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JONES ACT UPDATE: CUSTOMS AND BORDER PROTECTION RENDERS FIRST FLOATING OFFSHORE WIND RULING

For the first time, U.S. Customs and Border Protection (“CBP”), in Headquarters Ruling H318739 (July 6, 2021) (“HQ Ruling”), applied the Jones Act to a floating offshore wind turbine that will operate in the U.S. territorial sea.

The ruling held that a combination of coastwise qualified tugs and foreign-flagged barges could be used to fabricate and install a floating wind turbine without violating the Jones Act.¹

The Aqua Ventus Project

HQ Ruling H318739 addressed the use of non-coastwise qualified foreign barges in connection with construction and positioning of a floating wind turbine. The applicant, New England Aqua Ventus, LLC (“**Aqua Ventus**”), is a joint venture between Diamond Offshore Wind, RWE Renewables, and the University of Maine. Aqua Ventus was formed to construct a floating offshore wind demonstration project that would be deployed in U.S. territorial waters (i.e., within three miles from shore) near Monhegan Island, Maine. After completion, the wind turbine unit will consist of a concrete hull fixed to the seabed (“**Hull**”), supporting a wind turbine generator (“**WTG**”) comprised of a tower and turbine.

Aqua Ventus requested CBP to consider whether the Jones Act applied to either of the following of WTG Hull construction options:

- **Option 1**

In Option 1, the Hull would be fabricated on three to four barges lashed together at Mack Point in Searsport, Maine. One or two of the fabrication barges would be foreign-flagged. After the Hull is completed, it would then be transferred to a coastwise qualified launch barge via a skid system. The launch barge would be towed to an offshore transfer area by a coastwise qualified tug. The fabrication barges would remain stationary.²

The launch barge would then submerge so that the Hull could float off and a coastwise qualified tug would tow it to the assembly location. At the assembly location, the Hull would be ballasted down to the seabed for assembly and installation of the WTG. Following this, the completed wind turbine unit will be towed by a coastwise-qualified tug to a location near Monhegan Island, Maine for anchorage and operation.

- **Option 2**

Under Option 2, the Hull would be fabricated in segments ashore, which would then be laded onto a coastwise-qualified barge or barges. Coastwise-qualified tugs would tow the barges to Eastport, Maine. In Eastport, three non-coastwise-qualified submersible barges would be lashed together and moored to a pier to form a construction platform.

The Hull segments would be transferred from the coastwise-qualified transport barges to the non-coastwise-qualified lashed construction barges for assembly.

¹ The Jones Act specifically prohibits the coastwise transportation of “merchandise” between coastwise points by non-coastwise qualified vessels. Merchandise includes “(1) merchandise owned by the United States Government, a State, or a subdivision of a State; and (2) valueless material.” 46 U.S.C. § 55102(a).

² Under Option 1, Aqua Ventus posited that all of the fabrication barges would be coastwise qualified and the skid barge would be foreign flagged. In this permutation of Option 1, none of the barges would move.

During the assembly phase, the lashed barges may need to be moved from the pier so that other ships can temporarily access the pier. Such a movement would be accomplished by a coastwise-qualified tug or tugs. In each instance the lashed barges would be returned to their exact original mooring location at the pier without having unladen any items.

Once the Hull is complete, the lashed barges would submerge at the pier and the Hull would be floated off the barges. The remainder of the operation would be completed by coastwise qualified tug that would tow the Hull to the assembly location, where installation would be completed in the same manner as Option 1.

CBP's Ruling

Upon review of the two Options, CBP held that the use of non-coastwise-qualified barges that would remain completely stationary at all times the Hull was laden on board would not violate the Jones Act.³ CBP further held that in Option 2, the non-coastwise qualified barges movement off the pier to allow other vessels to access the pier, but which would return to the same exact point, likewise did not violate the Jones Act. CBP reasoned that the facts presented in Options 1 and 2 did not violate the Jones Act because the merchandise [the Hull] was not transported between coastwise points on board the non-coastwise-qualified barges.⁴

Conclusion

HQ Ruling H318739 is yet another ruling in a string of rulings issued by CBP in 2021 concerning offshore wind.⁵ Significantly, HQ Ruling H318739 addresses offshore wind operations in the territorial sea as opposed to operations on the Outer Continental Shelf and considers the application of the Jones Act to a floating wind structure instead of a fixed wind turbine assembly.

The Aqua Ventus signals that CBP will continue to apply the Jones Act model developed in the oil and gas arena to emerging offshore wind technology. In prior Jones Act oil and gas rulings, CBP has held that the use of a foreign flagged vessel as a stationary work platform did not violate the Jones Act. The Aqua Ventus ruling is also a reminder that the transportation element is a critical part of a Jones Act analysis. Given the Biden Administration's clean energy goals, it is reasonable to expect more CBP offshore wind rulings are on the horizon.

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³ CBP also held that there was not a violation of the Towing Statue because all of the towing would be performed by coastwise qualified tugs. 46 U.S.C. § 55111

⁴ A coastwise transportation of merchandise takes place when merchandise laden at a coastwise point is unladen at another coastwise point, regardless of origin or ultimate destination. See 19 C.F.R. § 4.80b(a).

⁵ See HQ H309186 (January 27, 2021); HQ H316313 (February 4, 2021) and HQ H317289 (March 25, 2021)

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