Coasting North: The Problem with the Jones Act for the Offshore Wind Industry and a Remedy from Canada

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COASTING NORTH: THE PROBLEM WITH THE JONES ACT FOR THE OFFSHORE WIND INDUSTRY AND A REMEDY FROM CANADA

SARAH MACLEOD NAGLE*

ABSTRACT

This Note is organized into three parts to examine how the Jones Act hampers the U.S. wind energy industry’s construction of offshore wind farms by requiring that only U.S. vessels transport materials from U.S. ports to the wind farms. The Note proposes a license modeled on Canada’s Coasting Trade Act (“CTA”) to allow non-U.S.-flagged vessels to participate in wind turbine construction. Part I will address the development of cabotage law in the United States, the creation of the Jones Act, and its impact on offshore wind. Part II surveys Canada’s cabotage laws, which culminated in the passage of the CTA in 1990. Examples are given of the successful implementation of the Canadian CTA license. Lastly, Part III argues implementing a licensing system similar to the CTA would be an effective solution to offshore wind woes and outlines how this license would function.

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INTRODUCTION

As climate change becomes an increasingly pressing topic in American political discourse, the country’s attention has shifted towards renewable energies. But one important arrow in America’s quiver to combat climate change has been slow growing. Offshore wind energy, especially compared to Europe’s offshore wind boom over the past few decades, has lagged behind in development. One of the reasons for this delay is a little-known facet of American law colloquially known as the Jones Act—the Merchant Marine Act of 1920. Protectionist in nature, the Jones Act is intended to preserve American-based commerce by only allowing U.S.-flagged and -crewed ships to traverse between the nation’s ports. Foreign-flagged vessels are thus barred from the coastal trade. The Jones Act likewise includes fixed points on American soil in this prohibition, meaning offshore wind farms under construction fall within the confines of the statute. This means foreign-flagged vessels cannot

6 Id. § 50102.
7 See id.; Press Release, John Garamendi, Member, House of Representatives, Congress Passes Garamendi Amendment Requiring Jones Act Enforcement in Offshore Wind
carry materials between a U.S. port and a wind turbine installation site. This presents a significant hurdle, as no U.S.-flagged wind turbine installation vessels (“WTIVs”) are currently in service, and only one is currently under construction. These vessels are important to the safe and efficient construction of wind turbines, and while workarounds exist, they cause costs and risks to increase. Combined with President Biden’s recent actions intended to increase investment in offshore wind energy, the potential for delays and bottlenecks is likely to increase. Furthermore, the Biden administration’s extension of tax breaks to investments in wind energy, coupled with increasing licenses for wind farms, will be less effective if the actual construction of wind turbines remains hampered by the Jones Act. As such, at least regarding wind energy, the Jones Act fails in its stated purpose, as it impedes instead of encourages this developing U.S. industry.

The 2020 Garamendi Amendment, which applied the Jones Act to offshore wind development, coupled with the Act’s bipartisan support, indicate that it is here to stay. However, discourse in Hawaii and...
concerns about offshore oil amidst the war in Ukraine indicate that the time is ripe for an amendment to the law.\textsuperscript{16} Such an amendment would extend the existing waiver process beyond the strict “national defense” requirement currently in effect.\textsuperscript{17} As such, this Note proposes that the United States should look to Canada’s Coasting Trade Act licensing policy for a uniform workaround.\textsuperscript{18} While Canada has not employed the licensing requirements for offshore wind development, as the country’s wind power is mostly land based,\textsuperscript{19} the policy has been successfully used for both shipping and offshore oil drilling.\textsuperscript{20}

Part I of this Note looks at the development of cabotage law in the United States, the creation of the Jones Act, and its intended protectionist function.\textsuperscript{21} Part I next examines the offshore wind industry in the United States and the Jones Act’s impact on offshore wind.\textsuperscript{22} Part II surveys Canada’s cabotage laws, which culminated in the passage of the CTA in 1990,\textsuperscript{23} and provides a few examples of the successful implementation of the CTA’s license.\textsuperscript{24} Lastly, Part III argues that implementing a licensing system similar to what is found in the CTA would be an

\textsuperscript{18} Coasting Trade Act, S.C. 1992, c 31 (Can.).
\textsuperscript{22} See generally Nicolas Martino, Offshore Wind Energy: Sophisticated Technology Struggling with Outdated Legislation, 58 JURIMETRICS 59 (2017).
\textsuperscript{24} CAN. TRANSP. AGENCY, supra note 20.
effective solution to offshore wind woes, and outlines how this license would function.25

