

U.S. Customs Provides New Jones Act Guidance for Offshore Wind Turbine Installation

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U.S. Customs and Border Protection recently issued rulings which continue to provide guidance on the application of the Jones Act to the installation of offshore wind turbines. The “Jones Act” is a popular term for several laws which reserve U.S. domestic maritime trade to U.S.-flag vessels which must be built in the United States and be owned and operated by qualified U.S. citizens.

FOUNDATION INSTALLATION

One issue addressed by CBP was when a foreign vessel can load offshore wind foundations in a U.S. port and then transport and install those foundations at a place on the U.S. outer continental shelf.

Prior to 2021, CBP had consistently interpreted federal law to require that there be a device or other installation on the U.S. OCS seabed for that potentially to constitute a “point in the United States” for Jones Act purposes. The law referred to as the “Jones Act” which applies to the “transportation” of “merchandise” applies between two “points in the United States.”

In January 2021, Congress amended the Outer Continental Shelf Lands Act or OCSLA to have its conflicts of laws provision apply to exploration, development, and production of offshore renewable energy. At first, CBP interpreted the change also to expand the applicability of the Jones Act to “pristine” places on the U.S. OCS where no device or other installation exists. CBP subsequently reversed itself with respect to the installation of scour protection and reverted to its long-standing interpretation that the Jones Act only applies to the U.S. OCS where there is a device or other installation present on the seabed for an energy-related purpose.

Great Lakes Dredge & Dock Corporation challenged the second ruling with CBP and then sued CBP in Texas federal court in July 2022 claiming that CBP’s first ruling on the installation of scour protection on the pristine seabed was correct. That case remains pending.

In the meantime, CBP ruled on July 17, 2023 that a foreign vessel can load monopile foundations in a U.S. port, sail to a work site where there is no preceding installation or other device and lawfully install that monopile. The reason is that the pristine seabed is not a “point in the United States.” CBP has also ruled that rocks installed for scour protection loaded in a U.S. port could similarly be installed by a foreign vessel if the rocks are delivered to the pristine seabed.

WIND TURBINE GENERATOR INSTALLATION

Another issue addressed by CBP is the transportation by a foreign wind turbine installation vessel of transition piece covers.

An early issue with the use of foreign WTIVs is what they can lawfully transport between foundations to install transition pieces, tower components, nacelles, and blades. But for potential Jones Act limitations, a WTIV would normally transport personnel as well as things such as tools and containers as well as consumables ranging from personal protective equipment to grout between foundations in connection with its operations.

CBP determined in the last couple of years that installation vessel personnel performing certain tasks on the tower are not “passengers” and therefore can be transported by a WTIV between foundations. Further, CBP has also determined that reusable items such as containers and tools and many incidental items such as PPE, hand washing equipment etc. are “vessel equipment” and not “merchandise” and so can also be lawfully transported by the foreign WTIV between foundations on the U.S. OCS provided they are utilized by the vessel transporting them.

In accordance with 2019 CBP guidance, “vessel equipment” are things “necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board.” CBP, however, did not extend this reasoning to certain consumables which it continues to consider “merchandise.”

CBP was asked earlier this year to assess whether covers for the top of transition pieces which are installed onto a foundation are “merchandise” or “vessel equipment.” Those protective covers are subsequently removed when the balance of the tower is installed. CBP determined in a ruling dated April 18, 2023 that the TP covers are “merchandise.”

The TP covers therefore cannot be loaded in a U.S. port, transported ashore, recovered by a foreign vessel from one work site, transported to a second work site, and then be transported to a U.S. port either for disposal or reuse. That would be case, according to CBP, even if most of the transportation of the TP covers is undertaken by qualified U.S.-flag vessels because the Jones Act proscribes “any part” of the “transportation.” In making its determination, CBP viewed TP covers as not being “necessary and appropriate to the operation” of the foreign installation vessel.

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