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When: **June 9-11 , 2015**
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The Department of Energy (DOE) Wind and Water Power Technologies Office recently released a report examining the potential for wind energy to generate electricity in all 50 states. The report addresses both the current state of wind production in the US and future issues. **More »**

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TRANSACTIONAL
Government Relations

The "Preliminary Agreement" – Framing or Frustrating the Deal?

Kathryn Marietta

Preliminary Agreements[1] come into play when structuring and negotiating a broad spectrum of transactions and agreements. They are embraced by many market participants and are, at best, tolerated by others. They have been the source of litigation and, in some cases, very well-known litigation.[2] A Preliminary Agreement manifests itself in many ways, ranging from a valuable nonbinding tool to frame a proposed transaction; to a set of principles agreed by representatives of counterparties who do not ultimately structure and negotiate a deal; to an unintended legally enforceable agreement with numerous ambiguous or missing terms; and, finally, to an intentionally enforceable agreement. What is certain is that the Preliminary Agreement is a widely accepted way to progress many commercial arrangements. They often bring focus to a proposed transaction, identify terms that may be deal breakers, provide a sense of commitment from the parties, and establish a timeframe in which the parties intend to finalize a negotiation. On the other hand, Preliminary Agreements can prove to add a layer of additional cost, cause the parties to get tied down to prospective deal terms set out in the Preliminary Agreement, and (in some jurisdictions) inadvertently create a duty to negotiate in good faith. Preliminary Agreements are commonly and successfully used for LNG sales, acquisition or divestiture of stock or assets, long term commodity (such as natural gas) sales, joint ventures, and many others. If common, and often fundamental, provisions are clearly documented and understood by the parties, a Preliminary Agreement will serve as a useful framework for structuring and negotiating a transaction, as opposed to a document that frustrates a definitive agreement of the parties.

Is it binding in whole or in part? Often the commercial (and some legal) terms of a Preliminary Agreement are not intended to be binding, but are intended to serve as the basis for future negotiation. However, in some circumstances, the parties elect to make the agreement binding in the event a definitive agreement is not achieved. There is rarely an agreement that is truly not binding at all – drafters clarify in the document the binding nature of various provisions. If the commercial terms in a Preliminary Agreement are intended to form the basis of future negotiation or serve as principles in future negotiations, such provisions are typically made expressly non-binding in the Preliminary Agreement. In these circumstances the provisions addressing the non-binding nature of the agreement, governing law, exclusivity (if applicable), term, confidentiality, assignment, notices and certain other miscellaneous provisions are, and should be, obligations of the parties to the agreement. Under some laws, in addition to concise language in the body of the Preliminary Agreement, it is important to also state at the top of the agreement that it is "Subject to Contract". In some jurisdictions the Preliminary Agreement will create an obligation to negotiate in "good faith". When a Preliminary Agreement is intended to be binding, it should be explicitly stated to avoid future disputes over the agreement's nature. In this case, it is critical that the agreement include the key commercial terms in sufficient detail that they are not left to later interpretation. It is also critical that governing law and sufficient non-commercial (legal) terms are also included to ensure some degree of certainty in interpretation and enforceability should there be a future

dispute.

Is there an element of exclusivity? In some circumstances, such as an acquisition and divestiture, one motivating factor in entering into a Preliminary Agreement is to establish a period of exclusivity of negotiations. Both the seller and potential buyer are often highly motivated to "get the deal done" during the exclusivity period. The seller has agreed to deal exclusively with the potential buyer and the buyer has a limited period of time to reach agreement without competition. The terms surrounding exclusivity must be clearly established in the agreement and the exclusivity provision is made an enforceable clause in the agreement. Because of the exchange of sensitive information, costs involved, and discussion of commercial terms, the parties often discuss and document the circumstances in which an exclusivity period may be extended by one or both parties.

Is the term clearly defined? If the Preliminary Agreement is only partially enforceable (non-commercial terms and exclusivity, if applicable) a clearly defined term should be included. Typically if the parties fail to reach a definitive agreement by a specified date, the Preliminary Agreement will terminate. It is important that a specific termination date be included so each party to the Preliminary Agreement knows when the arrangement ends.

