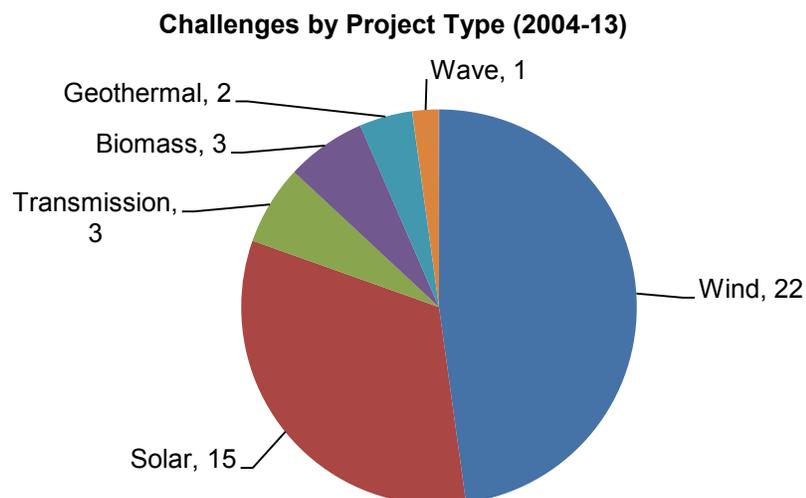


## 2013 in Renewable Energy Project Litigation

***Renewable energy developers continue to have an excellent track record of defeating project challenges.***

In December 2012, we summarized nearly 10 years of litigation against renewable energy projects.<sup>1</sup> Between the publication of that snapshot and the end of 2013, seven new challenges began and 16 ended. This update provides a high-level summary of key trends, notable cases observed in 2013 and suggests successful strategies for avoiding or overcoming litigation.

This year, we expanded our tracking beyond the western United States to select cases in other parts of the country. These and other additions increased the size of our dataset to 76 lawsuits, spanning 46 biomass, solar, wind, geothermal, wave, and transmission projects, as well as the US Department of Energy's federal loan guarantee program. The average duration of litigation has risen from approximately 400 days last year to over 500 days, primarily due to appeals following district court decisions. Wind and solar projects continue to constitute the vast majority of challenges.



The central conclusion from last year's snapshot continues to hold true: renewable energy project opponents rarely succeed on the merits. And, careful project siting, a strong administrative record and outreach to stakeholders helps to minimize potential litigation risk.

## New Challenges and Appeals

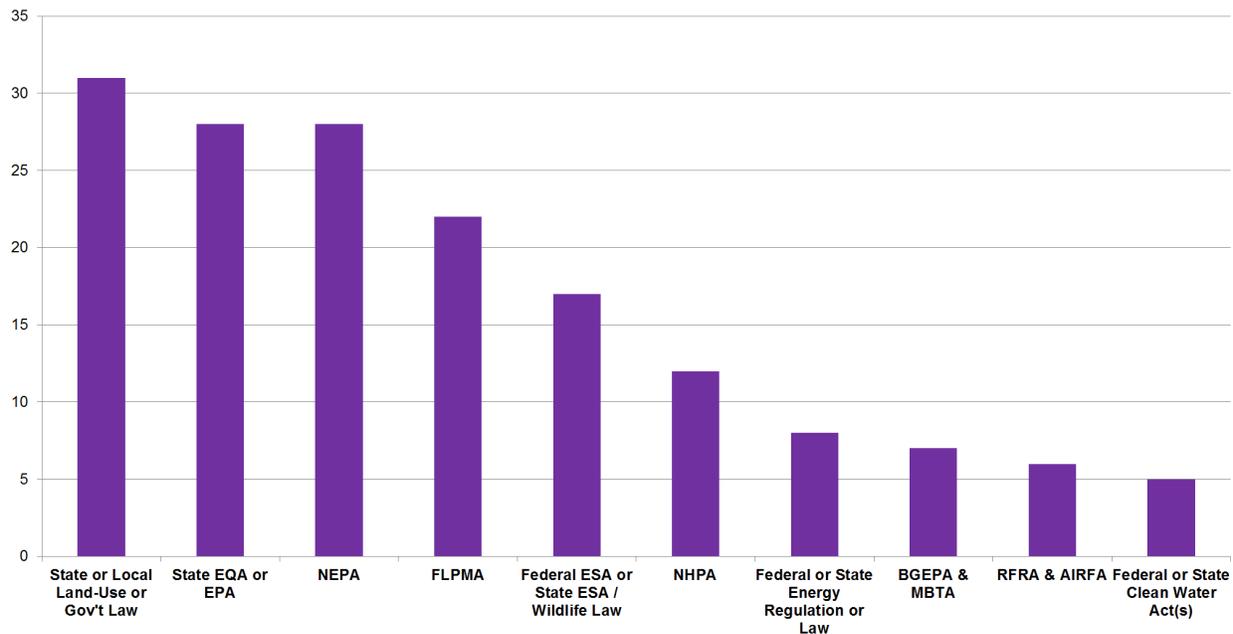
Challenges to renewable energy projects continued to be relatively uncommon in 2013. Of the seven challenges initiated since our last update, two have already concluded with the projects intact. As a comparison, the Bureau of Land Management (BLM) alone approved 12 renewable energy projects in 2013.<sup>2</sup> The new challenges include lawsuits against a transmission line project, a solar project and several wind projects.

