



Offshore Wind and the Jones Act: Renewable Energy Industry Should Be Aware of Recent Changes to Federal Shipping Law



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Cabotage laws prohibit foreign-owned or crewed vessels from transporting merchandise between two points in the host country. They date to a time when a nation's merchant marine and navy were a unified military asset, and they remain in force today primarily to protect domestic jobs. These laws now pose important challenges for the offshore wind (OSW) industry, but a recent ruling by US Customs and Border Protection (CBP) has simplified these challenges.¹ Not all the recent news is beneficial to the industry however.

The primary US cabotage law is the Jones Act, which is Section 27 of the Merchant Marine Act of 1920. Since 1920, the Jones Act has prohibited the carrying of merchandise between points in the United States on vessels not owned, registered and crewed (with limited exceptions) by US nationals.² Violations can result in fines and the confiscation of the offending vessel.



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For purposes of the Jones Act, each structure in an OSW farm is considered a separate point in the United States. Therefore, only Jones Act compliant vessels may move "merchandise," i.e., construction components or supplies, from US ports to the installation site, or between individual installation sites in an OSW farm. The absence of US-flagged OSW construction vessels, and the hundreds of millions of dollars it would cost to build them, have given the industry little choice but to find a way to use European-owned vessels at this stage of US OSW development.

In constructing the initial US OSW projects, European-owned installation vessels have avoided US ports and have relied on US-owned barges to ferry components to and between the installation sites. This approach has created compliance risk under the "Koff Rulings" issued by CBP in 2012-2013, which held that any lateral movement of a lifting vessel during loading and unloading operations – whether planned and intentional or not – amounted to movement of the "merchandise" suspended from the vessel's crane. Once a lift had begun, movement of an OSW installation vessel for safety or navigational reasons could have resulted in a Jones Act violation.



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- ¹ "Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points" (page 84). These changes became effective February 17, 2020.
- ² See 46 U.S.C. § 55102: Vessels may not provide transportation of merchandise by water (or by land and water) between points in the US to which coastwise laws are applicable, unless the vessel is wholly owned by US citizens for purposes of engaging in coastwise trade. Additionally, such vessels must have a certificate of documentation with a coastwise endorsement or be exempt from documentation but otherwise eligible for such a certificate and endorsement.

But no more. Under the December 2019 guidance, CBP has withdrawn the Koff Rulings. It now recognizes that incidental movement of vessels during lifting operations does not violate the Jones Act.

But not all the recent policy guidance has been beneficial to the OSW industry. Exceptions to Jones Act restrictions for the transportation of vessel equipment have also been narrowed.

Under the Jones Act, items classified as “vessel equipment” can be transported between points in the US without restriction. Vessel equipment has always been understood to cover items “necessary and appropriate for the navigation, operation, or maintenance of a vessel and for the comfort and safety of the persons on board.”

But before the December 2019 guidance, vessel equipment could also include items “necessary for the accomplishment of the mission of the vessel.” In the past, that category had been used to allow foreign vessels to transport items that might otherwise be considered merchandise when building or repairing offshore oil platforms. But in the December 2019 guidance, CBP terminated the “mission of the vessel” rationale and withdrew prior guidance based on it. The logic of doing so is understandable. All the components for wind turbine construction are necessary for the mission of an OSW construction vessel. In the OSW context, a mission-of-the-vessel exception could easily have swallowed the Jones Act rule.

The scope of “vessel equipment” now includes “those items that aid in the installation, inspection, repair, maintenance, surveying, positioning, modification, construction, decommissioning, drilling, completion, workover, abandonment or other similar activities or operations of wells, seafloor or subsea infrastructure, flow lines, and surface production facilities.” CBP clarified further that the “fact that an item is returned to and departs with the vessel after an operation is completed, and is not left behind, is a factor that weighs in favor of an item being classified as vessel equipment, but is not a sole determinative factor.”

In addition, the December 19, 2019 guidance document closed the door on any exception to Jones Act restrictions for transporting merchandise of *de minimis* scope or value, or for merchandise that whose transportation is incidental to the “primary activity of the vessel,” or for material or components that are used to respond to an unforeseen need for modifying or repairing to an item being constructed. Prior guidance documents had included such concepts.

The effect of the new guidance makes it clear that from CBP’s perspective, foreign-owned OSW lift and construction vessels can be used to install offshore wind turbines so long as all components and supplies are transported to and between installation sites on US-owned barges. Installers must strictly ensure that all components, fasteners, couplings, lubricants, shims, cable and similar items that will become part of the OSW structures remain on US-owned barges. None may be on board non-Jones Act compliant installation vessels as they move from installation site to installation site within an OSW farm.

The December 2019 rulings, however, may be challenged. A bipartisan group of Congressional members, as well as trade groups representing segments of the shipping industry, have written the administration to oppose these changes. They raise the possibility of challenging the new documents in court as beyond the legal power of CBP to issue without strict adherence to the procedures for adopting binding regulations.

In the interim, CBP has made clear that its preferred approach to enforcing the Jones Act is for interested parties to submit detailed, factual descriptions of anticipated activities and seek letter rulings from CBP before undertaking them. OSW supply-chain companies would do well to take this advice seriously, and to work in coordination with their legal counsel and CBP to define the scope and application of Jones Act restrictions before undertaking offshore projects with foreign-owned or crewed vessels.

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