

U.S. Customs Issues Further Turbine and Scour Protection Guidance for Offshore Wind

JUNE 13, 2022

U.S. Customs and Border Protection just made public two rulings dated May 11 and June 6 which further fill in the picture of what foreign vessels can lawfully do in the U.S. offshore wind industry.

Both rulings considered the application of the U.S. “Jones Act” to offshore wind. The “Jones Act” is a popular term for a set of U.S. federal laws generally restricting domestic maritime commerce to qualified U.S.-flag vessels. Specially, the law restricts “transportation” of “merchandise” between two “points in the United States.”

Prior to January 1, 2021 the application of federal laws like the Jones Act to U.S. offshore wind projects was ambiguous. Congress amended the Outer Continental Shelf Lands Act on that date to remove some of the ambiguity.

On January 27, 2021 CBP issued a ruling that indicated that the law change had expanded Jones Act jurisdiction to encompass the entire pristine seabed on the U.S. outer continental shelf. Prior to the January 2021 law change, CBP had ruled on many occasions that an “installation or other device” had to be “temporarily or permanently attached” to the seabed to create a “point in the United States.”

CBP reconsidered and on March 25, 2021, determined that the January 1, 2021 law had not affected a substantive expansion of pre-existing jurisdictional law other than to encompass renewable energy. CBP further determined that once a layer of stones was placed on the seabed, that such stones constituted a “point in the United States.”

CBP was challenged both by persons who argued that the January 1, 2021 law had fundamentally changed offshore jurisdiction and by persons who argued that stones resting on the seabed are neither an “installation” nor “other device.” Those challenges by persons who had not sought the original ruling were rejected by CBP on January 7, 2022 for lack of standing to seek such an appeal.

CBP implicitly rejected the argument that stones resting on the seabed are neither an “installation” or “other device” is not sufficient to be a U.S. point in the first comprehensive installation ruling dated April 14. CBP finally issued a rejection on June 6, 2022, of the original requestor’s May 2021 administrative appeal regarding pristine seabed.

CBP did not waiver on June 6 from its position that the January 1, 2021 law change did not fundamentally alter offshore jurisdiction other than to encompass renewable energy. CBP further confirmed that a U.S. point is not

created when the first stone is laid, but rather after the first layer of scour protection is laid.

The May 11 installation ruling is the third turbine installation ruling CBP has issued for the U.S. OCS. CBP again has confirmed that a foreign installation vessel can take on implements and tools including containers from a U.S. port and deliver them to an offshore worksite and recover them because such items are “vessel equipment” and not “merchandise.” CBP has also reconfirmed that personnel who go on a tower and are re-boarded for work on the next tower are “crew” and not “passengers” such that a foreign vessel can undertake such movements.

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Author

Charlie Papavizas

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Charlie Papavizas

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