Project opponents appealed a number of cases lost last year. In 2014, the Ninth Circuit Court of Appeals will likely rule on at least five district court decisions, making 2014 a year to watch. The pending appeals raise important issues, including whether a transmission line is interdependent and interrelated with a wind project and the extent to which the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (Eagle Act) apply to a federal agency approval of a wind project.

## Wind Energy and Avian Challenges Rise

Historically, project opponents have most commonly based their challenges on the National Environmental Policy Act (and its state analogues), the Federal Land Policy and Management Act, the National Historic Preservation Act, the Endangered Species Act, as well as state or local land-use and government laws (such as the Williamson Act, the Planning and Zoning Law and municipal codes).

Top 10 Claims Challenging Renewable Energy Projects



As the following chart demonstrates, in 2013 we observed an increase in claims based on two other environmental statutes: the Migratory Bird Treaty Act (MBTA) and Bald and Golden Eagle Protection Act (Eagle Act).

**Top 10 Claims**

<i>Statute</i>	<i>2013</i>	<i>2012</i>	<i>Trend</i>
State/Local Land-Use or Gov't Law	1	3	↑
State Environmental Quality Act / Environmental Policy Act	2	1	↓
National Environmental Policy Act	3	2	↓
Federal Land Policy Management Act	4	4	↔
Federal or State ESA / Wildlife Law	5	6	↑
National Historic Preservation Act	6	5	↓
Federal or State Energy Regulation or Law	7	Not ranked	↑
Bald & Golden Eagle Protection Act or Migratory Bird Treaty Act	8	Not ranked	↑
Religious Freedom Restoration Act / American Indian Religious Freedom Act	9	7	↓
Federal or State Clean Water Act(s)	10	8	↓

Project opponents brought claims in several cases alleging that a federal agency approving a wind energy project must obtain permits under the MBTA or Eagle Act for impacts to birds that opponents alleged would occur as a result of project operations. A Southern District of California judge ruled that the MBTA did not extend to incidental take from activities not aimed at intentionally taking birds.<sup>3</sup> As mentioned above, we expect the Ninth Circuit to decide the appeal of this decision in 2014. Several district courts are expected to consider the same issue in 2014, as well as the applicability of the Eagle Act take prohibition to wind turbine operations.<sup>4</sup>

On the criminal docket, the US Department of Justice announced in November 2013 a plea agreement with a wind developer involving allegations related to 14 eagles and more than 100 migratory birds.<sup>5</sup> The plea agreement — based exclusively on the MBTA — requires the operator to pay \$1 million in fines, serve five years of probation, and implement a mitigation plan designed to reduce risks to birds from turbine operations. As a result of the developer's plea and cooperation, DOJ agreed to forbear from bringing charges under the Eagle Act, which carries significantly higher penalties. Although DOJ had [previously prosecuted oil companies for migratory bird deaths](#), this agreement marked the first time DOJ successfully [extended the MBTA](#) to wind energy developers. Notably, the plea agreement addressed

facilities located in Wyoming — in the Tenth Circuit Court of Appeals — which has a broader “proximate cause” approach to strict liability standard under the statute than does the Ninth Circuit Court of Appeals.<sup>6</sup>

Although opponents have yet to successfully challenge wind projects using the MBTA and Eagle Act, developers should consider these statutes as additional factors during site selection and mitigation. The courts will likely provide further guidance on the contours of both laws in 2014.

