



Block Island Wind Farm off the coast of Rhode Island



OFFSHORE WIND Jones Act Developments

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The budding U.S. offshore wind market is poised for a huge expansion. How the offshore wind industry interacts with the U.S. Jones Act will have a lot to do with how smoothly that expansion will go. Of course, that act and related laws generally reserves U.S. maritime commerce to qualified U.S.-flag vessels. However, the exact application of the Jones Act to offshore wind continues to unfold, and the U.S. Congress is considering changes in the law that could affect how the industry develops.

At the present time, the only operational U.S. offshore wind development is the five-turbine project near Block Island, R.I., completed in 2016. Many other projects, however, are well underway. The U.S. Bureau of Ocean Energy Management has entered into 13 competitive leases from North Carolina to Massachusetts for the development of offshore wind, and more leases are in the works. The U.S. is likely to have at least 10 gigawatts of installed capacity by 2030. At an average production of 8 megawatts per turbine, that would require the installation of approximately 1,250 turbines.

What the Block Island project reaffirmed is that a foreign vessel could install a tower so long as it did so from a stationary position

and did not transport either merchandise or passengers between two points in the United States. This principle has been amply demonstrated over the years in the oil and gas industry by stationary drill ships, installation and construction vessels.

The reason this is the case is that the Jones Act applies to the transportation of “merchandise” between two “points in the United States.” A vessel that is stationary is not transporting anything between two points.

How the tower components arrive at the work site is another matter since places on the seabed far off shore can be a “point in the United States.” We start from the proposition that a “point in the United States” is every place in U.S. physical territory. So, Boston and New Bedford, Mass., are most definitely “points in the United States.”

That physical territory also extends 3 nautical miles from the U.S. coast. Beyond the 3 miles, U.S. jurisdiction depends on particular federal laws, most especially for purposes of the Jones Act on the Outer Continental Shelf Lands Act (OCSLA).

As interpreted by federal agencies, OCSLA—to the extent it applies to renewables, which is not an entirely settled issue—makes any man-made device permanently or temporarily, attached to the U.S.

outer continental shelf (out to 200 nautical miles from the coast) a “point in the United States.” The attachment of the first foundation elements of a wind tower would then likely make such a foundation a “point” so that anything delivered to that foundation from a U.S. port would have to be transported by a qualified U.S.-flag vessel.

This is the reason that the standard working methodology for installing a wind farm in U.S. waters with a foreign installation vessel involves the use of Jones Act qualified “feeder” vessels to transport components from a U.S. staging port to the wind farm work site.

Potential issues arise, however, when the foreign installation vessel moves. In those instances, the issues, which have arisen in the oil and gas industry, may have relevance for the offshore wind industry. Specifically, Customs and Border Protection (CBP) determined in 2012 that even short movements by an installation vessel when laden with merchandise to be installed offshore was a Jones Act violation. CBP reasoned on the basis of the portion of the Jones Act that provides that it applies to “any part” of the “transportation of merchandise.”

The basic oil and gas scenario involves a platform jacket or topside or other item being delivered offshore via a Jones

Act-qualified vessels. Because of a safety zone established around oil and gas drilling sites by law and prudence, a foreign heavy lift vessel may lift the item a short distance from the installation site outside the safety zone and then sail that short distance, often less than one kilometer, to the construction site. Vessel movement during the installation is also likely due to the unavoidable movement of the vessel on water. The lack of heavy lift capacity in the Jones Act fleet has made these scenarios problematic.

Authorization Bill Overview

The U.S. House of Representatives addressed this short distance/heavy lift issue in the Coast Guard authorization bill it reported favorably on June 26, 2019 (H.R. 3409). H.R. 3409 would create a waiver process similar to the existing process for launch barges whereby a foreign heavy lift vessel could be utilized but only after a finding by the U.S. Secretary of Transportation that there are no available qualified U.S.-flag vessels. The provision is limited to “installation vessels” which must, among other things, be used “to install platform jackets” as defined under existing law.

The provision is controversial in the offshore oil and gas industry and it is an open question whether the provision will survive

the legislative process. The proposal also raises a substantial concern in the offshore wind industry because of the possibility that the provision would be interpreted to encompass lifting operations from a stationary vessel, which is currently exempt from the Jones Act. Moreover, there is concern that the waiver process is cumbersome and could impede oil and gas and wind projects by introducing a bureaucratic process where none is required now.

Another area touched on by H.R. 3409 is the concept of “vessel equipment” which CBP determined long ago does not constitute “merchandise” as defined in the Jones Act. Over time, CBP issued a number of rulings regarding “vessel equipment” which focused on the mission of the vessel.

Those rulings became controversial and so, commencing in 2009, CBP proposed the revocation and modification of a number of rulings going back as far as 1976 interpreting “vessel equipment” in the offshore context. The matter is also the subject of ongoing federal litigation in the U.S. District Court for the District of Columbia.

One of the provisions in H.R. 3409 lists those CBP targeted rulings and would command CBP to “issue a notice, including an opportunity for public comment, on the

modification or revocation” of those rulings within 30 days of enactment.

The concept of “vessel equipment” is also important to the offshore wind industry. Items utilized by the installation vessel in constructing the tower, such as tools, might be offloaded at one tower construction site, recovered, and then unloaded at another construction site. If such tools are “vessel equipment,” then a foreign installation vessel can lawfully undertake those activities. If such tools are “merchandise,” then the items would have to be transported between “points in the United States” by a qualified U.S.-flag vessel.

Finally, H.R. 3409 would amend an existing provision of law that requires the Secretary of Transportation to maintain an inventory of U.S.-flag cable law vessels to revise the definition of covered vessels and to add “installation vessels” to that inventory.

In order for H.R. 3409 to become law, it must still be passed by the U.S. House of Representatives and the U.S. Senate and then be signed by the president. Generally, Coast Guard authorization bills are enacted in the fall of each year. How these provisions will fare in that process could have an impact on the installation of U.S. wind farms over the next few years and bear watching by all offshore industry participants. ☞

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