

Jones Act Compliance Strategies For Offshore Wind Projects

By **Jonathan Wilcon and Carl Valenstein** (January 7, 2022, 5:23 PM EST)

As renewable energy becomes a larger share of the U.S. power mix, offshore wind is the next frontier of the U.S. green energy boom. But today, the U.S. hosts only one operational commercial offshore wind farm, the five-turbine, 30-megawatt Block Island Wind Farm.

However, a robust pipeline of projects is under development with leases secured, development well underway and construction targeted for 2022–2024. The Bureau of Ocean Energy Management — a branch of the U.S. Department of the Interior — is said to be currently reviewing the construction and operation plans of nine more projects, is expected to complete another six by 2025, and has announced plans to hold lease auctions for up to seven new sites by 2025.

The Biden administration has established a goal of 30 gigawatts of U.S.-based offshore wind power by 2030, and issued an executive order targeting a goal of permitting at least 25 GW by 2025. But despite such tail winds, obstacles abound.

Development and permitting plans for the 800 MW Vineyard Wind project — which was approved by regulators in 2021, and broke ground in November — are viewed by many in the industry as blueprints for solving some of the community, permitting and technical challenges that other projects will face. But U.S. developers still will have to contend with a variety of challenges including local opposition from certain communities and fishing groups, and the need for interconnection and transmission upgrades.

Developers will also face the usual array of commercial, technical, legal and financial hurdles that accompany billion-dollar infrastructure projects, particularly those that involve installation of towers the size of a Manhattan skyscraper at sea via specially designed — and, thus far, European-owned — vessels.

Many of these challenges will be overcome via strategies informed by successes in Europe's more developed market. However, a unique obstacle to U.S. development for which U.S. developers will not be able to look to lessons learned in Europe is with respect to the Jones Act.

The act is actually a suite of U.S. maritime laws and decisions that requires vessels used in certain aspects of coastwise trade — i.e., transportation of people and merchandise, and undertaking of



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industrial activities, within U.S. territorial waters — be U.S.-built, U.S.-flagged, and owned and operated by U.S. citizens.

Because offshore wind turbines require installation via specially built self-elevating and self-propelled wind turbine installation vessels, or WTIVs, and because, to date, such vessels only exist in foreign waters, and with foreign crews, many see Jones Act compliance as a potential bottleneck for the nascent industry's progress.

In a December 2020 U.S. Government Accountability Office report, stakeholders described two approaches to using vessels to install offshore wind energy projects in the U.S. Either approach may lead to the construction of new vessels that comply with the Jones Act.

Under one approach, a Jones Act-compliant WTIV would carry components from a U.S. port to the site, and also install the turbines. A WTIV has a large deck, legs that allow the vessel to lift out of the water, and a tall crane to lift and place turbines. Stakeholders told the GAO there are currently no Jones Act-compliant vessels capable of serving as a WTIV, although Dominion Energy Inc. is building one.

Under the second approach, a foreign-flag WTIV would install the turbines with components carried to the site from U.S. ports by Jones Act-compliant feeder vessels. This was done in the case of Block Island.

While some potential feeder vessels exist, stakeholders said larger ones would probably need to be built to handle the large turbines developers would likely use. Port improvements will likely also be required to accommodate these feeder vessels.

Although navigation of Jones Act requirements will be a challenging prerequisite to successful U.S. offshore wind development, opportunity abounds for market players that are able to employ one of several key strategies to differentiate themselves from the competition and overcome this uniquely stateside challenge.

Further Background

Section 27 of the Merchant Marine Act of 1920 and its attendant regulations, as well as subsequent decisions issued by U.S. Customs and Border Protection — the regulatory body overseeing Jones Act interpretation — are collectively referred to as the Jones Act.

At its core, the act requires that vessels engaged in activities such as transportation of merchandise and passengers, dredging, towing, and related vessel escort services and towing assistance between two points in territorial U.S. waters be U.S.-built, U.S.-flagged, U.S. citizen-owned and U.S. citizen-crewed.

In 2021, an amendment to the Outer Continental Shelf Lands Act — which governs matters pertaining to U.S. waters and the seabed beneath — coupled with two CBP rulings confirmed that Jones Act compliance would be a critical step in U.S. offshore wind construction.

First, the OCSLA amendment clarified that devices affixed to the seabed for the purposes of oil and gas exploration, as well as for developing nonmineral energy resources, fall within exclusive federal jurisdiction, and constitute coastwise points under the Jones Act.

