



US OFFSHORE WIND ENERGY AT DAWN: THE INTERACTION BETWEEN OFFSHORE WIND PROJECTS AND THE JONES ACT

The United States is home to one of the largest and fastest growing wind markets in the world, according to US Department of Energy reports. A drive across west Texas, Oklahoma or the plains of Kansas will reveal large scale wind farms. While offshore wind energy development is firmly rooted in Europe, the American offshore wind energy sector is increasing momentum and experiencing substantial investment.

Offshore wind energy projects require large investment and long lead time. Located just off the coast of Rhode Island, the Block Island Sound project reportedly cost approximately US\$300 million. A complex offshore wind energy project will require use of several kinds of vessels, including specialized installation vessels, at various stages of the project. Since the US coastwise trade laws restrict which vessels can perform various services in US waters, planning an offshore wind project here calls for a firm understanding of the potential application of the coastwise trade law of the United States, the Jones Act.

The offshore wind energy sector presents a growth opportunity for US shipyards and for vessel operators who have faced difficult markets over the last few years. For wind energy developers, potential application of the Jones Act to a project may dictate vessel availability and associated costs. Since violations of the Jones Act carry severe penalties, understanding how it applies is critical.

Increasing North American offshore wind energy development

While a significant amount of attention in the energy sector has been focused on the shale boom, the wind energy sector is poised for rapid expansion. Land-based wind farms are prevalent in much of the southern and midwestern United States, but domestic and foreign investors alike are showing greater interest in offshore wind farms.

Europe has been the global example for offshore wind energy with over 4,000 offshore wind turbines across eleven countries that generate a total of 15.8 gigawatts of energy. Following this example, companies such as Equinor (formerly Statoil), Avangrid, and Orsted (formerly Dong Energy) are pursuing wind farm projects along the eastern seaboard of the United States in hopes of capitalizing on this alternative energy source. However, so far only one commercial offshore wind energy project – Block Island Wind – has been installed and is currently operating. This Rhode Island coast wind farm contains only five turbines and generates

30 megawatts of energy. But the Department of Energy reports that more than 25 offshore wind projects are being planned, and they could provide about 24 gigawatts of energy on the northeastern and mid-Atlantic coasts of the United States.

A number of states have ongoing initiatives to make offshore wind a viable energy source and are working with their legislatures to draft policies that will facilitate development in the coming years. New York has adopted a new Clean Energy Standard that asks for a large increase in renewable energy and reportedly is looking to develop 2.4 gigawatts of offshore wind power supplying the state by 2030. New Jersey is also looking to create 3.5 gigawatts of offshore wind energy on a similar timeline as New York. Maryland, as of May 2017, approved two offshore wind projects on its coast to be built by Deepwater Wind, the developer of the Block Island Wind farm.

The Massachusetts legislature has passed laws that will allow utility companies to enter long-term power purchase agreements with competitive offshore wind projects as a way to begin development. California and Hawaii are working with Statoil to identify the best locations for offshore wind farms. Hawaii is specifically looking to power its islands with one hundred percent clean energy by 2045.

Texas and Louisiana are no strangers to the offshore energy industry, given their long and successful history exploring and producing oil and gas in waters off their coasts. The Gulf of Mexico appears to be an area of interest for offshore wind developers due to a variety of advantageous factors. The shallow Gulf water allows for easier turbine installation and higher accessibility to the offshore oil and gas infrastructure, which may aid in quicker construction of wind farms. The challenge facing offshore wind development in Texas is the increased cost of offshore wind farms and the vast expanse of land that is still available for renewable energy development in Texas, as opposed to the much denser population concentrations in the northeastern coastal states of the US.

US coastwise law overview

The Jones Act governs the transportation of merchandise between points in the United States. Similarly, the Passenger Vessel Services Act (PVSA) governs the movement of people between coastwise points. Jones Act regulations are administered by the US Customs and Border Protection (CBP). Failure to comply with the Jones Act carries severe penalties, which may result in forfeiture of the merchandise or a monetary fine equal to the value of the merchandise.

