

Enforcement of the Jones Act and Vessel Crewing Laws

An industry interest group launched what was previously a crew boat, renamed the Jones Act Enforcer, in July 2021 to monitor offshore vessel energy activities for compliance with the Jones Act and other laws. The privately owned vessel, which has no governmental ties or actual enforcement authority, is operating offshore to gather photographic and video evidence of potential Jones Act and other violations. That evidence has been provided to enforcement authorities, made publicly available, and shared with elected officials and the media. Two reports of alleged violations of the Jones Act have been publicly announced and reported since the Jones Act Enforcer began these operations. However, a closer examination of the underlying law and regulatory policy raises significant questions whether the claimed violations occurred at all.

In August 2021, the industry group reported that a foreign-flag derrick barge allegedly transported merchandise between U.S. coastwise points off the coast of Louisiana, among other allegations. The industry group has alleged this movement was in violation of the Jones Act. This movement was related to the transportation of components of an old oil platform (known as a platform jacket) across the Gulf of Mexico using the derrick barge's heavy-lift crane related to decommissioning work.

Then, in November 2021, the industry group reported, among other things that a foreign-flag vessel allegedly transported, and continues to transport, merchandise between U.S. points in violation of the Jones Act. These alleged violations reportedly occurred while the vessel was conducting geotechnical research survey services, including transporting subsoil samples from points on the U.S. Outer Continental Shelf ("OCS") to U.S. ports for testing related to an offshore wind project. The vessel was also allegedly using foreign instead of U.S. citizen crew members.

As further detailed below, both allegations are without merit assuming the facts conform with current CBP rulings, and are simply an attempt to spread negative propaganda for the benefit of changing the law. Indeed, in both these areas, the agency responsible for enforcing the Jones Act, U.S. Customs and Border Protection ("CBP"), has published detailed and helpful rulings that control when foreign-flag vessels may be used, as explained below. Unfortunately, the operators of the Jones Act Enforcer appear to have paid little regard to the effect of these federal policies on their widely published allegations.

These continuous attempts to change the law are a move towards expanding the Jones Act which would be detrimental to all offshore energy projects, both renewable and oil and gas.

Background

The Coastwise Merchandise Statute (commonly known as the Jones Act) restricts the carriage of goods between U.S. ports to vessels that are US built, US flag, and 75% owned by US citizens. Such vessels must be documented for the coastwise trade. There is a similar restriction for the carriage of passengers and numerous other coastwise laws. The Jones Act and other cabotage laws are important for the protection of the domestic U.S. industry and national security, and violations of the Jones Act should not be taken lightly. CBP is the agency responsible for interpreting and enforcing the coastwise laws.

In addition, there is a requirement that foreign-flag vessels engaged in "OCS activities" offshore the United States must use US citizens to crew such vessels, unless the vessel is more than 50% foreign owned or controlled by foreign citizens. If this requirement is met, the vessel may engage in OCS activities using foreign crewmembers. Applications to use foreign citizens under these circumstances are approved by the U.S. Coast Guard. However,

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the Coast Guard currently takes the position that this requirement does not apply to offshore wind activities. As such, applications for approval are not currently required before using foreign citizen crews.

In this regard, CBP has enhanced its efforts to enforce the coastwise laws over the last decade through the implementation of an anonymous “suspected violation” online reporting system, called e-Allegations. The e-Allegations system allows anyone to submit information on a suspected violation and CBP encourages providing as much information on suspected violations as possible and it will keep the details of any allegation confidential. <https://www.cbp.gov/trade/e-allegations>. In addition, in 2016 CBP established the National Jones Act Division of Enforcement (“JADE”), a special enforcement division created to police the Jones Act. The mission of the JADE is to be a clearinghouse for all coastwise trade issues, including enforcement, with the exception of issuing rulings, which will continue to be handled by CBP’s Regulations and Rulings, in the Office of International Trade.

