

A Snapshot Of Renewable Energy Project Litigation



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Law360, New York (December 06, 2012, 10:23 AM ET) -- At the beginning of 2011, we began tracking current litigation related to solar energy, wind energy and transmission projects in southern California. Since then, we expanded our coverage to the western United States,[1] including historical coverage dating as far back as 2004. We have also included other forms of renewable energy projects, including biomass, geothermal and wave energy. After more than a year-and-a-half of tracking and almost 10 years of data, we present some observations on the litigation landscape relating to renewable energy development.

Although successful litigation challenges to renewable energy project approvals are relatively infrequent, they are not unprecedented. Even if litigation does not result in the challenger prevailing, several major renewable energy projects have experienced substantial delay and redesign, sometimes under the continuing supervision of a court. These examples demonstrate that developing a strong administrative record to support a project approval is critical to (i) managing risk for both for developers, investors and financiers; (ii) avoiding or controlling the potential for delay and (iii) succeeding against or even deterring litigation.

The Data

Our dataset includes 34 renewable energy projects, which have generated over 60 lawsuits, from 2004 to the present. There are 14 solar energy projects, 11 wind energy projects, three biomass projects, two geothermal projects, two transmission line projects,[2] one wave energy project and one challenge to the U.S. Department of Energy's federal loan guarantee program implicating renewable energy projects across the United States.

Although most projects only experienced one lawsuit, some projects were challenged by multiple actions. Three projects had six lawsuits each filed against them, and another four projects had four lawsuits each filed against them. Currently, 18 projects have ongoing litigation, eight resolved through settlement, and eight have reached a final disposition by a court.[3]

The data is heavily weighted toward California (24 projects), where the bulk of litigation is occurring, but also includes challenges in Nevada, Oregon, Arizona, Montana, Idaho, Hawaii, the District of Columbia (federal loan guarantee program) and Washington state (three projects). The data does not include projects that were challenged only administratively.

Nineteen projects were subject to litigation in a state forum only, whereas 10 projects saw only federal litigation. Five projects — one solar, two wind, one transmission project and one biomass project — were subject to litigation in both state and federal courts. Of the 45 “fast-track” renewable energy projects designated by the Bureau of Land Management,[4] only 12 have so far encountered litigation — just over 25 percent.

Types of Claims[5]

Not surprisingly, the most common claim in litigation involved state analogues to the National Environmental Policy Act (NEPA) (primarily the California Environmental Quality Act (CEQA), but also including other states’ NEPA-analogues), followed closely by NEPA claims on the federal side.

Other substantial litigation claims brought included the Federal Land Policy and Management Act, state and local planning and land use laws, claims based in regional land use management plans such as the California Desert Conservation Area Plan (which is related to the FLPMA), the National Historic Preservation Act and the Endangered Species Act.

Preliminary Relief

To date, preliminary relief in the form of a temporary restraining order or preliminary injunction has seen relatively little success. Our data includes seven motions for temporary restraining order (TRO), none of which were successful. Five were denied within one week of the motion, one was withdrawn, and one was denied 89 days after initial filing. However, this motion involved supplemental briefing, and in this respect, the motion practice resembled the longer-lasting briefing for motions for preliminary injunction.

The data also included 13 motions for preliminary injunction.[6] Ten were denied in an average of about six weeks and one was withdrawn. On a substantive level, the importance of renewable energy is increasingly being cited by the courts as a factor supporting the public interest weighing against the issuance of preliminary relief, and a balance of harms favoring project proponents (due to the relatively large up-front investments in equipment required for these projects, and construction costs pumping hundreds of millions of dollars into local and regional communities). Delay has also worked against plaintiffs’ success.[7]

Two examples, however, were successful in either halting or delaying the proposed development through preliminary relief — in one case for over a year and in the other case for a far longer period of time (which may have contributed to the sale of the project to another developer and the project’s significant reconfiguration). Both cases highlight the importance of close coordination with the government agency and third-party stakeholders during the administrative process.

