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## New Legislation to Apply the Jones Act to Offshore Renewables

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*Stakeholders in offshore wind construction projects, including vessel owners and operators, project developers, and equipment manufacturers, should ensure that their plans for offshore wind development comply with the Jones Act. While most stakeholders already assume in their planning that the Jones Act applies, new pending legislation, if enacted, would confirm that the Jones Act does indeed apply to offshore wind construction.*

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### NEW DEVELOPMENTS

The House of Representatives passed legislation, H.R. 4447, the Expanding Access to Sustainable Energy Act of 2019, on September 24, 2020, which included a provision from Representatives Garamendi and Lowenthal (“Amendment 33”) to amend the Outer Continental Shelf Lands Act (“OCSLA”) that would confirm the Jones Act applies to all offshore energy development on the Outer Continental Shelf (“OCS”), including wind energy. While most projects were planned with Jones Act compliance in mind, this is a welcome development for all stakeholders, as it will bring needed clarity to renewable energy development offshore.

### BACKGROUND

The Coastwise Merchandise Statute, commonly known as the Jones Act, has evolved over time. The U.S. cabotage laws date back to the founding of the Republic and were enshrined in their current form in the Merchant Marine Act of 1920. These were originally laws that dealt with

transportation issues for domestic voyages. However, as time progressed and production of marine resources became feasible, the U.S. Congress passed OCSLA, which extended federal law to installations on the OCS.

U.S. Customs and Border Protection (“CBP”) has historically interpreted OCSLA to apply the Jones Act to oil and gas related activities on the OCS. However, there is some ambiguity about whether the Jones Act applies to offshore wind projects. Arguably, under current law, the coastwise laws should not apply to a wind farm project located on the OCS because the resource is the wind above the ocean, not from the seabed itself. While most companies have conservatively assumed that the Jones Act will apply to offshore wind construction, CBP has yet to rule on this issue. In addition, other agencies, such as the U.S. Coast Guard, take the position that OCSLA does not apply to an offshore wind project.

## ANALYSIS

Amendment 33 would extend federal law to “all installations and other devices permanently or temporarily attached to the seabed [for the purposes of] ....*producing or supporting the production of energy from sources other than oil and gas.*” (amendment text in italics). The drafters of this provision have publicly declared that the purpose of this amendment is to extend the Jones Act to offshore renewables. While there have been some articles in the media questioning whether this language is flawed, we believe those articles are in error. The operative language here in the use of the words “supporting the production” are extremely broad and thus would clearly extend the Jones Act to offshore renewables including the placement of wind structures on the seabed.

As such, we believe CBP would have to conclude, if this language is enacted, that the Jones Act applies to renewable energy projects, such as offshore wind in the same way it applies to oil and gas. This legislation would be a positive development for vessel operators and renewable energy developers because it will bring clarity and ensure a level playing field for all stakeholders.

While enactment of this bill remains possible during the current Congress, there are numerous hurdles to overcome. The House of Representatives passed their version of an energy bill on September 24, 2020. While no action has been taken by the Senate to date on their version of the energy bill, it is possible that the bill, including Amendment 33, would come under consideration during the lame duck session after the November 3, 2020 federal election. Depending on other issues and the results of the election, passage by the Senate during this session could occur. In particular, the chair of the Senate Energy and Natural Resources Committee, Senator Lisa Murkowski (R-AK), has publicly and emphatically stated

her commitment to accomplishing an energy bill this year. Nevertheless, even if the Senate passes their version of an energy bill during the lame duck session, the House and the Senate would still have to harmonize the language in their respective bills before Congress could pass it and be signed into law by the president. As of this writing, the Senate bill does not include similar language.

## CONCLUSION

Enactment of Amendment 33 would bring welcome certainty to the application of the Jones Act to offshore renewable work. This law would give CBP the needed clarity to adequately rule on offshore wind issues related to Jones Act compliance. In addition, other federal agencies would have to align their positions on offshore wind with the new legislation. Passage of Amendment 33 would assist the burgeoning offshore wind industry, which in its nascent years in the United States has shown tremendous promise for energy production as well as exciting opportunities for domestic and international vessel owners and operators and shipyards.

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