The Jones Act, codified at 46 U.S.C. § 55102, determines what ships are allowed to transport cargo between two "coastwise points", known as coastwise trade. A vessel engaged in coastwise trade must have a coastwise endorsement issued by the US Coast Guard. In order to get a coastwise endorsement, a vessel must be built in the United States, registered under the US flag, owned and controlled by United States citizens.

The Jones Act applies to "merchandise" that is transported by water between "points in the United States." In the context of a wind energy project, merchandise could include turbine blades, piles or foundation jackets set into the ocean floor, generators and power transmission equipment, and a variety of other components necessary for constructing and operating a wind farm. A coastwise "point" is any place within the United States and its territories, including places up to three nautical miles offshore.

The Outer Continental Shelf Lands Act

Significantly for offshore wind farms, and as vessels serving the offshore energy industry know, a US point covered by the coastwise laws can include many places beyond three miles offshore that are on the US Outer Continental Shelf (OCS).

Under the Outer Continental Shelf Lands Act (OCSLA), US law extends to the subsoil and seabed of the OCS, including "all artificial islands, and all 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 therefrom, or any ... other device (other than a ship or vessel) for the purpose of transporting such resources¹. Once such a structure is erected on the OCS, it becomes a "point" covered by the coastwise trade laws.

When Congress enacted OCSLA in 1953, one of the law's main purposes was, arguably, to govern activities aimed at extracting oil, gas, and other resources from the seabed and offshore subsoil. Since wind farms are aimed at extracting resources from the wind, as opposed to the seabed or subsoil, it is arguably murky whether OCSLA extends US law, including the Jones Act, to wind farm projects on the OCS.

How does this play out in practice? In the oil and gas industry, foreign-flagged mobile offshore drilling units (MODU) routinely operate on the US OCS, which per a 1988 Customs Ruling Letter is not prohibited under the coastwise laws². While engaged in drilling operations, however, a non-coastwise compliant MODU is served by coastwise complaint offshore supply vessels that transport personnel and supplies to the MODU.

While the interplay between the Jones Act and the OCSLA is relatively clear within the oil and gas context, their application to offshore wind projects on the OCS remains a somewhat unresolved question. There is no specific mention within the OCSLA statute of alternative energy projects on the OCS.

CBP rulings on offshore wind development projects

Upon request, the CBP will issue Headquarters ruling letters (HQ Rulings) as to whether the use of a foreign-flagged vessel violates the Jones Act. While HQ Rulings are fact specific and CBP has taken the position that these rulings have no precedential value, the HQ Rulings

nevertheless provide guidance on how CBP interprets the Jones Act.

The 2010 NRG Bluewater Holdings LLC HQ ruling

In a 2010 ruling, CBP addressed the issue of construction of meteorological data towers off the coast of New Jersey and Delaware³. These meteorological towers were to be used in collecting wind speed data that would be useful for plotting the site for future wind farm development to be built on the OCS.

The component parts for these towers would be constructed onshore and brought to the offshore location for construction via coastwise-qualified vessels. A foreign-flagged construction vessel would be used to install the towers by driving the foundation into the seabed and then using its crane to pick up and install the tower's component parts. The tower parts would not be landed on the foreign-flagged vessel. In short, the foreign-flagged construction vessel would be used as a stationary construction platform.

CBP held that the use of the foreign-flagged vessel did not violate the Jones Act because neither "drilling nor pile driving by a stationary vessel constitutes coastwise trade or coastwise transportation." The CBP highlighted that since the foreign-flagged vessel would be stationary and would utilize a crane for installation of meteorological data tower components, no Jones Act violation would occur.

The 2011 Deepwater Wind Holdings ruling

A similar CBP ruling in 2011 discussed transportation and installation of wind turbines for two wind farms⁴. The first wind farm would be located three miles southeast of Block Island, Rhode Island, and the second wind farm would be twenty miles off the US mainland.

