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Trends/Updates and Legal Issues - Offshore Wind Projects – Eastern U.S., Western U.S., Gulf of Mexico

**Cindy Muller
Alyssa Karotkin**

Authors Contact Information:

Cindy Muller, Partner, Jones Walker
cmuller@joneswalker.com

Alyssa Karotkin, Head of U.S. Offshore
Land and Regulatory, Equinor
alyka@equinor.com

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I. Introduction

The U.S. offshore wind energy industry grew significantly in the past several years. In 2022 several lease areas were auctioned along the East and West Coast: New York Bight in February, Carolina Long Bay in May, and Humboldt and Morro Bay off of California in December. Additionally, two areas in the Gulf of Mexico, in Galveston and Lake Charles were converted into wind energy areas.

The offshore industries in the U.S. operates within bodies of water where state, federal and maritime laws intersect. Work on the Outer Continental Shelf (OCS) is performed on a wide variety of structures, including vessels, drill ships, jack-up rigs, lift boats, semi-submersible platforms, single point anchor reservoir (SPAR) and tension leg structures, floating production platforms (FPP), and floating production and storage and offloading (FPSO). Whether these structures are considered vessels is a key component to any choice-of-law analysis, as the use of a vessel is a critical factor in determining whether a contract is maritime and whether maritime law, the Outer Continental Shelf Lands Act (OCSLA), or state law might apply.

Many legal issues arising from offshore oil and gas exploration and production are analogous to those for wind. Specifically, the U.S. Supreme Court and the U.S. Court of Appeals for the Fifth Circuit have addressed similar issues in the context of offshore oil and gas development. As well, many Customs and Border Protection (CBP) decisions on the applicability of the Jones Act to the development of offshore wind mirror oil and gas rulings.

This article provides a basic overview of the applicability of maritime law to offshore wind projects, a basic overview of the OCSLA and its application to offshore wind projects, and an overview of the application of the Jones Act to offshore wind.

II. Maritime contract state/federal

If a contract is performed on a platform in state territorial waters rather than on the OCS, and the work has no maritime connection, then OCSLA will not apply. When the OCSLA does not apply, a federal court sitting in diversity jurisdiction must follow the choice of law rules of the forum state.

1. Does maritime law apply?

Whether maritime law applies requires the establishment of maritime jurisdiction, an inquiry which usually depends on the nature of the claim:

¹ This paper was prepared by Cindy Muller, Partner at Jones Walker LLP and Melanie Fridgant, Associate at Jones Walker LLP for the 18th Annual Renewable Energy Law Institute UT CLE conference.

[I]n the context of oil and gas exploration on the Outer Continental Shelf, admiralty jurisdiction and maritime law will only apply if the case has a sufficient maritime nexus wholly apart from the situs of the relevant structure in navigable waters.

Laredo Offshore Constructors, Inc. v Hunt Oil Co., 754 F.2d 1223, 1230 (5th Cir. 1985). To establish maritime jurisdiction for a tort, a party must show maritime situs and a connection to traditional maritime activity. *Champagne v Tetra Applied Technologies, Inc.*, No. 05–299, 2006 U.S. Dist. LEXIS 37457, *13–14 (S.D. Tex. Feb. 6, 2006). If the dispute arises out of a maritime contract, i.e., the nature of the contract is maritime, then maritime law applies rather than state law. A maritime contract has been described as one “relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment.” *J.A.R., Inc. v M/V LADY LUCILLE*, 963 F.2d 96, 98 (5th Cir. 1992).

Although offshore oil and gas exploration on the OCS has been ongoing for more than 50 years, the question of whether a contract is maritime in the oil and gas context has been murky and often conflicting. Recent jurisprudence has simplified the test for determining a maritime contract. In 2004, the Supreme Court held that courts must examine the primary objective of a contract when determining whether the contract is maritime. In part based on this pronouncement, the Fifth Circuit announces a new test to determine whether an oil and gas service contract is maritime in nature. The Fifth Circuit issued a unanimous *en banc* decision in *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2008), which provided that to determine whether an oil and gas service contract is maritime, a court must ask (1) whether the contract provides services to facilitate the drilling or production of oil and gas on navigable waters and (2) whether the parties expect that vessel will play a substantial role in the completion of the contract.

There, the decision dealt with determining the maritime nature of contracts dealing with exploration and production, but the court stated that the test could apply to non–oil and gas activity that involved maritime commerce. Thereafter, the Fifth Circuit expanded the *Doiron* test and announced that it applies to all mixed-services contracts, not just those arising in the oil and gas context.

Maritime law applies where the contract “focus” involves vessel operations. The vessel status versus platform status of an offshore facility also impacts insurance obligations and the enforceability of contractual indemnity obligations that may otherwise be limited by the laws of the adjacent states. Whether maritime law applies to a contract is of legal significance to understand the offshore regulatory scheme.

2. Is it a maritime contract?

In *Barrios v. Centaur, LLC*, 942 F.3d 670 (5th Cir. 2019), the plaintiff was injured while offloading a generator from a crew boat to a barge. The plaintiff’s employer had executed a master service contract with reciprocal indemnity provisions with the owner of a dock for repair work to be performed at the dock facility, including the installation of a concrete containment rail. To do the work, the plaintiff’s employer chartered a barge, which moved up and down the river using a tugboat and a winch. The plaintiff’s employer contracted with the barge owner to transport crew and equipment to the barge via a crew boat.

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