

In Headquarters Ruling HQ H325120 (May 23, 2023), Aqua Ventus LLC (Aqua Ventus) requested a US Customs and Border Protection (CBP) Jones Act ruling in connection with the installation and burial of cables that would transmit electricity generated by floating offshore wind turbines¹ (the Maine Research Array) to points on the Maine coast. Consistent with prior rulings, CBP held a non-coastwise vessel could install and bury the cable by jetting.

A coastwise qualified vessel, however, was required to transport cable protective material from a US port to the installation site.

The Proposed Cable Installation and Burial Is Not Dredging

Initially, the cable would be loaded onto a non-coastwise-qualified installation vessel (Installation Vessel) either in a US port or from another non-coastwise-qualified vessel at a US port. The Installation Vessel would then lay the cables on the seabed. Ultimately, the cables would be buried in a trench, either during initial installation or after the cable was laid on the seabed. If the cable was buried after it was laid on the seafloor, a different non-coastwise-qualified trenching vessel would be used.

Depending on the location, either a jetting cable burial tool or a mechanical burial tool would be used:

- The jetting method uses high pressure water jets and a jet cable burial tool to open a trench about 1-2 meters deep. The cable would then be pushed into the trench and the displaced soil would collapse back into the trench to bury the cable after the tool passes.
- Alternatively, Aqua Ventus would use a mechanical cutter cable burial tool. The tool would open a trench, likely 1-1.5 meters deep. A depressor would then push the cable into the trench. The trench would fill in after once the tool passed.

Dredging requires a US coastwise-qualified vessel.² CBP has held that the term “dredging” means “the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material.”³

In contrast, CBP has consistently held that the use of various devices to create underwater trenches for cable laying does not constitute “dredging.”⁴ Vessels that use jetting devices that emulsify the seabed, temporarily displacing sediment, surrounding the cable, does not constitute dredging under the coastwise law. Consistent with this position, CBP has held that using a narrow tool to cut a narrow trench in the seabed to bury cables is not dredging.⁵ Accordingly, the use of non-coastwise vessels to install and bury the cable did not violate the coastwise laws.

The Installation of the Cable Protection Material Requires a Jones Act Vessel

As part of the installation process, Aqua Ventus may install cable protection material (rock bags, concrete mattresses or loose rock) to cover the cable. The protective material would be loaded on a US coastwise-qualified vessel from a US port and transported to the Installation Vessel where the Installation Vessel would install the material over the pre-laid cable.

The Jones Act applies to the transportation of merchandise between two US coastwise points. Whether the Installation Vessel could permissibly install the protective material over the cables sitting on the seabed under the Jones Act required CBP to determine whether (1) the protective material was merchandise or vessel equipment and (2) whether there was transportation between two coastwise points.

The Protective Material Is Merchandise

Merchandise is broadly construed under the Jones Act. Vessel equipment, however, is not merchandise and thus outside the scope of the Jones Act. Vessel equipment is narrowly defined as “portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board.”⁶

Although the Installation Vessel’s mission is to install the protective material over the cables, CBP reasoned that the protective material was merchandise. Because the protective material would remain on the seafloor over the cables after installation and not remain with vessel or be used by the vessel in its operations, the protective material could not be considered vessel equipment.

¹ The floating wind turbines would be more than three miles off the Maine coast, located in federal waters.

² See 46 U.S.C. § 55109(a).

³ See HQ 103692 (Dec. 28, 1978), published as Customs Service Decision (C.S.D.) 79-331; HQ 109910 (Jan. 26, 1989), published as C.S.D. 89-64.

⁴ See, e.g., HQ 116117 (Feb. 26, 2004); HQ H311602 (Mar. 25, 2022); HQ H300962 (Apr. 14, 2022).

⁵ See HQ 113223 (Sept. 29, 1994); HQ 109412 (Mar. 29, 1988).

⁶ Treasury Decision 49815(4) (1939).

The Cables on the Seabed Are a Coastwise Point

The first coastwise point was the US port where the protective material would be loaded on a coastwise qualified vessel. The second coastwise point was the cable sitting on the seabed. To support this position, CBP cited the provisions of the Outer Continental Shelf Lands Act (OCSLA) that applies the Jones Act to "installations or devices attached to the seabed"⁷ serving a purpose as articulated in the OCSLA, which includes renewable energy projects.

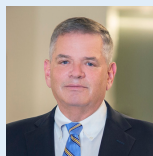
Accordingly, CBP held that as the rock bags, concrete mattresses and loose rocks are transported on a non-coastwise-qualified vessel from one US point to the subject cable, which itself is a US coastwise point, such transportation violates the Jones Act.

Conclusion

The Maine Research Array is part of a University of Maine research project that will test the viability of floating offshore wind off the coast of Maine. Floating wind turbines are also being considered for wind farms off the California coast. Whether a floating wind turbine is used, or a wind turbine sitting atop a monopile as in the Vineyard Wind project off Martha's Vineyard, the coastwise laws still apply. For cable installation, CBP has issued consistent decisions that distinguish between dredging and jetting, the latter of which may be performed by a non-coastwise-qualified vessel. The Aqua Ventus decision nevertheless underscores that need for coastwise-qualified vessels to support offshore wind operations.

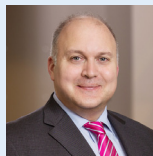
⁷ 43 U.S.C. § 1333(a)(1).

Contacts



Michael Kaye

Partner, Washington DC
T +1 202 457 6545
M +1 217 412 0096
E michael.kaye@squirepb.com



Michael J. Wray

Of Counsel, Houston
T +1 713 546 3330
M +1 504 250 2387
E michael.wray@squirepb.com