I. CABOTAGE AND THE JONES ACT

A. U.S. Cabotage: Origins of the Jones Act

To understand the role of the Jones Act in American society, it is necessary to first define cabotage, the underlying policy that guides U.S. protection of domestic ships and shipping.26 Many countries have some form of cabotage law, which is intended to protect domestic industry27 by reserving activities (such as the transportation of goods) between domestic ports for flagged vessels of that state.28 Flagging refers to the process of registering a vessel with a certain country such that the vessel becomes subject to that nation’s regulations.29 Over ninety-one countries have some form of cabotage,30 highlighting that the influence of this policy stretches far beyond U.S. waters.31

In the United States, the Merchant Marine Act of 1920, known colloquially as the Jones Act, requires American waterborne trade to be operated by vessels built, owned, and crewed by U.S. nationals and flagged by the United States.32 Ships registered in the United States must also meet Coast Guard requirements for safety.33 The Jones Act remains popular;34 the law enjoys widespread bipartisan support despite its share

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28 Id.
31 Id.
32 ECONOMIST, supra note 21.
34 James Gibney & Timothy Lavin, Don’t Waive the Jones Act. Scrap It, BLOOMBERG
of detractors. The Act’s central focus on supporting U.S. jobs and industry is a politically popular message, which gives lawmakers little incentive to consider repealing the law.

Critically, the origins of the Jones Act lie in concerns over national defense. Specifically, after World War I, concerns abounded that U.S. reliance on foreign-flagged ships to transport goods would render the nation vulnerable in future wars. The Jones Act was therefore intended to encourage the construction of U.S. vessels to strengthen domestic shipping and reliance on domestic vessels. By limiting access to competition from foreign-flagged vessels, lawmakers hoped to spur production of U.S. ships.

However, the resulting reality is that while foreign competition with U.S.-flagged vessels has decreased, construction of new U.S. vessels is often prohibitively expensive. Therefore, even with Jones Act protections in place, construction of vessels is not economically viable in many industries including shipping and the construction of offshore wind turbines. As such, there remains a shortage of U.S. vessels capable of performing essential functions. This is in part due to competition from other industries, such as defense, and the size limits of U.S. shipyards.

36 See Creamer, supra note 35.
38 See ECONOMIST, supra note 21.
39 See id.
40 See id.
41 See id.
42 See id.
that prevent many from constructing wind turbine installation vessels.45
As such, these issues are something that increased subsidies or tax
credits for WTIV construction from the Biden administration’s Inflation
Reduction Act cannot fully address.46 Therefore, a more permanent so-

lution is necessary.

B. Jones Act National Security Waivers

As previously noted, the Jones Act is intended to protect U.S.
industry by encouraging the construction of U.S.-flagged ships and the
use of U.S. crews.47 As a result, the existing mechanism for waiver of the
Act is very strict and can only be used upon a showing that a waiver is
“in the interest of national defense.”48 Upon demonstrating that a waiver
is necessary for national defense, a foreign-flagged ship can be given a
one-time waiver to perform a function that would otherwise be reserved
for a U.S.-flagged vessel.49 This waiver has been rarely used and confined
to the likes of Hurricane Katrina and other natural disasters.50 However,
recent issues, such as Hawaii’s rising oil costs due to Jones Act restric-
tions51 and increased scrutiny of offshore wind turbine installation
methods, make the Jones Act ripe for reform.52

45 Id.
46 Id.
47 Caminiti, supra note 43.
48 See Domestic Shipping, MARAD, https://www.maritime.dot.gov/ports/dominestic-ship-

