The 23rd Annual Energy Litigation Conference: Key Takeaways Regarding Construction Litigation Issues on Renewable Projects

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Last week we were lucky enough to attend the Institute of Energy Law's 23rd Annual Energy Litigation Conference in Houston, TX, and hear its unique collection of industry professionals exchange insights and address some of the most pressing challenges and developments in energy law and litigation. Among the standout discussion was a panel titled New Tech, Old Problems: Construction Litigation Issues on Renewable Projects. The panel addressed the legal complexities of renewable project construction at each of the four phases of project development: Contracting, Pre-Construction, Construction, and Post-Construction.

In this article, we'll dive into some of our key takeaways from the panel discussion, elaborating on the advice presented and challenges identified by the speakers as to each phase of project development. While these takeaways are derived from analysis of issues in the renewable project context, they have greater implications relevant to owners and contractors in the construction space at-large.

Contracting

Understandably, much of the panel's advice as to the contracting phase of a renewables project focuses on the risk-shifting devices regularly deployed in owner-contractor construction contracts.

Key Insight: Watch out for who bears the risk for defects in design documents.

The panelists emphasized that developers should watch out for how Chapter 59 of the Texas Business and Commerce Code affects their litigation risk during the contracting phase of a project.

Under Chapter 59 "[a] contractor is not responsible for the consequences of design defects in and may not warranty the accuracy, adequacy, sufficiency, or suitability of plans, specifications, or other design documents provided to the contractor by a person other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants, of any tier." Tex. Bus. & Com. Code Sec. 59.051(a).

Put more simply, where Chapter 59 applies, contractors don't bear the risk of design defects if the design documents are provided by anybody other than the contractor, its agents, or its subcontractors.

However, Chapter 59 does not apply to design-build contracts or engineering, procurement, and construction ("EPC") contracts where the alleged defect is in design documents that the contractor is responsible for. Tex. Bus. & Code Sec. 59.002(c). And it doesn't apply to a part of contract where the contractor agrees to provide input or guidance on design documents. Sec. 59.0002(d).

Chapter 59 also doesn't apply to contracts for the construction or repair of a "critical infrastructure facility" or to contracts with the owner of a critical infrastructure facility or construction or repair of facilities "necessary to the operation of and directly related to" the owner's critical infrastructure facility. Sec. 59.002(b).

That last exception is significant because it could mean that a given renewable energy project is not subject to Chapter 59's design document liability shift. The statute defines "critical infrastructure facility" broadly. For example, it includes "an electrical power generating facility"; oil, gas, and chemical refineries and pipelines; oil storage tanks; oil or gas wellheads and drilling sites; airports; and certain facilities involving liquid natural gas (LNG), natural gas compressors, telecommunications, railroads, transportation fuel, steelmaking, and utility-scale water[1]. But whether the statute applies to a given project needs to be examined on a case-by-case basis.

The applicability of Chapter 59 to projects that don't fit neatly into one of its named categories of "critical infrastructure facility" is an issue ripe for litigation, and developers should be prepared to navigate it with the help of experienced litigation counsel.

Key Insight: The impact of exculpatory clauses can vary from jurisdiction to jurisdiction.

Similarly, the panel advised contracting parties to pay special attention to the language of their respective exculpatory clauses, particularly as to consequential damages waivers. These waivers are usually intended to protect parties from paying damages that result

[1] See Tex. Bus. & Com. Code § 59.001(3).

indirectly from their breach of contract and would not necessarily be incurred by every injured party suffering from breach. For example, consequential damages may encompass lost profits, lost goodwill, interest payments, the results of business interruption, and other indirect losses that flow from a breach.

What constitutes 'consequential' damages as opposed to 'direct' damages, however, can vary from jurisdiction to jurisdiction and court to court. Taking lost profits as an example, a few courts have categorically defined lost profits as either 'direct' or 'consequential' damages.[2] More commonly, courts determine the nature of lost profit damages depending on their role in the contract and ensuing dispute.[3] Thus, while parties deploy consequential damages waivers relatively ubiquitously, a failure to properly account for the variations in what "consequential" damages captures can lead to unintended liability, leaving parties exposed to risks they thought were mitigated by the clause.

As the panel pointed out, consultation with legal experts is useful here to avoid the costly litigation that can flow from a failure to properly account for local statutory language, or the prior court interpretation of terms commonly used in risk-shifting contractual language. On the other hand, once a dispute arises on a project that implicates this risk-shifting language, it becomes doubly important to seek out litigators well-versed in these concepts, both at the pre-filing and post-filing stage.

Pre-Construction

Permitting litigation issues continue to be a significant hurdle for renewable energy projects, often causing delays and increasing costs.

The panelists highlighted two key developments that may make the already demanding permitting process for renewable energy projects even more burdensome – uncertainty regarding judicial review of agency decisions, and growing community opposition to new projects.

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[2] *Compare Moore v. Boating Indus. Ass'ns*, 745 F.2d 698, 717 (7th Cir. 1985) ("Lost profits are considered to be general or direct damages in a breach of contract case ....") *with Fishman Org., Inc. v. Frick Transfer, Inc.*, No. 11–cv–04598, 2013 WL 1655984, at *3 (E.D. Pa. Apr. 17, 2013) ("Lost profits are considered a form of consequential damages.")