What are the not so obvious pitfalls in drafting? Negotiate in "good faith"? Detrimental reliance? Some legal jurisdictions impose an obligation to negotiate in "good faith" under a Preliminary Agreement. Despite a drafter's best efforts in making commitments under a Preliminary Agreement non-binding, seemingly harmless provisions that involve "good faith" can become litigated provisions. It is always best to specifically disclaim a duty to negotiate in good faith when drafting a Preliminary Agreement. The creation of specific milestones to be achieved under a Preliminary Agreement has resulted in an obligation to achieve them based on good faith negotiations if certain conditions have been met. If a party is required to perform certain actions under a Preliminary Agreement, consider whether a risk has been created that may give rise to a claim of detrimental reliance or promissory estoppel. Again, understanding the legal regime that applies to a particular Preliminary Agreement is critical.

What are the financial arrangements? Break-up fees? Costs and Expenses? Typically, a Preliminary Agreement will not create financial obligations among the parties. Each participant assumes responsibility for all costs and expenses it incurs in connection with the matters contemplated in the Preliminary Agreement. It is important to contractually obligate the parties in this regard as it minimizes the chance for a claim of detrimental reliance or promissory estoppel if the deal does not progress to a definitive agreement. Explicit provisions setting out this responsibility make it clear that each party was aware of its responsibility for its expenses, whether or not the parties are successful in reaching a definitive agreement. There are a couple of circumstances where the parties do intend to incur financial obligations under the Preliminary Agreement. This is seen when an agreement includes break-up fees or when the Preliminary Agreement is a limited "notice to proceed" with a specified scope of work (*e.g.*, long lead items, preliminary engineering, etc.). If there are break-up fees or an authorized expenditure, the terms surrounding (and limiting) payment obligations should be clear, including the specific work scope that the payment is intended to cover. When contemplating break-up fees, the parties may elect to choose between a compensatory or a liquidated damages approach, depending upon whether one party may incur unusual or significant costs and expenses in connection with the negotiation. Anytime financial obligations are contemplated, a definitive maximum cap on liability and total commitment should be explicitly documented and the Preliminary Agreement should expressly state who has title to items purchased should a definitive agreement not be achieved.

What is the impact of the Confidentiality provision? Some parties execute numerous Preliminary Agreements as they investigate new business ventures. This practice could result in an inadvertent restriction on pursuing a similar transaction with a different counterparty. Depending on the nature of the business and underlying transactions, this practice may create future conflicts with respect to an asset or transaction. In the upstream oil and gas sector for instance, agreed restrictions on use of confidential information in a prior transaction could frustrate a deal with a future counterparty who also has an ownership interest in an asset. In drafting the confidentiality provision, care must be taken not to restrict a party's ability to evaluate an asset in connection with a prospective opportunity.

What are the benefits? When properly drafted, a Preliminary Agreement can provide significant upside to a proposed transaction. Preliminary Agreements are often used to bring focus to the early stages of a negotiation. The parties are able to determine early on whether there are deal breakers that cannot be resolved. The period during which a Preliminary Agreement applies can also be a time when the companies and negotiating teams develop a working relationship that enhances trust in the negotiation process and enhances the commitment of the parties to each other to work towards final agreement. In some industries or jurisdictions the Preliminary Agreement is so customary that the thought of moving forward without one creates an insurmountable obstacle to commencing negotiations.

Conclusion. If a Preliminary Agreement is properly drafted it very well may be the document that frames a transaction and paves the way for finalizing a transaction. Frustration results when critical provisions of a Preliminary Agreement are not well documented or well thought through. The agreement must clearly document its non-binding nature if that is the intention of the parties. Each party must understand the expense of preliminary negotiations and allocation of the costs and expenses.