ping/domestic-shipping [https://perma.cc/R5WT-GBEQ] (last visited Feb. 8, 2024); see also
Constantine G. Papavizas & Brooke F. Shapiro, Jones Act Administrative Waivers, 42
49 See MARAD, supra note 48.
50 Sean T. Pribyl, Gerald A. Morrissey III, Christopher R. Nolan, Vincent J. Foley & J.
Michael Cavanaugh, Jones Act Waivers Following Natural Disasters, HOLLAND & KNIGHT
following-natural-disasters [https://perma.cc/TGQ8-CY4F].
51 See Jonathan Helton, Hawaii Needs Jones Act Waiver for Oil Imports, GRASSROOTS
INST. OF HAW. (Feb. 22, 2022), https://www.grassrootstitute.org/2022/02/hawaii-needs
-jones-act-waiver-for-oil-imports [https://perma.cc/43QT-ECWL]; see also Press Release,
Alejandro Mayorkas, Secretary, Dep't of Homeland Sec., Statement by Secretary Mayorkas
on the Approval of a Jones Act Waiver for Puerto Rico (Sept. 29, 2022), https://www
.dhs.gov/news/2022/09/28/statement-secretary-mayorkas-approval-jones-act-waiver-
puerto-rico [https://perma.cc/QB5D-73H5].
52 See Colin Grabow, The Jones Act Continues to Hamper the Development of Offshore
Wind Energy, CATO INST. (May 19, 2021), https://www.cato.org/blog/jones-act-adds-costs-
-complications-offshore-wind-energy [https://perma.cc/B9LE-MXAE].
Currently, there are only two methods for obtaining a Jones Act waiver: waivers granted on request by U.S. Customs and Border Patrol ("CBP") to the secretary of defense, and discretionary waivers granted by the secretary of homeland security. When a waiver is requested by the secretary of defense, CBP issues an immediate waiver, as the defense secretary is the ultimate authority on what constitutes something required in the interest of national defense. The Department of Homeland Security has discretionary authority to issue a Jones Act waiver upon a determination that national security will be impacted. Upon a review of the requirements of 46 U.S.C. § 501(b), the Department of Homeland Security determines whether to accept or reject the civilian entity request for a waiver. Notably, no commerce branch of the U.S. government is implicated in a waiver determination, highlighting the limited lens through which the need for a waiver is viewed.

Used infrequently, the Jones Act national security waiver was most recently implicated to address Puerto Rico’s needs in the immediate aftermath of Hurricane Fiona. The waiver was granted to allow foreign-flagged vessels to transport oil to Puerto Rico once it was determined U.S. shipping could not meet demand. The effective, while limited, extent of the current Jones Act waiver program serves to demonstrate that, even if expanded in scope, effective stop gaps can be crafted to ensure true necessity exists. As such, given the inflexible nature of the current waiver system, reforms are necessary to use foreign-flagged vessels in important situations that nevertheless fail under the current national security standard.

C. The Offshore Wind Industry and the Jones Act: In Need of Reform

In April 2021, the United States set a goal of reaching net-zero carbon emissions by 2050. To reach this lofty objective, the offshore
wind industry will need to play a critical role. Specifically, the offshore wind industry has the potential to provide more than twenty thousand gigawatts of energy to the United States, which is two times the current capacity of the U.S. electrical grid. As such, measures are necessary to allow and incentivize offshore wind companies to scale up development to meet these goals.

Understanding the effect of the Jones Act on offshore wind development requires a brief description of the construction process for offshore wind turbines. During the process, a monopile is driven into the seabed at the installation site, rendering the site a fixed U.S. point that must now be Jones Act compliant. This means vessels must now be U.S. flagged to transport materials from a U.S. port to the construction site.

Usually, a type of specialized vessel is used to transport materials from the port and assist with constructing the wind turbine. These vessels, known as wind turbine installation vessels, are jack-up boats that allow the vessel to be lifted out of the water while installing a turbine. The size of a WTIV is likewise critical, as the vessel must be able to carry a wind turbine to the installation site. Therefore, the size requirement and jack-up capability combine to make the WTIV a highly specialized vessel. Unfortunately, there are currently no U.S.-flagged WTIVs, as they are costly to construct. Moreover, U.S. shipyards are ill-equipped

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65 See Christopher et al., supra note 2.
66 See Seltzer, supra note 64.
69 See id.
70 See Storrow, supra note 67.
72 Storrow, supra note 67.
73 Id.
74 Id.
75 Id.
to construct WTIVs and lack financial incentives to remedy the issue.\textsuperscript{76} Additionally, construction for only one U.S.-flagged WTIV is currently in the pipeline, and it is not expected to be ready for assignment until late 2023.\textsuperscript{77} While another company signed a contract in late 2022 for manufacture of an additional WTIV, a construction timeline has not been established and development of the project will likely exceed five years.\textsuperscript{78}

The current pace of the U.S. offshore wind market is lethargic; it has been limping along for more than a decade due to regulatory hurdles, including the Jones Act.\textsuperscript{79} For the most recent offshore wind project, located in Block Island Sound off the coast of Rhode Island, developers used foreign-flagged WTIVs stationed at the development site in combination with barges that ferried turbine components from the United States.\textsuperscript{80} While this workaround allowed installation to progress, it was estimated that the hybrid process significantly increased costs and slowed operations.\textsuperscript{81} This is critical in an industry that already operates on the margins, as offshore wind farms are expensive to build and maintain.\textsuperscript{82} Furthermore, there are concerns about the safety of such workarounds in choppy seas or less stable conditions; this is due to the fact that the transition of the wind turbine components from the barge to the WTIV is a delicate process.\textsuperscript{83} Additionally, bottlenecks are created in the development of offshore wind farms because there are already WTIV shortages limiting the pace at which new wind farms can be constructed, therefore, Jones Act issues are only exacerbating the problem.\textsuperscript{84}

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\textsuperscript{76} See Garcia, supra note 44.