The turbines would originate either in Rhode Island and be transported to the project site on coastwise-qualified vessels (barges), or originate in Germany and be transported on a non-coastwise vessel directly to the project site. Each of the turbines would be installed on separate

steel jacket foundations connected to the seabed. At both wind farm sites, a non-coastwise qualified jack up vessel would extend its legs to the seabed and use its crane to lift the turbines from the transporting vessels and place the turbines on their respective foundations. The jack up vessel would not transport any passengers or merchandise between any of the installation sites.

CBP held that the proposed transportation of the turbines by either barge from Rhode Island or aboard a foreign-flagged vessel to the project site would not be a violation of the coastwise trade laws. Regarding use of the foreign-flagged crane vessel, CBP said "[any] movement of merchandise is effected exclusively by the operation of the crane and not by the movement of the vessel, except for necessary movement which is incidental to a lifting operation while it is taking a place," so there is no violation of the Jones Act. The CBP reasoned that since the crane by which the turbines were being constructed was on a stationary vessel there was no "movement" occurring so this would not be considered "coastwise trade" under the Jones Act.

Interplay of Federal Regulations governing offshore energy development

The US Bureau of Ocean Energy Management (BOEM) is a federal regulatory body that governs energy projects on the OCS. Despite possible US restriction on use of vessels for offshore wind development under the Jones Act, the BOEM is inviting submissions from companies proposing commercial wind leases on the OCS in the New York Bight area, offshore New Jersey and New York. Although the April 2018 BOEM announcement is not a "lease sale" it does indicate the federal government's interest in generating revenue from wind energy lessees that may want to develop these projects. In addition, BOEM has commissioned various studies to evaluate standards for offshore wind development through the Bureau's Technology Assessment Program. Although the Jones Act may have a dampening impact on offshore wind development, BOEM

1. 43 U.S.C. 1333 (a)(1).

2. Customs Ruling HQ 109817, Nov 14 1988.

3. Customs Ruling HQ H105415, May 27, 2010.

4. Customs Ruling HQ H143075, February 24, 2011.

appears to be focused on the safe operation of commercially viable wind farms on the OCS that will generate lease bid fees and rental payments for the US government.

Looking to the future

There is great potential for offshore wind energy development in the United States, which could have a significant impact on US shipyards and vessel operators. Although most of the current wind farms are built in relatively shallow water, as technology advances floating wind turbine farms might be built further offshore. When planning these projects, the Jones Act is a key statute that offshore wind developers will have to navigate.

Based on CBP's 2010 and 2011 HQ Rulings, it appears that CBP will apply the same reasoning that it has applied to years of HQ Rulings in the oil and gas sector. Implicit in the 2011 HQ Ruling is CBP's belief that the Jones Act applies to a wind farm project site 20 miles offshore.

Congress has occasionally amended the OSCLA over the last sixty-five years, most recently in 2005, and may choose to address renewable energy at some point in the future. Proposals to repeal or substantially modify the Jones are periodically introduced into Congress but have never passed. In 2017 CBP proposed revisions to its interpretation of the definition of "merchandise" as it related to "vessel equipment" under the Jones Act, but this generated

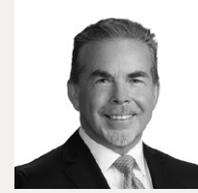
robust comments from multiple stakeholders, including various industry and trade associations, and the proposed revision has not been adopted. In short, it is not expected that the current regulatory scheme will change anytime soon.

Since it determines whether US coastwise-qualified or foreign-flag vessels may be employed, the Jones Act has an important effect on offshore wind project logistics, operations, and costs. As such, the potential impact of the Jones Act must be considered.

As the US is on the brink of an offshore wind energy boom, there is opportunity for significant growth in this sector. HFW partner Glenn Legge will address significant legal and regulatory matters that impact the US offshore wind energy industry at the Offshore Wind Executive Summit September 24-25, 2018 in Houston Texas. The Offshore Wind Energy Summit brings together wind energy and oil and gas professionals to address the legal, financial and operational challenges facing the developing offshore wind energy industry. For additional details and special rates for the Summit, please click [here](#).

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