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US Customs and Border Protection Ruling May Exempt Foreign Offshore Wind Farm Turbine-Installation Vessels From Jones Act Regulation

In response to an inquiry from an East Coast wind project, Customs and Border Protection (CBP) recently published a May 27, 2010 ruling exempting foreign flag vessels and crews from the Jones Act[1] when drilling, driving piles and installing wind towers in offshore wind projects.[2] While the inquiry pertained to metrological towers (MET) that collect data before the project receives final regulatory approval, the ruling appears to apply directly to turbine installation itself, as well as the drilling and pile-driving activities precedent to installation of the wind towers.

Generally, US maritime cabotage laws (which include the Jones Act) prohibit the transportation of passengers or merchandise between points in the United States in any vessel other than a vessel built in, documented under the laws of and owned by citizens of the United States. Such as vessel is considered "coastwise qualified."

The US maritime cabotage laws by and large apply to points in the territorial sea, which is defined as the belt, three nautical miles wide, seaward of the territorial sea baseline, and to points located in internal waters, landward of the territorial sea baseline. In certain cases, those laws are extended into federal offshore waters by virtue of the Outer Continental Shelf Lands Act of 1953.[3]

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Under the Jones Act, a coastwise transportation of merchandise takes place when merchandise loaded at a point embraced within US maritime cabotage laws ("a coastwise point") is unloaded at another coastwise point, regardless of the origin or ultimate destination of the merchandise. In the May 27 ruling, CBP held that "neither drilling nor pile driving, in and of itself, conducted by a stationary vessel, constitutes coastwise trade or coastwise transportation." CBP also stated:

> The proposed activity with respect to the driving of a monopile foundation into the seabed is very similar to pile driving and is governed by the same principle. Therefore, we find that the activity of the stationary construction vessel described above, involving driving of a monopile foundation into the seabed and then adding a platform deck, anemometer tower, and other components does not constitute coastwise trade or coastwise transportation.[4]

In summary, the CBP ruling found that a vessel and crew engaging in drilling, pile-driving and installation activities while constructing an offshore wind project is exempt from the Jones Act. Thus, foreign-flag construction vessels and foreign crews may be used for these activities.

Whether a specific marine task on the US continental shelf requires a US flag vessel depends upon the specifics of what the vessel will be doing. However, this ruling provides opportunities for offshore wind installations that can be included in installation planning.

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[1] The Jones Act (formerly 46 U.S.C. App. § 883, recodified as 46 U.S.C. § 55102, pursuant to Pub. L. 109-304 (October 6, 2006)).

[2] A copy of the May 27, 2010 ruling can be found by searching the US Customs and Border Protection database for CBP, HQ H105415 (May 27, 2010).

[3] OCSLA, Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356a (2006)).

[4] CBP, HQ H105415 (May 27, 2010) at p.2.

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