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Inside This issue

JONES ACT CONSIDERATIONS FOR THE DEVELOPMENT OF OFFSHORE WIND FARMS

By: Charlie Papavizas*

I. Jones Act Basics

A. History

The United States has restricted its domestic maritime commerce in merchandise since 1789. In its third Act, even before it enacted a system of vessel registration or established any department of the Government, the first U.S. Congress enacted "An Act Imposing Duties on Tonnage" which preferred American-owned vessels to foreign vessels in U.S. domestic trade.[1]

In 1817 the U.S. adopted an outright reservation to American-owned vessels which is the more direct predecessor to current U.S. cabotage laws reserving U.S. domestic trade to qualified U.S.-flag vessels.[2] That law prohibited the transportation of "merchandise" which

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[1] 1 Stat. 27 (1789).

[2] 3 Stat. 351 (1817).

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Managing Editor's Introductory Note

Our first article in this edition is by Charlie Papavizas on Jones Act issues relating to the development of the offshore wind industry. Charlie gives an historical review of the Jones Act and its development and then explains how the rules and regulations affect this new energy industry.

We next present an article by J. Andrew Black on the widening circuit court split on the application of *Wilburn Boat* to marine insurance policies, "specifically, when, where, and under what conditions the breach of an express warranty will void the entire marine insurance policy (and therefore excuse the insurer from coverage) whether or not the breach is connected to the loss itself." The latest decision by the Eleventh Circuit in *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 996 F.3d 1161 (11th Cir. 2021) ends with the somewhat forlorn hope that the Supreme Court will take up the issue and resolve the divergence.

George Chalos and Briton Sparkman give us a detailed analysis of the Third Circuit's decision in *Nederland Shipping Corporation v. United States of America*, 2021 U.S. App. LEXIS 33920 (3d Cir. Nov. 16, 2021), a case of first impression concluding that a security agreement is an admiralty contract within the admiralty jurisdiction.

Next, in his regular column Window on Washington, Bryant Gardner reports on 2021's Infrastructure Investment and Jobs Act and the National Defense Authorization Act for Fiscal Year 2022. He also reports on the Ocean Shipping Reform Act, which seeks to reshape regulation of the liner industry in the U.S.-international trades and has passed in the House of Representatives and may actually pass in the Senate in 2022. He concludes "Legislation passed by the Congress in 2021 contains many opportunities for renewal and support of the maritime industry, especially those segments which can leverage decarbonization initiatives and infrastructure packages, such as ferries and ports." He also advises that "carriers and shippers alike should keep a close eye on OSRA and its eventual implementation by the Federal Maritime Commission should it pass into law in 2022."

We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

Jones Act Considerations for the Development of Offshore Wind Farms

By Charlie Papavizas

(Continued from page 1)

was "imported" "from one port of the United States to another port of the United States" "in a vessel belonging wholly or in part to a subject of any foreign power." Notably, it was not until 1898 that this restriction was revised to exclude *foreign-registered* vessels from the U.S. domestic trade.

Over time the 1817 Act was refined, and the reservation principle embodied in the act was expanded to cover "passengers," "towing" and "dredging" in U.S. waters.[3] For example, the 1817 Act was restated and modified in 1898 to cover "any part of the voyage."[4] That restatement was interpreted by U.S. Attorney General George W. Wickersham in 1913 not to apply to mixed land and water transportation.[5]

A section of the Merchant Marine Act, 1920, shepherded through the U.S. Senate by Sen. Wesley Livsey Jones (R-WA) who was then Chairman of the Commerce Committee, included a section (§ 27) which restated the prior law and fixed the loophole created by the Wickersham opinion. At the time, the entire 1920 Act was thought of as the "Jones Law" or the "Jones Act" and most of it had nothing to do with U.S. domestic trade. Nevertheless, the U.S. domestic trade reservation which dates from 1789, together with the refinements and expansions, are generally lumped together and commonly referred to as the "Jones Act."

Today, the "Jones Act" and related laws restrict U.S. domestic commerce to U.S. registered vessels that are: U.S.-citizen owned, U.S.-citizen operated and U.S.-built.[6] Such vessels must also have a U.S. citizen crew by virtue of being registered in the United States.

B. Applicable Statute

The Jones Act, as it exists today relating to "merchandise" provides in pertinent part — "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 … [is a qualified U.S.-flag vessel]."[7]

The application of Act to particular activities is mainly interpreted by the U.S. Customs and Border Protection agency or CBP. CBP Jones Act rulings are publicly available at rulings.cbp.gov. The U.S Coast Guard oversees the U.S. build requirement and citizenship qualifications. The U.S. Maritime Administration has a role with respect to transfers of qualified U.S.-flag vessels to non-citizens including charters.

