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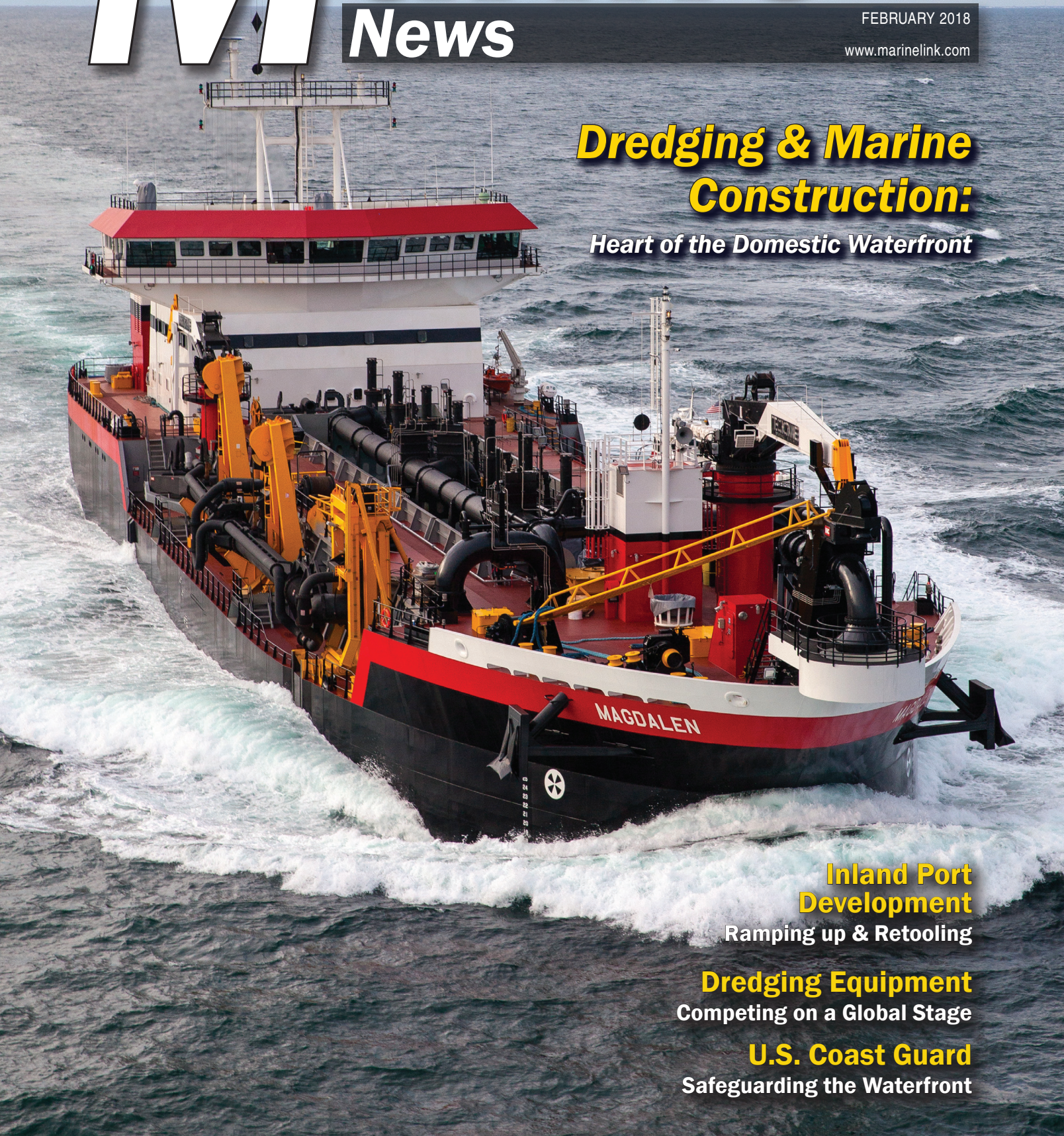

Dredging & Marine Construction:

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The Jones Act and U.S. Offshore Wind Power:

The Implications of the Jones Act on the Development, Operation and Maintenance of Offshore Wind Farms in the United States.

By John F. Imhof Jr.

