

The Jones Act

Offshore 2011



About the Author

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The last two years have proven to be tumultuous with regard to planning for and conducting deepwater Outer Continental Shelf (OCS) operations offshore. These operations require sophisticated vessels and equipment to work at great depths. Depending on the type of work actually being performed in support of such deepwater operations, there are not sufficient coastwise-qualified U.S.-flag vessels that are both capable and available to conduct such work. In the aftermath of the tragic Deepwater Horizon incident in 2010, including the implementation of more prescriptive regulatory and environmental requirements, as well as the deepwater drilling moratorium, as we look over the horizon, it is essential that industry do everything possible to ensure that no additional impediments arise that will further stall the important recovery of offshore energy development in 2011. This article will review the various agency administrative and legislative actions implicating the Jones Act that could adversely affect offshore operations in 2011.

Customs and Border Protection (CBP) Actions

On July 17, 2009, CBP proposed modifying or revoking 20 rulings issued over a span of more than 30 years, in which CBP had made determinations as to whether certain equipment would be considered vessel equipment or merchandise, and hence whether the item could be carried and used aboard non-coastwise-qualified vessels between coastwise points. CBP reasoned that it had made errors in issuing the interpretive rulings and therefore needed to provide more consistency and clarity to the offshore industry. This proposal came shortly after CBP's revocation of a ruling earlier in 2009 in which it determined that multi-

function well head assemblies called "Christmas trees" could be considered vessel equipment and therefore could be transported between coastwise points and installed by foreign-flag vessels. In its revocation notice, CBP stated that withdrawal of the "Christmas tree" ruling was necessary pending further clarification of the definition of vessel equipment and review of past rulings in which CBP determined certain items carried aboard a ves-

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sel were equipment and not merchandise. On September 15, 2009, CBP withdrew its July 17, 2009 proposed modification and revocation notice amid criticism from interested parties and industry groups regarding, among other things, an expedited process by which CBP was seeking to modify the rules regarding coastwise transportation of vessel equipment which would have become effective 60 days after issuance of the final decision, despite the broad ranging and significant implications of the policy changes.

As suggested by many facets of industry, CBP initiated a rulemaking proposal utilizing

the Notice and Comment procedures under the Administrative Procedure Act by submitting the proposal to the Office of Management and Budget for review in March 2010. However, the rulemaking was withdrawn by CBP and the Department of Homeland Security on November 15, 2010 amid concerns from various federal agencies that, among other things, the proposal could have serious foreign trade implications.

It is noteworthy, given the controversy surrounding whether a particular item is vessel equipment or merchandise since the revocation of the 2009 "Christmas tree" ruling, CBP has not issued any rulings involving the transportation of equipment or merchandise to points on the OCS since then, leaving the offshore industry in a state of uncertainty with regard to operations offshore. This is because although this would appear to mean that most of CBP's OCS-related rulings issued over the last 30 years remain valid as precedent, subject to CBP review on a case-by-case basis, CBP is now reviewing its policy with regard to the issuance of Jones Act rulings offshore and it is unclear at this time what that policy will be.

Congressional Action

Following the Deepwater Horizon incident, Congress was extremely busy with proposed spill legislation during the summer of 2010. In this regard, the House passed H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2009 (the "CLEAR Act"). Among other things, this bill would repeal limits of liability, increase the minimum level of financial responsibility for an offshore facility to \$1.5 billion, authorize recovery for non-pecuniary damages and human health injuries, and substantially revise the oil spill response

planning and safety regimes for vessels and facilities. It also has numerous provisions related to oil and gas activities offshore, including proposed legislation that would have the practical effect of stopping most deepwater projects offshore if enacted due to restrictions imposed on offshore workers and foreign-flag vessels as follows:

- **Section 220: Manning and Buy and Build American Requirements**

This provision would preempt the current regime and apply U.S. immigration laws offshore, which would have the practical effect of requiring foreign workers to obtain H2-B visas in order to work offshore. Not only do H2-B visas have a cap of 66,000 per year that is reached very quickly, but the process to obtain the visa is also lengthy. As a result, there would not be enough qualified personnel to operate vessels offshore.

- **Section 709: Americanization of Offshore Operations in the Exclusive Economic Zone**

This provision would require that all vessels involved in oil and gas projects out to 200 miles to be U.S.-flagged (and thus U.S.-crewed) and 75 % U.S.-owned. These include Mobile Offshore Drilling Units (“MODUs”), pipelay vessels, construction and specialty vessels that are essential to OCS operations and mostly foreign flagged and foreign crewed today. It would also require that a vessel engaged in any “other activities” be U.S.-flagged (and thus U.S.-crewed) and 75% U.S.-owned. Broadly interpreted, this requirement would make many offshore activities and projects—including alternative energy projects, lightering operations, freight carriage, or cruise lines economically impractical and operationally impossible.

- **Section 725: Build-America Requirement for Offshore Facilities**

These provisions would require, absent obtaining a waiver from the Coast Guard, any offshore facility (including a MODU) to be built in the United States, including construction of any major component of the hull or superstructure of the facility. Currently, few MODUs are built in the United States.

Although the Senate failed to pass a bill, it consolidated proposed oil spill legislation into S. 3663, the Clean Energy Jobs and Oil Spill Accountability Plan, which was introduced by Senator Reid on July 28, 2010. However, this

legislation generated too much controversy and no further action has been taken on S. 3663 since then.

Guidance for 2011

With regard to considering potential future offshore activities involving the use of non-coastwise-qualified vessels and the transportation of merchandise and/or carriage of equipment, owners, operators, charterers and other parties should confer with counsel and CBP with regard to seeking offshore Jones Act rulings before committing to future projects.

With regard to potential oil spill legislation, Congress failed to pass any such legislation during the so-called lame-duck session. If the Exxon Valdez spill in 1989 is instructive, it took Congress approximately 18 months to enact legislation following that incident. Hopefully, it will take Congress at least that long to implement legislation after the Deepwater Horizon incident to give it time to reflect on the actions taken by the industry and the Administration to implement changes based on lessons learned to prevent enacting legislation that overreacts to this incident. It is difficult, however, to predict what Congress will do and how quickly it will act in 2011 with regard to oil spill legislation. Accordingly, it is incumbent on industry to be ready at the beginning of the year to act quickly to advance its position and not miss any opportunities.