## **Inactive and Discontinued Projects**

In December 2012, we noted that a number of challenged projects had become relatively inactive but the litigation had not yet been formally dismissed. A number of those cases officially ended in 2013, with seven lawsuits challenging four solar projects in California finally dismissed in 2013.<sup>7</sup> BLM had originally “fast-tracked” all four projects and approved them in October 2010.<sup>8</sup> All but one lawsuit had been stayed or otherwise inactive for long periods; the one action that remained officially active had no filings for more than a year before dismissal.

Six of these lawsuits — related to three projects — ended because the projects were finally cancelled, rendering the challenges moot. One, a large solar project in Imperial County was sold by its original developer. The new developer later relinquished the right-of-way, and BLM and the Department of the Interior then excluded utility-scale energy development from most of the project area under the BLM Solar Programmatic Environmental Impact Statement Record of Decision.<sup>9</sup> The developer of a second large solar project in San Bernardino County also sold the project. BLM terminated the project’s right-of-way after the new developer failed to timely proceed with project development and pay rent.<sup>10</sup> The developer of the third project — also in San Bernardino County — cancelled the project and settled with the project opponent.<sup>11</sup> All three projects had proposed to change solar technologies from solar thermal or dish technology to photovoltaic panels after BLM issued the initial rights-of-way, thus requiring new environmental review after the litigation had commenced.

The developer of the fourth project — a Riverside County solar project — sold the project to a new developer. While the project remains in development, project changes will require additional environmental review. The court dismissed the challenge to the project because the project will not be constructed as approved.<sup>12</sup>

## **A Rare Win in Court for Project Opponents**

In the 76 cases we have monitored, courts ruled for the plaintiffs only four times through the end of 2012. In 2013, only one case we tracked was decided in favor of the project opponents. In this case, the Arizona Corporation Commission approved a waste incinerator as a pilot project under the Commission’s Renewable Energy Standard (RES) program, even though municipal solid waste (MSW) was not listed as an eligible renewable energy resource. The Commission determined that 90 percent of the MSW was biogenic and thus satisfied requirements for the renewable energy credit.

The Sierra Club challenged the decision, arguing that the Commission violated its own RES rules by determining that MSW could qualify as renewable in contravention of the plain language of the rule. Additionally, the Sierra Club alleged that the Commission’s determination that 90 percent of MSW was biogenic was unreasonable and not supported by the evidence. Commission staff concluded that no more than 75 percent of the feedstock was biogenic, but the commissioners chose to adopt a higher figure. The court agreed with the Sierra Club’s argument in its entirety.<sup>13</sup> The Arizona Corporation Commission has appealed the decision to the Arizona Court of Appeals.

Notably, the Arizona trial court focused its decision not on any flaws in the design of the project or potentially adverse impacts, but rather on what it saw as the strained decision making of the approving body. The decision reinforces the necessity for developers to help build a strong administrative record that shows that the permitting agency considered all evidence and drew reasonable conclusions from that evidence. Although courts generally defer to agency decisions approving renewable energy projects, that deference is by no means absolute.

## Conclusion

In general, developers continue to successfully defend renewable energy projects in litigation. We have not observed any trend suggesting that challenges to renewable energy projects have become more common or more successful. Although risks certainly exist, the data show that most projects do not encounter litigation challenges.

Careful preparation of environmental review documents, engagement with agencies and stakeholders, and deliberately building a strong administrative record are strategies consistently followed by successful developers. A lawsuit may be difficult to avoid in some cases, but early proactive efforts can greatly enhance a project's chances of success.

