BENEDICT'S MARITIME BULLETIN

The Quarterly Bulletin of Benedict on Admiralty

Vol. 22, No. 1 • First Quarter 2024

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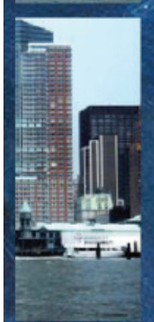

Application of the Jones Act to Floating Offshore Wind

By Charlie Papavizas*

With 80 percent of the world's wind resources in deep water, the future of offshore wind power generation is in floating offshore wind turbines (often abbreviated FOWT).[1] Because this is a relatively new technology, U.S. Customs and Border Protection (CBP) has not yet had the occasion to issue any rulings regarding floating offshore wind turbines in federal waters (generally, beyond three nautical miles from the U.S. coast). Here, we examine CBP's existing rulings and guidance to determine how the Jones Act may apply to floating offshore wind turbines.

U.S. Offshore Floating Wind Market

In September 2022, the Biden Administration announced a goal of deploying 15 gigawatts (GW) of floating wind capacity by 2035 to go along with its goal of 30 GW by

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This article contains the views of the author and not necessarily the views of Winston & Strawn LLP or any of Winston & Strawn LLP's clients. Charlie Papavizas is the author of the upcoming book, *Journey to the Jones Act–U.S. Merchant Marine Policy 1776-1920*, to be published by Adducent under its Fortis nonfiction imprint in the Spring 2024. The author is grateful to Philip Lewis, Director Research, Intelatus Global Partners, for reviewing the wind market section of this article.

[1] Presentation of Walt Musial, "Floating Offshore Wind Technology," National Renewable Energy Laboratory, Bureau of Ocean Energy Management, Gulf of Maine Intergovernmental Renewable Energy Task Force (May 10, 2023), https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Musial-Floating-Wind-Technology.pdf.

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A NOTE ON CITATION:
The correct citation form for this publication is:
22 BENEDICT'S MAR. BULL. [1] (First Quarter 2024)

Managing Editor's Introductory Note

Our first offering in this edition is an article by Charlie Papavizas on the application of the Jones Act to the offshore wind industry. Charlie takes us through the U.S. Customs and Border Patrol's existing rulings and guidance to determine how the Jones Act may apply to floating offshore wind turbines. This is a developing industry and future rulings by the courts and CPB will need to be closely monitored by the industry participants.

Sadly, our next submission is an obituary of Frank L. Wiswall, Jr. provided to us by his son, Frank L. Wiswall, III. In addition to his editorial work on Benedict's on Admiralty, Frank was the Editor in Chief of Benedict's Maritime Bulletin from January 2009, succeeding the founding Editor in Chief, John A. Edginton, to December 2014. In that time, in addition to his editorial work on Bendict's and BMB, Frank submitted many thoughtful and informative reviews of books on maritime issues and history. I knew Frank personally, when I was a young associate at Burlingham Underwood & Lord in the late 1970s. While I did not have many interactions with him because he was much senior to me in the firm, he was always a figure to be respected and admired for his high intellect and vast knowledge of maritime history. As outlined in the obituary, Frank was very interested and involved in the public international aspects of maritime law. The international community will miss his keen intellect and extremely hard work in advancing the rule of maritime law.

Our next article is written by one of our frequent contributors, Minoo Daryanani. Here, Minoo provides us with a refreshing insight from an international perspective on past and current "Gunboat Diplomacy," an especially topical discussion given current world political situations in the Mediterranean, Red, Yellow, and South China Seas.

We follow with an update of cases involving the maintenance and cure obligations of employers to seamen by Rowen Fricker Asprodites and Aaron B. Greenbaum. Rowen and Aaron provide us with detailed summaries of the cases on this topic from April 1, 2023 through December 31, 2023.

In the regular Window on Washington column, Bryant Gardner discusses the National Defense Authorization Act for Fiscal Year 2024 ("NDAA"). Bryant carefully and thoroughly details the various program fundings included in the Act. He concludes "the MARAD provisions are extensive and present meaningful opportunities for addressing the shortfall of mariners, increasing the number of U.S.-flag vessels, recapitalizing the RRF, strengthening MARAD, and advancing a national maritime strategy."

