

# Passengers and Merchandise

## The Jones Act and Offshore Wind Developments

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# Windpower Generally

- More than 59,900 utility-scale wind turbines have been installed in the U.S., with a cumulative capacity of 107.4 GW.
- U.S. wind capacity increased by 166% between 2010 and 2020, a 10% average annual increase.
- Global wind capacity increased by 15% annually, on average, from 2009 to 2019, reaching 651 GW in 2019.
- The 2019 U.S. wind capacity avoided an estimated 189 million metric tons of CO<sub>2</sub> emissions and reduced water use by about 103 billion gallons compared with conventional power plants.



# Why Offshore?

- Offshore winds are generally stronger than on land, and capacity factors are higher on average (expected to reach 51% by 2022 for new projects).
- But offshore wind farms are more expensive to build and maintain.
- Offshore turbines are currently placed in depths up to 40-50m (about 131-164ft), but floating offshore wind technologies could greatly expand generation potential as 58% of the total technical wind resource in the U.S. lies in depths greater than 60m.

- Up to 18 different types of vessels are involved during the full project life-cycle.

- Specialty vessels are used for surveying sites, the installation of foundations, turbines, export and inter-array cables, transportation of personnel and equipment, and eventual site decommissioning.





# The Jones Act Generally

- The coastwise laws apply to points within the territorial sea of the United States, 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 cases where the baseline and the coastline differ.”
- Regulates maritime commerce in U.S. waters and between U.S. ports and requires that all goods transported by water between U.S. ports be carried on U.S.-flag ships, constructed in the United States, owned by U.S. citizens, and crewed by U.S. citizens and U.S. permanent residents.

# Merchandise

- 46 U.S.C. § 55102 provides that a foreign vessel may not transport merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port.
- Pursuant to 19 U.S.C. § 1401(c), the word “merchandise” is defined as “goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited, and monetary instruments as defined in section 5312 of Title 31.” For purposes of the Jones Act, merchandise also includes “valueless material.” 46 U.S.C. § 55102(a)(2).

# Vessel Equipment

- “Vessel equipment” is not included within the general meaning of merchandise. “Vessel equipment” has been defined as portable articles, “necessary and appropriate for the navigation, operation or maintenance of the vessel and for the comfort and safety of the persons on the board.” Treasury Decision 49815(4) (Mar. 13, 1939).
- Interpreted to mean items “necessary to carry out a vessel’s functions.”

# Passengers

- The Passenger Vessel Services Act.
- 6 U.S.C. § 55103 provides that a foreign vessel may not transport passengers between ports or places in the United States to which the coastwise laws apply, either directly or via a foreign port.
- A passenger is “any person carried on a vessel who is not connected with the operation of the vessel, her navigation, ownership, or business.”





Why do offshore wind projects implicate the Jones Act?

- Europe leads the world in wind development.
- In 2018, more than 80% of global installed offshore wind capacity was in Europe.
- European shipping companies are leaders when it comes to turbine installation, so European vessels are used for projects in U.S. waters.





# Customs and Border Protection

- CBP interprets the coastwise laws through ruling letters, all of which are available through the Customs Rulings Online Search System (“CROSS”).
- CBP periodically publishes a “Jones Act Informed Compliance Publication” detailing recent developments and providing guidance, last revised September 2020.

## Are wind turbine components “vessel equipment”?

- Wind turbine components are arguably “merchandise” because they are bought, sold and transported for installation elsewhere.
- If the vessel’s function is to install wind turbines, then the wind turbine components are “necessary to carry out a vessel’s functions” and are not merchandise.



## Are installation personnel “passengers”?

- “The traditional basis for a passenger-carrier relationship has been the existence of a contract of carriage between a fare-paying traveler and a person-transporting shipowner, or their respective agents.” *Rutledge v. A & P Boat Rentals, Inc.*, 633 F. Supp. 654, 656 (W.D. La. 1986).
- If the installation personnel are transported for the purpose of installing the turbines, then they are arguably engaged in the “business” of the vessel.





# Customs and Border Protection

- CBP has ruled that a stationary foreign vessel can be used to install wind tower components on pre-existing foundations, so long as there is no water transportation of the tower components.
- Oil and gas rulings also indicate that the Jones Act doesn't apply to the laying of pipe or cable.



Avoid the issue completely. Don't move components or installation personnel aboard the installation vessel, just use foreign vessels in conjunction with U.S. flagged support vessels and barges.

# Outer Continental Shelf Lands Act

- OCSLA extends the application of the coastwise laws beyond the three-mile belt, generally defined as extending 200 miles from shore.
- OCSLA came about in the context of oil and gas exploration, so the question is whether it extends to non-extractive energy production.
- CBP is reluctant to rule on the issue.
- 2011's H.R. 2360 would have expanded the OCSLA's jurisdictional definition of "resources" to encompass alternative energy, but never made it through the Senate.
- The US House of Representatives recently passed the Expanding Access to Sustainable Energy Act of 2019, including an amendment which would enforce Jones Act requirements for all offshore renewable energy production.



# Takeaways

- Carefully assess what your project will entail.
  - Who will be moved? What will be moved? What types of vessels? Where are they going?
- Review CROSS rulings and watch for new rulings.
- Wait and see what happens with the Expanding Access to Sustainable Energy Act.