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As Offshore Wind Energy Projects Expand, So Too Does the Reach of the Jones Act

By Lars-Erik A. Hjelm, Suzanne Kane, Sarah B.W. Kirwin, Colette Laura McCrone, and Meaghan E. Jennison*

In this article, the authors explain that stakeholders involved in offshore industries must reassess their Jones Act compliance programs.

The Jones Act,[1] also known as the Merchant Marine Act of 1920, limits the transport of "merchandise" between U.S. coastwise points to only those vessels that are built in the United States, documented under United States law, and owned by a U.S. citizen. U.S. law defines merchandise broadly, but U.S. Customs and Border Protection ("CBP")—which has authority over vessels and merchandise arriving and departing U.S. ports and administers parts of the Jones Act—has long held that merchandise does not encompass "vessel equipment." Vessel equipment is defined as those articles that are ". . . necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board."[2]

CBP has also consistently held that coastwise laws cover any point within U.S. territorial waters, as well as certain points on the Outer Continental Shelf ("OCS").

Specifically, the Outer Continental Shelf Lands Act ("OCSLA") previously extended the Jones Act to the OCS by defining a "coastwise point" to include "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."

Historically, this definition left no question that oil and gas resource extraction projects on the OCS were categorized as coastwise points. However, until recently, there was confusion over whether the OCSLA extended the Jones Act to offshore wind projects.

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[1] https://www.loc.gov/item/uscode1958-009046024/.

[2] *See, e.g.*, HQ H316313 (Feb. 4, 2021).

OCSLA NOW APPLIES TO OFFSHORE WIND PROJECTS

In January, Congress took the first step toward resolving this confusion. Through the 2021 National Defense Authorization Act ("NDAA"),[3] Congress amended Section 4(a) of the OCSLA to explicitly include "non-mineral energy resources" in the definition of coastwise points.

In its first ruling[4] since that amendment was finalized, CBP found that the Jones Act applies to transportation of merchandise from a U.S. port and other coastwise points to wind turbine generator ("WTG") foundations located on the OCS.

In a subsequent modification of that ruling, CBP clarified that the Jones Act does not apply to the pristine seabed, but reiterated that under the OCSLA amendment, once WTG foundations or related material are placed on the seabed, a coastwise point is created.

In a separate but unrelated ruling,[5] CBP found that installing WTG foundations created a coastwise point, and that coastwise-qualified vessels were required to transport merchandise to each foundation site. In both rulings, CBP relied on the updated definition under the 2021 NDAA to support its conclusion.

CBP's rulings reinforce the OCSLA amendments by holding that foundations attached to the OCS are coastwise points. Further, the rulings clarify that "resources," as used in the OCSLA, encompass wind energy in addition to mineral energy resources such as oil and gas.

Importantly, the rulings, in combination with the 2021 OCSLA amendments, align OCSLA with the Energy Policy Act of 2005,[6] which granted the Bureau of Ocean Energy Management ("BOEM") the authority to grant leases for marine renewable energy projects on federal offshore lands, including the OCS.

CBP AMENDS ITS DEFINITION OF VESSEL EQUIPMENT

The extension of the Jones Act to OCS wind installations comes on the heels of another recent change to CBP's interpretation and application of the Jones Act, in which CBP amended its long-standing definition of "vessel equipment."

As noted above, CBP has historically interpreted the transportation of "vessel equipment" to fall outside the scope of the Jones Act. This trend began in 1939

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[3] https://www.congress.gov/bill/116th-congress/house-bill/6395.

[4] https://rulings.cbp.gov/ruling/H309186.

[5] https://rulings.cbp.gov/ruling/H316313.

[6] https://www.boem.gov/sites/default/files/documents/The%20Energy%20Policy%20Act%20of%202005.pdf.

with Treasury Decision 49815(4), in which the U.S. Department of the Treasury concluded that "merchandise" subject to the Jones Act did not include "vessel equipment." The Treasury Department included in the definition of "vessel equipment" those "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. . . ." CBP's predecessor agencies applied the principles from Treasury Decision 49815(4) until 1976, when CBP began issuing a number of rulings expanding this interpretation of "vessel equipment" to encompass those articles that were "necessary to the mission of the vessel," and whose use were "foreseeable," "incidental," or "de minimis." Under these rulings, CBP concluded that a wide variety of equipment used in offshore oil and gas operations constituted "vessel equipment" and need not be transported by coastwise-qualified vessels.

Following several recent attempts to more formally amend its interpretation—including CBP's solicitation and subsequent withdrawal of public comments on the topic in 2009 and 2017—CBP issued a notice[7] in December 2019 that revoked and modified a number of rulings using these broader definitions of "vessel equipment" and replaced them with the original 1939 Department of the Treasury interpretation. Unfortunately, the notice itself does not provide additional guidance on what precisely CBP considers "vessel equipment," but recent rulings suggest that CBP intends to limit the definition to encompass structural and operational equipment integral to supporting a vessel's task.

These actions are subject to a number of critiques.

First, "vessel equipment" is not a defined term in the Jones Act, such that the legal authority of CBP to so extensively create and then modify this term is not entirely clear.

Second, CBP's December 2019 notice came in response to an intense policy campaign by domestic shipping interests, and it is unclear the extent to which CBP considered other, opposing viewpoints.

Finally, as many of CBP's rulings lack sufficient detail on the articles being transported in each case, it remains difficult to ascertain what CBP considers "vessel equipment." Practically, the definition may be limited to case-by-case determinations.

In connection with this change, CBP also confirmed that it would not change its long-standing position that a foreign vessel may lay cable or pipe between two coastwise points. Finally, CBP changed its interpretation of

[7] https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/Vol_53_No_45_Title.pdf.

"lifting operations" such that these operations, and any lateral movement needed to safely lift or move an item from a structure, do not qualify as transportation of merchandise under the Jones Act. This final change was made in response to criticisms that CBP's application of the Jones Act to lifting operations was creating significant safety concerns.

IMPLICATIONS FOR STAKEHOLDERS AND RECOMMENDED NEXT STEPS

These changes are likely to increase the regulatory considerations for stakeholders involved in wind energy production, offshore construction and other offshore industries that rely on vessel transportation, particularly in light of strong support from the executive branch for these recent Jones Act jurisdictional developments. The Biden-Harris administration reaffirmed its support for the Jones Act in a January 25 executive order,[8] signaling the longstanding law will remain intact for the foreseeable future. The executive order establishes a Made in America Office that will vet all Made in America waivers, which include Jones Act waivers.

Moreover, a related White House press release[9] further underscored that "[w]ith the signing of the 2021 National Defense Authorization Act, the Jones Act has also been affirmed as an opportunity to invest in America's workers as we build offshore renewable energy, in line with the President's goals to build our clean energy future here in America." With these changes here to stay, impacted parties should evaluate their Jones Act compliance programs to ensure that coastwise transportation aligns with these recent changes.

Further, with the Biden-Harris administration's goal of steering the United States away from its reliance on traditional energy, opportunities abound for CBP to work with the burgeoning offshore wind industry.

Notably, given the ambiguity that remains over the definition of "vessel equipment," we recommend that stakeholders involved in offshore wind projects and other construction projects seek rulings from CBP to elucidate the Jones Act's application to transported equipment and supplies and, where applicable, seek waivers for the use of foreign vessels and crews.

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[8] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/.

[9] https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/25/president-biden-to-sign-executive-order-strengthening-buy-american-provisions-ensuring-future-of-america-is-made-in-america-by-all-of-americas-workers/.