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Implications of Jones Act Changes to the Offshore Energy Industry

*By Jonathan K. Waldron and Stefanos N. Roulakis**

In this article, the authors discuss recent changes to the interpretation of the federal Jones Act of particular interest to the offshore energy industry.

Vessels are the backbone of any offshore construction project, and the Jones Act, which celebrated its centennial this month, regulates their operations in U.S. waters on the Outer Continental Shelf. Originally promulgated as a transportation statute, the Jones Act has governed vessels engaging in offshore construction for nearly four decades. While offshore oil and gas construction operations have been conducted in compliance with the Jones Act for decades, with the burgeoning offshore wind sector there is renewed interest on how the Jones Act will be applied to such projects.

Indeed, planning for Jones Act compliance is a major component of successful wind farm installation operations, as has been the case for years with oil and gas-related work. Interestingly, despite the fact that the Jones Act is now a century old, there have been recent significant regulatory and legal developments in its interpretation.

Specifically, after years of debate within the offshore industry, on December 19, 2019, U.S. Customs and Border Protection (“CBP”) issued its decision in its Customs Bulletin, “Modification and Revocation of Ruling Letters Relating to CBP’s Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points” (the “Decision”). The Decision became effective on February 17, 2020.

Offshore developers, vessel operators, and other stakeholders must now face the question: How does the Decision affect offshore activities?

Further, the Decision currently faces challenges both in Congress and the courts. Some members of Congress who are not pleased with CBP’s actions have been focused on legislating in this area and modifying the Jones Act to include restrictions on lifting operations undertaken by installation vessels. This would effectively overrule parts of the Decision.

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Stakeholders in the offshore wind, ocean renewable energy, and offshore oil and gas sectors should pay attention to these developments as they will intimately impact offshore construction activities.

BACKGROUND ON THE CBP DECISION

In both 2009 and 2017, CBP published notices to revoke or modify various rulings, which potentially could have overturned decades of precedent with regard to a sweeping range of offshore operations that have never been subject to the Jones Act. To be frank, CBP did not fully understand how the offshore industry operated offshore, and the proposals were potentially overbroad without CBP understanding the economic impacts on the various types of offshore operations these proposals would have adversely affected. As a result of strong industry backlash on both occasions, the proposals were withdrawn for reconsideration.

Finally, following the 2017 withdrawal, CBP undertook an intensive exchange of information with all facets of industry to fully understand how industry actually operates offshore and to fine-tune and focus its 2019 proposal on vessel equipment issues and lifting operations, which resulted in a decision that took into account comments and input from all stakeholders.

As far as substance, the Decision eliminates previous erroneous decisions that permitted non-coastwise-qualified vessels to transport items that should have been considered merchandise under the Jones Act. The Decision also clarifies that lifting operations may be conducted by non-Jones Act vessels.

Specifically, as discussed in more detail below, the Decision:

- Broadens the definition of merchandise to make it clear that non-Jones Act vessels can no longer carry out certain offshore activities that they have performed for years under a misguided and overly broad “mission of the vessel” theory, and
- Establishes a new interpretation of “Lifting Operations” to specify the movements that a non-Jones Act vessel can perform when conducting installation or decommissioning operations, which will not be considered “transportation” within the meaning of the Jones Act.

Should the Decision be overturned either in court or through legislation, it will have a significant impact on the market for offshore construction, whether for renewable energy or fossil fuel production.

Currently, there are few or no Jones Act-qualified vessels that can perform the necessary lifting operations needed to undertake the multitude of varying construction projects offshore, depending on the crane capacity and vessel and stability characteristics required for a particular lifting operation.

THE CHANGES IN THE DECISION

Vessel Equipment

For decades, CBP used a “Mission of the Vessel” concept to justify certain subsea installation, repair, and maintenance work. CBP incorrectly applied this concept to the Jones Act. Notwithstanding that these transportations should have been reserved to the Jones Act fleet, the application of this concept allowed foreign-flag vessels to undertake transportation of certain items.

The Decision specifically revoked the application of “Mission of the Vessel” and established a new definition of vessel equipment. Under this interpretation, the Decision narrowed the scope of vessel equipment to include only items that are “necessary and appropriate for the navigation, operation, or maintenance of a vessel and for the comfort and safety of the persons on board.”

CBP stressed that if an item is necessary and appropriate for the operation or maintenance of a vessel, it is considered vessel equipment. Items considered “necessary and appropriate for the operation of the vessel” are those items that are integral to the function of the vessel and are carried by the vessel. CBP also emphasized that the fact that an item is returned to and departs with the vessel after an operation is completed and is not left behind on the seabed is a factor that weighs in favor of an item being classified as vessel equipment, but it is not the sole determinative factor. In addition, CBP determined that other historically used rationale using the terms “foreseeability,” “incidental” to an activity, “de minimis,” or “unforeseen,” can no longer be relied on to support an interpretation of vessel equipment.

Lifting Operations

While non-Jones Act vessels have been used for decades to perform lifting operations that were never considered subject to the Jones Act, in a series of three rulings that were issued in 2012 and 2013, CBP ruled that movement of a vessel, even a short distance, while a topside is suspended from its crane and off its central axis in order to avoid hitting the offshore facility before unlading the topside, is a violation of the Jones Act because this movement of the vessel is interpreted by CBP as providing part of the transportation of the topside between a point in the U.S. and the offshore facility. This created great confusion and consternation in the industry by virtually making any lifting operation potentially a violation of the Jones Act.