\textsuperscript{77} See MAR. EXEC., supra note 9.


\textsuperscript{79} See id.


\textsuperscript{83} See Shoemate & Franklin, supra note 80.

\textsuperscript{84} Matt Tremblay, The Complicated U.S. Regulations for Offshore Wind Vessels, WINDPOWER
WTIVs create the most glaring impacts on offshore wind development, the Coast Guard register indicates there are no U.S.-flagged vessels available to perform other aspects of wind turbine construction activity. Therefore, the impact of the Jones Act extends to multiple facets of offshore wind development.

While status quo advocates argue that development of a U.S. fleet of Jones Act–compliant vessels to meet demand is possible, that milestone still remains a theoretical possibility. With current issues such as the dearth of economic incentives to build U.S.-flagged WTIVs and shipyard size constraints, a number of separate issues would need to be addressed for the offshore wind industry to even begin to realize any benefits. Therefore, at a minimum, a short-term solution—such as the proposed Jones Act license—remains necessary.

II. CANADIAN CABOTAGE LAW AND THE DEVELOPMENT OF THE COASTING TRADE ACT

A. Origins of Canadian Cabotage

As noted above, many countries have some form of cabotage; however, Canada’s cabotage laws form the inspiration for the recommendations of this Note and therefore will be the focus of this Section. Canadian cabotage law does not have the protectionist origins of the Jones Act and is somewhat more lenient than its southern counterpart. This

See Shoemate & Franklin, supra note 80.
See Tremblay, supra note 84.
See Garcia, supra note 44.
See id.
See generally Hodgson & Brooks, supra note 23.
is because, as will be further discussed below, Canada’s cabotage laws have always included some type of exception for specific foreign-flagged ships to operate between Canadian ports. Likewise, these exceptions are both more closely defined and more expansive than the Jones Act’s waiver process.

The origins of Canadian cabotage laws date back to the 1800s, when Canada first gained independence from Britain and established itself as a sovereign nation. At that time, Canada’s cabotage laws restricted shipping to British-flagged vessels with an exception for foreign vessels upon the payment of a duty. This allowed for the United Kingdom to maintain its economic foothold in Canada while providing the fledgling country with the fleet it lacked.

The Canada Shipping Act came into being in 1936 in response to a determination that the restriction of commerce to British shipping was stifling domestic Canadian industry. As a result, the Canada Shipping Act required that any British vessel constructed outside of Canada obtain a license to operate between Canadian ports upon a payment of a duty of twenty-five percent of the value of the vessel. Canadian cabotage law thus shifted to a prioritization of Canadian vessels instead of an outright prohibition on foreign-flagged ships.

However, in the 1960s and later, Canada’s cabotage laws were again revisited in response to several developments. Specifically, a rise in the practice of flags of convenience and the decreasing costs associated with utilizing a British vessel was damaging the ability of the Canadian fleet to compete with foreign shipping. This, in part, can be attributed to the permanent waiver program of the Canada Shipping Act, which provided little oversight once the initial duty was paid. Further, the practice of using a “flag of convenience” is the name given to the decision to register a vessel with a certain country to reduce costs

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92 See generally HODGSON & BROOKS, supra note 23.
93 See id.
94 Id. at 26–32.
95 Id. at 10.
96 Id. at 26–32.
97 Id.
99 Id. at 27.
100 Id. at 28, 31.
101 Id. at 28.
102 Id. at 29.
and avoid operational oversight.\footnote{Flag of Convenience, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/flag-of-convenience [https://perma.cc/6HSK-C7KG] (last visited Feb. 8, 2024).} Flags of convenience are often nations that impose fewer safety and construction requirements.\footnote{HODGSON & BROOKS, supra note 23, at 45.}

In light of these developments, updates to Canada’s cabotage laws came in the form of the Coasting Trade Act in 1992.\footnote{Id. at 65.} While the CTA initially included a duty on foreign shipping, the duty was lifted in 2010 upon a demonstration that it was not encouraging domestic shipbuilding.\footnote{Id. at 4.} Therefore, the CTA serves as an example of a protectionist law that is consistently reevaluated to ensure its methods support its aims.\footnote{See TRANSP. CAN., supra note 25.}

