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## Customs and Border Protection Revokes New Ruling Regarding Offshore Wind

*Stakeholders in offshore wind, particularly vessel operators and project managers, should ignore a recent U.S. Customs and Border Protection (“CBP”) ruling on offshore wind. While there had been buzz about this ruling, CBP has revoked the ruling based on a misunderstanding of the facts in question in the ruling request. As such, there are no recent rulings related to offshore wind, and stakeholders should continue to examine their Jones Act compliance plans with experienced counsel and seek rulings as needed.*

### NEW DEVELOPMENT

A recent CBP ruling, HQ [H309672](#) (July 15, 2020) (the “Ruling”), drew the attention of many in the industry since the last ruling relating to offshore wind was issued approximately nine years ago for the Deepwater Wind project in 2011. The Ruling related to wind farm activities occurring in the territorial sea off the coasts of Rhode Island and Massachusetts. CBP has since published a revocation notice, HQ [H312773](#) (August 3, 2020) (the “Revocation”), which was published on the CBP website on August 12, 2020, retracting the Ruling. CBP’s stated reason for the revocation was the lack of clarity on whether the “activities would occur in the territorial sea or on the Outer Continental Shelf (“OCS”)” and that it would be best to revoke the Ruling “until the coordinates of the installation can be established.”

### BACKGROUND

In 2011, CBP issued Blank Rome a [ruling](#) on behalf of the Deepwater Wind project that the use of a crane that is aboard a non-coastwise-qualified vessel to load and unload wind turbines in the territorial seas is not prohibited by the Jones Act. No rulings have been issued on an offshore wind project since the 2011 ruling. Since that time, we understand CBP has declined to rule on requests to issue a ruling on the applicability of the Jones Act to offshore wind activities occurring on the OCS and whether a wind farm foundation or other devices attached to the seabed for wind farm purposes would constitute a coastwise point under the Jones Act.

## ANALYSIS

The Ruling itself was not particularly significant. CBP held that a foreign-flag jackup vessel could install turbines in the territorial sea once the turbines were brought from a coastwise point in the United States by a coastwise-qualified tug. The proposed operation involved a jackup installation vessel, which would position itself in territorial waters. A coastwise-qualified tug would transport the turbines from port, and the turbines would be loaded onto the deck of the jackup vessel. The jackup vessel would then install the turbines while keeping station. The Ruling was similar in nature to the 2011 Deepwater Wind ruling.

While the facts of the Ruling involved an offshore wind project in the sense that the operation in question was a wind project, none of CBP's analysis related to wind in any way. The primary reason for this was that all operations took place in the territorial sea, which is subject to the Jones Act in its entirety no matter what activity or location is involved. It apparently created confusion in the industry because some stakeholders assumed that the reasoning in the Ruling could be applied to an offshore wind farm occurring on the OCS and that the Jones Act applied to such a project on the OCS.

There apparently remains great confusion within industry concerning the extent of the territorial sea for purposes of the Jones Act. Points embraced within the coastwise laws include all points within the territorial waters of the United States, including points within a harbor. The territorial waters of the United States consist of the territorial sea, defined as the belt, three nautical miles wide, adjacent to the coast of the United States and seaward of the territorial sea baseline. While Presidential Proclamation 5928 of December 27, 1988, extended the U.S. territorial sea to 12 miles, this extension was only for international purposes and it did not affect domestic U.S. law. Congress has since extended many domestic laws relating to the territorial sea from three to 12 miles, but for the Jones Act, the territorial sea remains three miles. The OCS begins at this three-mile limit and extends seaward to 200 miles under U.S. law today for Jones Act purposes.

With regard to the OCS, CBP takes the position that the coastwise laws were extended by the Outer Continental Shelf Lands Act ("OCSLA") to installations and devices permanently or temporarily installed on the OCS for the "purpose of exploring for, developing, or producing resources therefrom." However, CBP has not issued any formal rulings or provided any other written guidance on whether the coastwise laws have been extended to wind farm projects located on the OCS. However, due to the controversy around the question of the application of the Jones Act to a wind farm project as compared to an oil and gas project involving the minerals from the seabed, CBP has not issued any formal rulings or provided any other written guidance on whether the coastwise laws have been extended to wind farm projects located on the OCS. No matter which way CBP ultimately rules, the decision will have huge implications for all stakeholders in the industry.

## CONCLUSIONS AND RECOMMENDATIONS

The revocation of the Ruling demonstrates the fact-sensitive nature of Jones Act analysis. Given the significant legal difference between an operation occurring in the territorial sea as opposed to being on the OCS, the revocation was merited. Now that the Revocation is official, stakeholders must continue to monitor future developments with regard to the application of the Jones Act to a wind farm activity on the OCS. As such, developers and contractors planning for offshore wind development should continue to examine their Jones Act compliance plans and seek the advice of experienced counsel in this area and possibly seek a Jones Act ruling depending on the facts.

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