U.S. Offshore Wind Keeps Spinning in July — Legislative Update

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While offshore wind has been on the radar for many years in the United States, there has been a palpable surge in the momentum behind the industry over the past several months. For example, earlier this week, New York Governor Andrew Cuomo announced a massive renewable energy solicitation that included a record breaking 2,500 MW offshore wind procurement. In conjunction with the solicitation, the state will require offshore wind generators to partner with one of 11 prequalified New York ports to stage, construct, manufacture key components, or coordinate operations and maintenance activities. Funding for port investments will include $400 million in both public and private funding.

Despite the surge in new activity, questions regarding one of our country's oldest laws still loom over the industry's development. The Jones Act celebrated its 100th birthday last month (and original requirements for use of U.S. flagged vessels for transportation between U.S points date back to legislation introduced in the first Congress). The Jones Act prohibits the transportation of merchandise between U.S. points on a vessel that isn't U.S. flagged and coastwise qualified (i.e., owned, operated, and controlled by U.S. citizens). Of particular significance to offshore wind, regulatory and legislative activity at the end of last year and the early part of this year called into question the extent to which foreign flagged heavy lift vessels will be authorized to conduct installation operations in U.S. waters. This issue is critical to the industry because there are currently no U.S. flagged heavy lift vessels capable of performing certain aspects of offshore wind projects. This fact, in addition to the long lead time required to secure the use of these vessels, means that any uncertainty regarding whether use of a U.S. coastwise qualified vessel is or will be required in the future has the potential to present significant complications for project owners.

On February 17, 2020, a previously issued decision of Customs and Border Protection (the agency responsible for interpreting and administering Jones Act requirements) to broaden the scope of activities that a foreign flagged vessel could undertake as part of lifting operations went into effect. Specifically, CBP's decision revoked prior CBP interpretative rulings that prohibited any movement of a foreign flagged vessel with merchandise aboard during a lifting operation. Instead, under its revised interpretation, CBP indicated that it will permit a foreign flagged vessel to engage in lifting operations that include certain lateral movements when the movement is necessary for the safety of surface and subsea infrastructure and/or the vessels and mariners involved. CBP clarified that this interpretation applies to all lifting operations (i.e., not just heavy lift).

Concurrent to that action by CBP, legislative efforts to define the scope of permissible foreign flagged vessel involvement in lifting operations were also underway. In July of last year, the House of Representatives passed the Coast Guard Authorization Act of 2019 (H.R. 3409). The House version of the bill included provisions that would have essentially overridden CBP's revised interpretation of lifting operations with respect to heavy lifts by instead prohibiting use of foreign heavy lift vessels unless there has been a finding by the U.S. Secretary of Transportation that there are no available qualified U.S.-flag vessels. A companion bill introduced in the Senate (S. 2297) did not contain these provisions. Neither version was ultimately enacted into law as negotiations on this language appeared to have stalled. Thus, the question of whether CBP's interpretation would be allowed to remain in place by Congress remains largely unsettled.

That changed, at least in part, last week when the House passed the Elijah Cummings Coast Guard Authorization Act of 2020 as part of the William M. (Mac) Thornberry National Defense Authorization Act for FY2021. The 2020 version of the House's Coast Guard Authorization Act did not contain the heavy lift waiver language. The bill now heads to the Senate to be reconciled in conference with the Senate version of the NDAA. Given that the Senate did not adopt the heavy lift waiver language last

year, it would seem that CBP's more permissive reading of the Jones Act will continue to apply. Obviously, all eyes in the industry will be watching this legislation's progress closely.