In *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Department of the Interior*,[8] the court granted the motion for preliminary injunction after concluding that the BLM did not adequately consult with the Quechan Tribe before approving the Imperial Valley Solar Project. The lawsuit was subsequently dismissed without prejudice due to changes in the design of the project that will require a new federal approval.[9]

In a similar state court case from Montana, *Jefferson County v. State Department of Environmental Quality*,[10] the superior court enjoined the State Department of Environmental Quality from releasing the draft EIS for the Mountain States Transmission Intertie project for failure to adequately consult with county

officials in accordance with the state Environmental Policy Act. Although the superior court's judgment was ultimately reversed on appeal and the action dismissed, thereby allowing the project to move forward, the lower court's order of injunction was in place for more than a year. The draft EIS for the project, which was originally going to be released in the summer of 2010, was not released until early in 2012.

Both Quechan Tribe and Jefferson County demonstrate that a project developer should be proactive in engaging both the agencies involved and interested stakeholders. The success of preliminary relief in these two cases was due to the perceived legal deficiency in the consultation efforts of the government agency with another stakeholder. That said, lawsuits have been avoided though both pressing the agencies to timely and substantively complete consultation obligations as well as proactively addressing other stakeholder concerns, either through influencing the agencies or through side agreements with the stakeholders. Managing these relationships as a third party can be challenging, but is nevertheless necessary, and often results in better defined projects.

Duration of Litigation[11]

Where projects proceeded beyond the preliminary relief stage, the project litigation lasted about 400 days, including litigation currently ongoing. About 60 percent of projects involved some form of review of a lower court's decision.[12] The type of energy project did not appear to correlate with the likelihood of an appeal — nine of 14 solar energy projects and seven of 11 wind energy projects involved appeals.

Based on our data, one might expect litigation to last as short as four to six months (depending on jurisdictional and procedural requirements, for example, if state law provides for expedited review for particular projects) or as long as several years.

Conclusions

As noted above, with limited exception, these lawsuits have been unsuccessful in halting renewable energy projects. However, three projects in our coverage were stopped indefinitely: a wave energy project in Washington, a wind project in California and a wind project in Idaho. These three examples further highlight the importance of proactively managing the political and administrative process (and in particular, managing relationships with various stakeholders) in order to avoid lost opportunities and wasted time.

The Makah Bay Wave Energy Project was opposed (and sued) by the state of Washington when the developer obtained its federal approval before obtaining concurrence from the state. The approval of the Goshen South Wind Project was reversed on judicial review due to procedural deficiencies in the approval process. The approval was a split (4-3) vote, and the court held that two of the supporting commissioners should have recused themselves for disclosed conflicts of interest, as required by state law. In addition, the conditions of approval involved an impermissible delegation of authority from the legislative body to a planning committee. The developer subsequently moved the project to a neighboring county. Finally, the Pahnamid Wind Project in Kern County, Calif., was canceled by the developer as litigation began, after active opposition by local residents, the director of the county planning department and a county supervisor.[13]

Even when project is not "killed," substantial delays due to litigation have also occurred. One solar energy project has been substantially delayed due to the applicant's voluntary surrender of the project's permit, as part of a settlement agreement to conduct environmental review through an environmental impact report. One transmission project was substantially delayed due to an adverse lower court judgment that was subsequently reversed on appeal.[14] Three other projects — solar energy projects involving nine lawsuits — underwent redesign after the initiation of litigation, and litigation remains pending but stayed or otherwise inactive but not terminated.[15] Finally, we note that federal approvals are subject to a relatively lengthy statute of limitations under federal law (six years). Thus, litigation risk exists not just immediately after project approval, but potentially for years after.

That said, a number of these projects, including one that was involved in substantial litigation,[16] have already begun operation. Similarly, several projects are now under construction, including two projects currently in litigation.[17] Risk can never be completely eliminated, but it can be managed and mitigated by a robust administrative record.

Although certainly not a guarantee against a lawsuit, thoughtful, proactive and strategic engagement in administrative proceedings can help address the concerns of potential project opponents, thereby improving the environmental review and documentation that will be used to support the project's approval in the event of litigation. Even where it appears that opposition to a project may be relatively light, we encourage developers and those involved in financing renewable energy projects to fully engage in the administrative process with a robust and knowledgeable team of consultants and attorneys, mindful that post-approval litigation is always a possibility, even years after the project is approved.

