Introduction
The past five years have seen significant growth in the extent and complexity of wind project development and financing in the United States and globally. Leading project finance lenders have demonstrated an increasing ability to assess individual projects or multiple project portfolios, and continue to expand their understanding of the risks and growth potential of the industry. Notwithstanding the ongoing maturation of wind project financing, developers and lenders still face significant issues in the documentation required to develop and finance the projects, and specifically, in the integration of the terms of project contracts with project financing documentation. Although these issues will never disappear entirely, understanding where the issues are most likely to arise, and employing effective tactics for addressing these issues, can help minimize the problems associated with successfully developing a wind facility or closing its project financing.

This article focuses on some of the key features of wind project development and financing that have the potential to pose documentation integration problems for developers and lenders. Contract integration issues can arise at all stages of project development, regardless of whether project financing is or will be contemplated, and again during the financing process. This article will focus first on selected integration issues that may appear during development, and then on the integration issues that arise when project documents confront financing documents. In addition, this article will suggest how to avoid costly or time-consuming problems where possible, or resolve them when they are inevitable.

Integration issues
“Integration,” as used in this article, generally refers to the process of ensuring that all project documents work smoothly together, and do not conflict in ways that damage the overall operational, financial, and legal integrity of the project. Integration issues in wind project documentation can arise in a number of areas. Many key project documents, such as power purchase agreements, interconnection agreements, turbine supply and installation agreements, and land leases and easements, are often negotiated and executed by early-stage developers, long before the final ownership structure of the project is settled and financing is sought and negotiated. Unless the owner carefully structures the project documentation with a view to financing requirements and regardless, if the lending market changes in the time between initial development and any later financing, the project owner may find itself negotiating with major contract parties for a second time in order to integrate the project documents with the financing documents, often at not insubstantial expense and with the passage of significant time. Resolving integration issues in project documents takes time, and requires experience, expertise and careful negotiation.

Integrating project documents

Force majeure clauses
A relatively simple example of project contract integration arises in the application of force majeure clauses. A project’s turbine supplier or construction contractor might be entitled to claim force majeure for unanticipated subsurface conditions at the project site to avoid damages or penalties in connection with construction delays resulting from these conditions. Ideally, if the construction contractor is entitled to claim such a force majeure, then the owner also should be entitled to claim force majeure under its power...
purchase agreement to avoid damages in connection with achieving construction milestones. Force majeure provisions often suffer from “boilerplate neglect” – that is, they often do not get the diligent analysis and crafting that other, seemingly more exciting, provisions do.

The foregoing example is fairly straightforward, but even very minor differences in wording can result in disputes and delays. For example, most force majeure provisions in project construction contracts excuse the contractor for construction delays resulting from “unusually severe weather conditions.” Often, contracts will list certain events such as lightning, blizzards or hail as weather events giving rise to a claim of force majeure. The issue for developers, who will be party to numerous project contracts with critical force majeure provisions, is that these lists, while similar and overlapping, might not be identical. A turbine supplier/installer might include “blizzards” in its list of force majeure events for a project being constructed in a northern climate, while the utility purchasing power from the same project might refuse to include blizzards, since they are relatively common and foreseeable events in its geographic region. If a blizzard delays construction of the project, the construction contractor may be entitled to claim force majeure, leaving the owner exposed to damages under its power purchase agreement for failure to achieve construction milestones. Since a general rule of contract interpretation is that the specific will have control over the general, it is important that the specific item lists for weather, labor, change of law and other force majeure events be properly matched between contracts. Integration issues associated with force majeure clauses may be solved by specifically stating that events of force majeure under one project contract entitle a party to claim force majeure under another contract.