We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

Application of the Jones Act to Floating Offshore Wind

By Charlie Papavizas

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2030 of fixed bottom capacity.[2] In that announcement, the Biden Administration indicated that "deep-water areas that require floating platforms are home to two-thirds of America's offshore wind energy potential." In general, floating wind must be employed if the water depth exceeds 60 meters."[3]

The Biden Administration recognized that floating wind will require further investment to be competitive. The U.S. Department of Energy estimated that the cost of floating offshore wind would be more than 50 percent higher than the cost of fixed-bottom offshore wind.[4] For this reason, the Energy Department announced in 2022 a "Floating Offshore Wind Shot" research and development initiative to drive down floating wind costs.

Although floating offshore wind generation is a fast-evolving technology, several floating projects have already been installed around the world and more are being installed. The largest floating project to date is Hywind Tampen in Norway which consists of 11 turbines of about 8 megawatts (MW) each for a total of 88 MW. Those turbines provide power to offshore oil and gas production facilities. There is also the Kincardine 47.5 MW capacity wind farm off the coast of Scotland installed in 2022 (five 9.5 MW turbines) and the WindFloat Atlantic 25 MW capacity wind farm off the coast of Portugal (three 8.4 MW turbines), among others.

The first substantial U.S. floating project is likely to be pursuant to a federal research lease issued to the state of Maine for an area 20 nautical miles southeast of Portland which would have a capacity of 144 MW (12 turbines).[5] The Gulf of Maine has deep water, making fixed bottom wind turbines impractical. Maine has been developing floating offshore wind since 2008 and intends to proceed first with a single turbine pilot project developed by New England Aqua Ventus, LLC, scheduled to deploy in 2025.[6] The Bureau of Ocean Energy Management ("BOEM" - the federal agency that manages the leasing and permitting review of offshore wind projects) also announced in October 2023 a draft wind energy area for floating wind in the Gulf of Maine that has a capacity of 40 GW if fully developed.[7]

In addition, BOEM issued in December 2022 five leases off the U.S. West Coast in deep waters which can only be developed to produce electricity with floating technologies. Those five leases were issued after an auction which generated $757 million in total in winning bids.[8] BOEM estimates that these lease areas have the capacity to produce over 4.6 GW of energy. In August 2023, BOEM announced two draft wind energy areas off the coast of Oregon.[9]

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2 The White House, "Fact Sheet: Biden-Harris Administration Announces New Actions to expand U.S. Offshore Wind Energy" (Sep. 15, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-biden-harris-administration-announces-new-actions-to-expand-u-s-offshore-wind-energy/.

3 Musial, Walt, Donna Heimiller, Philipp Beiter, George Scott, and Caroline Draxl. *2016 Offshore Wind Energy Resource Assessment for the United States*. Golden, CO: National Renewable Energy Laboratory. NREL/TP-5000-66599 (Sep. 2016), https://www.nrel.gov/docs/fy16osti/66599.pdf.

4 U.S. Department of Energy, "Floating Offshore Wind Shot: Unlocking the Power of Floating Offshore Wind Energy," DOE/EE-2634 (Sep. 2022), https://www.energy.gov/sites/default/files/2022-09/floating-offshore-wind-shot-fact-sheet.pdf.

5 BOEM, Press Release, "BOEM Seeks Input on Draft Environmental Analysis of Gulf of Maine Offshore Wind Research Lease" (Jul. 19, 2023), https://www.boem.gov/newsroom/press-releases/boem-seeks-public-input-draft-environmental-analysis-gulf-maine-offshore.

6 *See* https://newenglandaquaventus.com.

7 BOEM, Press Release, "BOEM Releases Draft Wind Energy Area in the Gulf of Maine for Public Review and Comment" (Oct. 19, 2023), https://www.boem.gov/newsroom/press-releases/boem-releases-draft-wind-energy-area-gulf-maine-public-review-and-comment .

8 BOEM, Press Release, "Biden-Harris Administration Announces Winners of California Offshore Wind Energy Auction" (Dec. 7, 2022), https://www.doi.gov/pressreleases/biden-harris-administration-announces-winners-california-offshore-wind-energy-auction.

