

## Offshore Wind Jones Act Issues Far From Settled

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Vessel availability is a key planning issue for offshore wind development anywhere in the world and particularly so in the United States where the Jones Act requires that qualified U.S.-flag vessels be utilized for certain activities. Although the U.S. Government issued its offshore wind leasing regulations in 2009, many of the issues arising from the application of the Jones Act to offshore wind remain unresolved. The uncertainties have recently been highlighted in ongoing litigation.

The federal agency Customs and Border Protection or CBP is charged with interpreting how the Jones Act applies to vessel operations. One of the laws grouped together and popularly referred to as the “Jones Act” restricts the transportation of “merchandise” between two “points in the United States” to qualified U.S.-flag vessels. A longstanding exception to the Jones Act is for “vessel equipment” which is not considered “merchandise.” A dispute arose starting 2009 as to the scope of the term “vessel equipment” which CBP did not settle until it issued guidance in October 2019.

In the meantime, the Offshore Marine Service Association and the Shipbuilders Council of America sued CBP in federal district court in 2017 arguing that certain of CBP’s “vessel equipment” rulings were contrary to law. Included in that litigation, was an allegation that the entire seabed on the U.S. outer continental shelf constitutes a “point in the United States” regardless of the presence of any installation of device attached to the seabed. This allegation was contrary to CBP’s interpretations going back to the origins of the extension of U.S. jurisdiction over the U.S. outer continental shelf or OCS.

A separate issue arose as to whether federal jurisdiction even applied to offshore renewable energy projects on the U.S. OCS because the applicable law was so oil and gas centric. Congress finally fixed that problem on January 1, 2021. CBP at first interpreted the January 1 change in a January 27, 2021 ruling regarding the dumping of rocks for purposes of scour protection. On March 25, 2021 modified that January ruling to provide, consistent with its decades’ long interpretations, that the transportation of items from a U.S. port to a pristine portion of the seabed is not governed by the Jones Act because the pristine seabed is not a “point in the United States.”

On May 28, 2021, the plaintiffs in the “vessel equipment” case brought to the attention of the court the latest CBP rulings and informed the court that they believed that CBP wrongly decided the scour protection issue. Plaintiffs

also informed the court that they had filed an administrative appeal seeking to overturn the March 25 ruling. That appeal is not a public document.

On June 9, 2021, the U.S. Government responded to plaintiffs' suggestion stating that "the March 25, 201 ruling does not set out a new CBP position, but rather, restates a position that CBP has held for many years."

It remains for the court and CBP to decide on interpretations which are in accord with the law. This back and forth in the case and behind the scenes illustrates how issues important to US offshore wind development relating to the Jones Act remain in flux and should not be taken for granted by anyone engaged in offshore wind planning and development in the United States.

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