



EBA • MAY 6 - 7, 2019

ANNUAL MEETING & CONFERENCE

SESSION A: OFFSHORE WIND ENERGY: PARTNERSHIPS, DEVELOPMENT AND US JONES ACT

MAY 6, 2019, 3:45 PM – 5:00 PM

Learn about legal issues surrounding transmission lines in federal, state, local waters; U.S. Jones Act application to offshore wind farms, and the role of the federal regulators; and Coast Guard and Customs and Border Protection responsible for ensuring compliance with these laws.

Moderator/Panelist: Antoine Peiffer, Senior Manager, Global Supply Chain and Development, Principle Power

Panelists:

Meagan Keiser, Legal Counsel, Equinor

Marjorie Krumholz, Partner, Thompson Coburn, LLP

Joshua M. Kaplowitz, U.S. Department of the Interior, Office of the Solicitor, Division of Mineral Resources, Branch of Offshore Resources



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The Jones Act and Offshore Wind

MARGIE KRUMHOLZ, THOMPSON COBURN LLP

MAY 6, 2019



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The Jones Act - Overview



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Collection of Statutes at 46 United States Code Chapter 551

- MOVING MERCHANDISE AND PASSENGERS
- TOWING
- HARBOR WORK
- TUG ASSIST
- DREDGING



Transportation

- “A COASTWISE TRANSPORTATION OF MERCHANDISE TAKES PLACE, WITHIN THE MEANING OF THE COASTWISE LAWS, WHEN MERCHANDISE LADEN AT A POINT EMBRACED WITHIN THE COASTWISE LAWS (‘COASTWISE POINT’) IS UNLADEN AT ANOTHER COASTWISE POINT, REGARDLESS OF THE ORIGIN OR ULTIMATE DESTINATION OF THE MERCHANDISE.”

—CBP: 19 CFR 4.80b

- SOME EXCEPTIONS



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What is merchandise?

- ALL-INCLUSIVE
- VALUELESS MATERIAL



Who is considered to be a passenger?

- ANY PERSON CARRIED ABOARD A VESSEL WHO IS NOT CONNECTED WITH THE OPERATION OF THE VESSEL, HER NAVIGATION, OWNERSHIP OR BUSINESS



What is not covered?

- CONSTRUCTION PLATFORMS, CRANE BARGES, PILE DRIVERS, PIPE LAYING
- BUT THESE VESSELS WOULD BE COVERED IF THEY MOVE MATERIALS OR PEOPLE BETWEEN COASTWISE POINTS



Jurisdiction of the Jones Act

- U.S. “COASTWISE POINTS”: ALL POINTS WITHIN THE UNITED STATES
 - All points within the “territorial sea” (the 3-mile limit)
 - All “internal” and “inland” waters
 - Generally does not include points within the Exclusive Economic Zone, except (1) valueless or dredged material; and (2) facilities affixed to the Outer Continental Shelf for the purpose of “exploring for, developing, or producing resources from” the Outer Continental Shelf
 - Covers transportation directly between coastwise points or via a foreign port



Jones Act

■ REQUIREMENTS:

- Vessel: Built in the U.S.
- Ownership: U.S. citizen ownership
- Registration of Vessel: Documented in U.S.



U.S. Build Requirement

- “TO BE CONSIDERED BUILT IN THE UNITED STATES A VESSEL MUST MEET BOTH OF THE FOLLOWING CRITERIA:
 - (a) All major components of its hull and superstructure are fabricated in the United States; and
 - (b) The vessel is assembled entirely in the United States.”
- COMPONENTS THAT ARE NOT STRUCTURAL PARTS OF THE HULL AND SUPERSTRUCTURE MAY BE FABRICATED OUTSIDE THE U.S.



Part I – Ownership by U.S. Citizen Requirement

“DOCUMENTATION CITIZEN” – 46 U.S.C. § 12103

- AN INDIVIDUAL WHO IS A U.S. CITIZEN;
- AN ASSOCIATION, TRUST OR JOINT VENTURE, ALL OF WHOSE MEMBERS ARE U.S. CITIZENS;
- A PARTNERSHIP WHOSE GENERAL PARTNERS ARE U.S. CITIZENS AND A CONTROLLING INTEREST IN THE PARTNERSHIP IS OWNED BY U.S. CITIZENS;
- A CORPORATION (A) ESTABLISHED UNDER THE LAWS OF THE U.S. OR A STATE, (B) WHOSE CHIEF EXECUTIVE OFFICER (BY WHATEVER TITLE) AND CHAIRMAN OF ITS BOARD OF DIRECTORS ARE U.S. CITIZENS AND (C) NO MORE OF ITS DIRECTORS ARE NON-CITIZENS THAN A MINORITY OF THE NUMBER NECESSARY TO CONSTITUTE A QUORUM;
- A LIMITED LIABILITY COMPANY—CITIZENSHIP ANALYSIS DEPENDS ON FORM OF MANAGEMENT STYLE (I.E., MORE LIKE A CORPORATION OR PARTNERSHIP).



