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DEPARTMENT OF TRANSPORTATION

Maritime Administration

Policy Clarification Concerning Designation of Adjacent Coastal States for Deepwater Port License Applications

AGENCY: Maritime Administration, Department of Transportation

ACTION: Notice of policy clarification.

SUMMARY: The Maritime Administration (“MarAd”) is providing this notice to clarify its policy on the unit of distance measurement to apply when designating Adjacent Coastal States (“ACS”) under the agency’s Deepwater Ports licensing program.

FOR FURTHER INFORMATION CONTACT: Ms. Yvette Fields, Director of the Office of Deepwater Ports and Offshore Activity, Maritime Administration, Room W21-309, 1200 New Jersey Ave., S.E., Washington, DC 20590; Yvette.Fields@dot.gov; phone (202) 366-0926.

SUPPLEMENTARY INFORMATION: MarAd has reviewed policies and practices with regard to the designation of ACS in the deepwater port application licensing process. In past applications and public notices, MarAd found inconsistency in the use of units of distance to describe the distance between proposed deepwater ports and ACS.

Under 33 U.S.C. 1508(a)(1), when issuing a Notice of Application, MarAd, as delegated by the Secretary of Transportation, shall designate as an ACS “any coastal State which (A) would be directly connected by pipeline to a deepwater port as proposed in an application, or (B)

would be located within 15 miles of any such proposed deepwater port.” In general, in its publications, MarAd adopted the units of measurement provided by the deepwater port license applicants in their descriptions of proposed deepwater ports. At different times, MarAd used statute miles (approximately 0.87 nautical miles) or nautical miles (approximately 1.15 statute miles) to describe the location of deepwater ports in its publications.

Due to the configuration and physical location of proposed deepwater port projects in prior applications, the use of either statute or nautical miles did not impact the designation of ACS, since those projects were either connected to the ACS directly by pipeline, or were within both 15 statute and 15 nautical miles from those states. As a result, MarAd was not required to clarify which unit of measurement is the appropriate distance standard to apply when designating an ACS in Notices of Application. However, for proposed port locations where the chosen distance standard is significant to the designation of ACS (applications where the port location falls beyond 15 statute miles but within 15 nautical miles of a potential ACS), clarification of the distance standard is necessary. For the sake of clarity in such instances, MarAd is issuing this Final Notice of Policy Clarification that nautical miles shall be applied when designating ACS under 33 U.S.C. 1508(a)(1).

The Deepwater Port Act (“DWPA” or the “Act”) (33 U.S.C. 1501 *et seq.*) authorizes the Secretary of Transportation to issue licenses for the construction and operation of deepwater ports.¹ A deepwater port is defined in Section 1502 of the Act as “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

¹ The Secretary of Transportation delegated to the Maritime Administrator the authority to “issue, transfer, amend, or reinstate a license for the construction and operation of a deepwater port.” 49 CFR 1.93(h)(1).

transportation, storage, or further handling of oil or natural gas for transportation to any State....”² Deepwater ports include “all components and equipment, including pipelines...to the extent they are located seaward of the high water mark.”³ The DWPA provides for a mandatory designation of State(s) as “Adjacent Coastal State(s)” (“ACS”) if certain criteria are met. Those criteria are: (1) if the ACS would be “directly connected by pipeline to a deepwater port,” or (2) “would be located within 15 miles of any such proposed deepwater port.”⁴ The DWPA does not specify whether the 15 mile geographical limit for the automatic designation of an ACS should be measured in statute miles⁵ or nautical miles.⁶

Congress did not specify how the 15 mile distance should be measured. Nevertheless, an examination of the entire statute and legislative history leads to the conclusion that Congress intended that for these purposes, where units of distance measurement are not specified as statute miles or nautical miles, those units of measurement should be read in terms of generally accepted nautical standards (i.e., nautical miles).