9 BOEM, Press Release, "BOEM Identifies Draft Wind Energy Areas Offshore Oregon for Public Review and Comment" (Aug. 15, 2023), https://www.boem.gov/newsroom/press-releases/boem-identifies-draft-wind-energy-areas-offshore-oregon-public-review-and.

Although there are many floating offshore wind methodologies and more are being developed,[10] all must be anchored to the seabed and connected by wire, synthetic rope, chain, or tendons to anchors of various types. California has particularly deep water with a minimum of 500 meters. The water depth in the Gulf of Maine lease areas ranges from 100 and 300 meters.[11] Both present a technical challenge, but the West Coast, in particular, will mean longer and heavier mooring lines than have otherwise been heretofore deployed anywhere in the world.

The anchor footprint can vary substantially depending on the floating technology employed, the type of anchor, the weighting of mooring lines, and the tautness of those lines, among other factors.[12] A typical arrangement would be for there to be three lines and three anchors per floating turbine unit although multiline and shared line anchors are possible.

It is likely that anchors and mooring lines will be pre-laid on the seabed and then left there for some time until the structure or platform is ready to be towed to the site for hook up. Some tensioning of mooring lines may have to be done by vessels. The lines will also likely require re-tensioning over time. Some anchors require drilling in the seabed.

Both the towing or other transportation of the floating turbine unit from a port to its intended offshore location and the transportation and placement of anchors and the connecting mechanisms require the use of substantial anchor handling tug supply vessels (AHTS) as well as subsea intervention vessels. A recent analysis by Intelatus Global Partners indicates that AHTS vessels would need to have at a minimum a bollard pull of 250 tons and a clear back deck of no less than 800 square meters.[13]

The wind turbine installation vessels (WTIVs) and heavy lift vessels utilized to install foundations and turbines for fixed bottom projects will not be needed as much for installation because units are likely to be assembled upright in port and then towed to their intended locations. Scour protection installation vessels also would not generally be needed since the anchors are not as susceptible to ocean current erosion over time as are fixed bottom foundations.

As with fixed bottom turbines, the wind farm will have to be connected to offshore substations and then to shore through the laying of submarine power cable resting in part on the seabed. Unlike fixed bottom turbines, some portion of the cables will be dynamic and will be installed likely by vessels with vertical lay systems, which are currently utilized to lay umbilicals for offshore oil and gas projects.

Offshore maintenance operations will require vessels with substantial remotely operated vessel (ROV) and crane capabilities to be able to inspect and recover mooring lines, anchors, and cables. In addition, floating turbines are likely to be inspected and serviced by technicians brought offshore by crew transfer vessels (CTVs), service operation vessels (SOVs), and helicopters. A major maintenance difference is that AHTS vessels may also be needed to "unhook" and tow turbines back to shore for major maintenance or replacement or those activities will occur off shore with WTIV-type vessels.

The Jones Act

The "Jones Act" is a term applicable to several laws which reserve certain maritime activities in U.S. waters to qualified U.S.-flag vessels.[14] Section 27 of the Merchant Marine Act, 1920 requires that all "merchandise" "transported" "between points in the United States" be carried by qualified U.S.-flag vessels.[15] The Passenger Services Act, originally enacted in 1886, similarly regulates the transportation of "passengers."[16] The 1904

[10] For example, Barooni, Mohammad, Turaj Ashuri, Deniz Velioglu Sogut, Stephen Wood, and Shiva Ghaderpour Taleghani. 2023. "Floating Offshore Wind Turbines: Current Status and Future Prospects" *Energies* 16, no. 1: 2. https://doi.org/10.3390/en16010002.

[11] Musial, Walt, Suzanne MacDonald, Rebecca Fuchs, Gabriel R. Zuckerman, Scott Carron, Matt Hall, Daniel Mulas Hernando, Sriharan Sathish, and Kyle Fan. *Considerations for Floating Wind Energy Development in the Gulf of Maine*. Golden, CO: National Renewable Energy Laboratory. NREL/TP-5000-86550 (July 2023), https://www.nrel.gov/docs/fy23osti/86550.pdf.

