



The Jones Act and Offshore Wind Farms

By Charlie Papavizas

OFFSHORE WIND FARMS IN THE UNITED STATES have to take into account a law known as the “Jones Act,” which can have a substantial impact on project timing and costs. The Jones Act requires the use of US- built vessels owned and operated by US citizens and manned by US citizens in certain circumstances. Understanding the nature of those circumstances can be one important key to a successful offshore wind farm.

The Jones Act uncovered

The Jones Act is the popular name for a couple of sections in the Merchant Marine Act, 1920, including section 27, which restricts the “transportation of merchandise by water” between “points in the United States” to qualified US vessels. Another section of the 1920 Act is a workman’s compensation provision for seafarers also (confusingly) referred to as the “Jones Act.” In each instance, the Jones Act was named after Senator Wesley L Jones, the leading sponsor of the 1920 Act.

Section 27 of the 1920 Act covering the movement of “merchandise,” and the subject of this article, can be traced back to a law enacted in 1789 preferring US vessels to foreign vessels in US domestic commerce. Federal maritime laws similar to the Jones Act restrict

the transportation of passengers, as well as towing and dredging in US waters. All of these requirements can be significant for the development and maintenance of an offshore wind farm.

Requirements of the Act

The Jones Act restricts certain activities to vessels, which must be built in the United States, owned by US citizens (unless an exception applies), operated by US citizens, and registered with the US Coast Guard. By virtue of being registered with the US Coast Guard, a vessel must be crewed primarily by US citizens (a certain number of non-officer crew members can be permanent resident aliens).

The citizenship standard is stringent. For a corporation to qualify as a US citizen, eligible to own and operate a Jones Act vessel, it must be organized in the United States, each of the Chairman of the Board and its chief executive officer must be US citizens, and no more than a minority of the number necessary to constitute a quorum of the board of directors can be non-citizens. In addition, at least 75% of the stock must be owned by similarly qualified US citizens.

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Penalties for violating the Jones Act can be severe. One of several possible penalties is the potential seizure and forfeiture by the federal government of any “merchandise” (like wind tower components) transported in violation of the law.

Application of the Act

The Jones Act applies to the transportation of “merchandise” between “points in the United States.” Merchandise is broadly defined to encompass most commercial items, although there are notable exceptions, such as for “vessel equipment.” Although “points” are not defined in the law, there are substantial administrative precedents on what constitutes a point.

Every port and terminal in the US is a “point in the United States” and, as such, the movement of commercial cargo between US ports is also covered by the Jones Act. Moreover, any place within three nautical miles of the US coast is a “point in the United States,” such that a vessel picking up damaged pipe or cable from the seabed within three nautical miles, and returning it to a US port, is covered by the Jones Act as well.

The application of the Act outside of the three-nautical-mile limit is more challenging. The Jones Act generally only applies outside the three-mile limit by virtue of the Outer Continental Shelf Lands Act (OCSLA), enacted in 1953, and significantly amended since then.

OCSLA indicates that a “point” outside the three-mile limit is anything permanently or temporarily attached to the seabed on the US outer continental shelf, “erected thereon for the purpose of exploring for, developing, or producing resources.” Based on OCSLA itself, related laws, and judicial and administrative precedents, it appears that the concept of “resources” is limited to oil and gas resources. If that is correct, the Jones Act would not apply to wind farms on the US outer continental shelf outside the three-mile limit.

Even if this interpretation is correct, wind farm developers must take into account the possibility that Congress will amend OCSLA, as it did in 2010 to encompass offshore wind farms generally, to include the Jones Act as well. In fact, the US House of Representatives passed a bill—H.R. 2360—on December 7th, 2011, that would expand the OCSLA’s jurisdictional definition of “resources” to encompass alternative energy. It’s unclear whether the US Senate will take up the measure this fall.

The Act in action

Where the Jones Act applies as a matter of geography, it only applies, of course, to the transportation of “merchandise” between US points. Therefore, the Jones Act doesn’t apply to a stationary vessel, such as a vessel engaged in offshore drilling. The Deepwater Horizon, a foreign vessel working on the US outer continental shelf, is a good example of this rule.

When applied to an offshore wind farm, it’s important to note that the Jones Act doesn’t apply to a stationary vessel installing a wind tower. This not only follows from the oil and gas administrative precedents, but has also been confirmed by administrative rulings issued in May 2010 and February 2011.

Numerous oil and gas related precedents also indicate that the Jones Act generally doesn’t apply to the laying of pipe or cable—although dredging restrictions might apply, depending on how the pipe or cable are laid. This aspect of the Jones Act is obviously important to connecting offshore towers to the energy grid.

Once a US point is established (assuming the Jones Act applies geographically), such as when a pile is driven into the seabed, anything transported to that point from the US coast thereafter is covered by the Jones Act under the rule established by OCSLA. So, even if the installation vessel is foreign, once it creates a “point” through its activities, all wind tower components and parts brought for installation to that place from a US port must be brought in a Jones Act vessel.

Great care should also be taken if a foreign construction vessel moves from one construction site to another because such movements may again implicate the movement of “merchandise” between US “points.”

Conclusion

Some aspects of the application of the Jones Act to offshore wind farms are well settled, such as with respect to near-shore projects and direct construction activities. Other aspects, such as with respect to projects further from shore, are unsettled and could change because of pending Congressional action. However, things turn out on that score, the Jones Act will continue to play a significant role in the development of offshore wind farms.

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