[3] *See, e.g., Harris Cnty. v. Pulice Constr., Inc*., 2024 WL 4052762, at *6 (Tex. App.—Houston [14th Dist.] Sept. 5, 2024, no pet. h.) (noting that lost profits can be either direct or consequential, depending on their nature); *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 839 (10th Cir. 2016) (same); *Mentis Scis., Inc. v. Pittsburgh Networks, LLC*, 173 N.H. 584, 590 (2020) (same); *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 650 F. Supp. 2d 314, 322 (S.D.N.Y. 2009) (same).

Key insight: Uncertainty about the future of judicial review of agency decisions might impact permitting litigation.

It's not yet clear how decisions made under the National Environmental Policy Act will be affected by the U.S. Supreme Court's decision in ***Loper Bright Enters. v. Raimondo***, which overturned the ***Chevron*** doctrine shielding federal agencies' interpretations of their own rulemaking authority. Courts may start scrutinizing whether certain NEPA review requirements are strictly authorized by statute, or courts may question the validity of recent administrative rules amending NEPA regulations.

Adding to the uncertainty, there may be an increase in judicial review of final agency determinations. Project proponents (and opponents) could have more opportunity to challenge an agency's final determination that they believe to be legally insufficient.

That much uncertainty could pose a challenge to developers who can't necessarily count on having a clear understanding of how an agency or a reviewing court might interpret a particular statute or regulation.

But it's also possible the ***Loper Bright*** decision won't have a meaningful impact on permitting. The language in the NEPA statute doesn't leave agencies with much room to craft their own interpretation, the Administrative Procedure Act still gives deference to agencies on fact-finding and policy judgments, and agencies still have wide latitude under the Administrative Procedure Act's "arbitrary and capricious" standard which requires only that agency actions must be reasonably explained and rationally connected to the facts found.

Either way, developers should be prepared for judicial review to possibly play a bigger role in permitting litigation.

Key Insight: Community opposition is still a significant hurdle in the permitting process.

The panelists noted that NIMBYs [4] and environmental groups continue to bog down the permitting process. These groups are active in filing lawsuits challenging projects for allegedly failing to comply with environmental standards. For example, wind energy projects have faced litigation over potential impacts on bird and bat populations, while solar projects might be challenged due to concerns about land use and habitat disruption. These lawsuits can delay projects for months or even years, adding uncertainty and financial strain.

To mitigate these issues, developers need to engage in thorough planning and community outreach. Early and transparent communication with stakeholders can help address concerns before they escalate into litigation.

[4] NIMBY stands for "Not In My Backyard" and is used to describe residents opposed to virtually any proposed development in their community.

At the same time, working closely with regulatory agencies to ensure compliance can reduce the risk of legal challenges. By proactively managing these obstacles, renewable energy projects can navigate the permitting landscape more effectively and move more quickly towards successful implementation.

Construction

Key insight: Consider resolving issues as they arise during construction.

When it came to the construction phase of the Project, the panel had one recommendation we found particularly noteworthy—there are some situations where it is advisable for the contracting parties to resolve disputes as they arise on the project, relying on the decision of an independent technical expert or umpire, rather than resolving all aggregated disputes upon completion of the project.

Specifically, where the dispute revolves around a discrete technical issue or interpretation of project specifications and is over an amount the parties are each willing to assume the liability of depending on the independent technical expert's determination, this mid-project dispute resolution process can successfully address issues before they compound.

While relying on a third-party consultant does present additional risks – for example, the expert may come to an interpretation of project specifications that has unforeseeable future impacts on project disputes – the panel suggested that the parties evaluate these additional risks against potential benefits and contract in a way that allows use of an independent technical expert under the right circumstances.

As such, parties to a construction contract should consider the value of resolving disputes during construction as they arise. But this should be done after consultation with an attorney with sufficient understanding of the underlying contract to foresee the ramifications of an expert's decision either way – as the panel noted, these decisions, particularly where they involve interpretation of project specifications, can be precedential for future disputes on the project.

Post-Construction

Key insight: Commit to a uniform dispute resolution plan.

One point the panel made that struck us as particularly important as to post-construction concerns is actually one that necessitates action well before the project documents have been signed: identifying a uniform dispute resolution strategy and ensuring as much uniformity as possible across all agreements in a particular segment.

Matching dispute resolution language across all agreements mitigates the risk of having parallel litigation and arbitration on a specific project, a costly and inefficient development that can

plague complex projects. And it is easy to see how repeat players in a market can benefit from uniformity in approach to dispute resolution – it can provide clarity as to potential liability and, further, gives context to the decisions made during litigation, leading to better decision-making.

Conclusion

The panelists shed light on critical litigation issues and trends shaping renewable energy projects. Among the key impacts discussed were the need to carefully assess who bears the risk for defects in design documents, the varying jurisdictional impact of exculpatory clauses, and the potential effects of uncertainty surrounding judicial review of agency decisions on permitting litigation. Community opposition continues to be a significant hurdle in the permitting process, while addressing issues as they arise during construction and committing to a uniform dispute resolution plan are essential strategies. These complex challenges underscore the importance of consulting with skilled litigators to navigate the evolving legal landscape and ensure project success.

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