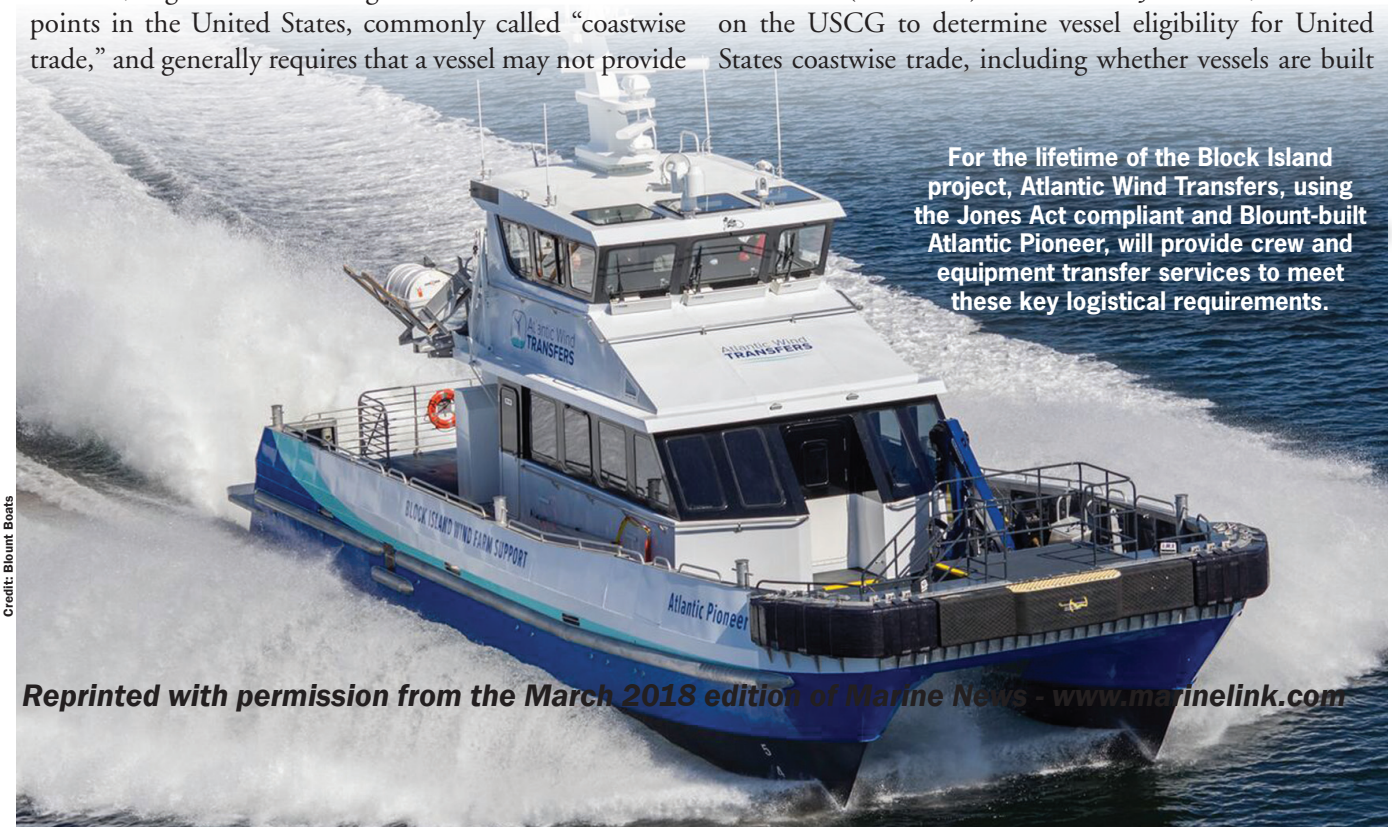
Imhof

After years of planning and some unsuccessful attempts, offshore wind power developers finally have their first success in the United States. The Block Island Wind Farm, a thirty-megawatt wind farm located just off the coast of Rhode Island, began operations in December 2016, fulfilling the goal of the project's developer, Deepwater Wind LLC, to build America's first offshore wind farm. The Block Island Wind Farm consists of only five wind turbines and is tiny in comparison to the large offshore wind farms operating off the coasts of Europe, but Deepwater Wind is planning larger wind farms off the coasts of New York, Massachusetts, Rhode Island, Maryland and New Jersey. Other developers are doing the same with other projects up and down the East Coast of the United States.

The Jones Act and the Passenger Vessel Services Act

Affecting how these wind farms are being planned and built is a little-known but controversial law: The Jones Act, originally enacted as part of the Merchant Marine Act of 1920, regulates the carriage of merchandise between points in the United States, commonly called "coastwise trade," and generally requires that a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel is wholly owned by citizens of the United States and has been issued a certificate of documentation with a coastwise endorsement by the United States Coast Guard (the "USCG") or is exempt but would otherwise qualify for such a certificate and endorsement. A coastwise endorsement may only be issued to a United States flagged vessel that, with limited exceptions, was built in the United States. The Passenger Vessel Services Act similarly restricts the transportation of passengers between points or places in the United States to vessels built in and owned by citizens of the United States.