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[1] For purposes of this article, the term "Preliminary Agreement" will be used as a reference to a letter of intent, a heads of agreement, a memorandum of understanding, and other similar agreements that are intended to pre-date a more formal contractual arrangement.
[2] Most notably, *Texaco, Inc. v. Pennzoil, Co.*, where a Texas jury found that Texaco had interfered with a Memorandum of Agreement between Pennzoil, Co. and Getty Oil, and awarded Pennzoil damages of $10.53 billion.

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Recent Maritime Cases Illustrate the Different Legal Risks Involved with Conducting Offshore Oil and Gas Operations

Andrew M. Stakelum

In May 2015 a U.S. District Court and U.S. Court of Appeals each issued opinions that address important legal issues concerning risk management in the offshore energy industry. In *Marquette Transportation Co. Gulf-Inland, LLC v. Unknown Potential Claimants*, the District Court for the Southern District of Texas examined whether an indemnity provision in a towing agreement encompassed claims for gross negligence claims and, if so, its validity in light of public policy considerations. 2015 WL 2151773 (S.D.Tex. 2015); Case 13-cv-00054. In *Alexander v. Express Energy Svcs. Operating Co., L.P.*, the U.S. Court of Appeal for the Fifth Circuit addressed whether an injured platform worker qualified as a seaman under the Jones Act, who would be entitled to assert much more lucrative claims against his employer. 2015 WL 2074244 (5th Cir. 2015); No. 14-30488. Each case provides an important reminder of how offshore oil and gas operations implicate very different risks from onshore operations.

1. **Indemnity for Gross Negligence Requires a Case by Case Analysis Under General Maritime Law**

Indemnity provisions are now standard in almost every offshore service agreement. When the indemnity obligations are mutual, they are often referred to as a "knock for knock" obligation. In these instances each party typically assumes the risk of injury or loss to its own personnel or property, as well as pollution emanating from its own equipment or vessels. By assuming risk based on the number of one's own company personnel or equipment (as opposed to the fault of one party or the other), a risk manager is better able to quantify total risk and manage that risk. Courts, however, have historically struggled to require a party to indemnity another for the other's gross negligence both due to the perceived inequities and potential public policy concerns.

In *Marquette Transp.*, a Marquette employee sustained personal injuries when he allegedly tripped over a broken wire on the deck of an American Commercial Lines ("ACL") barge and fell overboard. Marquette was towing the ACL barge pursuant to a towing agreement. The employee asserted claims against Marquette and ACL for personal injuries alleging, among other things, that ACL was grossly negligent. ACL sought to enforce the "knock for knock" indemnity provisions requiring Marquette to indemnify ACL for injuries to Marquette's employees regardless of fault. Marquette accepted the indemnity tender with respect to the negligence claims, but refused to indemnify ACL for its alleged gross negligence arguing that the terms of the indemnity provision did not encompass claims for gross negligence and that, even if so, such indemnities are against public policy.

The indemnity provision at issue did not expressly cover claims for gross negligence; however, it covered "all

claims … regardless of how caused" even if caused by the "negligence or fault [of ACL]… howsoever caused." Under the general maritime law, an indemnity clause should be interpreted to cover "all losses which reasonably appear to have been within the parties' contemplation." *Id*. (*citing Weathersby v. Conoco Oil Co.*, 752 F.2d 953, 956 (5th Cir. 1984)). Relying on prior case law interpreting similarly broad language, namely *Energy XXI, GoM, LLC v. New Tech Eng'g, L.P.*, 787 F.Supp. 2d 5490, 609 (S.D. Tex. 2011), the court found this language sufficiently broad to include claims for gross negligence.

The *Marquette Transp*. court further addressed the extent to which the indemnity clause could be enforced for gross negligence. Citing Judge Barbier's opinion in the *Deepwater Horizon* matter, the court found the indemnity for gross negligence invalid and against public policy to the extent ACL sought indemnity for *punitive damages*; but valid as to any claim for compensatory damages.

In finding the indemnity valid for compensatory damages, the court noted that the towing agreement's mutual, *i.e.* "knock-for-knock", indemnity obligations created an incentive for each party to avoid grossly negligent conduct and did not incentivize poor conduct. Moreover, both Marquette and ACL are large, sophisticated marine transportation entities with no evidence to suggest unequal bargaining power.