[12] For example, Hall, Matthew, Ericka Lozon, Sten Housner, and Senu Sirvinas. "Design and Analysis of a Ten-Turbine Floating Wind Farm with Shared Mooring Lines." *Journal of Physics: Conference Series* (IOP Publishing: 2022), https://doi.org/10.1088/1742-6596/2362/1/012016.

[13] Philip Lewis, "Anchor Handler Construction: What to Expect as Floating Wind Picks Up," 8 *Maritime Reporter and Engineering News* 26 (Aug. 2023), available online at https://www.marinelink.com/news/anchor-handler-construction-expect-507265.

[14] For a U.S-flag vessel to engage in reserved U.S. domestic trade it must be built in the United States and owned and operated by U.S. citizens (absent an exception).

[15] 46 U.S.C. § 55102.

[16] 46 U.S.C. § 55103.

Dredging Act limits "dredging" in U.S. waters. The Towing Act of 1940 does the same for "towing."[17]

Several issue areas impact floating offshore wind – (a) offshore jurisdiction; (b) anchor installation; (c) towing; (d) cable lay and protection; and (e) maintenance activities.

Offshore Jurisdiction. U.S. ports are obviously "points in the United States," but the presence of U.S. "points" on the U.S. outer continental shelf is not as clear. Application of U.S. federal law generally depends on the Outer Continental Shelf Lands Act (OCSLA) first enacted in 1954. CBP has consistently interpreted OCSLA to apply the Jones Act based on the following OCSLA phrase -- "installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing *resources*."[18]

When the U.S. Congress amended federal offshore leasing law in 2005 to permit leasing for offshore wind energy and other renewable energy projects, it did not amend section 4(a)(1) of OCSLA (entitled "Jurisdiction of the United States on the Outer Continental Shelf") to take that new leasing authority into account.[19] The issue was whether the word "resources" meant anything more than mineral resources such as oil and gas. [20]

As a result, there was some ambiguity whether the Jones Act, like other federal laws, applied to offshore wind projects. Congress amended OCSLA in January 2021 in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (2021 NDAA) to add the phrase "including non-mineral energy resources" to make clear that alternative-energy installations–-such as offshore wind farms–-fall within OCSLA's ambit.[21]

Prior to the law change, Great Lakes Dredge & Dock Company, LLC (GLDD) requested that CBP interpret OCSLA to extend the Jones Act to the entire "subsoil and seabed of the outer Continental Shelf" regardless of the presence of an "installation and other device."[22] Those words were in OCSLA both before and after the 2021 law change. The context was the installation of rocks for scour protection transported from a U.S. port to a place on the U.S. outer continental shelf (OCS) prior to the installation of a monopile foundation (usually referred to as the "filter layer").

In a January 27, 2021 ruling issued after the 2021 NDAA was enacted, CBP first determined that "OCSLA Section 4, as amended by the 2021 NDAA, extends U.S. law to the physical subsoil and seabed of the OCS as well as" installations and other devices.[23] CBP corrected that January ruling on March 25, 2021 to determine that "jurisdiction does not reach activity occurring at the pristine seabed, where there is no installation or device attached to the seabed" and at the time of the "first delivery" of rocks for scour protection, "there is no coastwise point."[24]

On May 18, 2021, GLDD filed an administrative appeal with CBP seeking to reinstate the January ruling. On June 6, 2022, CBP denied GLDD's appeal. CBP determined that "NDAA 2021 merely amended the OCSLA to 'affirm' that the OCSLA extends U.S. jurisdiction to certain activities involving non-mineral resources (*e.g.*, offshore wind)."

On July 26, 2022, GLDD sued CBP in the U.S. District Court for the Southern District of Texas seeking, among other things, a declaration "that the Jones Act prohibits the transportation of scour rock to the seabed of the OCS by a non-coastwise qualified vessel whether or not there is already a 'first layer' of rock attached to the seabed."

On October 16, 2023, the court rendered judgment in favor of CBP finding no standing because the court determined that "Great Lakes did not have a vessel capable of handling the Project [Vineyard Wind] and "[i]n this respect, Great Lakes [sic] claim is hypothetical as opposed to actual."[25] GLDD noticed an appeal to the U.S. Court of Appeals for the Fifth Circuit and the briefing on that appeal is currently scheduled to end on March 8, 2024.[26]

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17 46 U.S.C. §§ 55109 (dredging) & 55111 (towing).

