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BLOG

Congress to Fix Offshore Wind Jurisdiction Issue

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When the U.S. Congress amended existing law in 2005 to grant the federal government authority to lease offshore areas to generate renewable energy, it did so without making it clear that all federal laws would apply to such projects. A provision (sec. 9503) contained in the William M. (Mac) Thornberry National Defense Authorization Act of Fiscal Year 2021 (NDAA) Conference Report recently made available would fix that.

U.S. economic jurisdiction over its outer continental shelf is governed primarily by the Outer Continental Shelf Lands Act of 1953 (OCSLA) which was enacted as oil and gas legislation. It provides, as amended, that federal law applies to "installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources." The word "resources" has been arguably limited to oil and gas and other seabed mineral resources.

The practical effect of this ambiguity is that Customs and Border Protection has been reluctant to issue rulings regarding the application of laws to offshore renewable projects – such as tariff laws and the "Jones Act." The Jones Act restricts the transportation of "merchandise" between two "points in the United States" to qualified U.S.-flag vessels. Similar laws restrict the transportation of "passengers," "dredging" and "towing" in U.S waters – all of which have renewable energy implications. The lack of such guidance has inhibited project planning.

In September, Rep. John Garamendi, a Democrat from California, offered an amendment to the "Clean Economy Jobs and Innovation Act, H.R. 4447, that would have addressed the ambiguity. His amendment, which was accepted, would have added the phrase "or producing or supporting the production of energy from sources other than oil and gas." This potentially would have created a new ambiguity because of the use of the words "producing or supporting the production" instead of the OCSLA phrase of "exploring for, developing, or producing" resources. The NDAA language works with the existing OCLSA phrase and more directly addresses the original ambiguity in the words "resources." The NDAA would add after "exploring for, developing, or producing resources" the phrase "including non-mineral energy resources."

The NDAA is likely to be voted on by both chambers of Congress in the next two weeks and may become law shortly thereafter either with President Trump's signature or via a veto override by Congress. The OCSLA fix would be immediately effective upon the NDAA becoming law.

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