It should be noted that a court applying another state's law may have reached the opposite conclusion. Texas, for example, requires that an indemnity provision expressly state in specific terms that indemnity is owed for losses caused by the indemnitees own negligence or gross negligence. This express negligence rule combined with requirements that any indemnity provision be conspicuous and apparent on its face comprise the Texas fair notice requirements, which have led courts to strictly construe some indemnity provisions. Additionally, the Texas Supreme Court has recognized that the parties' freedom to contract has limitations casting doubt whether any indemnity for gross negligence could be enforceable. *See Zachry Construction Corp. v. Port of Houston Authority of Harris County*, 449 S.W. 3d 98 (Tex. 2014).

The *Marquette Transp*. case illustrates that even under the general maritime law, indemnity for gross negligence is not absolute. Circumstances may arise where because of the nature of the parties and obligations assumed by each, an otherwise valid gross negligence indemnity obligation may be voided for public policy concerns.

2. **Seaman Status Turns on Time Spent Working on a Vessel—Not Time Spent Performing Work that Required the Use of a Vessel.**

Whether an employee qualifies as a seaman under the Jones Act, 46 U.S.C. §30104 *et seq.*, can have significant implications to a risk management program. An injured seaman has significantly broader rights against an allegedly negligent employer than non-seaman, who is generally restricted to state worker's compensation or Longshore and Harbor Workers' Compensation Act (LHWCA) benefits.

A Jones Act seaman has the right to bring a negligence based suit against his or her employer in the forum of their choosing, with no liability cap on claims for pain and suffering, medical expenses, and lost past/future wages. A seaman is also entitled to maintenance (living stipend) and cure (medical care), which an employer owes regardless of who is at fault in causing the alleged injury. The failure to timely provide maintenance and cure benefits exposes an employer to claims for punitive damages and attorneys' fees.

Because of the very different risks involved with employing seamen, an employer must often turn to specialty marine policies and insurers, *e.g.*, Maritime Employers Liability (MEL) policy or Protection & Indemnity Clubs, to insure against these risks. Thus, the potential that oil and gas workers may qualify as Jones Act seamen both significantly impacts a company's risks and requires additional risk management tools.

To qualify as a seaman, a worker must prove that he contributed to the function of a vessel or to the accomplishment of its mission and that he was assigned permanently to the vessel or spent a substantial part of his total work time—30%--aboard the vessel or identifiable fleet of vessels. *Chandris, Inc. v. Latsis*¸ 515 U.S. 347 (1995). Some offshore workers, such as roustabouts and floorhands aboard a drillship or Mobile Offshore Drilling Unit, clearly qualify as seaman because the installations from which they work are vessels. Other

offshore workers, such as those working on fixed production facilities, are not seaman because they have no connection a vessel. Still others because of the nature of their work fall somewhere in the middle and the issue of seaman status can be hotly contested.

The *Alexander* case provides a common example of a worker whose assignments require him to spend time aboard both a vessel and fixed platform. The plaintiff was a lead operator for the defendant for an offshore plug and abandonment and platform decommissioning contractor. He was injured while performing work aboard a small platform that required the assistance of a lift boat positioned adjacent to the platform.

The *Alexander* plaintiff argued that since 35% of his assignments involved the use of a lift boat to assist in performing his work—a percentage not in dispute—he satisfied the temporal requirement to qualify as a Jones Act seaman. The plaintiff argued that only the participation of a vessel in a particular job was needed for that work to count towards his 30% temporal threshold. The defendant argued that a worker's connection to a vessel must be more substantive and that the proper inquiry was whether this plaintiff actually spent 30% of his total work time *on the adjacent lift boat*. The Fifth Circuit agreed with the defendant finding that proximity to a vessel during platform based assignments was insufficient. A plaintiff must prove that he spent at least 30% of his time working *on a vessel* to qualify as a seaman.