C. Penalties

The penalties for a Jones Act violation can be severe. The Act provides that "merchandise transported in violation … is liable to seizure by and forfeiture to the Government. Alternatively, an amount equal to the value of the merchandise (as determined by the Secretary of Homeland Security) or the actual cost of the transportation, whichever is greater, may be recovered from any person transporting the merchandise or causing the merchandise to be transported."[8]

The penalty for transportation of a "passenger" in violation of the law is a fixed amount per violation which has grown over time and is adjusted periodically for inflation.[9]

D. "Passengers"

CBP regulations define a "passenger" as "any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business."[10]

CBP has indicated that "workmen, technicians, or observers transported by vessel between ports of the United States are not classified as 'passengers' … if they are required to be … onboard because of a necessary vessel … business interest during the voyage."[11]

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3 24 Stat. 79, 54 Stat. 304 & 34 Stat. 204.
4 27 Stat. 248 (1898).
5 30 *Op. Att'y Gen.* 8-9 (1913).
6 46 U.S.C. § 55102 (for "merchandise").
7 46 U.S.C. § 55102(b).
8 46 U.S.C. § 55102(c).
9 *See* 46 U.S.C. § 55103(b).
10 19 C.F.R. § 4.50(b).
11 CBP HQ H229016 (Aug. 2, 2012).

Furthermore, the individuals must be "'directly and substantially' related to the … business of the vessel itself in order for such individuals to not be considered as passengers…."[12]

II. Jones Act and OCSLA

A. In General

The phrase in the Jones Act – "to which the coastwise laws apply" – has been interpreted by CBP to apply the Jones Act to the U.S. "territorial sea" – meaning 3 nautical miles from the coast.[13]

Beyond the "territorial sea," the Jones Act, like other federal laws, must be extended by some other law. The primary jurisdiction extension is contained in the Outer Continental Shelf Lands Act (OCSLA) enacted in 1953 and substantially amended in 1978.[14] OCSLA extends federal law out to 200 nautical miles from the U.S. coast on the U.S. outer continental shelf (OCS).

Where there is no federal law to apply, and that includes federal maritime case law, the law of the adjacent state applies. Prior to 2021, OCSLA applied the U.S. Constitution and federal law: "to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all 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."[15]

B. OCSLA Issues

Two OCSLA issues arose relating to offshore renewable energy: (1) whether the term "resources" encompassed offshore renewable energy since the law appeared to limit "resources" to oil and gas and other mineral resources; and (2) whether "to the subsoil and seabed of the outer Continental Shelf" means literally that federal law applies to the entire pristine OCS regardless of any attachment.

With respect to the first issue, the Energy Policy Act of 2005[16] granted the U.S. Government offshore leasing authority for renewable energy projects. But that grant did not revise the pre-existing OCSLA jurisdiction grant or define "resources" to make it clear it also covered non-mineral energy resources.

The "resources" issue was not addressed until January 1, 2021 when OCSLA was amended in the Fiscal Year 2021 National Defense Authorization Act as follows – "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 [and] … (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* …."[17]

C. Effect on the Issuance of CBP Rulings

The lack of clarity on the "resources" issue held up CBP guidance for any project in federal waters (beyond the territorial sea). CBP issued early installation wind rulings in May 2010 and February 2011.[18] Those rulings, however, barely scratched the surface of the issues which needed to be addressed in the offshore wind industry.

CBP then refused to issue any further rulings for projects in federal waters from 2011 until the January 1, 2021 jurisdiction fix even though rulings were requested as early as the fall of 2018. The two research turbines installed off the coast of Virginia in the summer of 2020 in federal waters were placed without the benefit of a ruling.

Following the jurisdiction fix, the first federal waters ruling issued since 2011 was issued February 4, 2021 to Maersk Supply regarding certain installation issues.[19]

D. Pristine Seabed Issue

On the second OCSLA issue, CBP has interpreted OCSLA from the beginning to require an attachment to create a Jones Act "point in the United States." For example, CBP has issued a series of consistent rulings regarding whether well heads constitute U.S. points depending on whether they are plugged, abandoned, exploratory etc.[20] The distinctions made in these rulings as to the purpose of the well head's presence would be superfluous if every place on the seabed is a U.S. point because then every well head would perforce be a U.S. point. Examination of the purpose of an attachment only makes sense if the only way to create a U.S. point is via the permanent or temporary attachment

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12 *Id.*
13 33 C.F.R. § 2.22(a)(3); CBP HQ 032257 (Aug. 1, 2008).
14 43 U.S.C. § 1333.
15 *Id.*
16 119 Stat. 594, 744 (2005).
17 Pub. Law No. 116-283, section 9503 (emphasis supplied).
18 CBP HQ H105415 (May 27, 2010); CBP HQ H143075 (Feb. 24, 2011).
19 CBP HQ H316313 (Feb. 4, 2021).
20 *E.g.*, CBP HQ 116394 (Feb. 8, 2005); CBP HQ 116350 (Jan 8, 2005); CSD 83-13 (Sep. 16, 1982).

of something "erected thereon for the purpose of exploring for, developing, or producing resources."

