

JONES ACT UPDATE AND THE DEVELOPING OFFSHORE WIND MARKET IN THE UNITED STATES

Our Members will be aware that IMCA has been successful in recent years in helping to manage the regulatory and legislative landscape in the United States to ensure continued access to the offshore construction market for vessels from around the world for both oil and gas and renewable projects. The following is a summary of what has been achieved by IMCA on behalf of its Members during President Trump's Administration and an outlook of the future of offshore wind renewables on the Outer Continental Shelf of the United States under the new President Biden Administration in 2021 and beyond.

Bringing Regulatory Certainty to Offshore Energy Operations

At the end of the Obama administration in 2017, U.S. Customs and Border Protection ("CBP") proposed a new interpretation of the Coastwise Merchandise Statute (commonly known as the Jones Act), which would have effectively shut down offshore contracting for vessels that were not built in the U.S. and owned by U.S. citizens. After almost three years of efforts, led primarily by IMCA and the American Petroleum Institute ("API"), and in cooperation with other industry stakeholders, we worked with CBP to create a common-sense interpretation of the Jones Act which allows both U.S. and foreign-flag vessels to cooperate in servicing the U.S. offshore market.

Specifically, CBP clarified that "lifting operations" are not a transportation activity within the purview of the Jones Act, thereby ensuring that foreign-flag vessels can perform offshore construction and decommissioning activities. At the same time, CBP issued an interpretation which clarified the items that can be transported as merchandise to and from the U.S. Outer Continental Shelf by domestic Jones Act vessels, and reinterpreted "vessel equipment" that can be used by foreign flag vessels during offshore operations, that is not subject to Jones Act restrictions. These interpretations were published in December 2019 in the form of a CBP Notice in its Customs Bulletin which became effective on February 18, 2020. The CBP Notice brought needed clarity and laid the necessary groundwork for a mutually beneficial relationship between energy producers and owners and operators of the domestic and foreign flag offshore vessel fleets.

Subsequent to the effective date of the CBP Notice, legislation was introduced that would have reversed the CBP Lifting Operation interpretation by creating a waiver regime for offshore lifting operations. IMCA successfully worked throughout 2020 in conjunction with other offshore industry stakeholders to ensure that this language was ultimately not included in any legislation enacted in 2020.

Lastly, at the end of 2020, legislation was enacted (the Garamendi Amendment) amending the Outer Continental Shelf Lands Act, clarifying that all federal law, including the Jones Act, is extended to offshore renewable activities, including offshore wind development projects. This is a noteworthy development that has resulted in the issuance of CBP rulings confirming that the Jones Act applies to offshore wind activities. Prior to this occurring CBP had not issued any rulings to this effect. This significant development brings certainty that the offshore regulatory landscape continues to remain open to foreign - flag vessels engaged in energy, including wind energy, projects offshore.

Cooperation and Strategic Partnerships

To achieve these goals, IMCA has fostered strong relationships with the other leading offshore trade organizations and industry advocacy groups including API, the International Association of Drilling Contractors ("IADC"), the

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American Clean Power Association (formerly the American Wind Energy Association), the National Ocean Industries Association (“NOIA”), and the Business Network for Offshore Wind, among others. These strategic partnerships were instrumental in industry speaking with one voice to regulators and legislators alike. These partnerships will be key as IMCA continues to secure access to the U.S. market, while building on its success in constructing the new regulatory landscape for offshore energy projects.

The Offshore Energy Industry Under the Biden Administration

As expected, based on President Biden’s campaign statements he quickly paused offshore oil and gas leasing and formally committed to facilitate offshore wind development in an Executive Order (“EO”) on *Tackling the Climate Crisis* issued on January 27, 2021. The EO pauses all new oil and gas leases onshore or offshore pending a completion of a comprehensive review of current practices (with no deadlines to complete such a review), while also committing to doubling offshore wind in the U.S. by 2030. Offshore wind development is one of the Administration’s key planks to achieve zero carbon emissions by 2035 and meet the goals of the Paris Climate Accords which the United States has rejoined.

In order to meet this goal, the Administration will have to expand the number of offshore wind leases and expedite the permitting process. This task falls to the Bureau of Ocean Energy Management (“BOEM”) in the Department of the Interior. One of the first steps and policy pronouncements of the new BOEM Director, President Biden appointee Amanda Lefton, is to restart permitting for the large Vineyard Wind project off Massachusetts. Vineyard Wind withdrew its permit application at the end of the Trump Administration, which then informed Vineyard it would lose its place in line for permitting purposes. However, under the Biden Administration, Vineyard was immediately placed back in its permitting slot. This action has strongly resonated with offshore wind stakeholders that the Biden Administration will clearly do what it can to expedite permitting for offshore wind projects.

In sum, BOEM has awarded 16 offshore wind leases on the Outer Continental Shelf of the United States to developers and is processing 12 Construction and Operation Plans including one for Dominion Virginia Energy off the coast of Virginia which will encompass 220 Siemens Gamesa turbines. At the same time, BOEM is considering whether to auction new leases off the Atlantic seaboard with states like New York pressuring BOEM for more leases off Long Island. To meet its own goals, BOEM is in the process of increasing its staff to expedite the permitting and environmental review process while still incorporating climate and environmental justice benchmarks.

U.S. State Developments and Challenges

Individual States are playing a major role in supporting offshore wind with a combination of renewable energy goals set by governors and state laws that specify such goals including those for offshore wind. Virtually every state along the Atlantic seaboard has an offshore wind lease off its coast. And even states along the Pacific and the Gulf of Mexico are entertaining visions for offshore wind. Without the states and consumers pushing for renewables and offshore wind, the pressure would not be on BOEM to expedite leasing and permitting.

Early in the development of offshore wind, the states were competing against each other for offshore wind jobs and wind farms. More recently, some of the states are cooperating on their programs. An example is the MOU between Virginia, Maryland and North Carolina which was signed last year by the respective state governors to collaborate on offshore wind resources and economic development. <https://www.governor.virginia.gov/newsroom/all-releases/2020/october/headline-861112-en.html>. This is the first sign that states will work together when it is in their mutual interests and a welcome signal that will hopefully mirror the collaborative successes we have seen for many years in the oil and gas sector amongst the Gulf states.

Each state brings its own unique perspective to offshore wind off its coast: some have Power Purchase Agreements while others have utility scale projects, which rate makers must approve. As a result, relations must be cultivated between the individual states as well as the major developers in order to ensure a seat at the “bringing business” table.

Conclusion

IMCA, working closely with other key association and company stakeholders, has had commendable success over the past four years, rebounding from what could have been a death knell for international operators in offshore construction to creating a landscape which preserved the rights and access to its Members. While the offshore oil and gas sector is being scrutinized under the Biden Administration, the nascent offshore wind sector in the U.S. provides attractive growth opportunities for both U.S. and international vessel operators. This projected growth is due to the extensive support the industry is expected to receive from both the federal and state governments. And, it is already clear that President Biden's Administration has made a strong commitment to make the development of offshore wind one of its top energy priorities. IMCA has worked extensively to allow its Members continued access to these opportunities and will diligently work to ensure benefits for all stakeholders with respect to access to the U.S. offshore construction market. We do however fully expect that there will be continued efforts in 2021 as there have been in recent years to persuade the Biden Administration and the new Congress to further restrict international offshore energy vessel activities.