B. The Coasting Trade Act

Contrary to its southern counterpart, the Jones Act, the CTA’s licensing requirement is based on domestic need, not national security.\footnote{See HODGSON & BROOKS, supra note 23, at 43.} A waiver, or license, to allow a foreign-flagged vessel to transport goods between Canadian ports is issued by the minister of public safety.\footnote{TRANSP. CAN., supra note 25.} A license is available to a foreign-flagged vessel upon a showing that no Canadian-flagged ships are suitable and available to perform the activity the company wishing to utilize a foreign vessel has outlined in its application for a license.\footnote{Id.} The suitability criteria includes: (1) commercial and economic suitability—the commercial (e.g., practical) and economic implications of using the foreign ship versus the offered Canadian-registered ship;\footnote{Id.; see generally Thomas Hawkins, Canadian Coasting Trade, BERNARD (2011), https://www.bernardllp.ca/wp-content/uploads/2011/11/hawkins-canada-coasting-trade.pdf [https://perma.cc/VUV3-XLWU].} and (2) technical and operational suitability—technical characteristics of the ship and equipment required to operationally perform the proposed marine service or activity.\footnote{Id.} If both criteria are met by a Canadian-flagged vessel, the application for a license will be denied.\footnote{Id.; see generally Thomas Hawkins, Canadian Coasting Trade, BERNARD (2011), https://www.bernardllp.ca/wp-content/uploads/2011/11/hawkins-canada-coasting-trade.pdf [https://perma.cc/VUV3-XLWU].}

Critically, higher costs associated with using a domestic vessel (economic implications) are alone insufficient; the applicant must demonstrate
an alternative would not be commercially viable.114 Furthermore, the burden is on the applicant to demonstrate no domestic vessels are suitable.115 As such, applications must include a detailed description of the activity identified in the application, the name of the proposed foreign ship, the type of ship required, and the size, capability, and any other required specifications.116 The license is valid for twelve months and can be renewed in twelve-month increments upon an additional showing of necessity.117

A Canadian-flagged vessel capable of performing the function listed in the application may contest the application and provide evidence of its own suitability for the job.118 However, if the Canadian-flagged vessel makes an insufficient showing of its own suitability and both suitability criteria are met by the foreign-flagged vessel, the application may be granted.119

Notably, recent disputes concerning the Coasting Trade Act have centered around whether the CTA should be amended to further liberalize cabotage or be kept as is, instead of dealing with calls to solidify protections against foreign shipping.120 Critically, no significant discourse exists that contends the license handicaps Canadian vessels or otherwise inhibits industry.121 Indeed, in December 2018, Canada enacted amendments to the CTA to permit foreign-flagged vessels to move empty containers owned by each vessel’s owner between ports in Canada on a nonrevenue basis without the requirement of obtaining a coasting trade license.122 These amendments served as a solution to an ongoing shortage

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115 See id.


117 See id.

118 See Bilodeau, supra note 114.

119 See id.


121 See id.

122 See Martin Abadi & Sam Levy, Transport and Trade: The United States-Mexico
of containers in the Canadian shipping market. Therefore, these examples demonstrate the CTA remains an effective method of balance protecting the domestic economy without stifling it.

C. Examples of Effective Utilization of the Coasting Trade Act

The effectiveness of the CTA is likely due in part to the existence of an important stop gap to prevent the licensing exception from being exploited by companies wishing to employ foreign-flagged vessels to reduce their costs. Notably, in July 2021, the Canadian company Orange Marine applied to use a French-flagged vessel to lay cable for a project. There, the license was denied because the only reason for the application was the expected costs to Orange Marine of using a Canadian-flagged vessel. Because Canadian-flagged vessels existed that could perform the job, the application for a license was transparently cost-motivated.

For a license’s suitability criteria to be met, economic burdens experienced by the Canadian company are alone insufficient to qualify a vessel. Additionally, a company with Canadian-flagged vessels capable of performing the function contested the license and won. This provides evidence of the important participatory element of the CTA license. The owners of the Canadian-flagged vessel successfully demonstrated that no technical issues existed with using their vessels and the expense was not prohibitively higher than using a foreign-flagged vessel.