18 43 U.S.C. 1333(a)(1)(A)(iii) (emphasis supplied).

19 *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

20 Constantine G. Papavizas and Gerald A. Morrissey III, "Does the Jones Act Apply to Offshore Alternative Energy Projects?" 34 Tul. Mar. L. J. 377 (Summer 2010).

21 Pub. L. No. 116-283, § 9502, 134 Stat. 3388, 4822-23.

22 Letter from M. Wray to CBP (Feb. 12, 2020), available (redacted) at *Great Lakes Dredge & Dock, LLC v. Magnus*, Case No. 4:22-cv-02481 (S.D. Texas), Doc. 34 (Feb. 15, 2023).

23 CBP, HQ H309286 (Jan. 27, 2021).

24 CBP, HQ H317289 (Mar. 25, 2021).

25 Memorandum Opinion and Order, *Great Lakes Dredge & Dock, LLC v. Magnus*, 2023 U.S. Dist. LEXIS 196375, at *9, 2023 AMC 554 (Oct. 16, 2023), *appeal filed*, (Oct. 23, 2023) (No. 23-20516).

26 There is a similar case with overlapping issues pending in the U.S. District Court for the District of Columbia. *See Radtke v. U.S. Bureau of Customs & Border Protection*, Case No. 1:17-cv-2412-TSC (D.D.C.).

Anchor Installation. CBP has not had occasion to address the placement of seabed anchors by vessels beyond state waters on the U.S. outer continental shelf in the context of offshore renewable energy. There is, however, some related oil and gas guidance on the transportation and placement of anchors as well as a special law relating to anchor placement that may apply at some point to renewable energy.

In the oil and gas context, CBP has taken a broad view of what constitutes a "point in the United States" for the purpose of placing anchors. For example, CBP determined in 1989 in connection with the installation of a tension leg platform (TLP) that an "installation site on the OCS at which there are foundation templates, piles, a mooring system, and temporarily abandoned wells" constitutes a "point in the United States."[27]

CBP has also determined that a foreign anchor handling vessel can be used "to unmoor a semi-submersible drill rig by lifting its anchors and anchor chains from points on the Outer Continental Shelf in order for the rig to reel them in for storage on board."[28] In that instance the anchors remained connected to the drill rig.

Similarly, CBP ruled as early as 1977 that anchors that remained attached to a drill rig could be moved by foreign anchor handling tugs because the anchors in that instance would be considered "fittings of the drilling rigs and not 'merchandise'" within the meaning of the Jones Act.[29] In 2005, CBP determined that an anchor handling supply vessel is subject to the Jones Act "when transporting a suction pile anchor and mooring assembly" between a U.S. port and "the site of an exploratory wellhead on the OCS."[30] Finally, with respect to drilling, CBP has generally taken the view that drilling is not "dredging" although there do not appear to be any drilling rulings relating to the placement of anchors on the seabed.[31]

In 2006, the U.S. Congress enacted a Jones Act-related law that requires that only U.S.-flag vessels with a registry endorsement can be utilized to set, relocate, or recover anchors for any mobile offshore drilling unit "that is located over the outer Continental Shelf."[32] A U.S.-flag vessel with a registry endorsement on its U.S. Coast Guard-issued Certificate of Documentation can engage in the U.S. international trade but not, ordinarily, the U.S. domestic (Jones Act) trade unless it also has a coastwise endorsement. A registry endorsement vessel can be built outside the United States. Amendments to this provision were considered by the 118th Congress in 2023 to expand its coverage to include potentially offshore wind related activities.[33]

Towing. Qualified U.S.-flag vessels must be utilized to tow "a vessel between ports or places in the United States to which the coastwise laws apply."[34] In connection with an offshore wind project, CBP cited early 20th century cases to the effect that "'towage service is the employment of one vessel to expedite the voyage of another.'"[35] In that same ruling, CBP determined that the use of anchor handling tugs to keep a heavy lift vessel stationary did not constitute "towing." Moreover, in the March 2021 modified GLDD ruling, CBP determined that foreign tugs could be used to tow a foreign barge from a U.S. port to a place on the U.S. outer continental shelf that CBP considered "pristine seabed."[36]