Determining whether an oilfield worker qualifies as a seaman can be complicated—especially where a worker is not permanently assigned to a particular installation but is dispatched on an as needed or per job basis. The inability to clearly classify some workers adds one more variable to the already complicated task of managing risk in the offshore energy industry.

3. **Conclusion**

The *Marquette* and *Alexander* decisions illustrate the different legal risks involved with offshore oil and gas operations. Understanding these differences is an important first step in successfully allocating these risks as part of larger risk management scheme.

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Texas Supreme Court Holds that "Reasonable Certainty" Requirement Applies to Claims for "Lost Market Value"

Jeremiah J. Anderson, William R. Burns, Eric A. Plourde

Texas law is well-settled that lost profits can be recovered only when the amount can be proven with "reasonable certainty." A recent Texas Supreme Court case has made clear that this requirement cannot be circumvented by seeking the lost "market value" of a venture that is determined based on lost profits.

Trial and Appellate Courts Reject Reasonable Certainty Requirement

In *Phillips v. Carlton Energy Group, LLC*, No. 12-0255, 2015 WL 2148951 (Tex. May 8, 2015), Carlton Energy Group, LLC ("Carlton") brought suit against entrepreneur Gene Phillips and other entities for the alleged tortious interference with Carlton's attempts to acquire an interest in an unproven coalbed methane exploration prospect in Bulgaria. Rather than seeking lost profits as damages in the case, Carlton sought the lost "market value" of its interests. Carlton argued it was entitled to the market value of its lost interest in the project and presented expert testimony regarding the fair market value of the investment. Carlton's expert offered three damages models, ranging from $12.54 million to as high as $11.305 billion. The expert estimated fair market value largely by the amount of lost profits. The jury found Phillips liable and awarded $66.5 million in actual damages and $8.5 million in exemplary damages.

On appeal, the First District Court of Appeals in Houston upheld the jury's award. The court of appeals concluded that Carlton had presented sufficient expert testimony and documentary evidence to support a broad range of values for the jury to consider in determining the fair market value of Carlton's interest. It thus held that Carlton was not required to prove any "lost profits" to recover actual damages. The court of appeals concluded that "it was the jury's job, as fact finder . . . to determine the fair market value of Carlton's interest[.]"

Texas Supreme Court Holds Reasonable Certainty is Required

The Texas Supreme Court disagreed and unanimously reversed the damages award as impermissibly speculative because there was no evidence that the amount awarded was "based on objective facts, figures, or data from which the amount of lost profits [could] be ascertained." The Court noted that "[w]hile we have never spoken to whether this requirement of reasonable certainty of proof should apply when lost profits are not sought as damages themselves but are used to determine the market value of property for which recovery is sought, it clearly must." Thus, the Court made clear that the "reasonable certainty" standard applies, and may not be avoided simply by seeking market value damages derived from lost profits, rather than seeking

lost profit damages themselves.

The Court, however, did not categorically reject the prospect of recovery for lost market value in this situation. It concluded that "when evidence of potential profits is used to prove the market value of an income-producing asset, the law should not require greater certainty in projecting those profits than the market itself would." The reasonable certainty requirement thus "should not be used to deny a claimant damages equal to the value the market would have placed on the property." The Court accordingly approved use of a lower market value damages model determined by market indicators, including offers that were made by willing buyers and sellers. The Court then remanded the case for a final determination of damages.

This case reminds us that Texas law is skeptical of lost profits claims arising out of untested ventures, but also establishes that actual valuations made by participants in the marketplace can be used as a "reasonably certain" measure of damages in cases seeking lost market value.

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What Does the UK's New Conservative Government and New Secretary of State for Energy and Climate Change Mean for the UK's Energy Sector?

Nina M. Howell

Introduction

On 8 May 2015 David Cameron's Conservatives won an unexpected majority in the House of Commons, bringing an end to the Conservative-Liberal Democrat Coalition that had been in power since 2010. The Liberal Democrat's Ed Davey, who served as the pre-election Secretary of State for Energy and Climate Change, lost his seat as a Member of Parliament, creating a vacancy for the post of leader of the UK Government's Department of Energy and Climate Change (DECC). On 11 May 2015 David Cameron appointed Amber Rudd, a former investment banker and businesswoman, and Member of Parliament for Hastings and Rye, as the new Secretary of State for Energy and Climate Change.