Also in 2021, a license was granted for a foreign-flagged vessel to transport oil during the COVID-19 pandemic via the Panama Canal when domestic pipelines broke. Because no Canadian vessels were capable of

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123 See id.
124 See CAN. TRANSP. AGENCY, supra note 20 (exemplifying how the license, while flexible, maintains rigid standards that ensure central aims of the CTA are not undermined).
125 See TRANSP. CAN., supra note 25.
126 See Bilodeau, supra note 114.
127 See id.
128 See id.
129 See id.
130 See id.
131 See id.
132 See Bilodeau, supra note 114.
moving the oil, the commercial and technical necessity requirements were met and a license was issued.\textsuperscript{134} This is an exception that could likely count under the Jones Act’s existing national interest waiver because Canadian industry would have ground to a halt if the license had not been issued.\textsuperscript{135} However, the issuance of the waiver here highlights that the license can work effectively to encourage domestic industry.\textsuperscript{136} If this license had not been granted, the Canadian oil industry would have suffered.\textsuperscript{137} Lastly, the CTA license has proven useful to the Canadian offshore drilling industry.\textsuperscript{138} In February 2022, a license was issued for a Canadian company to employ a foreign-flagged vessel as an offshore drill.\textsuperscript{139} The Canadian company successfully demonstrated that the license was necessary and no Canadian drills existed that could perform the necessary function.\textsuperscript{140} As such, these instances of CTA licenses being both granted and denied indicates the license is functioning effectively as a gap filler where demand outstrips supply of Canadian vessels,\textsuperscript{141} thereby allowing Canadian industry to operate without fearing the adverse effects of limited Canadian-flagged vessels.\textsuperscript{142} Given the success of the CTA license provision, the Act provides a clear blueprint for a similar Jones Act license.

III. IMPLEMENTING A JONES ACT LICENSE AKIN TO THE CANADA COASTING TRADE ACT LICENSE

A. The Time Is Right for Reform of the Jones Act

As indicated by the Biden administration’s push to “Buy American,” which is clear support for the growth of U.S. industry,\textsuperscript{143} and the continuing bipartisan support for the Jones Act, a significant overhaul

\textsuperscript{134} Id.
\textsuperscript{135} 46 U.S.C. § 501(a).
\textsuperscript{136} See id.
\textsuperscript{137} See id.
\textsuperscript{138} CAN. TRANSP. AGENCY, supra note 20.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} See id.
\textsuperscript{142} See Lauerman, supra note 133.
or repeal of the Jones Act remains unlikely.\textsuperscript{144} Similarly, the Jones Act serves some important functions; notably, maintaining safety and professional standards on vessels and ensuring the United States maintains control over domestic construction and infrastructure.\textsuperscript{145} As such, an outright appeal of the Jones Act is neither feasible nor wise.\textsuperscript{146}

However, the toll that the inflexibility of the Jones Act on various American industries, most notably offshore wind, cannot be understated.\textsuperscript{147} At a minimum, Customs and Border Patrol rulings have created confusion about the exact parameters of the Jones Act’s effect on offshore wind.\textsuperscript{148} This is because what is considered a fixed point on U.S. soil is often a flexible, yet necessary, determination.\textsuperscript{149} What is more, the central purpose of the Jones Act is unmet in the context of the offshore wind industry because no U.S.-flagged WTIVs exist to support the argument that protection of domestic vessels applies in this case.\textsuperscript{150}

Likewise, a license, or expanded waiver under the Jones Act, would decrease the issues associated with the already limited supply of foreign-flagged WTIVs by increasing the pace of construction of offshore wind farms.\textsuperscript{151} This would free up WTIVs to move from project to project more quickly.\textsuperscript{152} And because the existential threat posed by climate


\textsuperscript{146} See Coy, supra note 15.


\textsuperscript{148} See id.

\textsuperscript{149} See id.

\textsuperscript{150} See Pribyl et al., supra note 50.

\textsuperscript{151} See Tremblay, supra note 84; Taylor Jackson, Reforming the Jones Act: What the United States Can Learn from Canada, in THE CASE AGAINST THE JONES ACT 214, 231–32 (Colin Grabow & Inu Manak eds., 2020) (arguing that the United States should adopt Jones Act reforms that include a licensing system drawing from Canada’s cabotage law). This Note seeks to expand on the utility of such a license, particularly in the context of the offshore wind industry.

\textsuperscript{152} See id.
change does not fall under the existing national interest waiver under the Jones Act, it must be amended to allow alternative energy to flourish when it is desperately needed.\textsuperscript{153}

Therefore, given the current issues that exist with the implementation of the Jones Act in the United States,\textsuperscript{154} a licensing policy that adopts the framework of Canada’s CTA would provide for exceptions when no vessels suitable to perform a particular function can be found.\textsuperscript{155} This would eliminate the costly burdens associated with interpreting CBP rulings to avoid running afoul of the law.\textsuperscript{156}

\textbf{B. How a Jones Act Commercial and Technical License Modeled on the Coasting Trade Act Would Operate}

