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Offshore Energy: Vessel and Crew Nationality Requirements

Introduction

The 118th Congress is debating whether to further restrict foreigners from working in the U.S. offshore energy sector (i.e., oil, gas, and wind). The offshore wind industry asserts that proposed restrictions in H.R. 2741, the Coast Guard Authorization Act of 2023, would threaten development of U.S. offshore wind, affecting developers' ability to find workers with the requisite skill set. Proponents contend that the nascent offshore wind industry is an opportunity to ensure that Americans are employed to the greatest extent possible.

Jones Act Pertains to Some Offshore Vessels

Under current authorities, only a portion of the workforce in offshore energy may be foreign citizens. Many—but not all—of the vessels supporting offshore energy production must comply with the Jones Act (P.L. 66-261, §27), which requires that vessels transporting merchandise or passengers between U.S. points be U.S. built, U.S. owned, and crewed by U.S. citizens (the officers) or lawful permanent residents (LPRs, who can form up to 25% of the unlicensed crew; the remainder must be U.S. citizens). Vessels seeking to engage in these activities must obtain a “coastwise” endorsement from the U.S. Coast Guard (46 U.S.C. §12112).

Jones Act and Offshore U.S. Points

Although the Jones Act applies to transporting domestic cargo or passengers (e.g., on ferries), it may be less readily apparent how the law's requirements for vessels traveling between “U.S. points” would apply to offshore energy activity. A port is plainly a U.S. point, but Customs and Border Protection (CBP)—the agency that determines what maritime activities must adhere to the Jones Act—has determined that U.S. points also include offshore points tied to U.S. energy production. This is a result of the Outer Continental Shelf Lands Act (OCSLA, 43 U.S.C. §§1331-1356c), which provides, as amended, that U.S. laws extend to the subsoil and seabed of the outer continental shelf (OCS) and all artificial islands, installations, and devices attached to the seabed or erected thereon for the purpose of exploring, developing, or producing resources, including mineral (i.e., oil and gas) and non-mineral energy resources. Thus, offshore wind turbines and offshore oil rigs are considered U.S. points.

Two exceptions help clarify CBP's definition of a U.S. point. First, a pristine seabed that will become a future site of an offshore energy structure is not a U.S. point. CBP has determined that the first voyage of a rock-laying vessel that places a ring of rocks around the planned site of a wind turbine to prevent scouring of the seabed at that location need not be Jones Act compliant because the seabed, being undisturbed, is not a U.S. point. However, once an initial layer of rocks is installed, all subsequent layers must be carried by Jones Act-compliant vessels because the site has

now become a U.S. point. Second, CBP has determined that any vessels or floating structures *not* attached to the seabed, usually maintaining their position with self-positioning propellers used in water too deep for practicable use of anchors or moorings, are also not U.S. points. For instance, a floating hotel (floatel) used to house offshore workers that uses such propellers is not a U.S. point.

Coastwise Transportation for Offshore Energy

Once U.S. points are established, the second question determining whether the vessel must be Jones Act compliant is whether the vessel is transporting merchandise or passengers between those two points. Generally, construction workers are considered passengers, so vessels transporting workers to offshore energy structures are required to be Jones Act compliant. Similarly, supplies and food for the workers are considered merchandise, requiring transporting vessels to be Jones Act compliant.

Some other types of vessels performing tasks necessary for offshore energy development need not be Jones Act compliant. Vessels laying electric cable or oil pipe on the seabed between an offshore wind farm or oil rig and shore points are not engaging in transportation, according to CBP, and therefore can be foreign flagged. The same is true for vessels conducting surveys of the seafloor to determine the best locations for oil drilling or erecting wind turbines. For vessels operated by diving teams, the human divers are not passengers, and the equipment they use (robotic undersea vessels) is not merchandise, according to CBP.

CBP had ruled that vessels handling anchors for rigs that are in deeper waters and floating (instead of standing on the seafloor) are not engaging in transportation and therefore did not need to be Jones Act compliant. However, in 2005 (P.L. 109-241, §310), Congress specified that anchor-handling vessels must obtain a “registry” endorsement, which is the licensure that U.S.-flagged vessels sailing on international voyages obtain instead of a coastwise endorsement. To receive a registry endorsement, a vessel must be U.S. owned and crewed but can be foreign built. In the same act, Congress required that vessels transporting personnel or merchandise to a floating rig that is *not* attached to the seafloor must also obtain a registry endorsement.

While much of the offshore fleet is designed for a specific mission, specialized foreign-flag vessels could also efficiently transport supplies or personnel from shore to an offshore site or from one facility to the next, if not for the Jones Act. The Offshore Marine Service Association (OMSA), advocating for stricter Jones Act enforcement, has deployed its own vessel in the Gulf of Mexico to document any violations of the act, believing that the Coast Guard and CBP are not adequately enforcing the law.