As a result of its discussions with industry on this point, CBP made it a priority to clarify in its Decision that lifting operations are distinct from transportation within the meaning of the Jones Act. Accordingly, offshore “lifting operations” now include the lifting by cranes, winches, or lifting beams, or other similar activities or operations, from the time that the lifting activity

begins when unloading from a vessel or removing offshore facilities or subsea infrastructure until the time that the lifting activities can be safely terminated in relation to the unloading, installation, or removal of offshore facilities or subsea infrastructure.

CBP explained that offshore lifting operations are distinct from transportation in that any lateral movement of the vessel or the item in the vicinity of the structure or facility where the item is being positioned or removed is merely subordinate to and a direct consequence of the lifting operations. CBP reasoned that this interpretation was necessitated by safety and practical concerns, including the physical demands of the lifting operations, the mitigation of risk to human life and health, and the avoidance of damage to the marine environment. Importantly, CBP confirmed this interpretation applies to all offshore lifting operations and is not limited to heavy lifts.

Pipelaying, Drilling-Related Operations, and Offshore Wind Energy Facilities

CBP specifically confirmed in its Decision that CBP's existing rulings on pipelaying and cable laying remain valid and are unaffected by its Decision.

In addition, while not providing a similar statement with regard to drilling, it noted that drilling ruling letters previously identified for revocation pertaining to cement, chemicals, and other consumable materials remain in force.

Several comments sought clarification regarding the impact of the Decision on the development of offshore wind energy facilities. CBP responded that any future interpretations by CBP on the application of the Jones Act to wind energy facilities or other activities will be in response to ruling requests based on specific transactions. Accordingly, it remains prudent to assume for the most part that the Jones Act applies to wind projects similar to the manner it applies to oil and gas projects until CBP issues rulings in the future.

ONGOING ATTEMPTS TO OVERTURN THE DECISION

Congressional Legislation

Meanwhile, as of the time of the writing of this article, "Installation Vessel" legislation is pending in Congress in the form of an amendment to the Jones Act that would create a "waiver" procedure for certain lifting operations that could statutorily overturn the Decision with regard to lifting operations as discussed above. The House of Representatives provision is contained in the House-passed version of the Coast Guard Authorization Act of 2019. The Senate version of this bill is silent on this point. Negotiations are ongoing.

One issue that Congress is considering in its decision is the fact that there are press releases concerning the potential building of Jones Act-compliant

installation vessels to service the domestic offshore wind market. Some stakeholders assert that the plans to build this vessel demonstrates the need for further protections for the domestic industry. However, other stakeholders see these plans as demonstrating that the Jones Act as written continues to provide the necessary support to incentivize the domestic industry to thrive without the need for Congress to intervene with a waiver regime.

Litigation

At the time of the original notice and revocation in 2017, the Offshore Marine Service Association (“OMSA”) along with the Shipbuilders Council of America (“Shipbuilders”) filed suit against CBP. Count One of the three counts included in the OMSA-Shipbuilders’ original complaint challenged the 25 vessel equipment rulings that were the subject of CBP’s 2017 proposal to revoke.

When CBP issued the Decision, CBP filed a motion to the court asking the court to find that the first count was made moot by the CBP Decision and that the court should throw out the other two counts based on previous submittals. The case has largely been on hold while CBP considered the Decision issued by CBP.

The day after the Decision became effective, OMSA-Shipbuilders filed an administrative appeal with CBP challenging the Decision as unlawful. CBP denied the appeal on April 16, 2020. On April 30, the plaintiffs filed for Leave to Amend its Complaint. CBP, along with the American Petroleum Institute (“API”), who intervened in the lawsuit, have filed an opposition.

The sum of the opposition is that a significant amount of time has passed and leave should not be granted to amend the complaint. CBP/API note that there is an unexplained two-year delay in the litigation, which “should be fatal” to OMSA-Shipbuilders’ motion, and assert that the delay in a ruling on the CBP/API May 2018 motion for judgment on the pleadings has negatively affected their operations. CBP/API note that denying OMSA-Shipbuilders’ motion would not prejudice them, as they could reassert their claims in a new complaint.

It is unclear when or how the court will rule on these motions, but they raise continued questions regarding the ability of CBP to interpret the Jones Act. From a practical standpoint, stakeholders in offshore energy construction should monitor this litigation as it could have an impact on future operations.

CONCLUSION

Businesses involved in offshore renewable or oil and gas offshore energy production should continue to monitor these changes in the interpretation of

the Jones Act. Due to the Decision, non-Jones Act vessels must now comply with a narrower definition of what constitutes vessel equipment not subject to the Jones Act.

On the other hand, non-Jones Act vessels may conduct lifting operations in accordance with the Decision's new interpretation without fear of enforcement action because such operations are not transportation subject to the Jones Act.

However, industry must closely watch what action Congress ultimately takes on the installation vessel provision passed by the House to determine if the Decision's interpretation of lifting operations will be changed.

Similarly, the ongoing litigation against CBP could change the landscape for Jones Act compliance in the offshore energy production space.