In enacting the DWPA, Congress declared its purpose to be, among other things, to: “(1) authorize and regulate the location, ownership, construction, and operation of deepwater ports in waters beyond the territorial limits of the United States; [and] (2) provide for the protection of the marine and coastal environment to prevent or minimize any adverse impact which might occur as a consequence of the development of such ports.”⁷ The Act defines the term “coastal environment” in relevant part as: “the navigable waters (including the lands therein and

² 33 U.S.C. 1502(9)(A).

³ *Id.* Sec. 1502(9)(B).

⁴ *Id.* Sec. 1502(1)(A -B). The Act also provides for a permissive designation of an ACS if, upon petition and provision of evidence, the Maritime Administrator determines that “there is a risk of damage to the coastal environment of such State equal to or greater than the risk posed to a State directly connected by pipeline to the proposed deepwater port.” 33 U.S.C. 1508(a)(2).

⁵ One statute mile equals 5,280 feet.

⁶ One nautical mile equals 6,076 feet.

⁷ 33 U.S.C. 1501(a)(1-2).

thereunder) and the adjacent shorelines (including waters therein and thereunder).⁸ The term “marine environment” is defined as including: “the coastal environment, waters of the contiguous zone, and waters of the high seas”.⁹

The DWPA does not provide further definition of the terms “territorial limits”, “navigable waters (including the lands therein and thereunder)”, or “contiguous zone.” However, these jurisdictional boundaries have well accepted meanings both in international law and United States law, and help clarify how the 15 mile jurisdictional area for automatic designation of an ACS should be measured. Article 1 of the Convention on the Territorial Sea and the Contiguous Zone establishes that a Coastal State’s sovereignty extends “beyond its land territory and internal waters, to a belt of sea adjacent to its coast, described as a territorial sea.”¹⁰ Article 24 of the treaty also establishes that a Coastal State may exercise certain authorities in a “zone of the high seas contiguous to its territorial sea...”¹¹ For purposes of the Treaty, both the Territorial Sea and the Contiguous Zone are measured from the “baseline”, normally the mean low water line along the coast of the United States. The United Nations Convention on the Law of the Sea (“UNCLOS”) further clarifies the breadth of a Coastal State’s jurisdiction in its Territorial Sea and Contiguous Zone by establishing a seaward limit of “12 nautical miles” and “24 nautical miles” respectively.¹² Although the United States has not ratified UNCLOS, it has adopted the jurisdictional areas referenced in UNCLOS. In establishing its territorial limits, the

⁸ *Id.* Sec. 1502(5).

⁹ *Id.* Sec. 1502(12).

¹⁰ 15 U.S.T. 1606 (U.S. Treaty). This treaty was ratified by the United States on March 24, 1961, and entered into force on September 10, 1964.

¹¹ *Id.*

¹² United Nations Convention on the Law of the Sea, Art. 2-3, Art. 33, Dec. 10, 1982, 1833 U.N.T.S. 397.

U.S. has uniformly applied the international standard and used nautical miles as the unit of measurement.¹³

The Submerged Lands Act (“SLA”) was enacted in 1953.¹⁴ Its purpose was to “confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.”¹⁵ The SLA defines the term “boundaries” in relevant part to include: “the seaward boundaries of a State...but in no event shall the term ‘boundaries’ be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.”¹⁶ The SLA also provides that “[t]he seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line....”¹⁷ In the case of *United States v. California*¹⁸, the Supreme Court considered the extent of submerged lands granted to the State of California by the SLA. After reviewing the SLA and its legislative history, the court concluded that the SLA “effectively grants each State on the Pacific coast all submerged lands shoreward of a line three geographical miles from its coast line....”¹⁹ The Court further explained that “one English, statute, or land mile equals approximately 0.87 geographical, marine, or nautical mile. The

¹³ See, e.g., Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988)(“The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.”)

¹⁴ 67 Stat. 29.

¹⁵ *Id.*

¹⁶ 43 U.S.C. 1301(b).

¹⁷ *Id.* § 1312.