Documentation Citizen

- NO PROHIBITION ON FOREIGN CONTROL
- DOCUMENTATION CITIZENS MAY BE 100% FOREIGN OWNED
- HOWEVER, DOCUMENTATION CITIZENS MAY NOT OWN U.S. DOCUMENTED VESSELS THAT ARE ELIGIBLE TO PARTICIPATE IN THE COASTWISE TRADE (WITH LIMITED EXCEPTIONS)



Part II – Coastwise Citizen

- IN ORDER TO QUALIFY AS A “COASTWISE CITIZEN”:
 - Entity must meet the “Documentation Citizen” test, AND
 - Establish that at least 75% of the interest in and control of the entity is held by U.S. citizens

***ANALYSIS IS APPLIED FOR EACH CLASS OF STOCK
AND EACH TIER OF OWNERSHIP***



Controlling Interest

■ DEEMED OWNED BY U.S. CITIZENS IF:

- title to at least 75% of the interest in the entity is vested in U.S. citizens free from any trust or fiduciary obligation in favor of a noncitizen;
- at least 75% of the voting power in the entity is vested in U.S. citizens;
- there is no contract or other understanding by which more than 25% of the voting power in the entity may be exercised directly or indirectly by a non-U.S. citizen; AND
- there is no other means by which control of more than 25% of any interest in the entity is given to or permitted to be exercised by a person not a citizen of the United States.



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Part III – Foreign Leasing Exception to U.S. Ownership



Foreign Leasing Exception – the Owner

- OWNER MUST QUALIFY AS A DOCUMENTATION CITIZEN AND
- OWNER MUST:
 - be a leasing company, bank or financial institution;
 - own or hold the beneficial interest in the vessel solely as a passive investment;
 - not operate any vessel for hire and not be an affiliate of any person who operates any vessel for hire; and
 - be independent from and not an affiliate of any charterer of the vessel or any other person who has the right, directly or indirectly, to control or direct the movement of the vessels.



Foreign Leasing Exception – the Bareboat Charter

- THE BAREBOAT CHARTERER (I.E., LESSEE) MUST BE A COASTWISE CITIZEN
- THE BAREBOAT CHARTER MUST:
 - be for a term of at least three (3) years; and
 - transfer to the bareboat charterer full possession, control and command of the vessel so that the bareboat charterer is considered the owner *pro hac vice* during the term of the charter.



Vessel Registration Requirement

- VESSELS ARE SUBJECT TO CERTIFICATES OF TITLE AND MAY BE DOCUMENTED/REGISTERED IN A VARIETY OF COUNTRIES
- STATE OF REGISTRY REFERRED TO AS “FLAG STATE”
- FLAG STATE MAINTAINS RECORDS OF OWNERSHIP AND ENCUMBRANCES
- FLAG STATE RULES GOVERN OPERATIONAL AND INSPECTION STANDARDS



Vessel Registration – National Registries

- REQUIRE THAT THE VESSEL/OWNER HAS A NEXUS WITH THE COUNTRY
 - e.g., the U.S. is a “national” register – a vessel must have a connection with the U.S. in order to be eligible for registration
- IN ORDER TO REGISTER A VESSEL IN THE U.S., IT MUST BE OWNED BY A “CITIZEN OF THE UNITED STATES”





Vessel Registration for Jones Act

- VESSELS REGISTERED IN THE UNITED STATES ARE AUTHORIZED TO OPERATE IN A TRADE
- JONES ACT VESSELS OPERATE IN THE COASTWISE TRADE
- OWNERS OF JONES ACT VESSELS MUST BE “COASTWISE CITIZENS”



Agencies Responsible for Interpretation of the Jones Act

- U.S. COAST GUARD: WHICH VESSELS ARE “COASTWISE QUALIFIED”
- CUSTOMS & BORDER PROTECTION: WHICH ACTIVITIES ARE RESTRICTED BY THE JONES ACT
- MARITIME ADMINISTRATION: TRANSFERS OF VESSELS; PROMOTIONAL PROGRAMS



Penalties for Violation of Jones Act

- MERCHANDISE IS LIABLE TO SEIZURE BY THE AND FORFEITURE TO THE U.S. GOVERNMENT
- \$300 FOR EACH PASSENGER TRANSPORTED AND LANDED
- DREDGING VESSEL AND ITS EQUIPMENT ARE LIABLE TO SEIZURE BY AND FORFEITURE TO THE U.S. GOVERNMENT
- OWNER AND MASTER OF TOWING VESSEL, AND TOWING VESSEL ITSELF, SUBJECT TO MONETARY PENALTIES



Applicability to Offshore Wind Installations

- JURISDICTION
- INSTALLATION VESSELS
- FEEDER VESSELS
- VESSELS THAT MOVE WORKERS
- PIPE LAYING AND DREDGING



Future of the Jones Act

- VERY STRONG LOBBY THAT SUPPORTS THE JONES ACT
- SUPPORTED ON THE BASIS OF NATIONAL SECURITY
- DEVELOPERS OF OFFSHORE WIND INSTALLATIONS MUST STAY ON TOP OF THE JONES ACT



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Questions



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