The Offshore Marine Service Association (OMSA) has argued for years that this is a misinterpretation, and that the entire pristine OCS seabed is a "point" based on the first part of the jurisdictional grant. The issue is subject to pending litigation in the U.S. District Court for the District of Columbia,[21] which started with the "vessel equipment" controversy discussed below.

III. "Vessel Equipment" and "Transportation"

A. "Vessel Equipment"

The Jones Act applies to "transportation" of "merchandise." Both words have been controversial.

CBP has long considered "vessel equipment" not to be "merchandise."[22]

CBP has relied on a 1939 definition of vessel equipment – "portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel …"

CBP focused over time on "necessary for the operation of the vessel" and so ruled that many items installed on the OCS – such as pipeline connectors and risers – are all "vessel equipment" if carried and installed by the same vessel because they were necessary to the installation function of the vessel.

In 2009, CBP went the furthest when it confirmed that a subsea assembly or "Christmas tree" was "vessel equipment."[23]

When the ruling became public, political pressure was immediately brought to bear, and CBP withdrew the ruling and commenced a regulatory process which took more than ten years.[24]

The CBP regulatory process culminated in December 11, 2019 guidance which revoked several prior "vessel equipment" rulings.[25] The 2019 guidance retained the 1939 definition but eliminated prior rationales – "incidental," "unforeseeable," and "de minimis" contained in CBP rulings. The new focus was on "items that are integral to the function of the vessel and are carried by the vessel" versus "necessary for the operation of the vessel." The guidance further indicated that these "functions include, inter alia, those items that aid in the installation, inspection, repair, maintenance, surveying, positioning, modification, construction, decommissioning, drilling, completion, workover, abandonment or other similar activities or operations of wells, seafloor or subsea infrastructure, flowlines, and surface production facilities."

CBP also emphasized that when an item "is not left behind on the seabed," that "is a factor that weighs in favor of an item being classified as vessel equipment" although it also noted that "not left behind" is not a determinative factor."

B. "Transportation"

The December 2019 CBP guidance also addressed short and incidental vessel movements in connection with lifting operations. Because the Jones Act applies to "any part" of the transportation of merchandise between two U.S. points, CBP issued rulings in 2012, known as the "Koff rulings," which made it difficult to utilize foreign lift vessels offshore for even very short vessel movements otherwise necessary for safety reasons.[26]

The 2019 Guidance provides that "certain lateral movements" of lifting vessels do not constitute "transportation." The limits of what constitute "lateral movements" remains to be fleshed out by CBP in rulings. The December 2019 Guidance was also challenged in the pending "vessel equipment" litigation.

IV. Jones Act Applied to Offshore Wind

A. Survey

CBP has long held that the use of a vessel solely to engage in oceanographic research is not coastwise trade.[27] This is analogous to, but independent of, the Oceanographic Research Vessels Act[28] which exempts vessels engaged in oceanographic research from certain vessel inspection requirements.

As part of such oceanographic research, it is also well settled that any supplies or equipment carried aboard the vessel and necessary for the research would not be considered merchandise.[29] However, care must still be taken that the vessel is not used to transport cargoes or personnel from one U.S. point to another U.S. point in violation of the limits placed by oceanographic rulings.

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21 *Radtke v. CBP* (Civil Action No. 17-2412P).

22 *E.g.*, CBP HQ H029417 (June 5, 2008) quoting T.D. 49815(4) (March 13, 1939).

23 CBP HQ H046137 (Feb. 20, 2009).

24 CBP HQ H055599 (Mar. 26, 2009).

25 53 *Cus. Bull. and Dec.* 84 (Dec. 11, 2019).

26 CBP HQ H225102 (Sep. 21, 2012); CBP HQ H235242 (Nov. 15, 2012).

27 CBP HQ H116602 (Jan. 30, 2006).

28 46 U.S.C. § 50503.

29 *Id.*

In fact, on November 15, 2021, OMSA alleged that a foreign vessel doing survey work for a U.S. offshore wind project had violated the Jones Act by transporting subsoil samples from places on the U.S. OCS to U.S. ports. That activity appears expressly permitted under a long line of CBP rulings, but bears watching both for additional potential CBP guidance and potential legislative amendments to the law. This is in addition to (although under a similar theory) OMSA's challenge of the movement of research anodes from one place on the seabed to another place on the seabed by a foreign vessel in the "vessel equipment" litigation.