This article provides an overview of what the election result and the new minister for energy and climate change mean for the UK's energy sector.

Climate Change

In their pre-election manifesto, the Conservatives pledged to continue to support the UK Climate Change Act 2008, which established a framework to develop an economically credible emissions reduction path, and to fight for a global deal on climate change. Unlike many Conservative Members of Parliament who are skeptical of measures to address climate change and anti-renewable energy, the new Secretary of State for Energy and Climate Change has been described as "really green and no nonsense." She was climate change minister for almost a year before the election and is considered to have a strong grasp of the issues and a clear view on how to tackle them. Her objective is to adhere to the UK's overarching carbon targets, while focusing on minimizing costs. It is thought that she is likely to push hard for a deal to cut emissions at the December United Nations summit in Paris.

Nuclear

The Conservatives' manifesto backed a significant expansion in new nuclear. DECC's Policy Paper "2010 to 2015 government policy: low carbon technologies", which was published on the day of the election, stated the Government's aim to have the first new nuclear power stations generating electricity beginning around 2019. The Government is implementing measures to reduce regulatory and planning risks for investors in new nuclear. However the Government faces a number of challenges in the nuclear sector. The first is the further postponement of the plans for nuclear development starting at Hinkley Point in Somerset, a project that is

backed by Amber Rudd. Two new reactors capable of supplying 7% of total UK electricity demand are planned. However, despite £10 billion of financial guarantees, funding is not in place, and there is an apparent reluctance of investors to commit such funding, which has widespread implications for the companies involved (Areva and EDF) and the future of nuclear energy in the UK.

Wind

Controversially, the Conservatives' manifesto pledged to end support for onshore wind power, which provides the cheapest source of renewable energy and had previously received significant Government subsidy. It said: "We will end any new public subsidy for [onshore] wind and change the law so that local people have the final say on windfarm portfolios." The manifesto further noted that onshore windfarms "are unable by themselves to provide the firm capacity that a stable energy system requires." The wind industry has issued pleas for the Conservatives to reconsider their opposition to onshore windfarms.

UK North Sea Oil and Gas

The Conservatives have pledged to continue supporting the development of North Sea oil and gas. The Infrastructure Act 2015 requires the Conservative Government to draw up a strategy to maximize the economic recovery of UK oil. Historically the UK Government has tried to maintain investment in the aging UK North Sea via tax incentives. Recently, largely due to the fall in the price of oil, investment in new projects has fallen and billions of dollars of UK North Sea assets are up for sale. It is widely believed that the Government will have to introduce further bold oil tax changes to inject new life into the battered North Sea.

UK Shale

In recent times the UK Government has been supportive of shale gas development. However public opposition to fracking remains high and there has been relatively little shale gas exploration in the UK to date. The Infrastructure Act 2015 requires the UK Government to assess how the development of shale gas could fit with UK carbon targets. In its election manifesto the Conservatives said they "will continue to support the safe development of shale gas." On the eve of the general election, David Cameron remarked there would be "no dash into [shale gas] technology without the safeguards in place".

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EPA and U.S. Army Corps of Engineers Finalize Rule Expanding Federal Jurisdiction Over Waters and Wetlands

Lewis B. Jones, Adam G. Sowatzka

On May 27, 2015, the United States Environmental Protection Agency and the United States Army Corps of Engineers released a final rule expanding federal jurisdiction under the Clean Water Act. The rule expands on existing law by asserting jurisdiction over **all** tributaries to traditional navigable waters—without regard to the quantity or timing of flow—and by creating a new class of "adjacent waters" that is much broader than the "adjacent wetlands" that are currently regulated.

The final rule redefines the term "waters of the United States," which establishes the jurisdictional reach of all Clean Water Act programs, including but not limited to wetlands (Section 404), stormwater and other discharges (Section 402), and oil spill prevention and response (Section 311).