¹⁸ *U.S. v. California*, 381 U.S. 139(1965).

¹⁹ 381 U.S.C. at 148.

conventional ‘3-mile limit’ under international law refers to three geographical miles, or approximately 3.45 land miles.”²⁰

In defining the term “coastal environment”, the DWPA explicitly refers to “navigable waters (including the lands therein and thereunder).”²¹ This definition is similar to what is found in the SLA’s statement of purpose (“lands beneath navigable waters within State boundaries”²²). As noted above, the SLA confers upon States possession of title to, and ownership of the “lands beneath navigable waters within [their] boundaries,”²³ and applies geographical (nautical) miles for that purpose.

The legislative history of the DWPA reveals that Congress viewed ACS status as a jurisdictional issue. For example, in the Conference Report to the DWPA, the State’s role in approving a deepwater port is discussed in terms of the three-mile limit which is measured in nautical miles. Congress recognized that “under the Submerged Lands Act..., the States have either exclusive or concurrent authority with the Federal government over most activities within the 3-mile limit,”²⁴ which is measured in geographical (nautical) miles. Moreover, the Senate Report noted, a coastal State’s jurisdiction would normally end at the State’s three-nautical mile seaward boundary and the State would have no authority over offshore activity beyond that point.

Consistent with Congress’ view of ACS status as a jurisdictional issue, the use of nautical miles to determine ACS status allows for an extension of the State’s jurisdiction to be measured consistently with the measures of jurisdiction required by law. Absent this interpretation, a

²⁰ *Id.* at Fn. 8.

²¹ *See supra* Fn. 16.

²² 67 Stat. 29.

²³ *Id.*

²⁴ 1974 U.S.C.C.A.N. 7529, 7538.

State's jurisdiction that is measured in nautical miles would then subsequently be extended by Congress under a different unit of measurement.

In addition to the legislative history, the regulatory history of the Deepwater Ports program provides further support for interpreting the DWPA to apply nautical miles to ACS designations. The original Final Rule in 33 CFR part 148 published on November 10, 1975, defined mile for the purposes of the regulations as a nautical mile.²⁵ Although the definition for "mile" was subsequently removed in a May 20, 2003 Notice of Proposed Rulemaking and did not appear in the Final Rule published on September 29, 2006, 33 CFR part 2 indicates that nautical miles are the appropriate units of measurement to be employed for determining United States Coast Guard jurisdictional definitions where such jurisdictional definitions are not otherwise provided.²⁶

Discussion of Comments

MarAd published a Notice of Proposed Policy Clarification on Tuesday, March 5, 2013 (78 FR 14411). Interested persons were invited to submit comments on the proposed policy clarification by April 4, 2013. MarAd received one comment. The comment and MarAd's response is set forth in the following paragraph.

Clean Ocean Action, a coalition of diverse groups interested in improving the water quality of the New Jersey and New York coastal marine environment offered their support of the agency's analysis stating,

²⁵ 40 Fed. Reg. 52554 (Nov. 10, 1975).

²⁶ See 33 CFR 2.1(a) ("The purpose of this part is to define terms the Coast Guard uses in regulations, policies, and procedures, to determine whether it has jurisdiction on certain waters where specific jurisdictional definitions are not otherwise provided.")

Clearly, the MARAD analysis of the Congressional Record, international law, and related domestic U.S. law properly led to the conclusion that “miles”, for the purposes of Deepwater Ports, means nautical miles.

MarAd values Clean Ocean Action’s input.

Accordingly, as a result of its interpretation of the DWPA, its legislative history, and implementing regulations, MarAd will apply nautical miles when designating ACS in future Notices of Application under 33 U.S.C. 1508(a)(1).

(Authority: 33 U.S.C. 1501, et seq.; 49 CFR 1.93(h)(1))

Dated: April 24, 2013.

By Order of the Maritime Administrator:

Julie Agarwal

Secretary, Maritime Administration.

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