

Maritime



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CBP Modifies First Offshore Wind Ruling

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 take into consideration the implications of U.S. Customs and Border Protection's ("CBP") most recent Jones Act ruling. While a previous ruling issued by CBP in January 2021 changed course by ruling that "pristine sites" were subject to the Coastwise Merchandise Statute (commonly referred to as the Jones Act), CBP has modified this ruling generally in line with past precedent. Nonetheless, CBP's modification creates some changes for Jones Act compliance in the offshore wind sector.

On January 27, 2021, CBP ignited controversy in its first Jones Act ruling on offshore wind since the passage of the 2021 National Defense Authorization Act ("NDAA"). The NDAA, through an amendment to the Outer Continental Shelf Lands Act ("OCSLA"), clarified that the Jones Act applied to renewable energy projects on the U.S. Outer Continental Shelf ("OCS"), and stakeholders expected that the same cabotage rules which have applied to mineral energy development projects would equally apply to offshore wind. Nonetheless, in HQ H309186, CBP deviated from decades of precedent by ruling that the lading of "scour protection" materials by a non-coastwise qualified vessel at a U.S. coastwise point (*i.e.*, a port or place in the United States), and unloading of these materials at a pristine site on the OCS, would violate the Jones Act. Reversing course after comments from industry stakeholders, CBP issued a modification, which held that the "Jones Act does not apply to activity occurring at the pristine seabed on the OCS, which has been CBP's longstanding position on the issue." [HQ H317289](#) (March 25, 2021). While CBP's reversal appears to be consistent with "longstanding" precedent on

pristine sites, the modification itself raises questions about the applicability of the Jones Act in certain contexts as discussed further below.

BACKGROUND

Decades after extending federal law (including the Jones Act) to the OCS for mineral-related energy development projects, Congress enacted the 2021 NDAA, which included a provision confirming that the Jones Act applies to all offshore energy development on the Outer Continental Shelf, including wind energy. While most offshore wind projects were planned with Jones Act compliance in mind, this has generally been a welcome development for all stakeholders, with the hope that it would bring needed clarity and certainty to renewable energy development projects offshore.

However, CBP's first shot out of the gate in January missed the mark, although the agency should be lauded for issuing a correction in short order last month. In the initial ruling, Great Lakes Dredge and Dock ("Great Lakes") proposed to transport and unlash "scour protection"

materials (*i.e.*, rocks) to protect wind turbine generator (“WTG”) foundations in conjunction with the construction of the Vineyard Wind Project located on the OCS off the southeast shore of Martha’s Vineyard. Great Lakes proposed unloading the materials at the WTG sites on the OCS in layers and at different phases of the WTG installation process using both coastwise and non-coastwise vessels under various scenarios.

ANALYSIS

In its initial ruling, CBP correctly ruled that most of the scenarios contemplated would violate the Jones Act. However, while mentioning that at least some of the work involved unloading and installation at a “pristine site,” CBP determined (without articulating any rationale for its determination with regard to the pristine site) all operations under these scenarios violated the Jones Act because they constitute transportation of merchandise between two coastwise points. In reaching this conclusion, CBP determined that the project site on the OCS would be a coastwise point even prior to any construction occurring.

Previously, CBP had defined a pristine site, in the context of OCS operations, as one “at which no surface, sub-surface, or seabed structure of any sort currently exists, nor will be in existence at the time the rig arrives.” HQ 113176 (Sept. 6, 1994). CBP’s reasoning at the time was that the site “although located over the OCS, is not considered to be a point within the jurisdiction of the coastwise laws at the time of unloading.” In its modification, CBP corrected this mistake and provided new guidance for where the applicability of the Jones Act begins and ends in offshore wind projects.

The modification ruled that transportation from a coastwise point to a “pristine site” would not implicate the Jones Act. CBP reasoned that it “treats the seabed of the territorial sea differently from that of the OCS because of the narrower jurisdiction provided by the OCSLA. Within the territorial sea, U.S. sovereignty is unlimited.” As a result, “at that time of first delivery [of scour protection material], there is no coastwise point, and hence, no transportation of merchandise from one coastwise point to another.”

However, CBP’s decision raises some additional questions. Despite ruling that a “pristine site” is not a coastwise point, CBP goes on to determine that any initial placement of scour protection or other materials on the seabed creates a coastwise point and that any additional placement of scour protection in the “vicinity” of the first scour protection is subject to the Jones Act without any definition or further explanation of the meaning of the term “vicinity.” This

functionally limits the role that foreign-flag scour vessels can play in offshore wind development. In particular, CBP rules that the first layer of scour protection creates a coastwise point. CBP reasons that because “debris or wreckage” can be “attached” to the seabed, any material attached to the floor of the seabed for resource development purposes creates a coastwise point. CBP did not explain how rock lying on the seabed is an “installation” or “device” which, pursuant to OCSLA as amended by the NDAA, is a predicate for the extension of the Jones Act.

CONCLUSION

In its first ruling on offshore wind, CBP managed to defy expectations by issuing a ruling contradicting past precedent. To its credit, the agency quickly rebounded and corrected its decision generally in line with its past “pristine site” rulings. Stakeholders in offshore wind should pay particular attention to how CBP defined coastwise points for the purposes of offshore wind projects, particularly that adding a first layer of scour protection, in the absence of any other structure, is sufficient to create a coastwise point. The process of applying the coastwise laws to offshore renewables is an evolving and ongoing process. While the NDAA eliminated the uncertainty over whether the coastwise laws apply generally to wind projects, the details of exactly how they apply will continue to be interpreted by CBP. While oil and gas precedents provide some useful guidance, it will be important for the offshore wind industry to continue to interface with CBP to clarify the treatment of unique elements of renewables infrastructure projects. Indeed, it will be interesting to see how CBP analyzes vessel operations in the new context of offshore wind.

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