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Introduction

The United States has a set of federal laws popularly referred to as the "Jones Act" which impact the development of U.S. offshore energy by restricting many operations in U.S. waters to qualified U.S.-flag vessels. Where the Jones Act does not apply, operations in U.S. waters can be conducted lawfully by foreign vessels. The boundary between what is restricted and what is permitted continues to develop as the U.S. Congress has adjusted the relevant law over time and as U.S. Customs and Border Protection, which issues Jones Act interpretive rulings, continues to adapt to new technologies and methods. The emergence of the U.S. offshore renewable energy industry has in particular spurred new guidance and controversy regarding federal offshore jurisdiction and especially the application of the Jones Act.

Historical Background

The first U.S. Congress meeting in 1789 enacted several laws preferring U.S. citizen-owned vessels in both U.S. foreign and domestic trade.[1] Congress considered reserving U.S. domestic trade outright to U.S. citizen-owned vessels but decided instead to impose a substantially greater duty on foreign vessels engaged in the U.S. domestic trade than U.S. citizen-owned vessels. This was enacted even before the U.S. adopted a law providing for vessel registration.

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[1] *E.g.*, Act of July 20, 1789, ch. 3, 1 Stat. 27.

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Offshore Energy Jones Act Update

By Charlie Papavizas

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The 1789 domestic preference remained the law until 1817.[2] Then Congress was considering how to counteract foreign discrimination against U.S. citizen-owned vessels in the foreign trade in the aftermath of the War of 1812 and the U.S.-Great Britain Commercial Convention of 1815.[3] Congress chose to adopt a law similar to prior English Navigation Acts particularly the Acts of 1650 and 1660.

Those Acts, which dealt mainly with England's foreign trade, also included a reservation of England's domestic maritime trade to English citizen-owned vessels first adopted by Queen Elizabeth I in 1563.[4] That law provided that it was not lawful for any "stranger" to the kingdom to carry "any kind of fish, victuals, or wares or things" "from one port or creek of this realm to another port or creek of this realm."

The 1817 outright domestic maritime trade reservation was signed into law by President James Madison a few days before he finished his second term. That Act restricted the "importation" of "goods, wares, or merchandise" from "one port of the United States to another port of the United States" to U.S. citizen-owned vessels. The 1817 Act did not restrict U.S. domestic maritime commerce to U.S. registered, *i.e.*, "U.S.-flag," vessels.

In 1886 "passengers" were added to the domestic trade reservation in what has come to be known as the "Passenger Vessel Services Act."[5] That was caused by competition particularly on the Great Lakes from Canadian vessels.

In 1898, Congress amended the law to restrict U.S. domestic maritime commerce to U.S. registered vessels for the first time.[6] All U.S. registered vessels at the time, whether in foreign or domestic trade, had to be built in the United States.

The arrival of foreign-built dredges in Galveston in 1904 to do post hurricane recovery work precipitated another expansion in 1906 of the reservation to encompass "dredging" in U.S. waters.[7] Congress did not define "dredging" leaving it to be delineated by administrative decisions.

A 1913 U.S. Attorney General opinion determined that the domestic trade reservation law did not apply to mixed land and water transportation particularly between the lower 48 states and the Alaskan territory.[8] This opinion was the primary motivation for the enactment of a restatement of the domestic maritime reservation in section 27 of the Merchant Marine Act, 1920.[9] Senator Wesley Livsey Jones from the State of Washington was the most responsible for the 1920 Act.

That 1920 Act mainly dealt with disposal of the U.S. World War I-constructed fleet and a program to establish a permanent and substantial U.S. merchant marine presence in foreign trade. The whole of the 1920 Act at the time was known as the "Jones Act." After World War II, section 27 and related domestic maritime reservation laws relating to the "passengers," "dredging," "towing,"[10] and "fishing" came to be known loosely as the "Jones Act."

The 1920 Act revised the prior law to provide that "no merchandise shall be transported by water, or by land and water" "between points in the United States" "either directly or via a foreign port, or for any part of the transportation" except in U.S.-flag vessels built in the United States and owned and operated by qualified U.S. citizens. The U.S.-built requirement remains to this day with respect to domestic trade but no longer pertains to U.S.-flag vessels engaged in the foreign trade. The penalty for a violation was the potential forfeiture of the "merchandise" to the U.S. Government. Present law provides that the potential penalty is the greater of the value of the merchandise or the cost of transportation undertaken in violation of the law.[11]

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2 Act of Mar. 1, 1817, ch. 31, § 4, 3 Stat. 351.