B. Foundations and Scour Protection

CBP ruled on January 27, 2021 that the entire pristine seabed is a "point in the United States" for purposes of scour protection installation.[30] This caused an uproar in the oil and gas/renewable communities. CBP reversed itself on March 25, 2021 when it ruled that an installed foundation or first layer of scour protection creates a "point in the United States" and that a "vicinity" around a foundation is part of the "point" – but the pristine seabed is not a "point."[31] There remain pending administrative challenges based on the rocks not being an "installation and other device" and there being no "vicinity" concept in the law. OMSA has reportedly also asked CBP to revert to its January 27 interpretation.

At least under the March 2021 ruling, a foreign vessel can pick up a foundation and install it on the U.S. OCS provided there is nothing there preceding the foundation. A foreign vessel can also pick up rocks for scour protection and lay a pattern preceding the foundation; subsequent layers which come from the U.S. must arrive in a qualified U.S.-flag vessel.

C. Tower Installation

Installation of a foundation undeniably creates a "point in the United States." Any "merchandise" brought to that "point" from the U.S. must be transported by a qualified U.S.-flag vessel. However, a foreign installation vessel can remain in place and perform the entire installation. This leads to the U.S. flag feeder/foreign installation vessel model. Lifting guidance would also appear to grant a foreign installation vessel the right to move short distances at least with items on hook.

CBP's February 2021 ruling appears to indicate that items incidental to installation, such as blade cassettes, are "vessel equipment" – similarly for tools, expendables etc. placed onto the tower some of which are left behind – and can be transported by a foreign installation vessel between work sites. Such items may also be "stevedoring equipment and material" which is not, by law, "merchandise."[32] The February 4 ruling also appears to indicate that all the installation-related personnel including persons who work primarily off the vessel on the tower are crew and not "passengers."

D. Cable Installation

Cable lay between U.S. points by a foreign vessel is generally permitted under the theory that the cable is not "transported" between two U.S. points but rather is "paid out, but not unladen."[33] CBP confirmed this for offshore wind on August 31, 2020 with a ruling relating to a state waters project.[34]

The following activities appear permitted by a foreign vessel – (1) load cable in a U.S. port and lay it from that port in U.S. waters to another U.S. point; (2) load cable in a foreign port and deliver it to a U.S. port; and (3) pick up cable from the seabed outside U.S. territorial waters and deliver it to a U.S. port. The following activities appear not permitted by a foreign vessel – (1) load cable in one U.S. port and deliver it to another U.S. port; (2) pick up cable from the seabed in U.S. territorial waters and deliver it to a U.S. port; and (3) load cable from a storage vessel in U.S. territorial waters even if unanchored, and deliver it to a U.S. port.

Foreign vessels are prohibited from "dredging" in U.S. waters.[35] "Dredging" means "the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material."[36] CBP has determined that devices using "jetting action"/"pressurized water jets" to emulsify the seabed are not "dredging."[37] However, devices which "use a mechanical plow or cutter" are "dredging."[38] It is unclear whether devices which use some form of both methods constitute "dredging."

The most recent guidance on the subject is a November 2, 2021 CBP ruling[39] which indicated, with respect to the burial of fiber optic communications cable, that a cable-burial device using jetting action does

30 CBP HQ H309186 (Jan. 27, 2021).
31 CBP HQ H317289 (Mar. 25, 2021).
32 19 C.F.R. § 4.93; 46 U.S.C. § 55107.
33 *E.g.*, CBP HQ 115431 (Sep. 4, 2001).
34 CBP HQ H311603 (Aug. 31, 2020).
35 46 U.S.C. § 55109.
36 CBP HQ 115580 (Mar. 20, 2002).
37 CBP HQ H012082 (Aug. 27, 2007).
38 CBP HQ 115580 (Mar. 20, 2002).
39 CBP HQ H321256 (Nov. 2, 2021).

not constitute "dredging" including when the device utilizes a cutting wheel or digging chain to cut through hard sediment or rock.

E. Operations and Maintenance

Once a tower is installed on the U.S. OCS, it is a "point in the United States" and all items and personnel transported and unloaded onto that tower that were loaded in a U.S. port must be transported by a qualified U.S.-flag vessel. Thus, crew transfer vessels (CTVs) picking up personnel from U.S. ports to work on U.S. offshore wind farms will have to be such qualified vessels. Similarly, service operations vessels (SOVs) which pick up items and personnel from U.S. ports and transport such items and personnel to U.S. offshore wind farms will have to be qualified U.S.-flag vessels.

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