

OCTOBER 2020

VOL. 20-9

PRATT'S

ENERGY LAW

REPORT



LexisNexis

EDITOR'S NOTE: ENVIRONMENTAL JUSTICE

Victoria Prussen Spears

PREPARING FOR INCREASED FOCUS ON ENVIRONMENTAL JUSTICE IN PROJECT PERMITTING

Kerry L. McGrath and Alexandra K. Hamilton

NEPA OVERHAUL: TRUMP ADMINISTRATION FINALIZES LANDMARK RULE REFORM

Raya B. Treiser, Rachel Jacobson, Michael J.P. Hazel, Shannon Morrissey, Heidi K. Ruckriegle, and Lauren Mercer

IMPLICATIONS OF JONES ACT CHANGES TO THE OFFSHORE ENERGY INDUSTRY

Jonathan K. Waldron and Stefanos N. Roulakis

OFFSHORE WIND WILL NEED SUPPORT VESSELS; WHAT FORM WILL BE USED?

Keith B. Letourneau and Douglas J. Shoemaker

NOW. NORMAL. NEXT.

EFFECTIVE COMPLIANCE OVERSIGHT OF ENERGY COMMODITY TRADING IN A REMOTE TRADING ENVIRONMENT

Levi McAllister, Katherine Dobson Buckley, Sarah V. Riddell, and Pamela Tsang Wu

Pratt's Energy Law Report

VOLUME 20

NUMBER 9

October 2020

Editor's Note: Environmental Justice

Victoria Prussen Spears

277

Preparing for Increased Focus on Environmental Justice in Project Permitting

Kerry L. McGrath and Alexandra K. Hamilton

279

NEPA Overhaul: Trump Administration Finalizes Landmark Rule Reform

Raya B. Treiser, Rachel Jacobson, Michael J.P. Hazel, Shannon Morrissey,
Heidi K. Ruckriegle, and Lauren Mercer

293

Implications of Jones Act Changes to the Offshore Energy Industry

Jonathan K. Waldron and Stefanos N. Roulakis

298

Offshore Wind Will Need Support Vessels; What Form Will Be Used?

Keith B. Letourneau and Douglas J. Shoemaker

304

Now. Normal. Next.

Effective Compliance Oversight of Energy Commodity Trading in a Remote Trading Environment

Levi McAllister, Katherine Dobson Buckley, Sarah V. Riddell, and
Pamela Tsang Wu

308

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528
Email: jacqueline.m.morris@lexisnexus.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexus.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexus.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

STEPHEN J. HUMES

Partner, Holland & Knight LLP

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Offshore Wind Will Need Support Vessels; What Form Will Be Used?

*By Keith B. Letourneau and Douglas J. Shoemaker**

The authors discuss the forms available to the offshore wind industry to use when contracting with support vessels and the issues likely to be subject to negotiation and modification.

As the United States develops offshore wind capacity, the need for vessels to support the industry for installation and maintenance will rapidly expand. While it may seem perfectly logical for the industry to adopt the BIMCO WINDTIME form, the SUPPLYTIME 2005 form is more common and generally known to the U.S. service and supply-vessel industry.

In any case, we wholly expect that there will be a good deal of modifications to any form or perhaps use of bespoke agreements as the work comes online. This article reviews the various forms available and looks at particular terms and issues likely to be the subject of specific negotiation and modification.

SUPPLYTIME: THEN AND NOW

The SUPPLYTIME form was first developed in 1975 to meet the rising demand for specialty vessels to support offshore oil and gas exploration and production. This form and its progeny became the leading time-charter terms for offshore-support vessels, and its use has spread beyond the oil and gas industry to include cable and pipe laying, seismic work, anchor handling, surveying, ROV and dive support, and other offshore and near-shore construction work.

Although there is a 2017 version of the SUPPLYTIME, it has not been widely adopted in the United States, particularly since it came out after the substantial decrease in offshore oil and gas activity. (Interestingly, the drafting committee that developed the WINDTIME form differed from the SUPPLYTIME 2017 committee, and the difference is noticeable.)

As for the U.S. offshore marine service and support industry, it appears that the SUPPLYTIME 2005 version remains prevalent at this time. (Obviously, any SUPPLYTIME form used with respect to the offshore wind industry would

* Keith B. Letourneau, a partner in Blank Rome LLP and co-chair of the firm's Maritime & International Trade Practice Group, focuses his practice on maritime and energy transactions and litigation matters. Douglas J. Shoemaker, a partner in the firm and a member of the firm's Maritime Emergency Response Team, focuses his practice on complex maritime transactions and litigation. Resident in the firm's office in Houston, the authors may be contacted at kletourneau@blankrome.com and dshoemaker@blankrome.com, respectively.

need to be logically amended to change oil and gas industry references to the appropriate wind-industry terms. For example, the term “offshore unit” in the SUPPLYTIME 2017 form is defined as “any vessel, offshore installation, structure and/or mobile unit used in offshore exploration, construction, pipe-laying or repair, exploitation or production.” There also are repeated references to the defined term “well.”)

At the heart of the SUPPLYTIME form since the 1989 version came into play is a “knock-for-knock” indemnity provision, allocating liability regardless of fault with each party indemnifying the other for the injury or death of its personnel and for the loss of or damage to its property—without recourse.