In the latest development, the industry group that launched the Jones Act Enforcer claimed that the vessel was needed because CBP’s interpretations have created loopholes in the law which are exploited repeatedly by foreign flag vessels.

Analysis

This Information Note examines the alleged incidents from the perspective of the coastwise laws and U.S. citizen crewing requirements. In short, the allegations create a false sense that there are numerous Jones Act violations occurring offshore. The fact is that there are CBP ruling letters that make it clear that decommissioning work and survey work may be carried out by foreign vessels without violating the Jones Act. Further, there are currently no restrictions or approval requirements to use a foreign crew aboard a foreign-flag vessel engaged in offshore wind activities.

With regard to the first report CBP has ruled that a foreign-flag vessel may transport a platform jacket in compliance with the Jones Act. For example, an artificial reefing site on the OCS would not be a coastwise point subject to the Jones Act if the reefing site is not related to an active energy project. Further, CBP has previously ruled that if a well site at which a platform jacket was located has been permanently abandoned and decommissioned in accordance with Bureau of Safety and Environmental Enforcement regulations, such a location would not constitute a coastwise point. As such, if these are the circumstances associated with the first report then the foreign-flag vessel may legally perform this type of offshore activity on the OCS.

With regards to the second report, CBP has long held that the use of a vessel solely to engage in oceanographic scientific type research is not a use in the coastwise trade. This CBP oceanographic exception includes commercial seismic survey/geotechnical work and is not limited to purely scientific/research operations. As such, a non-coastwise vessel may perform commercial geotechnical operations without violating the Jones Act. CBP has ruled that the use of non-coastwise-qualified vessels to engage in oceanographic research, including the transportation of persons participating in the research from, to, and between research sites in United States territorial waters, would not violate the coastwise laws. Furthermore, CBP does not consider survey related soil samples to be “merchandise,” and as such their collection and transportation under these circumstances is not considered merchandise subject to the Jones Act.

Therefore, if the vessel was conducting research work related to the seabed and was performing, collecting, and transporting subsoil samples as part of oceanographic research activities, in line with CBP rulings, it would be in compliance with the law.

Conclusion

It is important that CBP address actual violations of the Jones Act, if it determines they exist after investigation. CBP rulings issued over the years distinguish allowable activity from unlawful actions. Vessel owners and operators must understand the reach of the Jones Act, other applicable coastwise laws, and crewing laws, before participating in offshore activities as delineated by numerous CBP rulings and Coast Guard interpretations over the years.

However, the two recent reports create an inaccurate sense that there are numerous Jones Act violations occurring offshore. In truth, these recent reports are an expression of disgruntlement with the law today. Indeed, depending on the facts, these type of offshore decommissioning and survey activities are carried out by foreign flag vessels in compliance with the Jones Act on a routine basis. Allegations of the illegal use of foreign crews are similarly unfounded. These reports are based on allegations on what some interests would like the reach of the Jones Act to be, not what the law is today based on reasonable interpretations by the agency responsible for interpreting and enforcing the Jones Act.

Ultimately it is the responsibility of CBP and the Coast Guard to investigate and determine whether certain actions are in compliance with the law. With the establishment of e-Allegations and JADE it is clear that CBP has made Jones Act enforcement a priority. However, these types of public reports create unnecessary confusion when they allege there were clear violations of the law when the actual facts are not known, and based on what have been asserted, appear to point to an opposite conclusion that the operations were in compliance with the Jones Act.

To be very clear, the current fleet of Jones Act vessels do not have the required capability nor capacity to perform many of the key offshore operations, including heavy lifting, required for the vast majority of offshore energy projects including renewables. Couple this fact with the extremely high-cost barrier of building such capabilities in the United States and limited U.S. offshore crewing capabilities, any expansion of the Jones Act or additional restrictions placed on the use of foreign flag vessels would shut down new developments and substantially impede the development of the fledging U.S. offshore renewable industry.