Jones Act Considerations for the Development of

 Offshore Wind Farms

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1. Jones Act Basics
2. 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. 1 Stat. 27 (1789).

 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. 3 Stat. 351 (1817). That law prohibited the transportation of “merchandise” which 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” between U.S. ports in U.S. waters.[[1]](#footnote-1) For example, the 1817 Act was restated and modified in 1898 to cover “any part of the voyage.” 27 Stat. 248 (1898). That restatement was interpreted by U.S. Attorney General George W. Wickersham in 1913 not to apply to mixed land and water transportation. 30 *Op. Att’y Gen.* 8-9 (1913).

 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. 46 U.S.C. § 55102 (for “merchandise”). Such vessels must also have a U.S. citizen crew by virtue of being registered in the United States.

1. 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].” 46 U.S.C. § 55102(b).

 The Act is mainly interpreted by the U.S. Customs and Border Protection agency or CBP with respect to its applicability. 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.

1. 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.” 46 U.S.C. § 55102(c).

 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. *See* 46 U.S.C. § 55103(b).

1. “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.” 19 C.F.R. § 4.50 (b).

 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.” 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 . . .” *Id.*

1. Jones Act and OCSLA
2. 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. 33 C.F.R. § 2.22(a)(3); CBP HQ 032257 (Aug. 1, 2008).

 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. 43 U.S.C. § 1333. 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.” *Id.*

1. OCSLA Issues

 Two OCSLA issues have arisen relating to offshore renewable energy: (1) whether “resources” encompassed offshore renewable energy since the law appeared to limit “resources” to oil and gas; 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, 119 Stat. 594, 744 (2005), had granted the U.S. Government offshore leasing authority for renewable energy projects. But that grant did not address 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 as amended in the Fiscal Year 2021 National Defense Authorization Act (section 9503) (emphasis supplied) 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* . . .”

1. CBP Rulings Effect

 The lack of clarity on the “resources” issue held up CBP guidance for any project in federal waters (outside 3 NM in the northeast). CBP issued early installation wind rulings in May 2010 and February 2011. CBP HQ H105415 (May 27, 2010); CBP HQ H143075 (Feb. 24, 2011). 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 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. CBP HQ H316313 (Feb. 4, 2021).

1. 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. (e.g. CBP HQ 116394 (Feb. 8, 2005); CBP HQ 116350 (Jan 8, 2005); CSD 83-13 (Sep. 16, 1982)). 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 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 (*Radtke v. CBP* (Civil Action No. 17-2412P)), among other issues, which started with the “vessel equipment” controversy discussed below.

1. “Vessel Equipment” and “Transportation”
2. “Vessel Equipment”

 Jones Act applies to “transportation” of “merchandise.” Both terms have been controversial.

 CBP has long considered “vessel equipment” not to be “merchandise.” E.g., CBP HQ H029417 (June 5, 2008) quoting T.D. 49815(4) (March 13, 1939).

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.

 In 2009, CBP went the furthest when it confirmed that a subsea assembly or “Christmas tree” was “vessel equipment.” CBP HQ H046137 (Feb. 20, 2009).

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

 CBP regulatory process culminated in December 11, 2019 guidance which revoked a number of prior “vessel equipment” rulings. 53 *Cus. Bull. and Dec.* 84 (Dec. 11, 2019).

 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 the fact 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, but is not a determinative factor.”

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

 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.

1. Jones Act Applied to Wind
2. Survey

 CBP has long held that the use of a vessel solely to engage in oceanographic research is not coastwise trade. CBP HQ H116602 (Jan. 30, 2006). 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. *Id.* However, care must still be taken that the vessel is not used just to transport cargoes or personnel from one
U.S. point to another U.S. point in violation of the limits placed by oceanographic rulings. Moreover, OMSA has challenged 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.

1. Foundations and Scour Protection

 CBP ruled on January 27, 2021 that entire pristine seabed for purposes of scour protection installation is a “point in the United States.” CBP HQ H309186 (Jan. 27, 2021). 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.” CBP HQ H317289 (Mar. 25, 2021). There remains a challenge based on the rocks not being an “installation and other device” and there being no “vicinity” concept in the law.

 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 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.

1. Foundation and Scour Protection

 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 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. The February 4 ruling also appears to indicate that all of the installation-related personnel including persons who work primarily off the vessel on the tower are crew and not “passengers.”

1. 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.” E.g., CBP HQ 115431 (Sep. 4, 2001). CBP confirmed this for offshore in on August 31, 2020 with a ruling relating to a state waters project. CBP HQ H311603 (Aug. 31, 2020).

 Activities 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. Activities not permitted for 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. 46 U.S.C. § 55109. “Dredging” means “the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material.” CBP HQ 115580 (Mar. 20, 2002). CBP has determined that devices using “jetting action”/“pressurized water jets” to emulsify the seabed are not “dredging.” CBP HQ H012082 (Aug. 27, 2007). However, devices which “use a mechanical plow or cutter” are “dredging.” CBP HQ 115580 (Mar. 20, 2002). It is unclear whether devices which use some form of both methods constitute “dredging.”

1. 24 Stat. 79, 54 Stat. 304 & 34 Stat. 204. [↑](#footnote-ref-1)