A Jones Act commercial and technical license would maintain the strict and clear parameters that has made the CTA successful. Specifically, in the context of offshore wind development, U.S. wind turbine development companies would need to submit a license application to the Department of Homeland Security and demonstrate there are no U.S.-flagged vessels available to perform the necessary function.\textsuperscript{157} This would prevent the exception from overwhelming the function of the Jones Act, thereby preserving its essential protectionist elements.\textsuperscript{158}

As with the CTA license, the company would bear the burden of demonstrating that the commercial and technical barriers created by the present Jones Act–compliant workarounds impair the industry.\textsuperscript{159} They would need to show that the commercial implications of using a compliant ship (i.e., the impact on the construction of offshore wind turbines)

\begin{footnotesize}
\begin{enumerate}
\item 46 U.S.C. § 501(a).
\item CAN. TRANSP. AGENCY, supra note 20.
\item See Hjelm et al., supra note 156.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
are not viable, and that the technical characteristics of the vessel and her equipment are not suitable for the proposed function. Both of these criteria could be readily demonstrated by the industry, as current workarounds have slowed offshore wind development, costing jobs and revenue, while also increasing construction risks.

The license would be valid for twelve months, subject to renewal should the company present updated evidence that the workarounds continue to be prohibitive. While the duration of the license would differ vastly from the current national security waiver exception, it is necessary to prevent application processing delays and account for the complicated reality of offshore wind turbine construction. Contrary to instances where the national security waiver comes into play, which is often a one-off instance of delivering necessities, wind turbine construction is ongoing. Additionally, because the license application process is multifaceted and requires the collection of significant evidence, a license that requires an offshore wind company to reapply during every phase of construction would be untenable. Given the purpose of a Jones Act commercial and technical license is to facilitate the development of offshore wind, the red tape and delays associated with repeated applications would hinder incentives to apply.

However, the requirement that an applicant present new evidence if they seek to extend the license beyond twelve months is critical for two reasons. The first is that it ensures the spirit of the Jones Act is preserved in its intent to protect U.S. industry. Second, it provides an ongoing transparency requirement to ensure industries are accurately reporting their expenses. This ensures applicants will not continue to use foreign-flagged vessels once their technical and commercial supremacy has expired in an attempt to circumvent the Jones Act.

As such, the license would not counter the intended effects of the Jones Act, because removing barriers to offshore wind development would likely increase investment in the industry, bringing with it jobs for U.S.

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160 See id.
161 See id.
162 See Shoemate & Franklin, supra note 80.
163 Id.
164 See id.
165 See Pribyl et al., supra note 50.
166 See Shoemate & Franklin, supra note 80.
167 Grabow, supra note 52.
168 See TRANSP. CAN., supra note 25.
169 See id.
workers and reliance on a panoply of Jones Act–compliant support vessels.\textsuperscript{170} Currently, however, the protectionist aim of the Jones Act is clearly not working in offshore wind development—the very fact that a Virginia-based project chose to have its WTIV operate out of Canada indicates the prohibitive economic barriers to working within the confines of Jones Act–compliant workarounds.\textsuperscript{171}

Jones Act workarounds are not just costlier than allowing a license for a foreign-flagged WTIV to operate out of a U.S. port but also produce more emissions.\textsuperscript{172} And likewise, WTIV development is not encouraged by the Jones Act—rather, in early 2022 the company Eneti shelved plans for the construction of a Jones Act–compliant WTIV, citing high costs.\textsuperscript{173} While it has since signed a contract for a different WTIV, construction has yet to start, and the vessel will not be ready until 2025.\textsuperscript{174} Currently, only one Jones Act WTIV is in the pipeline, and it is not anticipated to finish construction until late 2023.\textsuperscript{175} While ideas for the creation of new WTIV models to meet demand are in the works,\textsuperscript{176} such proposals are in their nascent stages and do not address current needs.\textsuperscript{177}

The second reason that a license system should be implemented is equally critical: A license engenders constant reassessment of the supply of U.S.-flagged vessels to meet demand.\textsuperscript{178} If workarounds become more efficient, and the United States provides economic incentives for

