

Headwinds or fair winds: Understanding U.S. offshore wind energy regulations



The Club has seen a rapid growth in enquiries from Members operating in or planning to operate in the U.S. offshore wind sector. The regulatory requirements here are complex and fast evolving. The following guest article therefore looks at the U.S. wind offshore environment, its energy regulatory bodies and regulations, the process for permits and examines what types of vessels can work on offshore projects in U.S. territorial waters. The article is by Michael Wray – Partner at HFW. His practice focuses on aviation, marine and energy, commercial litigation, environmental, insurance coverage, and transactional matters.

After taking office in January 2022, the Biden Administration set a goal of deploying 30 gigawatts (GW) of offshore wind by 2030, enough to power 10 million homes with clean energy, support 77,000 jobs, and spur private investment up and down the supply chain.

Subsequently, the Biden Administration quickly issued two Executive Orders that directly impact offshore wind. The Executive Orders reveal that: (1) offshore wind power is a critical element of the Administration's climate change policy goals; and (2) the Administration supports the Jones Act as part of a broader policy that seeks to maximize the use of U.S. goods, products, services and materials.^[1] After the Executive Orders were issued, there was a visible shift in regulatory priorities, which reveals the complex legal and regulatory landscape that stakeholders in the offshore wind arena must understand and navigate.

Offshore wind energy projects on the U.S. Outer Continental Shelf (OCS) are the focal point of federal regulation. The 2022 U.S. Department of Energy Offshore Wind Market report stated that as of May 2022, current and planned U.S. offshore wind energy projects have the potential

to generate 40,083 megawatts of power.

In 2022, the federal government expanded beyond the Atlantic coast and designated areas of offshore California for wind energy leases and has taken steps to designate areas in the Gulf of Mexico for future lease sales. The Inflation Reduction Act (IRA) became law on August 16, 2022. The IRA contains investment tax credits and other incentives to encourage offshore wind development, which will only hasten further developments.

For stakeholders interested in the expanding U.S. offshore wind market, a comprehensive understanding of the regulatory and legal playing field that apply to offshore projects in the U.S., in particular the Jones Act, is required.

The Extension of Federal Law to the OCS

The U.S. is a federal system. State waters and jurisdictions generally extend three miles offshore. State regulators certainly have a key role in offshore wind since electricity generated on the OCS must tie into a state's power grid. In fact, several states have passed statutes to encourage offshore wind development at the local level.

The development of wind energy fields on the OCS will predominantly be subject to federal law. The Outer Continental Shelf Lands Act (OCSLA) extends federal jurisdiction to submerged lands on the OCS. OCSLA was originally passed in 1953 to encourage offshore oil and gas development. In 2021, the OCSLA was amended to specifically apply to renewable energy projects, including offshore wind.

Various federal regulations, including environmental and safety regulations, apply to offshore wind projects. Numerous federal agencies, such as the U.S. Coast Guard, regulate in the offshore space. The Bureau of Ocean Energy Management (BOEM) and the U.S. Customs and Border Protection (CBP) are key regulators involved with the development of offshore wind energy fields. BOEM is responsible for offshore wind leasing and permitting. CBP rulings dictate whether a Jones Act vessel is required to conduct certain activities during the life of a wind energy farm.

BOEM: Leasing and Permitting

As an agency within the United States Department of Interior, BOEM's purpose is to manage the development of the United States' offshore resources in an environmentally and economically responsible manner.^[2] BOEM has the authority to grant leases and permits on federal lands on the OCS for offshore wind energy projects.

The multi-phased leasing and permitting process is subject to environmental review. An offshore lease permit may also be subject to administrative law or court challenges by interested stakeholders. The following diagram from a BOEM document for the Vineyard Wind project is illustrative of the different phases of the leasing and permitting process. As illustrated below, permitting is a lengthy process.

CBP: The Coastwise Laws & Headquarters Rulings

CBP is the agency charged with rendering administrative decisions on the application of the coastwise laws, including the Jones Act, to offshore projects. To date, CBP has shown a willingness to apply historical decisions from the oil and gas industry to several wind energy projects. While each CBP Headquarters Ruling (HQ Ruling) is highly fact specific, HQ Rulings are indicative of whether a coastwise qualified vessel, commonly referred to as a Jones Act vessel, is required for certain aspects of an offshore wind energy project.

1. The U.S. Coastwise Laws

The coastwise laws apply to the U.S. territorial sea and the OCS. If an activity is subject to the coastwise laws, a coastwise-qualified vessel is required. A coastwise-qualified vessel is required to be (1) built in the U.S.; (2) owned by U.S. citizens; (3) U.S.-flagged; and (4) manned by U.S. personnel.

The Jones Act, 46 U.S.C. § 30104, Dredging Act, 46 U.S.C. § 55109 and Passenger Vessel Services Act (PVSA), 46 U.S.C. § 55103, are highly relevant for offshore wind projects. Specifically, the Jones Act restricts the transportation of merchandise between two coastwise points in the U.S. to a U.S. coastwise-qualified vessel. Dredging in U.S. "navigable waters" requires a coastwise-qualified vessel. The PVSA requires passengers, but not vessel crew, transported between two coastwise points to be carried on coastwise-qualified vessels.

Failure to comply with the Jones Act carries severe penalties, which may result in the forfeiture of merchandise or a monetary fine equal to the value of the merchandise. Thus, Jones Act compliance is critical.

2. CBP Offshore Wind Energy Rulings

CBP has a growing body of HQ Rulings that reveal a combination of Jones Act qualified and non-Jones Act qualified vessels may be used for different phases of an offshore wind energy project. A snapshot of recent HQ Rulings reveals that:

- A non-coastwise qualified wind turbine installation vessel may use its crane to lift turbines and place them on their steel jacket foundations without violating the Jones Act.[\[3\]](#)
- A coastwise qualified vessel is not required to apply scour material to a pristine seabed.[\[4\]](#)
- A combination of coastwise qualified tugs and foreign-flagged barges could be used to fabricate and install a floating wind turbine without violating the Jones Act.[\[5\]](#)
- A non-coastwise cable laying vessel could install subsea electrical cables installed between wind turbine generators and offshore substations and ultimately to an onshore

connection to the grid.^[6]

- Concrete mats that would be installed at an offshore wind farm as protection for subsea pipes and cables that were loaded at a U.S. port required a Jones Act vessel.^[7]

Conclusion

There remains a strong federal policy push to increase the amount of renewable energy from offshore wind energy projects, which creates further market opportunities for vessel operators and offshore contractors.

Recent market activity indicates that operating companies may require contractors to obtain HQ Rulings as part of a response to a request for proposal. Other vessel companies have announced joint venture or cooperation agreements between Jones Act vessel operators and foreign partners. With a dynamic market, understanding and assessing the regulatory environment before contracting is critical.

^[1]Executive Order 14005, "Strengthening 'Buy American' Provisions, Ensuring Future of America is Made in America by All of America's Workers" (January 25, 2021); See also "Executive Order on Tackling the Climate Crisis at Home and Abroad" (January 27, 2021) (The Biden administration has also articulated its goal of "doubling offshore wind by 2030 while ensuring [. . .] creating good jobs.")

^[2] *Id.*

^[3] HQ H143075 (2011).

^[4][4] HQ 317289 (March 25, 2021).

^[5] H318739 (July 6, 2021)

^[6] HQ H300962 (April 14, 2022)

^[7] HQ H300962 (April 14, 2022)