that it floats, nothing about Lozman’s home suggests that it was designed to any practical degree to transport persons or things over water. It had no rudder or other steering mechanism. Its hull was unraked, and it had a rectangular bottom 10 inches below the water. It had no special capacity to generate or store electricity but could obtain that utility only through ongoing connections with the land. Its small rooms looked like ordinary nonmaritime living quarters. And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows.

Although lack of self-propulsion is not dispositive, it may be a relevant physical characteristic. And Lozman’s home differs significantly from an ordinary houseboat in that it has no ability to propel itself. Lozman’s home was able to travel over water only by being towed. Prior to its arrest, that home’s travel by tow over water took place on only four occasions over a period of seven years. And when the home was towed a significant distance in 2006, the towing company had a second boat follow behind to prevent the home from swinging dangerously from side to side.

The home has no other feature that might suggest a design to transport over water anything other than its own furnishings and related personal effects. In a word, we can find nothing about the home that could lead a reasonable observer to consider it designed to a practical degree for “transportation on water.”

Id. at 741.

Here, counsel’s suggestion that the power plant will be “indefinitely moored to the shore” through permanent mooring structures and relocated “once every 15 to 20 years, if ever” suggests that it will be permanently moored and thus not considered a vessel for purposes of the coastwise laws. *See Stewart*, 543 U.S. at 495. So too do the power plant’s connections with the land. Similar to the *Evansville* wharfboat’s connection to land through cables, a water pipe, electrical wires, and telephone wires, the power plant’s water pipe, bridge, and electrical cables evidence a “permanent location.” *See Evansville*, 271 U.S. at 22.

At the same time, counsel concedes that that the power plant might be relocated for shorter periods “on rare occasion” even though it would be expensive due to the “high costs of obtaining

permits and installing the plant-to-shore infrastructure.” So although it is possible that the power plant could be “permanently moored,” it is also possible that it could be moved from place to place such that it does not have a permanent location. Without knowing how the power plant is actually used, we cannot determine whether it is “permanently moored” for purposes of vessel status.

Even if the power plant is not “permanently moored,” however, we believe that “a reasonable observer, looking to the [structure's] physical characteristics and activities,” would not find that the power plant is “designed to a practical degree for carrying people or things over water.” See *Lozman*, 133 S. Ct. at 741. Thus, applying the standard in *Lozman*, the power plant will not be a “vessel” for purposes of the Jones Act.

To be sure, there is some evidence that the proposed power plant would have certain attributes of a vessel. It will float on water and will be capable of being towed into place as a barge would be. It will also have ballast tanks for stability. And it will have a raked hull that appears similar to those of typical ships.

Despite those attributes, however, other characteristics of the power plant would prevent a reasonable observer from concluding that the power plant is “designed to a practical degree for carrying people or things over water.” *Lozman*, 133 S. Ct. at 741. For one, the power plant will not be fitted with much of the equipment that a reasonable observer would expect a vessel to have. Most importantly, even though “lack of self-propulsion is not dispositive,” *id.*, the power plant will lack a motor or other way of propelling itself. *Contra Stewart*, 543 U.S. at 484. Like the floating home at issue at issue in *Lozman*, the power plant will also lack a rudder or steering mechanism and navigational equipment such as lights, positioning equipment, radar, or marine radio communication systems. Furthermore, the power plant has no dedicated areas to store cargo or overnight accommodations for crew. In fact, the power plant will not have a “crew” at all and will be operated by land-based workers who will rotate on and off the power plant in standard work shifts.

Besides lacking much of the equipment that a reasonable observer would expect a structure “designed to a practical degree for carrying people or things over water” to have, *Lozman*, 133 S. Ct. at 741, the power plant would be equipped with many features more typical of land-based structures. For example, instead of watertight portholes, the power plant will be fitted with windows typical of onshore industrial facilities. Similarly, the mountings for the power plant’s engines will be spring packages that are more suitable for onshore facilities and potentially unsuitable for the roll, pitch, and other motions that vessels encounter on the water. In short, we believe that a “reasonable observer” would agree that the proposed structure is “nothing more than a floating electric power generation facility.”

HOLDING:

The power plant is not a “vessel” as defined by 1 U.S.C. § 3. It therefore will not be subject to the Jones Act.

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