\textsuperscript{170} See id.
\textsuperscript{171} See Partlow, \textit{supra} note 81.
\textsuperscript{175} See MAR. EXEC., \textit{supra} note 9.
\textsuperscript{177} See id.
\textsuperscript{178} See \textit{TRANSP. CAN.}, \textit{supra} note 25 (noting the CTA requires a demonstration of economic need in a waiver application).
the construction of Jones Act–compliant WTIVs, companies would no longer need a license to operate efficiently.\(^{179}\) Further, the license system would require companies to open their books to demonstrate a continued need,\(^{180}\) and companies with Jones Act–compliant alternatives would be able to challenge that need if they could show their alternative would be viable from both a technical and commercial standpoint.\(^{181}\) Likewise, the participatory nature of a license application would allow owners of U.S.-based vessels that could perform any given function to countermand an application and therefore feel as though their concerns are accounted for and repeatedly reassessed.\(^{182}\) This second reason dovetails with the license system’s intent to preserve the Jones Act’s support of U.S. industry.\(^{183}\)

Additionally, while the ability of companies to challenge the issuance of a license would lengthen the process for obtaining a license generally, this would likely not apply to WTIVs,\(^{184}\) as it would be relatively straightforward to demonstrate no reasonable alternative vessels exist.\(^{185}\) Even once Dominion Energy finishes construction of its WTIV, demand will outstrip what one Jones Act–compliant WTIV can handle.\(^{186}\) This would allow for relative ease in demonstrating a continued need for licenses in the offshore wind industry, and a clear stopping point if and when more U.S.-flagged WTIVs are able to be built.\(^{187}\)

Implementing a technical and commercial need license would also likely garner more bipartisan support than an industry-specific waiver, which could draw harsh pushback from the oil and gas industries.\(^{188}\) This is because the offshore wind industry already poses an existential threat to the health of the oil and gas industries as a competing fuel source.\(^{189}\)

\(^{179}\) See Traweek, supra note 10.

\(^{180}\) Coasting Trade Act, S.C. 1992, c 31 (Can).

\(^{181}\) See id.

\(^{182}\) See id.

\(^{183}\) See id.

\(^{184}\) See id.

\(^{185}\) See Shoemate & Franklin, supra note 80.


\(^{187}\) See Shoemate & Franklin, supra note 80.


\(^{189}\) Michael Freeman, Offshore Wind Can Lower Energy Prices and Beat out Oil and Gas, CTR. FOR AM. PROGRESS (Sept. 23, 2022), https://www.americanprogress.org/article
A technical and commercial need license could be utilized by various industries, thus benefitting producers and consumers alike by reducing costs.\textsuperscript{190} Therefore, a technical and commercial need license would benefit various industries upon a demonstration of need, ensuring support will not be limited to proponents of offshore wind or alternative energy sources.\textsuperscript{191} Furthermore, a license that goes beyond the strict national security requirements currently in place would go hand-in-hand with the Biden administration’s call to create jobs and foster alternative energy development.\textsuperscript{192} The current bottleneck that results from the dearth of Jones Act–compliant U.S.-flagged vessels limits new construction and, therefore, new jobs.\textsuperscript{193}

Concerning oversight of the license process, control should remain with CPB and the secretary of homeland security to limit disruption to the current system to the extent practicable.\textsuperscript{194} Therefore, the only difference would be the expanded scope of the Jones Act waiver process.\textsuperscript{195} This expanded scope would provide support for the struggling offshore wind industry in a manner that ensures this developing power source will not receive special treatment, yet be allowed to grow.\textsuperscript{196}

\textbf{CONCLUSION}

A license requirement would have the critical effect of increasing the capacity and efficiency of U.S. offshore wind development, which would decrease current uncertainties in the industry and encourage private investment in offshore wind.\textsuperscript{197} Further, given existing Jones Act limitations

\textsuperscript{190} See Smith & Hoxie, \textit{supra} note 188.

\textsuperscript{191} Id.


\textsuperscript{193} See Sayer, \textit{supra} note 4.

\textsuperscript{194} MARAD, \textit{supra} note 48.

\textsuperscript{195} See id.

\textsuperscript{196} See Sayer, \textit{supra} note 4; Smith & Hoxie, \textit{supra} note 188.

have not encouraged the development of U.S.-flagged WTIVs—only one is in production and plans for another were scrapped due to cost and lack of perceived benefits—additional economic incentives would be necessary to increase construction and fully realize the intended effects of the Jones Act on the offshore wind industry. Therefore, given the immediate need for WTIVs and the economic costs of prioritizing U.S. vessels when none currently exist, the necessity of implementing a license process modeled on Canada’s Coasting Trade Act is clear. By presenting the license as a commercial and technical need license, and not an industry-specific allowance, various industries outside of offshore wind would benefit. This would, in turn, strengthen bipartisan support for a licensing process and make possible the first real change to domestic cabotage law in over a hundred years.

WTIVs, coupled with the prohibitively expensive cost of constructing Jones Act–compliant installation vessels, presents a significant challenge to the offshore wind industry.


200 See id.