EDITORIAL

What the "Jones Act" Means to Dredging in America

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The Jones Act, so named due to "the law of inertia," is a bad word for coastal engineers, planners and administrators in the field of dredging of navigation channels, maintenance of coastal inlets and improvement and maintenance of beaches and shores in the United States.

This brief commentary discusses the background for the Jones Act, why it was established, how it has been operated, and its ill effects on the performance of the American dredging industry, including its price levels, compared to countries in the Western World outside the United States.

Some technical improvements seem to be in sight at this time. They assume the introduction of some new and better equipment together with the establishment of a competitive market in the dredging industry.

THE HISTORIC BACKGROUND FOR THE "JONES ACT"

The immediate following sections are a result of discussions with the U.S. Customs Service under the Department of Treasury (1992). Certain paragraphs are phrased directly from correspondence (U.S. Department of the Interior, U.S. Customs Service, 1992).

"Section 1 of the Act of May 24, 1906 (34 Stat. 204; 46 U.S.C. App. 292), provides that, "a foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States unless documented as a vessel of the United States."

"In our interpretation of 46 U.S.C. App. 292, we and our predecessor in the administration of the navigation laws, the Bureau of Marine Navigation, have consistently held that, under 46 U.S.C. App. 292, a foreign-built dredge (except those dredges named in section 2 of the Act of May 28, 1960; see below) may not engage in dredging in the United States whether or not documented as a vessel of the United States. This is so because of the historical background and legislative history of the Act of May 28, 1906. The provision was enacted as a result of controversy which arose over the use of "foreign-built dredges" to repair damage done by a hurricane at Galveston, Texas, in 1900. At the time of the enactment of the provision, foreign-built vessels could not be documented in the United States, unless captured in war by citizens of the United States and lawfully condemned as prize or adjudged to be forfeited for a breach of the laws of the United States (section 4132, Revised Statutes). Thus, at the time of enactment, the proviso in section 1 of the Act of May 28, 1906, "unless documented as a vessel of the United States," was by itself, practically meaningless. However, section 2 of the Act of May 28, 1906, provided: four exceptions of U.S. dredges foreign-built but authorized as vessels of the United States."

Reading both sections together, it is clear that the proviso in section 1, "unless documented as a vessel of the United States," refers to the dredges which were authorized and directed to be documented as vessels of the United States by section 2. The legislative history of the Act confirms this interpretation (see Cong. Rec. 7029 (1906)) and, stated above, the Act has consistently been so interpreted by the agencies responsible for its administration. Even though a foreign-built dredge may now be documented as a vessel of the United States (see 46 U.S.C. 12102, 12105), it would be

prohibited by 46 U.S.C. App. 292 from engaging in dredging in the United States.

"Customs has long held that dredging in United States territorial waters, and certain dredging on the United States Outer Continental Shelf outside territorial waters, is dredging in the United States, for purposes of section 292."

"The Customs Service has ruled that dredging, for purposes of 46 U.S.C. App. 292, means the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material."

"Giving the word "excavate" its common, plain and ordinary meaning, the proposed dredging and pumping of sand operation would be dredging in that the operation would be removing soil from the seabed."

"Given the foregoing definition, it is clear that the proposed activity constitutes dredging so as to come within the purview of 46 U.S.C. App. 292, as discussed above."

"In conclusion, a foreign-built dredge may not engage in dredging in the United States whether or not documented as a vessel of the United States."

"The coastwise law pertaining to the transportation of merchandise, section 27 of the Act of June 5, 1920, as amended (41 Stat. 999; 46 U.S.C. App. 883, often called the Jones Act), provides that:

> "No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury, or the actual cost of the transportation, whichever is greater, to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States . . . embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States . . ."

THE EFFECTS OF THE JONES ACT ON THE DREDGING MARKET INCLUDING NOURISHMENT OF BEACHES IN THE UNITED STATES

The effects include:

(1) The U.S. dredging fleet has been aging, much equipment is almost obsolete.

(2) A certain lack of competition.

(3) High overhead costs partly due to less effective equipment, but mainly caused by the relatively low employment rate of the American dredgers (<50% at present). To this, high insurance costs and some taxes must be added.

Obviously, U.S. prices have difficulties competing with overseas prices, where the dredging industry does not face similar hardships. The ultimate consequence is that in the U.S. we will have to pay higher prices for the same job than they pay elsewhere. Large American pipeline dredgers may, however, under favorable conditions for operations, including large quantities to be handled in less exposed waters, still be able to work at prices not too much higher than their European or Australian counterparts.

The dissatisfaction with the Jones Act would undoubtedly be less, if some American companies would acquire new equipment of the type which is already in demand for combined bypassing and backpassing at tidal entrances on littoral drift shores. Here, the shallow water hopper dredger with pump-out capability over the bow and/or through a jet pontoon connected to the dredge by a short floating or submerged pipeline, is very handy. There is little doubt that some American dredging companies are going to pursue such projects in a near future. That, of course, will be helpful in lifting the restrictions of the Jones Act.

Obviously, such jobs must be provided by government agencies, consulting engineers, inlet districts and others who are able to produce or advocate proper designs and projects for which such equipment is ideal.

That is not only true for bypass-backpass projects at inlets, but for general backpass projects which were designed for more frequent operations on nourishment of long sections or shores, thereby securing more stability of beaches to the advantage of recreation and dune (storm) protection as well (Bruun, 1990, 1992a, b).

So, in case it is difficult to change the Jones Act, it seems to be at least possible to circumvent the act, in part, by the establishment of better procedures on nourishments and maintenance of tidal entrances, for which more versatile and economic equipment is necessary.

The part of the Jones Act affecting the dredging industry is only a small part of the law directing that interstate coastwise transportation of merchandise can only be transported in vessels built in and documented under the laws of the United States and owned by persons who are citizens of the United States.

Outside the United States this law is often called "the American Flag-discrimination Law," which, of course, is not held in high regard by foreign seafaring nations. They have consistently protested against it, because it deprives them from business by their merchant marines in the U.S. territorial waters.

Proponents of the law claim that it has served its purpose of securing the availability of U.S. vessels which are badly needed in the case of wars. The question which arises now is whether this still may be considered a valid argument in the world which is now emerging after the downfall of the U.S.S.R. Proponents of the law still claim that the continued unrest in the world justifies the law. During the Gulf War many foreign vessels were chartered by the United States for military transportation, because proper U.S. tonnage was not available in quantity and quality.

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