



MAY 2022

## CBP ISSUES KEY RULING ON U.S. OFFSHORE WIND OPERATIONS

**U.S. Offshore wind is in high demand. On February 25, 2022, the Bureau of Ocean Energy Management (BOEM) announced the winning bids for six lease areas totalling some 480,000 acres in the New York Bight area on the Outer Continental Shelf (OCS) for wind energy development. On May 11, 2022, BOEM announced results from its wind energy auction in the Carolina Long Bay OCS area, which covered 110,091 acres. BOEM is currently considering OCS locations off the coast of central and northern California for future lease auctions.**

Given the pace of wind energy development on the OCS, understanding how the U.S. coastwise laws potentially apply to vessels engaged in wind energy projects is critical. A recent ruling from the U.S. Customs and Border Protection (CBP), Headquarter Ruling HQ H300962<sup>1</sup> (**HQ H300962**), is instructive regarding the application of the coastwise laws to different phases of an offshore wind energy project. HQ H300962 builds on prior offshore wind rulings and indicates how the CBP may classify certain vessel related activities under the coastwise laws going forward. There is now an evolving body of CBP offshore wind rulings, which reveal that a mixture of U.S. coastwise-qualified and foreign-flagged vessels may be utilized during the lifespan of an offshore wind energy project.

### Coastwise Law Overview

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

For offshore wind projects, the Jones Act, 46 U.S.C. § 30104, Dredging Act, 46 U.S.C. § 55109 and Passenger Vessel Services Act (PVSA), 46 U.S.C. § 55103, are highly relevant. Specifically, the Jones Act restricts transportation of merchandise between two coastwise points in the U.S. to a U.S. coastwise-qualified vessel. 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. HQ H300962 examines the application of the Jones Act and the PVSA at different stages of an offshore wind project.

### Analysis of HQ H300962

HQ H300962 centers on an offshore wind energy project slated to begin in 2023. The party requesting a ruling by the CBP plans to transport and install wind turbine generator units at an offshore windfarm via a non-coastwise-qualified vessel. The project consists of four different phases: (1) cable installation; (2) scour protection installation; (3) foundation installation; and (4) installation of the wind turbine generator units.

In the ruling, the CBP gives distinct guidance regarding whether specific wind turbine installation activities would fall within the coastwise laws. The ruling covers the four project phases and the following activities: (i) cable laying; (ii) the installation of scour protection; (iii) the installation of piles for each turbine's foundation; (iv) turbine installation; and (v) transportation of the crew.

#### (i) Cable-Laying

To integrate into the power grid, subsea electrical cables will have to be installed between wind turbine generators to offshore substations and ultimately to an onshore connection to the grid. CBP considered whether a non-coastwise cable laying vessel could perform this work, which would involve a trenching machine to create a path along the seabed in which to lay the cables.

---

<sup>1</sup> See HQ H300962 (Apr. 14, 2022).

Dredging is considered an activity subject to the coastwise laws per 46 U.S.C. § 55109. CBP has previously held that dredging is a form of excavation. Historically, CBP has differentiated between traditional dredging activities and subsea jetting<sup>2</sup> in the context of pipeline installation. CBP does not consider jetting<sup>3</sup> to be within the definition of dredging and therefore not within the purview of the Dredging Act.<sup>4</sup>

In HQ H300962, CBP considered the use of a non-coastwise qualified vessel that would load sections of cable at either a U.S. port or a foreign port. After loading, the cable laying vessel would lay various sections of cable on the seabed in both the U.S. territorial sea and between different points on the OCS. Some sections of the cable would be laid down on "pristine seabed" (i.e. clean, untouched seabed). After this first phase of cable installation is complete the cable would be stored on the seabed until it is picked up by another vessel. During the second phase of the installation process, various sections of cable would have to be picked up and brought to the surface and placed on a vessel and thereafter connected to either another section of cable or to a substation. After the relevant connections were made, the cable would be returned to the seabed.

In line with prior oil and gas rulings, CBP held that cables laid by a non-coastwise-qualified cable installation vessel between two coastwise points does not constitute dredging because cable-laying vessels using cable-burial devices, which employ a jetting action resulting in the emulsification of the seabed surrounding the cable, does not constitute dredging. CBP further held that a non-coastwise-qualified vessel may pick up the installed cable and connect it to another section of cable. The non-coastwise-qualified vessel can then lay the cable back onto the seabed to make a final connection to an offshore structure without violating the Jones Act because the movements constitute a cable-laying operation.

### **(ii) Scour Protection**

Scour material provides erosion protection at the base of a wind turbine. Scour material is typically rock and the scour material is applied during the installation phase around the base of a wind turbine tower. Scour protection materials would need to be installed at each wind turbine site on the seabed of the OCS. Each individual wind turbine foundation would need scour protection in order to prevent erosion of the seabed. The project includes scenarios where scour rocks are loaded from both coastwise and non-coastwise points and then transported and placed on the seabed.

The CBP has previously held that a coastwise point will be created when the first layer of scour protection is placed on the pristine seabed. See HQ H317289 (Mar. 25, 2021). In the March 25, 2021 ruling, the CBP stated that installing scour protection when the scour rocks are transported to, and installed on, the pristine (untouched) seabed, would not constitute a violation of the Jones Act. However, if even one layer of scour rock is laid on the seabed, a coastwise point is established, and then a U.S. coastwise-qualified vessel would have to transport additional scour protection rocks from a U.S. port.