Initially, this was a difficult concept to accept in the United States—the idea that a party must indemnify another for a loss even though the loss was caused solely by the fault of the other party was a hard pill to swallow. However, in practice, the industry found it far more efficient for the parties to provide insurance for their own people and their own property and simply name the other party as an additional assured, rather than litigate every loss with each party claiming the other was at least partially to blame. The knock-for-knock indemnity concept is particularly efficient where a project involves a number of offshore contractors and all the parties agree to the same allocation of liability.

SUPPLYTIME VERSUS WINDTIME

The WINDTIME form, introduced in 2013, was primarily intended for offshore wind farm personnel transfer and support vessel services and was largely adopted from the SUPPLYTIME 2005. Key differences from the SUPPLYTIME 2005 include:

- The WINDTIME form expressly encompasses an indemnitee’s gross negligence, as well as simple negligence in the knock-for-knock indemnity obligations, but excludes intentional or willful misconduct, while the SUPPLYTIME 2005 form only expressly addresses the indemnitee’s negligence;
- The SUPPLYTIME 2005 form is more owner-friendly concerning cancellation with no provision for the recovery of damages; and
- The WINDTIME form includes a broader waiver of consequential damages encompassing subcontractors.

It has been reported that the committee drafting the WINDTIME form initially considered, but quickly abandoned, the idea of including contract terms appropriate for installation vessels. We understand that industry practices for installation vessels were considered too varied and complex to reach

consensus. Thus, the better option for installation vessels may be a SUPPLY-TIME 2005 particularly modified to allocate liabilities and responsibilities, or a bespoke contract.

GENERAL MARITIME AND STATE LAWS

As noted above, important differences between the SUPPLYTIME 2005 and the WINDTIME are the express inclusion of indemnity for gross negligence and the express exclusion of willful misconduct. This gets into an interesting issue under U.S. law in that the U.S. general maritime law varies from certain state's laws as to whether a party may be indemnified for its own gross negligence. Under the U.S. general maritime law, a party may agree to indemnify another party for its own negligence, provided the terms are clear and unequivocal.

With respect to state law, for example, under Virginia law, an agreement to indemnify a party for its own negligence is invalid. Under New York state law, the contract may validly require such indemnity, except for agreements concerning onshore building construction or maintenance.

While the SUPPLYTIME and WINDTIME forms each include an option to apply U.S. general maritime law, a court or arbitration panel may look to analogous state law if no "entrenched federal maritime law" exists. We believe U.S. maritime law is well entrenched with respect to indemnity for vessel operations such that state law should not be a factor, but we note that if the loss occurs onshore or implicates non-maritime activity or only involves a vessel tangentially, the knock-for knock indemnity may not be valid.

Regardless of which form is used, the parties and their counsel should give careful consideration to the allocation of responsibility for claims.

CHARTERER RECOURSE AND CONSEQUENTIAL DAMAGES

Another key difference between the WINDTIME and SUPPLYTIME 2005 forms is that the WINDTIME is more charterer-friendly with respect to delivery and cancellation.

Under the SUPPLYTIME 2005, if owners fail to deliver the vessel by the cancellation date and charterers elect to cancel, charterers have little or no recourse against owners—generally similar to "blue water" time charters. This may be appropriate where other vessels are available to undertake the work, but could be problematic for specialty vessels where alternatives are limited.

Under the WINDTIME, if it is clear that owners will be unable to deliver by the cancellation date, owners must notify charterers in writing, stating the date by which they will be able to deliver the vessel, and charterers have three days to cancel the charter party. The WINDTIME form includes optional

clauses concerning remedies for cancellation under these circumstances, ranging from “drop hands” (similar to the SUPPLYTIME form) to reserving rights for claims and to liquidated damages up to a cap—with the default being the third option and the cap being 20 percent of total hire for the agreed period. We expect this may be a particularly fraught issue ripe for negotiation and potential dispute considering the time-sensitive nature of most wind farm projects.

The WINDTIME form includes a broader waiver of consequential damages than provided in the SUPPLYTIME 2005, but excludes the waiver’s application to several clauses, including bunker liability, knock-for knock indemnity, and pollution. As with the offshore oil and gas industry, limitation of consequential damages will be particularly important to owners in large complex offshore-construction projects related to wind-energy production, likely impacting substantial flow-down-contractual obligations. Regardless of the form in use, we highly recommend careful consideration of potential liability for consequential damages, and, if the WINDTIME form is used, note the default provisions.

FINAL THOUGHTS

Notwithstanding the foregoing, we expect that many of the parties involved in the fledgling U.S. offshore wind industry will come from the U.S.-based offshore oil and gas industry, but some may be experienced players from the more advanced European wind industry and more knowledgeable of its developed practices. Whether those practices and contractual terms will readily translate to work in U.S. waters and the application of U.S. law will need careful consideration.

At this time, it appears to us that a modified version of the SUPPLYTIME 2005 may be the most appropriate for offshore wind installation and maintenance operations. Regardless of the contract form, the parties will need to pay particular attention to the choice of law and the choice of forum and how those choices may impact the allocation of responsibility and liability between the parties.

As with any contract, it is impossible to anticipate every circumstance that may arise, but we expect the experience gained from the offshore oil and gas industry may provide a good foundation for offshore wind operations and contractual terms.