

U.S. Customs Reverses Course on Important Offshore Wind Ruling



MARCH 29, 2021

U.S. Customs and Border Protection (CBP) issues rulings on, among other things, the application of U.S. coastwise laws (popularly referred to as the “Jones Act”) to vessel movements and activities in U.S. waters. Those rulings have important implications for the installation and maintenance of offshore renewable energy projects in addition to being significant for offshore oil and gas projects.

On January 27, 2021, CBP issued a surprising ruling which for the first time asserted that the entire pristine seabed on the U.S. outer continental shelf was a “point in the United States” for purposes of U.S. coastwise laws. The ruling, although focused on the application of scour protection (the application of rocks to prevent and reduce erosion) would also have affected other operations, such as the installation of certain types of foundations. [On March 29, 2021, CBP posted a partial revocation and modification of that ruling](#) (dated March 25).

U.S. coastwise laws limit the transportation of “merchandise” and “passengers” between “points in the United States” to qualified U.S.-flag vessels. CBP has interpreted every place within a “territorial sea” three nautical miles seaward from the U.S. territorial baseline to be a “point in the United States.” Beyond 3 NM, a place may be a “point in the United States” based on the jurisdictional grant contained in the Outer Continental Shelf Lands Act, 1953.

As amended through 2020, OCSLA provided that – “The Constitution and laws and civil and political jurisdiction of the United States are 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 attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom.” Notably, OCSLA did not make the outer continental shelf a physical part of the United States.

This jurisdictional grant was not modified in 2005 when the United States first made explicit authority of the federal government to engage in offshore leasing for renewable energy projects in the Energy Policy Act. We wrote as early as 2010 shortly after the federal regulations implementing the leasing authority were promulgated that application of federal law to offshore renewable energy projects was uncertain. The ambiguity arose from the phrase “exploring for, developing, or producing *resources*.” The legislative indicators pointed to “resources” meaning “mineral resources” such as oil and gas and not any other type of resource.

In the meantime, CBP consistently interpreted, in a wide array of contexts, OCSLA to create “points in the United States” on the US OCS only where there was an artificial island or attached installation or device which was there for

the requisite statutory purpose – not to the entire “subsoil and seabed of the outer Continental Shelf.”

On several occasions from 2005 to 2020, the U.S. Congress considered a “fix” to the jurisdictional issue relating to offshore renewable energy but none of those proposals was enacted until January 1, 2021. Section 9503 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY 21 NDAA) added the words “non-mineral energy resources” to the extension of jurisdiction to “installations and other devices permanently or temporarily attached to the seabed.”

In its January 27, 2021 ruling, CBP interpreted the addition of the “non-mineral” words to have created a fundamental change in the way OCSLA has been interpreted for decades for oil and gas projects with respect to the installation of scour protection on the US OCS. CBP determined that picking up rocks in a U.S. port and then dumping them on the US OCS where there was nothing preceding the rocks was a coastwise movement requiring the use of a Jones Act-qualified vessel because the entire US OCS was a “point in the United States.” Following the posting of the January 27 ruling, a range of oil and gas and renewable energy interests pointed out to CBP that the ruling was inconsistent with prior long-standing precedents and was not justified by the renewable energy fix contained in the FY 21 NDAA.

CBP went back to the drawing board and in a ruling dated March 25 confirmed that there must be an attachment for there to be a coastwise “point” on the US OCS. Specifically, the ruling provides that “the pristine seabed on the OCS is not a coastwise point” and that prior to anything being present on the seabed, “there is no coastwise point.” Thus, the first layer of scour protection can be applied by a foreign vessel which has picked up the material in a U.S. port.

CBP went further and determined that once a layer of scour protection is applied to the seabed on the US OCS, that layer itself becomes a U.S. point. CBP did appear to consider or evaluate how a layer of rocks constitutes a “device” or “installation” as required by law.

CBP also appears to have expanded on the concept of what constitutes a “point” by indicating “that a coastwise point exists in the *vicinity* of an installation or device attached to the seabed.” The concept of “vicinity” was not defined in the March 25 ruling.

Otherwise, the March 25 ruling merely confirms aspects well supported by prior rulings such that a foreign barge towed by a qualified Jones Act vessel cannot transport “merchandise” between two U.S. points and that a vessel anchored on the US OCS for the requisite OCSLA statutory purpose constitutes a “point” in the United States.

What is often not mentioned in many Jones Act offshore wind analyses is the fact that how the Jones Act applies – including whether the pristine seabed is a “point in the United States” – remains the subject of ongoing litigation in the U.S. District Court for the District of Columbia, which could result in the alteration of this latest guidance. In addition, it is anticipated that CBP will be issuing more rulings in the coming weeks dealing with renewable energy. This latest ruling is therefore not the final word on the subject.

4 Min Read

Related Locations

Washington, DC

Related Topics

Maritime

Jones Act

Related Capabilities

Maritime & Admiralty

Related Professionals



Charlie Papavizas

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.