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U.S. Cabotage Laws and Offshore Energy Projects

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MEMORANDUM

DATE: June 15, 2007
TO: Mr. Erich Stephens, Rhode Island Project Director
CC: Mr. Kevin R. Pearce, Director of Offshore Programs
FROM: Brian Eisenhower
SUBJECT: U.S. Cabotage Laws and Offshore Energy Projects

Per your request, I researched the implications of U.S. cabotage laws for offshore energy projects. I analyzed the issues based on my training in both law and ship design. In general, U.S.-flagged vessels are required for cargo transportation associated with the construction of offshore energy projects, although a Jones Act waiver may be granted absent a U.S.-flagged vessel capable of providing the requisite transportation. Even if a Jones Act waiver is granted, careful logistical planning is necessary to ensure compliance with U.S. cabotage laws; below, several transportation strategies for the construction of an offshore wind farm are analyzed. Additionally, under the Passenger Vessel Services Act, U.S.-flagged vessels are required for transporting personnel between the offshore energy project and shore.

TRANSPORTATION OF CARGO ON THE OUTER CONTINENTAL SHELF

The “Jones Act” refers to the Merchant Marine Act of 1920, which was passed following World War I to ensure that the United States always has a merchant marine for commerce and national defense. The Jones Act is best known for making tort damages, as opposed to workers’ compensation, available to injured seamen. The statute also contains cabotage provisions that require U.S.-flagged vessels for coastwise trade. See 46 U.S.C. § 55102. Although the Jones Act is controversial, reform efforts failed in 1999 after strong opposition from an active special interest group known as the Maritime Cabotage Task Force.¹

The Jones Act requires U.S.-flagged vessels for cargo transportation between U.S. coastwise points. See 46 U.S.C. § 55102(b). Cargo includes valueless material, such as waste mud produced by offshore drilling. See 46 U.S.C. § 55102(a)(2). The penalty for violating the cargo transportation provision is either forfeiture of the cargo or the actual cost of transportation, whichever is greater. 46 U.S.C. § 55102(c).

The Outer Continental Shelf Lands Act (“OCSLA”) extends the laws of the United States to the outer continental shelf and any structures temporarily or permanently attached to it. 43 U.S.C. 1333(a)(1). According to the legislative history, the act applies to drilling rigs and other watercraft when they are connected to the seabed. H.R. Rep. No. 95-590, at 128 (1978). The Bureau of Customs and Border Protection recently ruled that the OCSLA applies to a dynamically-positioned drilling vessel; although the vessel did not use anchors to hold its position, drilling was considered temporary attachment to the seabed. See Customs Ruling Letter HQ W116737, Customs Bulletin and Decisions, Vol. 41, No. 11, p. 9 (March 11, 2007).

In the same decision, Customs held that a foreign-flagged vessel violates 46 U.S.C. § 55102(b) if it provides any part of the transportation of cargo between coastwise points, where drilling waste was to be stored on board a drilling ship as it traveled from site to site until storage tanks were full enough to justify offloading the waste onto a coastwise-qualified barge for ultimate transportation to shore. See id. at 13.

Accordingly, an installation vessel temporarily attached to the seabed constitutes a coastwise point, from or to which no cargo may be transported by a foreign-flagged vessel. Additionally, a foreign-flagged installation vessel temporarily attached to the seabed may not subsequently transport cargo bound for another coastwise point. It is likely that driving pilings for wind turbines would be considered temporary attachment to the seabed, given that drilling for oil and gas is considered temporary attachment to the seabed. See id. at 9.

JONES ACT WAIVERS

A Jones Act waiver may be granted in the interest of national defense by the Secretary of Defense or the head of an agency responsible for the administration of navigation or vessel inspection laws. See 46 U.S.C. § 501. In June 2006, Escopeta Oil became the first independent oil company to receive a Jones Act waiver.² The waiver permitted the use of a foreign-flagged vessel to transport a jack-up drilling rig, given that no U.S.-flagged vessel was capable of doing the job.³ A significant factor in the decision was the potential for discoveries that would boost U.S. oil reserves.⁴ A Jones Act waiver was also granted for petroleum transportation immediately following Hurricane Katrina.⁵ However, a request for a Jones Act waiver was denied following a labor union lockout that caused a cargo backlog on the west coast.⁶

It is likely that a Jones Act waiver would be granted for alternative energy project transportation that could not be accommodated by a U.S.-flagged vessel. A waiver is in the interest of national defense because an alternative energy project will provide a domestic energy source, given that a waiver was in the interest of national defense because Escopeta Oil's project had the potential to provide a domestic energy source.⁷ Additionally, the Minerals Management Service explicitly acknowledges that foreign vessels may be required for transportation and installation associated with the construction of the first alternative energy projects on the outer continental shelf. See Minerals Management Service, U.S. Dep't of the Interior, Draft Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternate Use of Facilities on the Outer Continental Shelf, p. 3-23 (March 2007).

