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NY Offshore Wind Plan Spotlights Jones Act Compliance

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On July 12, 2018, New York Gov. Andrew M. Cuomo announced an ambitious plan for New York state to procure 2,400 megawatts of power from offshore wind by the year 2030. The first phase of the state's plan includes obtaining 800 megawatts of offshore wind power by 2019.

But this plan cannot succeed without complying with the Jones Act, a federal law affecting most offshore marine activity. Although the Jones Act is often thought of as a project barrier, there are ways to comply through careful supply chain planning and sharp review of administrative precedents.

The Jones Act is named after Sen. Wesley Jones, R-Wash., who was the chief sponsor of the Merchant Marine Act of 1920. One section of that law restated a legal requirement which the United States has had in one form or another since 1789. Specifically, that section restricts the transportation of "merchandise" between two "points in the United States" to qualified U.S.-flag vessels. In other words, the Jones Act reserves U.S. domestic maritime trade to U.S.-built vessels owned and operated by Americans — which are often more expensive than their foreign-registered counter parts.

To qualify to engage in domestic marine transportation, a vessel must be U.S.-built, registered with the U.S. Coast Guard (which makes it a "U.S.-flag" vessel) and owned and operated by qualified U.S. citizens. There are special rules for how an entity, such as a corporation, can qualify as a "citizen of the United States." By virtue of being U.S.-registered, a vessel must also have a U.S. citizen crew (with a few minor exceptions).

There are also similar laws to the Jones Act which restrict the transportation of passengers, as well as "dredging" and "towing" in U.S. waters. Both "dredging" and "towing" have technical meanings under U.S. law and should be analyzed with care with respect to any intended sea bed displacement or vessel movement.

The Jones Act applies without qualification to U.S. federal territorial waters, meaning within three nautical miles of the U.S. coast. The Jones Act also applies beyond the three nautical miles from the U.S. coast by virtue of the Outer Continental Shelf Lands Act, originally enacted in 1953 to deal with the nascent offshore oil industry. OCSLA, as it is

commonly known, generally extends federal laws to any man-made device permanently or temporarily affixed to the U.S. outer continental shelf out to 200 nautical miles from the coast.

For purposes of how to apply the Jones Act to offshore projects in general, there is publicly available guidance issued by U.S. Customs and Border Protection, mainly drawn from offshore oil and gas industry experience.

Even without that guidance, it is apparent from the Jones Act text that the act does not apply if there is no transportation of merchandise between two U.S. points. So, for example, if cargo is loaded at point A in the United States and the vessel eventually returns to point A and discharges the cargo (being careful to ensure that it is the same berth in the same terminal and port), then the Jones Act does not apply to such a movement.

Even more important, a vessel that remains stationary and engages in offshore installation activities is not engaged in activity encompassed by the Jones Act. This application of the Jones Act is in fact the basis for the use of a foreign vessel for installation of the four wind towers off of Block Island, Rhode Island, and the basis for much of the planning for other projects, because of the general lack of Jones Act qualified vessels capable of undertaking all the necessary installation functions.

There are, however, installation issues that must be considered. For example, the Jones Act applies to “any part of the transportation of merchandise,” and CBP has interpreted “any part” to encompass even very short movements. So, if an item is loaded in a U.S. port by a qualified Jones Act vessel and delivered to a foreign-flag installation vessel offshore, the foreign vessel (versus a crane on the vessel which can in and of itself move without violating the Jones Act) cannot move even a short distance just to reposition itself for safety or other reasons once it has loaded the item.

Moreover, issues might be created as the installation vessel moves from tower work site to tower work site. For example, if the installation vessel discharges tools at work site A, recovers the tools and then discharges them again at work site B, before recovering them again, that might be considered a transportation of “merchandise” between two U.S. points (work site A and work site B).

“Vessel equipment” has not been considered “merchandise” by CBP under a long-standing exemption, but the continued application of that exception is uncertain. In 2009 and 2017, CBP proposed modifying a number of rulings going back to 1975, and there is pending litigation in the U.S. District Court for the District of Columbia concerning, among other things, whether the vessel equipment exception is consistent with the Jones Act.

There are also issues relating to whether a foreign installation vessel can serve as a work platform for installation technicians. Those technicians might be considered “passengers,” and a foreign vessel cannot transport “passengers” between two points in the United States any more than it can transport “merchandise.”

Offshore site preparation and cable laying/trenching also potentially present Jones Act issues, as well as dredging issues. Cable or pipe laying in and of itself is exempt from the Jones Act — but trenching might considered “dredging,” which is restricted by legislation similar to the Jones Act. CBP has generally determined that “dredging” means the use of a mechanical plow, but not the displacement of the seabed by fluidization. However, there are many devices in use that are hybrids, and it is not readily apparent whether their use would constitute “dredging” or not.

Even when a foreign vessel can be used in U.S. waters legally, careful attention should be paid to other U.S. laws which may affect vessel operations, particularly when a vessel (such as an installation vessel) might remain in U.S. waters for an extended period of time. U.S. tax, immigration, employment, safety, environmental and other laws all have potential application to any vessel in U.S. waters, even if it is under foreign registry and is complying with the Jones Act and related laws.

New York’s offshore wind plan can succeed, and the U.S. offshore wind industry can work within the Jones Act to meet its objectives. But great care must be undertaken to be sure that all of the activities of foreign vessels are lawful in U.S. waters and properly authorized where applicable.

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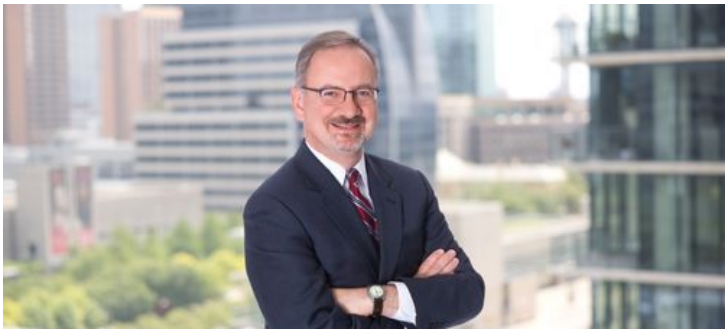

Charlie Papavizas