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BLOG

Customs Rejects Challenges to Offshore Wind Scour Protection Jones Act Ruling

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On January 7, 2022, Customs and Border Protection sent letters to three trade associations declining to revisit its March 25, 2021, Jones Act ruling on the definition of a "point in the United States" for purposes of installing scour protection or foundations for an offshore wind farm. The letters were made available on February 9, 2022, in response to a Freedom of Information Act request. As a result, CBP's March 25, 2021 ruling remains the best available guidance on what a foreign-flag vessel can lawfully do with respect to the installation of foundations or scour protection on the U.S. outer continental shelf in compliance with 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 apply to the transportation of "passengers," and "dredging," "towing," and "salvage" in U.S. waters. The Jones Act applies organically to U.S. physical territory out to three nautical miles from the U.S. coast. On the U.S. outer continental shelf out to 200 nautical miles, the Jones Act applies by the terms of the Outer Continental Shelf Lands Act or OCSLA. The issues posed to CBP related to which places on the U.S. OCS constitute a "point in the United States."

On January 27, 2021, CBP ruled contrary to decades of direct and indirect rulings that the entire pristine seabed on the U.S. OCS is a "point in the United States." The ruling was decided in the context of whether a foreign vessel could be utilized to pick up rock in a U.S. port and drop that rock at a location on the U.S. OCS for the purpose of providing scour protection to the base of a monopile foundation. CBP determined that such a movement could not be undertaken by a foreign vessel lawfully even if the rocks were the first thing placed at the delivery location.

CBP heard from several interests complaining about the January 27 ruling and modified it on March 25, 2021. In the second ruling, CBP determined that there is no "point in the United States" on the U.S. OCS prior to the attachment of an "installation and other device" placed there for either a resource (including renewable energy resources) recovery purpose. Those words are contained in OCSLA. However, CBP also ruled that once rocks are dumped, those rocks create such a "point" and then everything delivered to that "point" from a U.S. port must be transported by a qualified U.S.-flag vessel including any subsequent layers of scour protection or a monopile. CBP also determined that there is a "vicinity" around an "installation and other device" which constitutes part of the "point in the United States."

CBP's January 7, 2022 letters reveal that three persons challenged the March 2021 ruling. It is believed that the challenges were submitted by the American Waterways Operators, the Offshore Marine Service Association, and the American Clean Power Association. It is likely that the March ruling was challenged both for having reversed the January 2021 ruling and, in the opposite direction, for treating rocks resting on the seabed as an "installation and other device" and for "vicinity" concept.

CBP did not re-address the substance in the January 7, 2022 letters. Rather, it rejected all three requests on the technical grounds that none of the requestors originally sought the affected rulings and only that person could have filed an administrative appeal within the time allowed by regulation. The result is that the March 25, 2022 ruling remains effective guidance for the U.S. offshore wind industry until further rulings are issued.
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