Cable Lay and Protection. In connection with offshore oil and gas activities, CBP has long determined that pipe or cable laying does not constitute the transportation of "merchandise" between two "points in the United States" even if the pipe or cable is laid between such "points."[37] CBP has repeatedly confirmed this interpretation in connection with cable laying for fixed bottom offshore wind projects and one floating wind project in state waters (within three nautical miles of the Maine coast).[38] CBP's logic is that the process of laying cable is not "transportation" of merchandise where the merchandise is first "laden" and then "unladen," but rather the cable is "paid out, but not unladen."

CBP has also determined certain cable protection matters in connection with fixed bottom wind projects. Specifically, CBP has approved the use of several burial devices utilizing water jets, among other things.[39] CBP has not considered such devices to be engaged in "dredging," which CBP has defined as "'the use of a vessel equipped with excavating machinery in digging

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27 C.S.D. 89-115, 23 Cust. Bull. 838 (Jul. 14, 1989).

28 CBP, HQ 112387 (Jul. 23, 1992).

29 CBP, HQ 102984 (Nov. 14, 1977) (*quoted in* CBP, HQ 116350 (Jan. 18, 2005)).

30 CBP, HQ 116350 (Jan. 18, 2005).

31 *E.g.*, CBP, HQ 116117 (Feb. 26, 2004).

32 Pub. L. No. 109-241, § 310, 120 Stat. 516, 529 (2006) (*codified at* 46 U.S.C. § 12111(d)).

33 *See* H.R. 2741, 118th Cong., 1st Sess., § 341.

34 46 U.S.C. § 55111(b)(1).

35 CBP, HQ H326258 (Sep. 15, 2023) (citing *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927)).

36 CBP, HQ H317289 (Mar. 25, 2021).

37 C.S.D. 79-321.

38 *E.g.*, CBP, HQ H318628 (Jun. 30, 2022); CBP, HQ H329630 (Mar. 9, 2023); CBP, HQ H325120 (May 23, 2023) (floating Maine project).

39 *E.g.*, CBP, HQ H329630 (Mar. 9, 2023).

up or otherwise removing submarine material.'"[40] CBP separately determined that already laid power cable is a "point in the United States," and so the placement of concrete mats or other protective items on top of already laid cable brought from a U.S. port must be transported by a qualified U.S.-flag vessel.[41]

Maintenance Activities. Once a foundation is established on the U.S. OCS or a turbine anchored to the U.S. OCS, those installations are U.S. points. All "merchandise" or "passengers" transported by water to such installation from a U.S. port must occur via coastwise qualified U.S.-flag vessels. With respect to bottom founded turbines, CBP has determined that some items transported by foundation, turbine, or cable installation vessels are "vessel equipment" and not "merchandise."[42] Similarly, certain personnel who work on board the vessel and on offshore structures are not "passengers."[43]

Jones Act Applied to Floating Offshore Wind

Anchors. A threshold question in applying the Jones Act to floating offshore wind is the jurisdictional issue presented in the pending GLDD case. If the view were ultimately taken that the entire U.S. OCS is a "point in the United States" to which the Jones Act applies, then every anchor (not connected already to a structure or platform) that CBP considers "merchandise" loaded in a U.S. port and transported to the pristine seabed on the U.S. OCS may need to be transported in a Jones Act-qualified vessel.

At the present time, applying the principles of CBP's current interpretations, that would not be the case. A foreign vessel would be able to transport anchors considered "merchandise" from a U.S. port to a place on the U.S. OCS where no "installation or other device," and so no "point," yet existed

There remains an open question under current CBP interpretations whether that result should continue to pertain after the first anchor is transported and placed on the seabed. The issue is whether the presence of that first, single, anchor creates a "point in the United States" that encompasses the entire project area. CBP's 1989 TLP ruling indicates that the presence of a single anchor may create an "installation site" as a "point in the United States."[44] CBP has been much more precise in more recent offshore wind fixed bottom rulings,[45] but it remains unclear whether the anchor placement distances will mean that there is collection of U.S. points or a single "point in the United States."

