

Legislative Update – Congress Acts to Clarify the Application of the Jones Act to Offshore Wind

Late last week, House Armed Services Committee Chairman Adam Smith, D-Wash., and Ranking Member Mac Thornberry, R-Texas, issued a joint statement announcing that both chambers of Congress have reached agreement on the National Defense Authorization Act (NDAA) for fiscal year 2021. While much of the media attention regarding the bill has been focused on President Trump's threats to veto unless the bill includes a repeal of Section 230 of the Communications Decency Act (which protects tech companies from being held legally liable for what is posted on their platforms), some very important language relating to the Jones Act and offshore wind was inserted in conference. In particular, the NDAA now includes an amendment to the Outer Continental Shelf Lands Act of 1953 (OSCLA), 43 U.S.C. § 1333(a), the effect of which is to clarify that U.S. law (including the Jones Act) applies to "installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources."

This language was previously proposed by Congressman Garamendi of California as part of a separate bill, the Clean Economy Jobs and Innovation Act (H.R. 4447), but is a new addition to the NDAA. It is intended to address a question that existed under the current law. In particular, the existing language of OCLSA does not currently contain the words "including non-mineral energy resources." Thus, whereas OCLSA has been interpreted to extend the Jones Act's restrictions to installations, artificial islands, and similar structures, as well as to mobile oil drilling rigs, drilling platforms, floating anchored warehouse vessels, and other devices if they are attached to the seabed of the Outer Continental Shelf for the purpose of oil and gas exploration/exploitation, there has been an open question as to whether wind energy is a "resource" under the OCLSA subject to the Jones Act. If the above language becomes law, the effect would appear to be that any wind energy related installation on the OCS would be deemed a U.S. point for Jones Act purposes.

Both houses of Congress are expected to put the bill to vote as soon as this week. It will then need to be signed into law by the president or a veto by the president would need to be overridden by Congress.



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