HQ H300962 confirms the CBP's prior rulings on the issue. A non-coastwise-qualified vessel may transport the scour protection material from a coastwise point to the installation location when that location is the pristine seabed without violating U.S. coastwise laws because of the lack of a U.S. coastwise point. However, once "the first layer of scour protection material is placed on the seabed" in any amount, the area becomes a U.S. coastwise point. Applying additional layers of scour material will require the use of a U.S. coastwise-qualified vessel, if the scour material originates from another U.S. coastwise point.

### **(iii) Transportation and Installation of Concrete Mats**

For the project at issue in HQ H300962, subsea pipes and cables installed at the offshore wind farm would be protected by placing concrete mats over them after the initial installation on the seabed by a non-coastwise-qualified vessel, which would be loaded at either a U.S. port or a foreign port. The key legal issue was whether the concrete mats were considered merchandise or vessel equipment under the Jones Act.

In the ruling, CBP determined that under the Jones Act, concrete mats or other protective material were merchandise because they do not aid the operation of the installation vessel itself as a vessel, nor are such items returned to the vessel; they are left on the seabed. As a result, the transportation of such materials on a foreign flag vessel between coastwise points may be prohibited.

HQ H300962 is a significant departure from prior CBP rulings which have allowed concrete mats and other protective equipment to be loaded at a coastwise point such as a U.S. port, then transported to an offshore coastwise point for installation by non-coastwise-qualified vessels because the mats were considered vessel equipment.<sup>5</sup> In 2019, CBP issued a decision that narrowed the scope of "vessel equipment."<sup>6</sup> Under the revised 2019 standard, the concrete mats at issue were considered merchandise because the concrete mats were not used by the vessel itself

---

<sup>2</sup> Generally speaking, subsea jetting is a process where high pressure water and/or air is used to disperse subsea soil.

<sup>3</sup> See HQ 115646 (Apr. 12, 2002).

<sup>4</sup> See 46 U.S.C. § 55109.

<sup>5</sup> See HQ 115531 (Dec. 3, 2001) and HQ 113838 (Feb. 25, 1997).

<sup>6</sup> See Customs Bulletin and Decisions, Vol. No. 53, No. 45 at 84 (Dec. 11, 2019).

to operate the vessel, nor used as tools, and were not returned to the vessel. As a result, concrete mats loaded at a U.S. port and installed over a power cable sitting on the OCS seabed constitutes coastwise transportation subject to the Jones Act. If the concrete mats were loaded at a foreign location, the coastwise laws would not apply.

#### (iv) Turbine Installation

During the project at issue, a foreign wind turbine installation vessel would be utilized to install the wind turbine generator units onto the pile structure. Components for the structure will either arrive from a foreign port or be on a coastwise-qualified feeder vessel coming from a U.S. port. The components will then be loaded onto a stationary structure such as a feeder vessel attached to the seabed via jack-up legs or anchor, or in a stationary position with the assistance of a dynamic positioning system.

In HQ H300962, the CBP held that a non-coastwise-qualified vessel may install the wind turbine components so long as the components were not transported from a U.S. coastwise point. Likewise, a foreign vessel can also transport foundations and components from a foreign port to U.S. waters and install those foundations and materials at the wind farm site. Since the installation vessels onto which the components will be unloaded will remain stationary during the operations, the use of a non-coastwise-qualified Pile Installation Vessel and Turbine Installation Vessel would not constitute a violation of the Jones Act.

#### (v) Transportation of Crew and Tools

A non-coastwise-qualified Turbine Installation Vessel will transport a complement of crew to conduct the wind turbine generator unit installation. Members of the “project crew” will either join the vessel in a U.S. port or will be transported from a U.S. point to the Turbine Installation Vessel on the OCS aboard either a coastwise-qualified vessel or U.S.-registered helicopter. The CBP held the transportation of supervisors, lifting operations crewmembers, and technical crew from a U.S. coastwise point to the installation site and between installation sites would not violate the Jones Act because they are not passengers per the PVSA. The CBP rules that the project crew are not passengers since their activities are “directly and substantially” related to the operation, navigation, or business of the vessel itself.

Likewise, the CBP held that items and tools that will be used by the crew to assist with installation are an integral part to the function of the vessel. As a result, the tools on the installation vessel are considered vessel equipment under the Jones Act.

## Conclusion

CBP's HQ H300962 addresses and confirms several established coastwise compliance points in the rapidly developing U.S. offshore wind market. The new wrinkle is CBP's rejection of prior rulings on the scope of materials falling within the definition of vessel equipment and holding that the concrete mats are merchandise. The concrete mat ruling indicates how CBP may apply the 2019 vessel equipment ruling going forward.

Understanding whether an installation activity is regulated by the Jones Act is key for offshore wind actors. Under current law, it appears that a mix of coastwise and non-coastwise compliant vessels will be the model for offshore wind energy projects. Since the application of the coastwise law is a highly fact specific determination, parties involved in offshore wind projects should retain experienced counsel and obtain a CBP ruling letter before starting operations.

For more information, please contact the author(s) of this alert



**MICHAEL WRAY**

Partner, Shipping, 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



**SVETLANA SUMINA**

Associate, Houston

**T** +1 (713) 706 1946

**E** svetlana.sumina@hfw.com



**MELANIE FRIDGANT**

Associate, Houston

**T** +1 (281) 305 5154

**E** melanie.fridgant@hfw.com

**hfw.com**

© 2022 Holman Fenwick Willan LLP. All rights reserved. Ref:

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email [hfwenquiries@hfw.com](mailto:hfwenquiries@hfw.com)

Americas | Europe | Middle East | Asia Pacific