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BLOG

U.S. Customs Issues Offshore Wind Farm Installation Guidance

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On July 15, 2020, U.S. Customs and Border Protection issued "Jones Act" guidance on the installation of offshore wind farms in U.S. waters. This is the first offshore wind guidance issued by CBP since 2011.

The "Jones Act" is the popular term for a group of laws which restrict certain activities in U.S. waters to qualified U.S.-flag vessels. Section 27 of the Merchant Marine Act, 1920 in particular restricts the transportation of "merchandise" between two "points in the United States" to qualified U.S.-flag vessels owned and operated by U.S. citizens absent an exception.

Similar laws apply to the transportation of "passengers" as well as dredging, fishing and towing in defined U.S. waters. A "point in the United States" is every place within U.S. territorial waters as defined by CBP (out to three nautical miles from the coast) and can also include any man-made object, such as a drill rig, attached permanently or temporarily to the U.S. outer continental shelf beyond three nautical miles for defined purposes.

The request for guidance stated that the "installation operations will occur at two sites located in U.S. territorial waters off the coast of Rhode Island and Massachusetts." It is not evident from the ruling which sites CBP is referring to since "U.S. territorial waters" for purposes of the Jones Act (unlike other purposes) is three nautical miles from the coast, not 12 nautical miles from the coast.

In the ruling, CBP confirmed the well-understood maxim that a foreign installation vessel can install wind tower components so long as the vessel is stationary and does not "transport" components but is provided those components from shore via Jones Act qualified "feeder" vessels.

CBP also addressed the issue of "vessel equipment" for the first time since it issued new guidance on December 11, 2019, effective February 17, 2020. That guidance is the subject of ongoing litigation in the U.S. District Court for the District of Columbia.

CBP has long held that "vessel equipment" is not "merchandise" and therefore can be transported by a foreign vessel between two "points in the United States." The original definition utilized by CBP of "vessel equipment" is a 1939 definition providing that "vessel equipment" is "portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on board . . .".

Commencing in 1976, CBP issued a number of rulings focusing on whether items were necessary for the "mission of the vessel" as a gloss on the concept of being "necessary and appropriate for the operation of the vessel." Subsequent rulings also focused on whether the item was "used on or from" the transporting vessel, whether the employment of items was "foreseeable," "incidental" or "*de minimis*" (with unforeseeable, incidental or *de minimis* deployments weighing in favor of an item being "equipment").

Under these formulations, CBP issued rulings to the effect that a variety of items utilized in oil and gas operations, such as risers and pipe connectors, were "vessel equipment" primarily under the interpretation that they were necessary for the "mission of the vessel" and therefore could be transported from a U.S. port to a U.S. "point" and installed by a foreign vessel.

These rulings became particularly controversial in 2009 when CBP first issued, and then withdrew, a ruling to the effect that a sub-sea assembly known as a "Christmas tree" was "vessel equipment." CBP then proposed to revoke or modify a whole series of "vessel equipment" rulings, but the public opposition was substantial and CBP eventually withdrew that notice. Under that proposal, the term "vessel equipment" would have been very narrowing defined.

Ultimately, CBP issued a December 11, 2019 notice where CBP retained the 1939 definition as the basis for its interpretations and added that "vessel equipment" means items "necessary and appropriate for the vessel" "to include, *inter alia*, those items that aid in the installation, inspection, repair, maintenance, surveying, positioning, modification, construction, decommissioning, drilling, completion, workover, abandonment or similar activities or operations of wells, seafloor or subsea infrastructure, flowlines, and surface production facilities."

CBP further emphasized "that the fact that an item is returned to and departs with the vessel after an operation is completed, and is not left behind on the seabed, is a factor that weighs in favor of an item being classified as vessel equipment, but is not a determinative factor."

For some reason, CBP did not cite to its December 2019 guidance in its July 15, 2020 ruling. There it affirmed that "tools" taken on board a tower by the installation crew of the installation vessel that are returned to the vessel are "vessel equipment," based on the 1939 definition, and can be transported from work site to work site by the foreign vessel. CBP also indicated that items needed for the "comfort and safety" of the crew – such as containers, bags, personal protection equipment, food and drink and hand washing materials – were also "vessel equipment." CBP did not address items taken on board towers by the installation crew intended to be left behind such bolts and grout and other expendables.

With respect to the transportation of the installation crew from work site to work site, the question was apparently not addressed to CBP whether such crew are "passengers" or not within the meaning of the Passenger Vessel Services Act. A foreign vessel would only be prohibited from such transportation if such persons were considered "passengers" rather than "crew."

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