3 Treaty of Amity, Commerce and Navigation, Between His Britannick Majesty and The United States of America, by Their President with the Advice and Consent of Their Senate, 8 Stat. 116, Treaty Series 105.

4 5 Eliz., c. 5.

5 Act of Jun. 19, 1886, ch. 421, § 8, 24 Stat. 81.

6 Act of Feb. 17, 1898, § 1, 30 Stat. 248.

7 Act of May 28, 1906, 34 Stat. 204.

8 30 *Op. Att'y Gen*. 3 (Jan. 4, 1913).

9 *See* Act of Jun. 5, 1920, 41 Stat. 988.

10 Act of Jun. 11, 1940, 54 Stat. 304.

11 46 U.S.C. § 55102(c).

Section 27 had been amended over time primarily with the addition of "provisos" dealing with specific situations. For example, the second proviso added in 1956 makes any qualified vessel "rebuilt" outside the United States permanently ineligible to participate in the restricted domestic trade.[12]

The Jones Act and its predecessor laws have never had an exception for safety or commercial disruption or necessity. If the requisite transportation is involved, a qualified U.S.-flag vessel must be utilized. The Jones Act can be waived, but only under narrow circumstances.[13]

Certain Issues

U.S. Customs and Border Protection has provided some guidance in its regulations of the Jones Act. The regulations provide that a "coastwise transportation of merchandise takes place, within the meaning of the coastwise laws, when merchandise laden at a point embraced within the coastwise laws ('coastwise point') is unladen at another coastwise point, regardless of the origin or ultimate destination of the merchandise."[14] The concepts of "laden" and "unladen" have been given further meaning in CBP rulings.

CBP regulations also define who is a "passenger" versus someone who might be considered part of the vessel's crew.[15] Specifically, a "passenger" "is any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business."

CBP regulations further provide a process whereby anyone can seek an "advisory ruling" from CBP "as to whether a specific action taken or to be taken" would be lawful under the Jones Act.[16] CBP publishes its rulings on its web site at https://rulings.cbp.gov.

Many of the issues associated with the application of the Jones Act have focused on certain of its terms -- "any part of the transportation," "merchandise," and "points."

"Any Part of the Transportation." CBP has interpreted the Jones Act words – "any part of the transportation" – to mean any portion of the overall voyage. Thus, CBP has determined that even very short vessel movements are "transportation" if most of a voyage between two U.S. points is undertaken by qualified U.S.-flag vessels.[17]

Issues arose in the oil and gas industry when topsides were assembled on shore, transported to the work site by Jones Act-qualified vessels, and then installed by foreign heavy lift vessels. Because of the U.S. Government-imposed safety zone around subsea infrastructure, lifting operations must occur outside the safety zone. CBP deemed the short distance sailed by the foreign vessel with the topside under hook from where it lifted the topside outside the safety zone to where it was installed within the safety zone to be a Jones Act violation.[18]

CBP has otherwise interpreted the word "transportation" not to apply to crane operations when a foreign vessel remains stationary or only pivots on its own axis.[19] Thus, a foreign crane vessel can take under hook an item and install it at a U.S. point provided the vessel itself did not move other than to rotate during the operation.

CBP expanded this concept to deal with the offshore lifting safety issue in 2019 vessel equipment guidance.[20] In that guidance, CBP determined that lateral movements of a vessel engaged in "lifting operations" was not "transportation" and therefore could be undertaken by a foreign vessel even if the item lifted started at a U.S. point and ends at a U.S. point.

Finally, CBP has interpreted "transportation" not to include pipe lay operations even if between two U.S. points.[21] CBP's rationale is that such laying does not constitute the "landing as cargo" but rather the paying out of pipe or cable, referred to as "paid out/ not unladen" principle. Thus, a foreign pipe lay vessel can pick up pipe in a U.S. port and start laying that pipe from that port to another U.S. point. A foreign vessel cannot, however, generally load pipe in a U.S. port and transport it to another U.S. port where it is unladen.

