

## The Jones Act and Offshore Wind

MARGIE KRUMHOLZ, THOMPSON COBURN LLP  
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### Overview

The Jones Act is a collection of statutes at 46 United States Code Chapter 551 regarding water transportation.

#### Jurisdiction:

- U.S. “Coastwise Points”: All points within the United States, including the island territories and possessions of the United States (with limited exceptions)
  - 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) the transportation of 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

#### Activities that are covered:

- Transportation of merchandise (§ 55102)
- Transportation of passengers (§ 55103)
- Dredging (§§ 55109, 55110)
- Towing (§ 55111)
- Vessel escort services and towing assistance (§ 55112) (harbor work)

#### Requirements:

- Vessel: Must be built (and rebuilt) in the U.S.
- Ownership: Vessels must be owned and operated by U.S. citizens.
- Registration of Vessel: Vessels must be documented in U.S.

#### U.S Build and Rebuild Requirements:

- “To be considered built in the United States a vessel must meet the following criteria:

- All major components of its hull and superstructure are fabricated in the United States.
- The vessel is assembled entirely in the United States.” 46 CFR §67.97
- Components that are not structural parts of the hull and superstructure may be fabricated outside the U.S.
- A vessel loses its Jones Act eligibility if it is “rebuilt” outside of the United States. This means:
  - A major component of the hull or superstructure, not fabricated in the United States, is added to the vessel.
  - Any considerable part of the hull or superstructure is built upon or substantially altered outside of the United States. 46 CFR §67.117

## **Ownership by U.S. Citizens**

### **Part I: “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., a manager-managed LLC is treated like a corporation, and a member-managed LLC is treated like a partnership).
- no prohibition on foreign control
- documentation citizens may be 100% foreign owned

### **Part II: “Coastwise Citizen” – 46 U.S.C. § 12112**

- 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

The analysis is applied for each class of stock and each tier of ownership.

### **The controlling interest test**

- A vessel is deemed owned by U.S. citizens if:

- title to at least 75% of the stock 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.

**There are limited exceptions to the coastwise citizenship requirement.**

**Foreign Leasing Exception – the Owner 46 USC § 12119**

- 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 Charterer (i.e., Lessee)**

- The Bareboat Charterer must be a Coastwise Citizen
- The bareboat charter (i.e., lease) 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**

- Vessels are subject to a certificate of title and may be documented/registered in a variety of countries.
- State of registry is referred to as “flag state.”
- Flag state maintains records of ownership and encumbrances.
- Flag state rules govern operational and inspection standards.
- U.S. flag – 46 CFR Parts 67 and 68

## **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 United States, the vessel must be owned by a “citizen of the United States.”

## **Agencies Responsible for Interpretation of the Jones Act**

- U.S. Coast Guard: which vessels are “coastwise qualified”
- Customs and Border Protection: which activities are restricted by the Jones Act
- Maritime Administration: eligibility of vessels for promotional programs; transfer of vessels

## **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.”
  - Customs and Border Protection (CBP) Regulations at 19 CFR §4.80b

## **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 such vessel, her navigation, ownership or business. 19 CFR §4.50(b)
- Such persons must be “directly and substantially” connected with the operation, navigation, ownership or business of that vessel itself.

## **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

## **Penalties**

- Merchandise is liable to seizure by, and forfeiture to, the U.S. government (§ 55102)

- \$300 for each passenger transported and landed (§ 55103)
- Dredge and its equipment are liable to seizure by and forfeiture to the U.S. government
- Owner and master of towing vessel and towing vessel subject to monetary penalty

## **Applicability to Offshore Wind**

### **Jurisdiction**

- Technically, a wind installation on the Outer Continental Shelf is not a coastwise point because of the wording of the Outer Continental Shelf Lands Act.
- However, it is advisable to treat it as one for purposes of a Jones Act analysis because the law could be easily changed.

### **Installation vessels**

- An installation vessel may be foreign-flagged and may bring material from a foreign location to an offshore site for installation.

### **Feeder vessels that bring supplies to the installation site**

- The movement of material from a U.S. point to the installation site must be on a vessel qualified for the coastwise trade (i.e., U.S. built, owned and documented).

### **Vessels that bring people from shore to the installation site**

- Vessels that move workers must be qualified for the coastwise trade (i.e., U.S. built, owned and documented).

### **Pipe Laying and Dredging**

- Vessels that lay pipe do not need to be qualified for the coastwise trade.
- Vessels that perform dredging must be qualified for the coastwise trade (i.e., U.S. built, owned and documented).

### **How do non-U.S. wind companies address vessel needs?**

- If they want to own vessels, they need a U.S. citizen partner, since non-citizens are limited to 25% ownership interest.
- They can hire the use of coastwise qualified vessels through a “time charter”.

### **Customs and Border Protection Rulings**

- Found on Customs Rulings Online Search System (CROSS)
- These rulings address specific fact patterns and only apply to the party that filed the request; however, the rulings provide a good framework of permitted and non-permitted activities.

- Examples:
  - Block Island Wind Farm—HQ H143075
  - Meteorological Towers—HQ H105415
  - Passengers—HQ H10198
  - Pile driving—HQ 111412; HQ 114833; HQ 111927
  - Pipe laying—HQ 112032
  - Dredging—HQ 115538; HQ H012082; HQ 114743