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## Endnotes

- <sup>1</sup> Janice M. Schneider and Taiga Takahashi, *A Snapshot of Renewable Energy Project Litigation*, Law360 (Dec. 6, 2012).
- <sup>2</sup> Bureau of Land Management, *Renewable Energy Projects 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](http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/Renewable_Energy_Projects_Approved_to_Date.html).
- <sup>3</sup> *Protect Our Cmty's. Found. v. Salazar*, Civ. No. 12-CV-2211 (S.D. Cal.).
- <sup>4</sup> Indeed, just recently, the [federal district court for the District of Columbia ruled against project opponents on both MBTA and Eagle Act claims](#), as did the federal district court for the Southern District of California. See *Public Employees for Public Responsibility v. Beaudreau*, Civ. Nos. 10-1067, 1073, 1079, 1238 (RBW) (DAR) (D.D.C.) (March 14, 2014); *The Protect Our Communities Foundation, et al. v. Jewell*, Civ. No. 13-CV-575 (March 25, 2014); see also [The Protect Our Communities Foundation, et al. v. Salazar](#), No. 12-CV-2211 (S.D. Cal. 2013) (November 6, 2013) (2013 WL 5947137) (MBTA claims, among others).
- <sup>5</sup> *United States v. Duke Energy Renewables, Inc.*, No. 13-CR-00268 (D. Wyo.).
- <sup>6</sup> See, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010) (“[A] strict liability interpretation of the MBTA for the conduct charged here [— migratory birds becoming trapped and dying in oil drilling equipment —] satisfies due process only if defendants proximately cause the harm to protected birds”; but see *Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991) (holding that the MBTA applies to “physical conduct of the sort engaged in by hunters and poachers”).
- <sup>7</sup> *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Council v. Dep’t of the Interior*, Civ. No. 11-CV-00395 (C.D. Cal.); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Council v. Dep’t of the Interior*, Civ. No. 11-CV-04466 (C.D. Cal.); *Protect Our Cmty's. Found. v. Salazar*, Civ. No. 11-CV-00124 (S.D. Cal.); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Council v. Dep’t of the Interior*, Civ. No. 11-CV-02664 (S.D. Cal.); *Burlington N. Santa Fe R.R. v. Dep’t of the Interior*, Civ. No. 10-CV-10057 (C.D. Cal.); *Defenders of Wildlife v. Abbey*, Civ. No. 12-CV-02578 (C.D. Cal.); *Natural Res. Defense Council v. Abbey*, Civ. No. 12-CV-02586 (C.D. Cal.).
- <sup>8</sup> Bureau of Land Management, *Renewable Energy Projects 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](http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/Renewable_Energy_Projects_Approved_to_Date.html) (accessed Dec. 4, 2013).
- <sup>9</sup> *Protect Our Cmty's. Found. v. Jewell*, Civ. No. 11-CV-00124 (S.D. Cal.); see also *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep’t of the Interior*, Civ. No. 11-CV-02664 (S.D. Cal.) (both dismissed in June 2013). The original project was one of the few solar projects successfully enjoined at a preliminary stage in December 2010, based primarily on a failure to appropriately comply with the National Historic Preservation Act’s tribal consultation requirements. *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior*, Civ. No. 10-CV-02241 (S.D. Cal.) (December 15, 2010). The *Quechan* case was dismissed without prejudice on a joint motion in 2011. Notably, a recent subsequent [decision challenging a wind project](#) on similar National Historic Preservation Act grounds was rejected in 2013. See *Quechan Tribe v. U.S. Dep’t of the Interior*, Civ. No. 12-CV-1167 (S.D. Cal.).
- <sup>10</sup> *Natural Res. Defense Council, Inc. v. Abbey*, Civ. No. 12-CV-05286 (C.D. Cal.); *Defenders of Wildlife v. Abbey*, Civ. No. 12-CV-02478 (C.D. Cal.).
- <sup>11</sup> *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. Dep’t of the Interior*, Civ. No. 11-CV-00395 (C.D. Cal.).
- <sup>12</sup> *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. Dep’t of the Interior*, Civ. No. 11-CV-04466 (C.D. Cal.).
- <sup>13</sup> *Sierra Club – Grand Canyon Chapter v. Ariz. Corp. Comm’n*, No. LC2012-00470-001 DT (Super. Ct. Ariz.).