CONSTRUCTION STRATEGIES FOR OFFSHORE WIND FARMS

In light of U.S. cabotage laws, several construction strategies for offshore wind farms are analyzed. It is assumed that the turbines will be manufactured overseas. Even if a limited Jones Act waiver is granted, careful logistical planning is necessary to ensure compliance with U.S. cabotage laws. The Maritime Cabotage Task Force and other lobbyists will be eager to point out technicalities, such as an installation vessel that jockeys its position with cargo on board.

Currently, there are few vessels in the world capable of installing wind turbines. Purpose-built turbine installation vessels include *Jumping Jack* and *Resolution*, both of which are foreign-flagged.⁸ Some multi-purpose vessels also have the capacity to install turbines; REPower employed *Rambiz*, a Belgian ocean-going heavy-lift catamaran, to transport and install a fully-assembled 5.0-MW prototype from shore to the installation point off the Scottish North Sea coast.⁹ Investors may respond to the anticipated need for turbine installation vessels by providing a suitable U.S.-flagged vessel, which would be unencumbered by U.S. cabotage laws. A U.S.-flagged vessel could transport turbines from a shoreside staging area to the installation site, or between installation sites, without restriction.

The following transportation possibilities are analyzed because a suitable U.S.-flagged vessel may not be available in time for the first projects. The first strategy involves off-loading wind turbine components onto the installation vessel from the ocean-going vessel transporting them to the U.S. At first glance, it may appear that the Jones Act is not applicable because the turbines are transported directly from a foreign port to the installation vessel. However, in light of a recent Customs decision, a foreign-flagged installation vessel may not be permitted to transport turbines between two installation sites. See Customs Bulletin and Decisions, Vol. 41, No. 11, p. 9. Therefore, the installation vessel could accept only one turbine at a time from a stand-by vessel; the installation vessel would have to install the turbine and then re-position itself at the next installation site before accepting another turbine. Further, the stand-by vessel would have to be U.S.-flagged in order to transport cargo between installation sites. The ocean-going vessel could off-load its cargo onto U.S.-flagged barges; however, open-water unloading would be inherently more dangerous and expensive than unloading in port.

The second strategy improves upon the first by eliminating the complexities of unloading the ocean-going vessel in open water. Here, the ocean-going vessel travels to a U.S. port to unload the turbine components, which are subsequently loaded onto U.S.-flagged barges for transportation to the installation vessel. Once again, the installation vessel may only handle one turbine at a time; however, practical constraints may dictate similar limitations, as the current installation vessels are not large enough to carry more than a few turbines at a time.

The third strategy assumes that turbines will be assembled at a shoreside staging area, a process employed by REPower for its prototype 5.0-MW turbine.¹⁰ This strategy is desirable because assembly is cheaper and simpler on shore; these benefits would have to be evaluated in light of the transportation cost for a fully-assembled turbine as compared to the transportation cost for turbine components. However, calm seas may be required to transport fully-assembled turbines in the upright position.¹¹ There may not be a U.S.-flagged vessel capable of transporting the fully-assembled turbine to the installation site, in which case a Jones Act waiver may be granted to allow a foreign-flagged installation vessel to provide transportation as well.

Accordingly, the best transportation strategy depends on the construction plan, sea state, and vessel availability. The third strategy is likely the most cost-effective, achieving the benefits of shoreside turbine assembly, but is subject to site-specific limitations, because calm seas are likely required for transporting and unloading fully-assembled turbines in the upright position, and may depend on a Jones Act waiver, because the Jones Act fleet may not currently include a vessel capable of transporting fully-assembled turbines. If the third strategy is not feasible or desirable, the second strategy allows the use a foreign-flagged installation vessel while complying with Jones Act requirements for transportation of turbine components to the installation site.