"Merchandise." With respect to "merchandise," the general statutory definition CBP utilizes is "goods, wares, and chattels of every description."[22] CBP has determined in a number of rulings that virtually everything a vessel can carry as cargo is "merchandise." Congress also made a change in 1988 when it inserted -- "the term 'merchandise' includes valueless material" and "dredged material."[23] This amendment was a

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12 Codified at 46 U.S.C. § 12132(b).
13 46 U.S.C. § 501.
14 19 C.F.R. § 4.80b(a).
15 19 C.F.R. § 4.50(b).
16 19 C.F.R. Part 177.
17 *E.g.*, CBP Ruling HQ H310940 (Nov. 10, 2020).
18 CBP Ruling HQ H225102 (Sep. 24, 2012); CBP HQ H235242 (Nov. 15, 2012).
19 *E.g.*, CBP HQ 111684 (Jun. 26, 1991).
20 53 *Cust. Bull. & Dec.* 45 (Dec. 11, 2019), 84-133, 94-8.
21 *E.g.*, CBP HQ 115431 (Sep. 4, 2001).
22 *See* 19 U.S.C. § 1401(c).
23 *See* 46 U.S.C. §§ 55102(a) & 55110.

reaction to a case in which municipal sludge was determined not to be "merchandise."[24]

One exception is for "vessel equipment" which is not considered "merchandise." CBP has referenced a 1939 Treasury Decision for the definition of "vessel equipment" as "articles" which are "necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of persons on board."[25]

Starting as early as the 1970s, CBP determined that items needed for the function ("operation") of the vessel and used by the vessel were "vessel equipment" and could be transported by a foreign vessel between U.S. points. This became particularly controversial starting in 2009 when CBP ruled that a foreign vessel could load a subsea assembly (known as a "Christmas tree") in a U.S. port and install it on the U.S. OCS on a well head because the vessel's mission was subsea installation.[26]

CBP withdrew that ruling and started a public notice and comment process which did not run its course until CBP issued guidance in December 2019.[27] In that 2019 guidance, CBP revoked and modified certain of its prior "vessel equipment" rulings and provided the current definition of "vessel equipment" -- "[i]tems considered 'necessary and appropriate for the operation of the vessel' are those items that are integral to the function of the vessel and are carried by the vessel." Moreover, these "items may include those items that aid in the installation, inspection, repair, maintenance . . . [etc.] or other similar activities or operations of wells, seafloor or subsea infrastructure, flow lines, and surface production facilities." Finally, CBP emphasized that items that were left behind at the end of an operation tended to be "merchandise" rather than "equipment."

Even before the final 2019 guidance was issued, a case was brought in the U.S. District Court for the District of Columbia challenging, among other things, CBP's authority to provide for a "vessel equipment" exception.[28] The complaint in that case was amended in November 2022 effectively starting the case over again and it remains pending as of the writing of this article.

"Point." When Congress substituted "point" for "port" in the 1920 Act it did not explain the reason for the substitution or define the term. There is no doubt that a U.S. port is a U.S. "point." The transportation of gasoline from Houston to Tampa is obviously proscribed by the Jones Act. The issues arise in two areas – (1) what constitutes a "point" for purposes of returned cargoes, and (2) what constitutes a "point" outside U.S. territory.

Because the Jones Act applies to "transportation" "*between*" U.S. points, CBP has long considered that transportation of merchandise from one U.S. point that is returned to the same U.S. point may fall outside the Jones Act. CBP has been particular, however, as what constitutes the "point." For example, cargo taken from one pier and returned to an adjacent pier in the same harbor even in the same terminal would constitute transportation "between" points because each pier would be considered a U.S. point.[29]

The much more consequential aspect for offshore energy of what constitutes a "point" relates to offshore jurisdiction. Prior to the rise of the offshore oil and gas industry in the 1940's, the United States did not pay much attention to who owned or controlled the ocean adjacent to the United States. A fight between states and the federal government over oil and gas jurisdiction led to the adoption of a framework primarily embodied in the Outer Continental Shelf Lands Act (OCSLA) enacted in 1953.[30]

That framework gave states jurisdiction over near shore waters (out to three nautical miles from shore for most states other than the east coast of Florida and Texas where it is nine nautical miles). For this reason, these locations are sometimes referred to as "state waters." The Block Island offshore wind project was constructed in Rhode Island's state waters. CBP also refers to this zone as the "territorial sea" or "territorial waters" and the waters beyond "state waters" are often referred to as "federal waters." All of the Bureau of Ocean Energy Management leased oil and gas and offshore wind projects are in "federal waters."