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[1] California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Hawaii and Alaska.

[2] Challenges to a renewable energy project that included a high voltage generation intertie were classified as solar energy project, wind energy project, etc. and not as a transmission line project.

[3] Projects with multiple lawsuits, some of which were settled and the remainder litigated to final disposition, were classified as having reached final disposition rather than having resolved by settlement.

[4] See US Bureau of Land Management, Renewable Energy Project Approved Since the Beginning of Calendar Year 2009, http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/Renewable_Energy_Projects_Approved_to_Date.html (last updated Aug. 7, 2012); US Bureau of Land Management, 2012 Renewable Energy Priority Projects, http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/2012_priority_projects.html (last updated June 21, 2012).

[5] This breakdown is by lawsuit, as opposed to by project. There are 11 types of claims listed due to a three-way tie for ninth place.

[6] Motions for TRO or preliminary injunction were categorized as motions for preliminary injunction, except where the court ruled on two forms of relief separately.

[7] *Backcountry Against Dumps v. Abbott*, No. 10-cv-1222 BEN (BGS), 2011 U.S. Dist. LEXIS 90163, at *19–20 (S.D. Cal. Aug. 12, 2011) (“The development of renewable energy is a national energy priority. . . . Furthermore, . . . [m]aintaining jobs is in the public interest.”), *aff’d*, *Protect Our Cmty. Found. v. U.S. Dep’t of Agric.*, 473 Fed. Appx 790 (9th Cir. 2012); *W. Watersheds Project v. Salazar*, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *67–68 (C.D. Cal. Aug. 10, 2011) (“[S]everal important factors weigh against injunctive relief: (1) this project is expected to contribute to state and federal goals for the increased use of renewable energy and the reduction of greenhouse gas emissions; (2) BrightSource has already expended more than \$712 million constructing the project to date; (3) the project’s success includes a substantial socioeconomic impact upon hundreds of workers and state revenues and (4) Plaintiff delayed in bringing its

motion for a preliminary injunction until after the project was well underway.”), aff’d, 692 F.3d 921 (9th Cir. Aug. 10, 2012); *Desert Protective Council v. U.S. Dep’t of the Interior*, No. 12-cv- 01281-WQH-MDD, at 9 (S.D. Cal. Sept. 28, 2012) (order denying motion for preliminary injunction) (“In this case, the grant of an injunction halting construction of the OWEF project would have immediate negative impact on funding to complete the project and immediate negative economic impact on jobs in the local economy and revenue for the government. The federal government and State of California have significant interests in developing renewable energy resources that would reduce reliance on fossil fuels while increasing domestic energy security. Finally, Plaintiffs delayed filing the instant motion for preliminary injunction until months after construction began and the filing their initial complaint in this case.”) (internal citations omitted).

[8] No. 10-CV-2241-LAB-CAB (S.D. Cal. Dec. 15, 2010).

[9] For more information, see a previous post on the Latham & Watkins Clean Energy Law Report by Daniel Brunton, Large solar project on Federal land enjoined for BLM's failure to adequately consult Quechan Tribe on historic resources (Nov. 2, 2010), <http://www.cleanenergylawreport.com/environmental-and-approvals/large-solar-project-on-federal-land-enjoined-for-blms-failure-to-adequately-consult-quechan-tribe-on/>.

[10] No. DV 10-0052 (Mont. Dist. Ct. Sept. 8, 2010), reversed and remanded to dismiss, 2011 MT 265, 264 P.3d 715 (2011).

[11] Our measurement of the duration of litigation included any subsequent review by a higher court.

[12] Twenty-one of 34 projects involved appeals.

[13] This lawsuit is a quiet title action to prescriptive use rights to airspace above the former project area.

[14] This is the Jefferson Cnty. case discussed above.

[15] The Calico Solar Project (stayed), Blythe Solar Project (stayed), and Imperial Valley Solar Project (inactive but not terminated), all in California.

[16] The Spring Valley Wind Project in Nevada.

[17] The Ivanpah Solar Electric Generating System and Genesis Solar Project in California.