

U.S. Customs Issues Offshore Cable Lay Wind Farm Guidance

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U.S. Customs and Border Protection recently made available August 31, 2020-issued “Jones Act” [guidance](#) on cable lay operations in connection with offshore wind farms in U.S. waters. This is the first offshore wind guidance issued by CBP since 2011. Earlier guidance issued on July 15, 2020, was withdrawn on August 3.

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. Similarly, the Dredging Act of 1906 and the Passenger Ship Act of 1886 restrict “dredging” and the carriage of “passengers” in U.S. waters.

The request for guidance relates to the Block Island Wind Farm which is in Rhode Island “state waters,” i.e. within three nautical miles of Rhode Island’s coast including Block Island. CBP refers to “state waters” as “U.S. territorial waters.” Everyplace within such territorial waters is a “point in the United States” for purposes of the Jones Act. Beyond three nautical miles to the extent of the U.S. outer continental shelf, the application of the Jones Act relies on the Outer Continental Shelf Lands Act or OCSLA which contains a purpose limitation.

CBP has not addressed whether that purpose limitation, which is focused on oil and gas activities, encompasses offshore renewable activities and, at least to date, CBP has not issued any recent rulings relating to offshore wind projects outside territorial waters. In fact, the reason the July 15 guidance was withdrawn was that CBP had incorrectly understood that the activities encompassed by the request were within U.S. territorial waters.

The August 31 ruling confirmed that mere laying of cable by a foreign vessel in U.S. territorial waters is permissible – which is a long-standing interpretation – and that cable recovered from the seabed within U.S. territorial waters by a foreign vessel cannot be discharged in a U.S. port.

The recent ruling also confirmed long-standing interpretations that a cable burial device that employs only pressurized water jets to fluidize the seabed does not constitute “dredging” and therefore a foreign vessel can use such a device in U.S. territorial waters. CBP was apparently not presented with the issue of devices which employ water jets and cutters.

Finally, the request indicates that the foreign cable lay vessel will pick up technicians and other personnel in a U.S. port and later return them to the same port. CBP, consistent with long-standing precedent, indicated that such transportation would be considered a Jones Act violation because the vessel would not leave U.S. territorial waters - which is a necessary element to fall under the “voyage to nowhere” exception. However, CBP also determined that such persons were not “passengers” in that their work on board the vessel was necessary for the operation of the vessel and so the foreign cable lay vessel could transport the personnel as proposed.

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