TRANSPORTATION OF PERSONNEL ON THE OUTER CONTINENTAL SHELF

U.S.-flagged vessels are also required for personnel transportation between the offshore energy project and shore. Under the OCSLA, federal law applies because the wind turbines will be attached to the seabed. See 43 U.S.C. 1333(a)(1); H.R. Rep. No. 95-590, at 128 (1978). The Passenger Vessel Services Act, a corollary to the Jones Act, requires U.S.-flagged vessels for the transportation of passengers between U.S. coastwise points; violations carry a penalty of \$300 per passenger. See 46 U.S.C. § 55103.

Passengers include those personnel not part of a vessel's regular complement, as suggested by the carefully-worded facts considered in the recent Customs case. See Customs Bulletin and Decisions, Vol. 41, No. 11 at 10.

The transportation industry for offshore energy projects is already well-established, having developed to meet the needs of the offshore oil and gas industry. The Offshore Marine Service Association has been transporting workers and supplies to offshore energy projects since 1973.¹² It is likely that the association can provide U.S.-flagged personnel transportation for routine maintenance of offshore energy projects, although heavily-padded tenders may be required to avoid damaging the monopole support structure.

CONCLUSION

U.S. cabotage laws require the use of U.S.-flagged vessels for transportation associated with offshore energy projects, including the transportation of personnel. The best cargo transportation strategy will depend on a number of factors, including the construction plan, sea state, and vessel availability. A Jones Act waiver may be granted if the U.S.-flag fleet cannot provide the requisite transportation; a waiver may be necessary to meet the unique needs and construction schedule of the first offshore alternative energy projects.

ENDNOTES

- ¹ See Christopher Dinsmore, *Jones Act Reform has Spurred Debate*, The Virginian-Pilot (Nov. 19, 1995), available at <http://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1995/vp951119/11190400.htm> (last visited June 6, 2007) (discussing the controversial nature of the Jones Act, including the greater cost of U.S.-flagged vessels and the higher standards to which they are held); Maritime Cabotage Task Force, *History of MCTF*, at <http://www.mctf.com/history.shtml> (last visited June 6, 2007).
- ² Business Wire, *Escopeta Oil and Centurion Gold Holdings, Inc. to Begin Drilling for Alaska's 'Missing Giants'; Department of Homeland Security Grants Historical Jones Act Waiver*, Business Wire (August 8, 2006), at http://findarticles.com/p/articles/mi_m0EIN/is_2006_August_8/ai_n16610212 (last visited June 6, 2007).
- ³ See *id.*
- ⁴ See *id.*
- ⁵ Office of the Secretary, U.S. Dep't of Homeland Security, *Waiver of Compliance with Navigation and Inspection Laws* (Sept. 1, 2005), available at http://www.npga.org/files/public/Jones_Act_Waver_9-05.pdf (last visited June 6, 2007).

6 American Maritime Officers, *Customs Denies Request for Jones Act Waiver: U.S. Agencies Concur: Port Lockout did not Create a Need to Suspend Cabotage Law*, American Maritime Officer (2003), available at <http://www.amo-union.org/Newspaper/Morgue/1-2003/Sections/News/jonesact.htm> (last visited June 6, 2007).

7 See Business Wire, *supra* note 2.

8 See Press Release, A2SEA, *A2SEA Acquires Specialist Jack-Up Barge from Mammoet Van Oord* (February 8, 2007), available at http://www.a2sea.com/uploads/A2SEA_Press_Release_04-07_JUMPING_JACK.pdf (last visited June 6, 2007); *Wind Farm Installation Ships have O&G Future*, Marine Technology Reporter (Jan. 13, 2006), available at <http://www.seadiscovery.com/mt/mtStories.aspx?ShowStory=1002602047> (last visited June 6, 2007).

9 See REPower Systems AG, *Countdown*, Aug. 20, 2006, at <http://www.repower.de/index.php?id=369&L=1&det=9> (last visited June 6, 2007); *Technical Specs: Rambiz*, at http://www.tricolorsalvage.com/pages/fleet_rambiz.asp (last visited June 6, 2007); Scaldis, *Beatrice Wind Farm Demonstrator Project*, at <http://www.scaldis-smc.com/Latestnews.htm> (last visited June 6, 2007) (includes many photos of the installation process).

10 See Scaldis, *supra* note 9.

11 See BBC News, *Giant Wind Turbine Plan Postponed* (Sept. 9, 2006), available at <http://www.repower.de/index.php?id=369&L=1&det=9> (last visited June 6, 2007).

12 Offshore Marine Service Association, *Our History*, at <http://www.offshoremarine.org/history.html> (last visited June 6, 2007).