The initial proposed rule was extremely controversial, generating over 1 million comments and strenuous opposition from many sectors. In response to these comments, the agencies included an important new exemption for stormwater infrastructure, clarified that most ditches and "erosional features" with less than perennial flow are **not** covered, and expanded an exemption for artificial lakes and ponds.

Notwithstanding these and other improvements and clarifications, the final rule unquestionably expands federal jurisdiction while leaving many important questions to be resolved through litigation. For example, because ephemeral tributaries will now be covered but ephemeral "ditches" and "erosional features" will not be, the distinction between these types of drainage features is critical, but the terms "ditch" and "erosional feature" are not defined in the rule.

The new class of "adjacent waters" may also be tested through litigation, especially to the extent the new rule appears to recapture "isolated" waters and wetlands previously exempt. The term "adjacent" is defined very broadly as potentially including all wetlands and waterbodies within the 100-year floodplain. All such waterbodies are included **by rule** if they are within 1,500 feet of the ordinary high water mark of a covered waterbody, and on a case-by-case basis if they are further away.

In sum, the final rule has major implications for any business that develops or alters land—including state and local governments, utilities, energy companies, mining operations, developers, road builders, pipeline operators, reservoir builders, and many others. Some projects that previously would not have required a Clean Water Act permit will now be subject to regulation; and some that could have benefited from expedited permitting procedures will no longer qualify.

Furthermore, given the fact that this rule concerns the jurisdictional reach of all Clean Water Act programs, it has significant implications for stormwater and MS4 permitting. While the rule does provide an exception for certain stormwater features, municipalities with MS4 permits must now determine which stormwater conveyance structures are jurisdictional and how to incorporate these features into their permit programs such as monitoring and inspections.

The new rule will take effect 60 days after it is published in the Federal Register. Jurisdictional determinations associated with existing permits and with **completed** permit applications and pre-construction notifications will generally not be affected.

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June 2015

REGULATORY
Government Relations
Department of Energy Report Examines Wind Energy's Potential
Lauren M. Donoghue

On May 19, the Department of Energy (DOE) Wind and Water Power Technologies Office released a report examining the potential for wind energy to generate electricity in all 50 states. Wind energy currently provides about 5% of the nation's electricity generation, but DOE believes that wind energy can be deployed at higher levels once the next generation of larger, taller turbines in development hits the market. DOE notes that the report supports President Obama's "all-of-the above" energy strategy.

The report, "Enabling Wind Power Nationwide" (available at: energy.gov/sites/prod/files/2015/05/f22/Enabling-Wind-Power-Nationwide_18MAY2015_FINAL.pdf), describes the current state of wind technology and details future pathways for technical innovation, while recognizing that addressing environmental, economic, and human use considerations are necessary in order to realize the nation's full wind power potential and value. Wind generation has more than tripled in the United States in just six years, which is not surprising given that the cost of wind power has decreased 58% since 2009, according to the American Wind Energy Association (AWEA).

On wind energy, DOE is "focused on expanding its clean power potential to every state in the country," said Energy Secretary Ernest Moniz. "By producing the next generation of larger and more efficient wind turbines, we can create thousands of new jobs and reduce greenhouse gas emissions, as we fully unlock wind power as a critical national resource." The wind energy industry currently operates in 39 states, but taller wind turbines, currently under development by DOE and their private sector partners, would significantly expand wind energy development particularly in the Southwest, Northeast, and states surrounding the Ohio River Valley and the Great Lakes.

Several federal agencies already have initiatives underway to support efforts to enable wind power nationwide, including the Federal Aviation Administration (FAA)'s lighting guidelines for wind turbines and DOE's Funding Opportunity Announcements targeting research and development solutions for taller towers and larger rotors.

DOE's wind energy report was released in conjunction with Secretary Moniz's appearance at AWEA's annual conference in Orlando, Florida. It follows the release of DOE's Wind Vision report (available at: www.energy.gov/sites/prod/files/WindVision_Report_final.pdf), which provided a roadmap for reducing wind costs, expanding developable areas, and increasing economic value for the nation.

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