OCSLA affirmed federal government jurisdiction over the seabed beyond state waters out to 200 nautical miles from the U.S. coast including authority to lease submerged land for the purpose of exploring for, developing, or producing "resources." The federal

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[24] *106 Mile Transp. Assocs. v. Koch*, 656 F. Supp. 1474 (S.D.N.Y. 1987).

[25] 53 *Cust. Bull. & Dec.* 45 (Dec. 11, 2019), 84-133, 87.

[26] CBP Ruling HQ H046137 (Feb. 20, 2009).

[27] 53 *Cust. Bull. & Dec.* 45 (Dec. 11, 2019), 84-133.

[28] *Radtke, Offshore Marine Services Ass'n & Shipbuilders Council of America v. U.S. Customs and Border Protection*, Civ. Action No. 17-2412 (TSC) (D. D.C).

[29] *E.g.*, CBP HQ H028458 (Jun. 19, 2008).

[30] Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356a).

government also extended, in a limited way, federal law offshore. Specifically, and as amended in 1978, OCSLA provided --

> The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily affixed to the seabed, which may be erected thereon for the purpose of exploring for, developing, removing, and transporting *resources* therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. . .

CBP interpreted this section to extend the Jones Act offshore to installations or other devices permanently or temporarily affixed to the seabed for the requisite purpose. CBP did not interpret the Jones Act to apply to the entire U.S. outer continental shelf (OCS) seabed. In addition, CBP did not consider things placed on the seabed which either did not meet the purpose (such as debris) or no longer met the purpose (such as abandoned well heads), as U.S. points.

CBP has contrasted the three nautical mile zone around the United States from the U.S. OCS. Every place within three nautical miles is U.S. physical territory and therefore every place within that zone is a U.S. point for purposes of the Jones Act, according to CBP.[31] This is in contrast to the 12 nautical mile limit which is important for U.S. environmental, safety, and other jurisdiction but is not relevant to the Jones Act. Thus, cargo transported from a U.S. port to a foreign vessel floating within three nautical miles of the coast but not anchored must be transported in a qualified U.S.-flag vessel. However, cargo transported from a U.S. port to a foreign vessel floating beyond three nautical miles and not anchored can be done by a foreign vessel – provided the cargo is not then transported by the second vessel to be unladen at another U.S. point.

Congress amended the original OCSLA leasing authority in 2005 to encompass offshore renewable energy projects.[32] Congress did not simultaneously amend the OCSLA's application of law section quoted above which led to a question whether federal law – including the Jones Act – applied to offshore renewable energy projects. Congress attempted to fix that problem in January 2021 by adding the words "including non-mineral energy resources" after "resources" and inserting romanettes to separate the clauses in OCSLA's jurisdictional grant. This has led to controversy discussed below.[33]

Application of the Jones Act to Offshore Wind Activities

CBP issued its first offshore wind energy ruling in May 2010.[34] That ruling confirmed that a foreign vessel could install a meteorological data tower on the U.S. OCS that was transported to the work site by qualified U.S.-flag vessels. CBP applied the same principle in the second ruling issued in February 2011 in connection with the installation of the Block Island wind farm.[35] After that ruling, there was a long period where CBP did not issue any offshore wind rulings. This was in part because of the slow pace of offshore wind permitting, but also because CBP was waiting for guidance from Congress as to whether the Jones Act applied to offshore renewable energy.

Since the January 2021 amendment, CBP has been regularly issuing offshore wind energy rulings. Those rulings have provided certain guidance for each phase of offshore wind energy projects – survey, foundation and turbine installation, cable lay and cable protection, scour protection installation, and wind farm operations and maintenance.

