

Customs Issues Comprehensive Offshore Wind Jones Act Ruling

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On April 21, 2022, U.S. Customs and Border Protection posted on its public website a ruling dated April 14 which addresses in one ruling many of the Jones Act issues which arise from the installation of offshore wind turbines off the coasts of the United States.

The “Jones Act” is the popular term for a set of U.S. federal laws which reserve U.S. coastwise trade and activities, such as “dredging,” to qualified U.S.-flag vessels. The Jones Act is an important delimitation between which offshore wind installation activities can be performed by foreign vessels lawfully and which activities are reserved to qualified U.S.-flag vessels.

Because of a jurisdictional ambiguity which was not addressed until January 1, 2021, CBP did not issue many offshore wind rulings before that date. In fact, the April 14 ruling responds to a request originally submitted in 2018 and supplemented in 2021.

Many issues have arisen as a result about the application of the Jones Act to offshore wind installation activities, and the recent ruling addresses many of those issues in a single guidance document.

The ruling confirms that a foreign wind turbine installation vessel (WTIV) can install foundations and tower components provided it has not transported such items from a U.S. point, and that such a vessel can move crew members and work materials from work site to work site because the crew members are not considered “passengers” and materials are not considered “merchandise.” The ruling also confirms that a WTIV can arrive in U.S. waters and install foundations and components it has transported from a foreign port.

With respect to cable installation, the ruling confirms the well settled CBP interpretation that a foreign vessel can lay electrical cable in U.S. waters between two points in the United States including picking up that cable in a U.S. port before commencing laying operations. Moreover, the use of a device to simultaneously lay and bury cable which utilizes water jets to create a trench does not constitute “dredging” and so can be undertaken by a foreign cable lay vessel.

With respect to the installation of scour protection, the ruling confirms that a foreign vessel can pick up rocks in a U.S. port and lay those rocks on the pristine U.S. seabed, although that would be unlawful if there are either rocks or a foundation already present. In a separate ruling, CBP had already determined that a foundation has a “vicinity”

which is part of the “point in the United States.” On these rulings, CBP rejected arguments that rocks resting on the seabed do not constitute an “installation or other device” as required by statute to create a U.S. point.

The significant surprise in the ruling relates to the installation of cable protection. CBP has indicated in past rulings that concrete mats could be loaded by a foreign vessel and then laid on top of already laid pipe because the already laid pipe is not a U.S. point (provided it was at least some distance from a well head).

The April 14 ruling reverses this view based on a re-examination of the Outer Continental Shelf Lands Act and concludes that electrical cable laying on the seabed, even if not near a foundation, was intended to be made a U.S. point because it is a means of transporting resources.

Although the April 14 ruling does not address all the issues relating to the application of the Jones Act to offshore wind farms, it is a significant step towards giving the affected industry the guidance it needs.

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