Of course, if the anchors come from outside the United States, such as from Canada or Mexico, directly to the U.S. OCS, then a foreign vessel could be utilized regardless of the outcome of the pristine seabed litigation. The principle is similar to the situation where rocks are transported from Canadian ports to be placed on the U.S. OCS for scour protection around the base of fixed bottom structures on the East Coast.

Moreover, CBP has indicated that anchors which remain connected to a floating drill rig are not "merchandise," but rather they are exempt "fittings."[46] It remains to be seen how CBP would view the installation of a floating turbine structure or platform where anchors remain connected to the structure or platform through the installation process.

Consideration will also have to be given if the special anchor handling legislation is expanded to cover renewable energy and how that expansion occurs. Such special legislation could override the Jones Act for such movements which could provide for the possibility of foreign-built/U.S.-flag AHTS vessels to perform such anchor handling functions as the law exists today for mobile offshore drilling units.

Structures/Platforms. Even if the current CBP view of the U.S. OCS is changed and the entire U.S. OCS is determined to be a "point in the United States," there would remain a question regarding the towing ashore of turbine structures or platforms. The issue would be whether the water surface above either the pristine seabed or installed anchors is such a "point." CBP oil and gas rulings imply that the water surface might be considered a U.S. point if there are structures below on the seabed,[47] but there do not appear to be any definitive rulings regarding the "point" creating effect of anchor placement.

Cable and Mooring Lines. CBP rulings to date definitively permit the laying of cable between two points in the U.S. with respect to offshore wind farms. However, CBP revoked in 2019 a 2001 ruling in which it permitted a foreign vessel to install riser pipe and umbilical tie-ins which are similar to both the installation of mooring lines and cable connections for floating

40 *E.g.*, CBP, HQ H325120 (May 23, 2023).
41 CBP, HQ H300962 (Apr. 14, 2022).
42 *E.g.*, CBP, HQ H300962 (Apr. 14, 2022).
43 *E.g.*, CBP, HQ H327590 (Dec. 16, 2022).
44 *See* C.S.D. 89-115, 23 Cust. Bull. 838 (Jul. 14, 1989).
45 *E.g.*, CBP, HQ H333946 (Sep. 14, 2023).
46 *See* CBP, HQ 102984 (Nov. 14, 1977) (*quoted in* CBP, HQ 116350 (Jan. 18, 2005)).
47 *E.g.*, CBP, HQ 115069 (Jun. 14, 2000).

offshore wind.[48] That revocation adds uncertainty even though it was focused on whether the tie-ins were exempt "vessel equipment" rather than "merchandise" which may not affect the installation of mooring lines.

Maintenance. Most issues relating to maintenance applicable to floating offshore wind are like, or the same as, with fixed bottom turbines because in both instances the maintenance occurs after a U.S. "point" undeniably exists. For example, tools brought on board a floating structure or platform by technicians are "vessel equipment" in the same measure as with fixed bottom structures and the technicians themselves are either "passengers" or not in either situation in the same fashion.

There are nevertheless certain unresolved maintenance issues. For example, it is unclear how mooring line repair would be viewed because CBP has not yet had the occasion to examine the relevant issues. Repairs by a foreign vessel may be permissible including line tensioning, but operations where damaged mooring line sections are recovered and returned to a U.S. port may not be permitted.[49]

Conclusion

How the Jones Act will apply to floating offshore wind is in flux both because CBP's interpretation of U.S. offshore application has been challenged in court and because CBP has not yet had the occasion to apply the law to the particular facts of floating projects in federal waters. If CBP's application of the law to fixed bottom projects is any measure, where the agency has issued about two dozen rulings since 2020, it will likely be a slow and iterative process to provide the industry the guidance it needs to apply the Jones Act to floating offshore wind.

[48] 53 Cust. Bull. & Dec. 84, 92 (Dec. 11, 2019) (revoking CBP, HQ 115522 (Dec. 3, 2001)).

[49] *See* CBP, HQ H311603 (Aug. 31, 2020).

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