Survey Work

CBP has long held that the use of a vessel solely to engage in certain oceanographic research is not coastwise trade.[36] This is analogous to, but independent of, the Oceanographic Research Vessels Act which exempts vessels engaged in oceanographic research from certain vessel inspection requirements.[37] As part of such oceanographic research, CBP has indicated that any supplies or equipment carried aboard the vessel and necessary for the research would not be considered "merchandise."

CBP has been challenged in this area. In November 2021, the Offshore Marine Service Association (OMSA) alleged that a foreign vessel doing survey work for a

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31 33 C.F.R. § 2.22(a)(3); *e.g.*, CBP HQ 032257 (Aug. 1, 2008).

32 Pub. L. No. 109-58, § 388, 119 Stat. 594, 744 (2005).

33 Pub. L. No. 116-283, § 9503, 134 Stat. 3388, 4822-23.

34 CBP HQ H105415 (May 27, 2010).

35 CBP HQ H143075 (Feb. 24, 2011).

36 *E.g.*, CBP HQ 116602 (Jan. 30, 2006).

37 *See* 46 U.S.C. § 50503.

U.S. offshore wind project had violated the Jones Act by transporting subsoil samples from places on the U.S. OCS to U.S. ports. OMSA is also a plaintiff in the suit brought against CBP in 2017 amended in November 2022 which, among other things, challenges CBP's view of oceanographic research vessels.[38]

Foundation and Turbine Installation

CBP has also long held that a foreign vessel can engage in installation activities on the U.S. OCS as confirmed in the 2010/2011 offshore wind rulings and in more recent rulings. This leads to the so-called "feeder solution" whereby a foreign wind turbine installation vessel (WTIV) will remain on site and take on board foundations, transition pieces, and tower components from qualified U.S.-flag vessels which will transport those items from a U.S. staging port to the WTIV.[39] The WTIV will then take on board these items by the use of its crane and install them. After one turbine is installed, the WTIV would move to a second work site, take on board from the qualified U.S.-flag vessels another set of items to be installed, and repeat the operation.

There are a number of issues with this "solution," some of which CBP has addressed. CBP has indicated that items used by the WTIV to transport and install turbine components, such as blade cassettes, containers, and tools, are all "vessel equipment" and can be transported by the WTIV between work sites even if they are temporarily placed on the tower. Expendable items, however, are not, according to CBP, "vessel equipment."[40]

CBP has also ruled that all personnel on board the WTIV who perform installation functions, including personnel who perform some of those functions on a tower, are not "passengers" and so can be transported by a foreign WTIV from tower to tower.[41]

Cable Lay and Cable Protection

CBP has confirmed that the laying of power cable is no different than the laying of pipe both of which can be done by a foreign vessel between two U.S. points including cable pull-in operations.[42] CBP has also confirmed that the cable lay vessel (CLV) personnel who may perform some tower functions (such as pull-in operations) are nevertheless not "passengers" and so can be transported by the CLV between towers.[43]

With respect to the transportation of cable versus laying cable, CBP has confirmed that a foreign vessel cannot transport cable from one U.S. port to another U.S. port.[44] The three nautical mile limit comes into play with respect to wet storage of cable, *i.e.*, the placement of cable on the seabed for later recovery and use. A foreign vessel cannot lawfully load cable in a U.S. port and then place it on the seabed within three nautical miles of the coast but can do so on the U.S. OCS provided CBP continues to view the pristine seabed as not being a "point in the United States." The cable can be later picked up and laid by a foreign vessel in the same manner that such an operation can occur after cable is loaded in a U.S. port.

One exception to this transportation of cable rule is for "excess" or "surplus" cable. After at first reversing a long-standing ruling that a foreign vessel could unlade "excess cable" left over from a cable lay operation in a U.S. port other than the load port, CBP ruled in 2022 that the "excess cable" principle is still valid.[45] Specifically, a foreign vessel can deliver to a U.S. port other than the one it loaded the cable up to five percent "by quantity, of the original cable" after completing a cable lay operation.