The penalties for violating the Jones Act can be severe, including forfeiture of the merchandise transported or a monetary amount equal to the greater of the value of that merchandise or the cost of the transportation. The penalty for violating the Passenger Vessel Services Act is a fine of $300 per passenger transported and landed. The laws are otherwise similar enough that, for the purposes of the remainder of this article, they are collectively referred to as the Jones Act. United States Customs and Border Protection ("USCBP") enforces the Jones Act, but relies on the USCG to determine vessel eligibility for United States coastwise trade, including whether vessels are built



For the lifetime of the Block Island project, Atlantic Wind Transfers, using the Jones Act compliant and Blount-built Atlantic Pioneer, will provide crew and equipment transfer services to meet these key logistical requirements.

Credit: Blount Boats

in and owned by citizens of the United States.

So how does the Jones Act affect the development of offshore wind farms in the United States? Offshore wind farms are just that, offshore, and nothing in the Jones Act appears to restrict the transportation of merchandise or passengers between United States ports and offshore wind farms.

The Territorial Sea and the Outer Continental Shelf Lands Act

USCBP has repeatedly ruled that points in United States territorial sea are points in the United States for the purposes of the Jones Act. The territorial sea is defined as a belt, three nautical miles wide, seaward of the territorial baseline (typically the coastline) and to points located in internal waters, landward of the territorial sea baseline. Documents filed with USCBP suggest that the Block Island Wind Farm is located in the territorial sea.

But developers are planning bigger projects even further offshore, on the outer Continental Shelf of the United States (the "OCS"), where the winds are stronger and more constant. The Outer Continental Shelf Lands Act provides that the laws of the United States, including the Jones Act, extend to the subsoil and seabed of the OCS, and all 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 therefrom. As a result, the Jones Act extends to drilling rigs and platforms sitting on or attached to the seabed of the OCS for the purpose of exploring for, developing or producing oil or natural gas. It is less clear whether the Jones Act extends to a wind turbine on a tower attached to the seabed of the OCS because it is unclear whether the turbine is developing or producing natural resources from the seabed, but many developers are taking a cautious approach and assuming that it does.

The Effect of the Jones Act on Offshore Wind Farms in the United States

The Jones Act complicates the construction, operation and maintenance of offshore wind farms in the United States because it generally requires merchandise and passengers to be moved between a port in the United States and towers attached to the seabed of the territorial sea or possibly the OCS, or between these towers, using vessels built in and owned by citizens of the United States. The wind power industry in Europe has used purpose-built wind turbine installation vessels ("WTIVs") to build offshore wind farms for years, but few, and most likely none, of these vessels were built in the United States.

Offshore wind farms can also be built using Jones Act qualified vessels built for other purposes, but these vessels may not be as efficient or reliable as purpose-built WTIVs, especially in rougher or deeper waters. A study concluded in October 2017 found that offshore wind farm development in the United States could eventually support the construction of multiple WTIVs in the United States, and plans were announced earlier in 2017 for the construction of a WTIV in the United States, but it remains uncertain whether the number of offshore wind farms needed to support a Jones Act qualified WTIV will actually be built.

A Jones Act qualified WTIV could also be used in other applications, including the construction of wind farms in Europe and the decommissioning of oil and gas installations on the OCS, but the higher cost of building WTIVs in the United States may make it too expensive for use outside of the United States and it may not be as efficient in other applications as vessels built for those applications. Until a sufficient number of Jones Act qualified WTIVs are actually built and enter service, offshore wind farm developers may need to look to other possible solutions.

So how can developers work around these problems? Most proposed solutions employ a combination of Jones Act qualified and non-Jones Act qualified vessels. Turbines located at a United States port could be transported to a tower on a Jones Act qualified vessel and installed by a non-Jones Act qualified specialized WTIV. This process, or something like it, may have been used at the Block Island Wind Farm.

Alternatively, turbines could be shipped from outside the United States on foreign-flagged vessels scheduled to arrive directly at the wind farm just in time to be installed by a non-Jones Act qualified WTIV. In each case the process works as long as the operators of the WTIV and any foreign-flagged vessels are careful not to transport merchandise or passengers between towers, between a tower and a port or other point in the United States, or between any such ports or points. Other solutions may also be possible, but whether any solution, including any of those described above, complies with the Jones Act always depends on the facts of the situation.

Until a sufficient number of Jones Act qualifying WTIVs can be built in the United States, offshore wind farm developers and operators may need to be resourceful in how they comply with the Jones Act.

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