The CBP rulings — particularly HQ H316313, issued Feb. 4, 2021 — later affirmed to the market that, although certain portions of the project construction and turbine erection process could fall outside the

purview of the Jones Act and be completed using noncompliant vessels, the act would ultimately apply to offshore wind construction and operations and, therefore, require the market to carefully adapt to the Jones Act's requirements.

Potential Solutions

Of course, the most obvious solution for project sponsors is to build Jones Act-compliant WTIVs, which might be made available for charter.

Dominion Energy is doing exactly that with its Charybdis, which is expected to be a \$500 million, largest-of-its-kind installation vessel to be based out of Hampton Roads, Virginia. Following construction — underway since December 2020 in Texas, and expected to be completed in 2023 — Charybdis will be available for charter.

Dominion, Orsted and Eversource Energy already have entered into an agreement to use Charybdis for construction of Revolution Wind and Sunrise Wind. These two projects off the Eastern Seaboard, under development by the joint venture between Orsted and Eversource, will deliver power to customers in Rhode Island, Connecticut and New York.

Other market players have indicated varying levels of intention to build additional vessels, but are not as advanced as Charybdis. For example, Eneti Inc., formerly Scorpio Builders, has announced its intention to construct at least one Jones Act-compliant WTIV. Though not yet contracted, Eneti submitted U.S. Securities and Exchange Commission filings in November 2021 to initiate a \$200 million public offering to fund its plans.

But with over a dozen U.S.-based projects already having secured leases from BOEM, and with more in varying levels of development, demand for new vessels — both WTIVs and feeder vessels — will surely outpace supply. The goals of market players, the federal government and applicable states cannot be met if the lengthy financing and construction of new vessels is a barrier to successful turbine installation.

Another option is the use of feeder vessels — utilizing Jones Act-compliant tugs and barges to transport turbine components, equipment and personnel to and from WTIV jack-up vessels parked and affixed to the seabed at turbine locations. This is the tactic chosen by Vineyard Wind, and confirmed as in conformity with the Jones Act in the February 2021 CBP decision.

Vineyard has contracted with both U.S.-based Foss Maritime Co. and the U.S. branch of the Belgian marine services provider DEME Group to transport turbine components and personnel from the project's port base of New Bedford, Conn., to the foreign-flagged and DEME-owned WTIV parked at each turbine location.

According to the February CBP decision, the WTIV in Vineyard's plan is not required to be Jones Act-compliant, because it remains completely stationary during the installation of a given turbine, and hence is not engaged in coastwise transportation, while the movement of its crane to unload components from the feeder vessels and installation on the seabed also does not constitute transportation.

The CBP decision also held that Vineyard's transportation of tools, equipment and personnel to and from the WTIV — and, critically, on board the WTIV as it moved from location to location — fall outside the Jones Act's requirements, because the tools and equipment do not constitute merchandise, and

because the crew onboard the WTIV "are directly and substantially related to the operation of the vessel."

Other construction activities, such as grading, turbine foundation preparation and cable laying, also have been held to fall outside the scope of the Jones Act. However, in several instances based on nuanced fact sets and application of Jones Act principles that may not be relevant for every project, companies are advised to seek rulings from CBP to clarify any open issues.

Finally, it should surprise no one that, since the passage of the original Jones Act in 1920, the regulatory environment has developed to allow some foreign participation in the ownership, construction and financing of Jones Act vessels. For example, existing rules allow up to 25% foreign ownership of a Jones Act vessel, and some foreign developers are seeking U.S. partners to provide the requisite 75% Section 2 U.S. citizenship.

In addition, as an alternative to financing construction of new vessels on the corporate balance sheet, as Dominion has done with Charybdis, the so-called leasing rule allows a U.S. leasing company or financial institution to set up a U.S.-documentation citizen to own the vessel and time-charter it on what is called a "hell or high water" long-term basis to a foreign person, as long as operational control of the vessel through a bareboat charter remains with an independent and qualified Section 2 U.S. citizen.

This practice allows the foreign time charterer to obtain use of the Jones Act vessel, and to provide the financial support necessary to finance its construction.

Conclusion

As global demand for offshore wind farms, and the green power they produce, increases, the scarcity of specially built turbine installation vessels used to construct them is exacerbated in the U.S. by the Jones Act and its requirements that vessels used in coastwise trade — including nonmineral energy generation development and construction — be U.S.-owned and operated, except in limited circumstances.

However, certain strategies will permit U.S.-based project sponsors to access and utilize foreign vessels, or to build new Jones Act-compliant vessels to accelerate the U.S. offshore wind industry's growth, and unlock its full potential.

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