One issue addressed by CBP with respect to cable lay has been cable protection. CBP has long distinguished cable burial mechanisms as to whether they constitute "dredging" or not. CBP has defined "dredging" as "the use of a vessel equipped with excavating machinery in digging up or otherwise removing submarine material."[46] Applying this definition, CBP has ruled that devices which utilize a mechanical "share or plow" constitute "dredging" and that devices which utilize high-pressure water jets do not constitute "dredging." CBP has confirmed in individual rulings that a number of specific water jet devices can be utilized by foreign vessels to bury cable for U.S. offshore wind projects.[47]

The last issue CBP has considered for cable lay operations is the placement of concrete mattresses, rock bags, or other cable protection items on the seabed by a foreign vessel. In the oil and gas context, CBP

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38 *Radtke, Offshore Marine Services Ass'n & Shipbuilders Council of America v. U.S. Customs and Border Protection*, Civ. Action No. 17-2412 (TSC) (D. D.C).

39 *E.g.*, CBP HQ H316313 (Feb. 4, 2021).

40 *See* CBP HQ H320052 (May 11, 2022).

41 *Id.*

42 *E.g.*, CBP HQ H318628 (Jun. 30, 2022).

43 CBP HQ H327804 (Oct. 28, 2022).

44 *Id.*

45 *Id.*

46 *E.g.*, CBP HQ 115580 (Mar. 20, 2002).

47 *E.g.*, CBP HQ 113223 (Sep. 29, 1994).

had indicated that a foreign vessel could load such a protection item in a U.S. port and place it on top of already laid pipe on the U.S. OCS beyond three nautical miles.[48] In more recent offshore wind rulings, CBP has determined that power cable laying on the seabed on the U.S. OCS all constitutes a "point in the United States."[49] Therefore, CBP reasoned, a foreign vessel cannot lawfully load such protective materials in a U.S. port and place it over already laid cable on the U.S. OCS.

Scour Protection Installation

Almost immediately after the January 2021 amendment was enacted, CBP ruled that Congress had altered OCSLA to provide that the entire pristine seabed of the U.S. OCS was a U.S. point.[50] Various organizations argued to CBP that it had made a mistake and CBP reversed course by affirming that an installation or other device had to be present for there to be a U.S. point.[51]

The context was the placement on the seabed of rocks for scour protection loaded in a U.S. port. CBP indicated in its revised ruling that the rocks could be loaded by a foreign vessel and delivered to the U.S. OCS lawfully but only if the seabed was pristine where the rocks are delivered. CBP also indicated that there is a "vicinity" around an installed foundation that constitutes the U.S. point but did not define the term. Thus, rock loaded in a U.S. port cannot be delivered by a foreign vessel to be placed around an already installed foundation on the U.S. OCS. Canadian source rock, of course, can be loaded in a Canadian port by a foreign vessel and placed on the U.S. OCS regardless of whether there is any pre-existing attached installation or other device.

CBP's reversal was challenged by the original ruling requester in an administrative appeal, which CBP denied in June 2022. Suit was then brought in federal court in Texas against CBP seeking to reverse CBP's scour protection ruling which pends as of the writing of this article.[52]

Operations and Maintenance

It has been long known that many of the vessels engaged in the long operations and maintenance phase of an offshore wind farm's life will be qualified U.S.-flag vessels. Only such vessels will be able to operate unhindered in transporting people and items from U.S. ports to an already installed wind farm where each turbine is a "point in the United States." That does not preclude foreign vessels from engaging in repair activities analogous to installation activities such as cable repair or the use of a WTIV to repair a turbine. However, the crew transfer vessels (CTVs) and service operations vessels (SOVs) will be, as a practical matter, Jones Act-qualified vessels.

Conclusion

CBP has answered many questions regarding the application of the Jones Act to U.S. offshore energy projects. However, some questions remain and more will arise as the industry changes and as new methods and technology are introduced even if Congress leaves the law as is. Moreover, pending litigation could upend long-held interpretations. There will, therefore, be a continuing need for the industry to pay attention to the boundary between what qualified U.S.-flag vessels must do and what foreign vessels may do.

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48 CBP HQ 115531 (Dec. 3, 2001).
49 CBP HQ H300962 (Apr. 14, 2022).
50 CBP HQ H309186 (Jan. 27, 2021).
51 CBP HQ H317289 (Mar. 25, 2021).

52 *Great Lakes Dredge & Dock Company v. Magnus*, Civ. Action No. 4:22cv2481 (S.D. TX).