



THE SUMMER OF U.S. OFFSHORE WIND: REGULATORY INCENTIVES AND PROPOSED VESSEL MANNING MANDATE

Summer 2022 has seen significant action in the renewable energy arena and confirms that offshore wind energy is a critical piece of the Biden Administration's clean energy plan. While the offshore wind energy industry is poised for significant growth, stakeholders will have to consider how U.S. coastwise laws apply to the vessels that will be used to construct and maintain offshore wind energy fields.

A current bill pending in Congress could significantly impact how offshore wind energy vessels are manned, which would change the currently understood regulatory model.

“As US offshore wind growth continues, there will be significant opportunities for developers, contractors, vessel owners and operators, and lenders. Stakeholders should remember, however, to carefully consider how the Jones Act fits into the complex set of regulations that apply to OCS wind energy projects.”

BOEM’s July Announcements

The Bureau of Ocean Energy Management (**BOEM**) is the federal agency charged with leasing and permitting sites on the Outer Continental Shelf (**OCS**) for offshore wind energy development. BOEM made several announcements in July 2022 that are very important for the offshore wind energy industry.

- On July 13, 2022, BOEM announced that the agency will conduct a regional environmental review of six lease areas offshore New York and New Jersey, in an area known as the New York Bight. This will be the first time that BOEM has conducted a regional analysis containing multiple lease areas for offshore renewable energy. The environmental review is an integral part of the permitting process regulated by BOEM.
- On July 20, 2022, BOEM announced a request for public input to develop two potential wind energy areas (**WEAs**) in the Gulf of Mexico (**GOM**) on the OCS. The first proposed WEA is located approximately 24 nautical miles (nm) off the coast of Galveston, Texas. The second area is approximately 56 nm off the coast of Lake Charles, Louisiana. The combined area for review totals 188,023 acres and has the potential

to power 799,000 homes by offshore wind energy.

- If the proposed GOM WEAs proceed to the leasing stage, this will open an entirely new region of the country for offshore wind energy development. Although US offshore wind developments currently are farthest advanced off the US East Coast, the GOM region has significant experience conducting offshore operations given the long history of OCS oil and gas development in the GOM.
- BOEM’s offshore wind announcements follow the July 1, 2022 release of BOEM’s Proposed Program for the U.S. Department of Interior’s National Outer Continental Shelf Oil and Gas Leasing Program for 2023 to 2028 (**National Program**). The National Program is the schedule for oil and gas lease sales in federal waters in the various OCS areas administered by BOEM. BOEM’s Proposed Program identifies 11 potential lease sales, which is down from 47 proposed lease sales announced in 2018 by the Trump Administration. While the Proposed Program is subject to public comment and further agency review and thus not final, it is further evidence of

the Biden Administration’s pivot to renewable energy.

The Inflation Reduction Act of 2022

Following BOEM’s July announcements, the Inflation Reduction Act of 2022 (**IRA**) passed Congress, and was signed into law by President Biden. The IRA contains various provisions that are designed to encourage clean energy production, which includes offshore wind.

Among the IRA’s provisions are an extension of the Investment Tax Credit and Production Tax Credit and the addition of expanded tax credits for other technologies and for manufacturing of clean energy equipment as well as terms allowing parties to monetize the tax credits more easily. These tax credits are designed to encourage development of clean energy sources.

Coastwise Trade Laws and Offshore Wind Projects

The Biden Administration is certainly encouraging development of offshore wind energy projects on the OCS. To achieve these policy goals, a host of special purpose vessels are needed to develop, install, and maintain wind energy fields. Stakeholders need to understand how the coastwise laws determine whether U.S. coastwise compliant or foreign flag vessels can be used for a particular job.

The coastwise laws apply to the U.S. territorial sea and to the OCS via the Outer Continental Shelf Lands Act (**OCSLA**). If an activity is subject to the coastwise laws, a coastwise-qualified vessel is required. A coastwise-qualified vessel must be (1) built in the US; (2) owned by US citizens; (3) US-flagged; and (4) manned by US personnel.

For offshore wind projects, three coastwise law statutes are highly relevant: The Jones Act, 46 U.S.C. § 30104, the Dredging Act, 46 U.S.C. § 55109, and the Passenger Vessel Services Act, 46 U.S.C. § 55103. Specifically, the Jones Act restricts transportation of merchandise between two US coastwise points to US coastwise-qualified vessels. Dredging in U.S. “navigable waters” requires a coastwise-qualified vessel. The PVSA requires passengers transported between two coastwise points to be carried on coastwise-qualified vessels.

The U.S. Customs and Border Protection (**CBP**) and the U.S. Coast Guard (**USCG**) are key coastwise law regulators. CBP issues Headquarters Ruling Letters that provide guidance on whether certain operations fall within the purview of coastwise laws and thus require use of a coastwise qualified vessel. The USCG is the agency that administers Jones Act manning regulations under OCSLA, which dictate whether a vessel may employ foreign crew members.

While the application of the coastwise law is highly fact specific, under the

current regulatory model CBP Ruling Letters have determined that foreign flag vessels can – without violating the coastwise laws – perform a variety of tasks associated with installing a wind energy field, such as wind turbine installation and cable laying. In contrast, Jones Act compliant US flag feeder vessels are required to deliver wind turbine component parts, passengers, and supplies to the OCS project site from US ports.

Proposed Vessel Manning Mandate

There is a proposed amendment to the current bill for the National Defense Authorization Act (**NDAA**) that could alter how foreign flag vessels working on OCS wind projects are manned. The proposed amendment would require a non-coastwise compliant vessel to be manned by US citizens, lawful permanent resident aliens, or by citizens of the vessel’s flag state. The amendment would restrict the number of crew members who are citizens of the vessel’s flag state which could not exceed two and one-half times the number of individuals required to crew the vessel. This NDAA bill has passed the House of Representative and is currently pending in the Senate.

Conclusion

This summer the federal government continues encouraging offshore wind energy projects, proposing to open new OCS areas to wind energy development and providing clean energy tax incentives. As US offshore wind growth continues, there will be significant opportunities

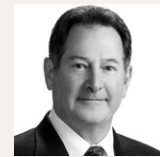
for developers, contractors, vessel owners and operators, and lenders. Stakeholders should remember, however, to carefully consider how the Jones Act fits into the complex set of regulations that apply to OCS wind energy projects.

If you have questions about this briefing or about applying US coastwise laws to offshore wind projects, please feel free to contact the authors:



MICHAEL WRAY

Partner, Houston,
T +1 (713) 706 4905
E michael.wray@hfw.com



CHRIS HART

Of Counsel, Houston
T +1 (713) 706 1958
E chris.hart@hfw.com



MELANIE FRIDGANT

Associate, Houston
T +1 (281) 305 5154
E melanie.fridgant@hfw.com

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