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Clarifying The Jones Act For Offshore Wind

Most everyone familiar with offshore wind recognizes the importance of the Jones Act. However, the maritime law is often misunderstood.

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One of the unique factors involving the development of U.S. offshore wind farms is the Jones Act, which is often misunderstood in the context of offshore construction. Because the application of the Jones Act can significantly affect the cost, timing and sequencing of projects, it is important to have a good understanding of how the act works. Although the Jones Act, in application, can be complicated, certain principles of the maritime law can help guide any analysis.

The Jones Act that governs merchant mariner personal injury claims should not be confused with the Jones Act restricting certain activities in U.S. interstate maritime commerce to qualified U.S.-flag vessels. Both Jones Acts get their name from the fact that they are sections of the Merchant Marine Act of 1920, which is generally credited to Sen. Wesley L. Jones.

The Jones Act governing domestic trade actually has a long lineage going back well before 1920. The third session of the first U.S. Congress in 1789 imposed a preferential tariff favoring U.S.-built vessels in U.S. interstate trade. Later, in 1817, Congress established the Jones Act principles – which have survived to this day – of restricting, rather than preferring through a tariff, the carriage of "goods, wares or merchandise" between U.S. ports to U.S.-flag vessels.

The modern Jones Act has a number of offshoots and provisos that have accumulated over time, but the essence of the act remains as it was in 1920. The Jones Act restricts the transportation of merchandise between points in the U.S. to qualified Jones Act vessels. For a vessel to qualify, it must be registered in the U.S., built in the U.S., and owned and operated – absent an exception – by U.S. citizens. A U.S.-flag vessel, in turn, must consist entirely of U.S. citizen officers and crew members, with a limited exception for permanent resident aliens.

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The importance of the Jones Act is also underscored by the penalties associated with the wrongful use of a foreign vessel. The U.S. government is authorized to, among other things, seize and forfeit any cargo transported in violation of the law.

Laws related to the Jones Act that should also be considered by an offshore developer restrict dredging, towing, and the carriage of passengers and salvage in U.S. waters to qualified U.S.-flag vessels. The passenger law, in particular, could have many applications to the development and maintenance of an offshore wind farm.

Transportation

A useful way to look at the Jones Act is to analyze how it works based on the major components of the law, including transportation, merchandise and traveling between points in the U.S.

Perhaps the first thing to notice about the Jones Act is that it applies to the transportation of merchandise. Many offshore activities, particularly relating to construction, do not involve transportation per se, even though the transportation of merchandise may be a related activity. For example, a stationary vessel that does nothing more than drive pilings in the seabed is probably not engaged in transportation, but a vessel bringing the pilings to the construction vessel from shore most likely is.

In fact, federal regulators have already issued two stationary construction vessel rulings directly related to offshore wind farms. In a May 2010 ruling, regulators indicated that a stationary foreign vessel can be used in U.S. waters to install a meteorological tower. In a February ruling, regulators indicated that a foreign vessel can be used to install wind tower components on pre-existing foundations. In

both instances, the regulators noted that the foreign vessels would not engage in any water transportation of the tower components.

These rulings relating to offshore wind farms are consistent with rulings that have been issued with respect to oil and natural-gas projects. Perhaps the most infamous example in that industry is the drill rig Deepwater Horizon, which was drilling in U.S. waters but was registered in the Marshall Islands.

The concept of "transportation" also figures into whether the Jones Act applies to the installation of seabed cables or pipelines. Federal regulators have interpreted the word "transportation" to require the loading and unloading of the merchandise at separate points. With respect to cable or pipe laying, federal regulators have determined that the laying out of cable – even when each end is at a point in the U.S. – is not the unloading of merchandise; therefore, the Jones Act does not apply.

Care should be taken, however, in how the Jones Act and the related laws, particularly with regard to dredging, apply to all aspects of a particular cable- or pipe-laying project. For example, the burying of the cable by means of a mechanical device in certain U.S. waters could require the use of a Jones Act-qualified vessel.

The second aspect of the Jones Act that is noteworthy is its use of the word "merchandise," which has been broadly defined over time to include virtually anything that can be transported. For example, cremated human remains have been found to be merchandise, even though the statutory definition of merchandise includes "valueless material."

Although broadly defined, the term "merchandise" has several exceptions. Of most potential interest to offshore construction is the exception for "vessel equipment." That exception was interpreted over time to mean items "necessary to carry out a vessel's functions," including items a construction vessel might install at an offshore construction site, such as risers and pipe connectors.

This interpretation of what constitutes vessel equipment proved to be hugely controversial in the oil and gas industry, leading federal regulators to propose in early 2009 withdrawing a number of rulings issued over several years. That proposal was withdrawn and replaced with an advance notice of proposed rulemaking, which was itself withdrawn in November 2010. The end result of this yo-yo regulatory treatment is uncertainty, leaving it up to developers to evaluate whether the vessel equipment exception has any continued applicability to their particular project.

Points in the U.S.

The last aspect of the Jones Act to consider is the requirement that each transportation of merchandise must occur "between points in the United States." A "point" in the U.S. is easy to spot on land because every place in the country, including every port, terminal and harbor, is a U.S. point. Similarly, every place within U.S. territorial waters is generally a point in the U.S. For Jones Act purposes, "territorial waters" essentially extend three nautical miles from land.

For purposes of offshore wind farm development, with all places within the territorial waters being "points in the United States," every near-shore project is probably encompassed by the Jones Act. This means that the movement of wind farm component parts from any port, for example, to any work site within the three-mile limit would probably require the use of a Jones Act-qualified vessel.

The issue becomes much trickier outside of U.S. territorial waters. Spurred by offshore oil and gas development after World War II, Congress enacted in 1953 the Outer Continental Shelf Lands Act (OCSLA). The act extends federal law jurisdiction to certain places on the U.S. outer continental shelf (OCS), which is generally defined as extending 200 miles from shore. Of particular note to the Jones Act, OCSLA defines any man-made object permanently or temporarily affixed to the seabed on the OCS as a U.S. point.

Part of the trickiness arises from the fact that OCSLA is expressly written to cover the exploration, development and production of mineral resources and does not appear to extend to non-mineral projects.

In 2005, Congress changed the law to apply licensing requirements to alternative energy projects but left the ambiguity untouched with regard to the Jones Act and other laws.

The U.S. House of Representatives passed legislation last year dealing with the Deepwater Horizon incident that would have adjusted the jurisdictional language to cover renewable energy projects, but that legislation was ultimately not enacted.

Thus, the industry is presently left with the quandary as to whether the Jones Act has any application to offshore wind farms outside territorial waters. Although it appears likely that Congress will revisit the issue and remove the ambiguity at some point, the timing is unpredictable.

If OCSLA is determined to apply or the jurisdictional hole is expressly plugged, the Jones Act would apply to the movement of any merchandise between a U.S. port and any work site on the OCS once something, such as a piling, is attached to the seabed.

From that point, it is likely that everything brought to that piling to complete a wind tower would have to be brought in a Jones Act-qualified vessel.

Although the application of the Jones Act to any particular project can be highly fact-dependent, the principles relating to the "transportation" of "merchandise" "between points in the U.S." can help guide the discussion in the application of the Jones Act to offshore wind farms. WP

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