Construction and Installation Vessels

Perhaps the most technically sophisticated and most expensive vessels used in offshore energy development are the construction vessels that build and install oil rigs and wind turbines. These vessels are designed differently depending on whether built for the oil or wind market, but they share common features, such as especially large cranes for hoisting and erecting sections of rig or turbine and self-elevating jack-up “legs” attached to the seafloor to firmly hold the vessel in place. For structures constructed in deeper water, instead of using jack-up legs, self-positioning propellers keep the construction vessel stationary.

A wind turbine installation vessel (WTIV) can have a crew of 70-100 individuals, including a vessel crew of 30-40 navigators/mariners responsible for operating the vessel and a project crew of 40-60 personnel involved in the construction of the wind turbines. CBP has determined that WTIVs need not be Jones Act compliant as long as the vessel does not move, other than incidentally, while constructing the turbine. However, if the vessel were to first transport the wind turbine components from a U.S. port and then engage in constructing them when reaching the offshore point (as is typically done in foreign waters), the vessel would have to be Jones Act compliant, as it would be engaging in coastwise transportation. Developers of the earliest U.S. offshore wind projects, including Vineyard Wind 1 off the Massachusetts coast, have stated an intent to use WTIVs strictly to perform construction, while a different “feeder” vessel transports turbine components from shore to the offshore construction site, thus avoiding the need for the WTIV to comply with the Jones Act. Dominion Energy is constructing a Jones Act compliant WTIV for its Virginia project with delivery set for 2024.

In 1988, Congress enacted a Jones Act exemption for barges over a certain size and age that are used to transport and launch, at the construction site, large sections of offshore oil rigs (46 U.S.C. §55108). The concern was that Japanese and Korean manufacturers of these oil rig sections were gaining inroads into the U.S. market because it could be more economical for U.S. buyers to buy and ship the components from a foreign source than from a U.S. point.

Outer Continental Shelf Lands Act Requirements

Separately from the Jones Act, amendments to the OCSLA in 1978 also contained requirements for the nationality of vessel crews on the OCS (43 U.S.C. §1356). These requirements apply broadly to vessels, rigs, and platforms on the OCS, including vessels that may not be subject to the Jones Act. The OCSLA generally requires that OCS vessels be crewed by U.S. citizens or LPRs, with some exceptions. For instance, foreign-owned and -flagged vessels are not required to hire U.S. citizens, which is relevant for the WTIVs described above. Also, U.S.-flagged vessels are exempted from hiring U.S. citizens in some circumstances, such as if there is a finding of nonavailability of U.S. workers or if specialists are needed for emergencies or certain temporary operations (33 C.F.R. §141). Generally, the Coast Guard would determine when a vessel would qualify for an exception from the OCSLA requirements.

H.R. 2741 Crew Nationality Requirements

The Coast Guard Authorization Act of 2023 (H.R. 2741, §336), ordered to be reported by the House Committee on Transportation and Infrastructure on April 26, 2023, discusses manning requirements of vessels, vehicles, and structures. The same provision was passed in the House in the 117th Congress (H.R. 6865) but was not taken up by the Senate. The provision would alter the exemptions to the OCSLA’s crew nationality requirements. This could particularly affect vessels such as WTIVs that are not subject to the Jones Act and would be exempted from the OCSLA requirements under current law. The bill would require that these and other OCS vessels hire either U.S. citizens (or LPRs) or citizens of the flag state of the vessel, whereas under current law, the crew of an exempted vessel could come from any nation. In the offshore wind market, some vessels are flagged in Norway, the Netherlands, and Denmark, which have a strong tradition in offshore energy. More commonly, vessels in both the oil and wind markets are flagged in “open-registry” countries, such as Panama, Liberia, the Bahamas, and the Marshall Islands, among others. Open registries, also referred to as “flags of convenience,” allow crew of any nationality to be hired (contingent on meeting international training and English proficiency standards). Open registry flag states are typically small states whose own populations often would not have the qualifications to support ship crewing or the technical skills needed in offshore energy. Thus, although H.R. 2741 would allow hiring of flag state nationals, the primary effect would likely be to hire U.S. citizens.

H.R. 2741 also would require foreign offshore workers to obtain a transportation worker identification credential, which is also required of U.S. mariners. This is a security screening requiring a visit to a U.S. enrollment center to provide fingerprints and identifying documentation.

Balancing Production with Hire America Goals

The 1978 OCSLA amendments sought to increase the number of American workers in offshore projects. However, Congress recognized that an outright foreign ban would have severely disrupted production during an oil crisis and feared retaliation for American workers working on foreign offshore projects (H.Rept. 95-590). Therefore, Congress provided some exemptions, as described above. In 2022, Congress further facilitated use of foreign crews on crude oil lightering tankers that shuttle oil from and to tankers too large for harbor transit by extending the visas of such crews from 29 days to 180 days (P.L. 117-360).

Similarly, some offshore wind industry advocates contend that the recent proposals would create severe challenges for the future of domestic offshore wind, given insufficient numbers of specialized workers from the United States or flag countries to crew wind vessels. The OMSA, by contrast, contends that the changes would provide parity for U.S. workers and would spur investment in training and domestic supply chains.

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