Construction and operations milestone dates
There is potential for project impairment or even failure if construction and operations milestones in project documentation are not properly integrated. The typical wind energy power purchase agreement will establish a date certain by which the facility in development must achieve commercial operations to avoid penalties or damages. For example, a power purchase agreement might make a seller responsible for outages or curtailments that result from the seller’s negligence in the operation and maintenance of its facilities, while the interconnection or transmission agreement might specifically provide that neither party is liable for certain types of curtailment, regardless of whether such curtailment resulted from the negligence of one party. Without congruent standards of responsibility, the risk of curtailment due to an interconnection provider’s negligence could shift to the seller under the power purchase agreement. In addition, outages and curtailments that result from scheduled or unscheduled outages on the interconnection or transmission system should result in a corresponding reduction in the required annual delivery amounts under the power purchase agreement. This point is particularly important for wind projects and intermittent energy resources that are generally required to produce a minimum annual quantity of energy in order to receive a maximum price for that energy. If the power purchase, interconnection and transmission agreements

There is potential for project impairment or even failure if construction and operations milestones in project documentation are not properly integrated. The typical wind energy power purchase agreement will establish a date certain by which the facility in development must achieve commercial operations to avoid penalties or damages.
Integrating project and financing documents

Integration by consent or “forced integration”

In a non-recourse or limited recourse project financing, the owner’s interests in all major project documents are typically assigned to the lenders for collateral purposes. Where financing arrangements are executed before or during construction (with or without a term conversion feature), the project documents assigned also include all construction related contracts and documents. Where term financing is being arranged post-completion and post-commercial operation, construction documents (except to the extent that they include warranties, guarantees, or other ongoing obligations in favor of the project owner) may not need to be assigned. In every case, all other material project documents (including power sales agreements, turbine warranties, interconnection agreements, transmission service agreements, site leases, and easements) will be assigned to the lender to secure the borrower’s performance of its obligations.

In connection with the assignment of project documents by the borrower to the lender (acting as the security agent), the counterparty to each agreement will be asked to enter into a consent to that assignment with the lenders’ security agent. This procedure results in a degree of “forced integration” of the key project documents with the financing documents as the consent will contain terms correcting any material conflicts or issues that the lenders have identified in the project document. From the lender’s perspective, this forced integration is absolutely necessary to perfect its interest in the collateral represented by the most important project documents. The typical consent contains the following key provisions:

• Counterparty acknowledgment that the security agent has the right to exercise rights and perform duties of the developer under the assigned contract;
• Counterparty agreement that upon foreclosure, the security agent will have the right to further assign or sell the contract;
• Counterparty agreement to give the security agent notice of defaults under the assigned contract as well as the right to cure such defaults, usually with an extended cure period;
• Counterparty agreement to enter into a replacement contract with security agent upon substantially similar terms if the assigned contract is rejected or terminated in bankruptcy;
• Counterparty agreement to make any payments under the assigned contract to collateral accounts controlled by the security agent;
• Counterparty agreement not to terminate, or accept termination of, the assigned contract by the developer without the consent of the security agent; and
• Acknowledgment by the counterparty that the assigned contract is in full force and effect, and that there are no defaults or facts that could lead to a default then in existence. Each consent provides the necessary link between the relevant project document and the financing agreement, integrating the whole. From minor requirements of the lenders, such as the delivery of information or notices, to more significant matters like ensuring that payments under a power purchase agreement are made to accounts under control of the lenders, the consents should effectively integrate the lender/borrower/counterparty triangle.

For emerging industries such as wind, lenders may view one of the co-owners as strategically more important than other owners because it has more wind project development experience. Lenders may seek to put greater restrictions on the transfer of this strategically critical owner’s interest in a project, thus potentially upsetting the balance established in the co-owners’ relationship.

Transfer restrictions

Many, if not most, renewable energy projects (even many small-scale projects) are developed or owned by multiple parties. The joint venture, partnership, shareholders’ or other agreement governing the relationship between the co-owners, and in particular, provisions dealing with exit strategies and transfer restrictions, will likely have been negotiated (often extensively and not without difficulty) before financing arrangements are finalized. While the co-venturers need not and should not be entirely guided by what lenders will or will not allow in the way of transfers of interests by parties (because financing is not forever), it is nevertheless important that in structuring these arrangements prior to financing the parties be aware of the types of restrictions likely to be imposed by the lenders, and come to terms among themselves as to what lender restrictions on transfer or assignment of interests will be acceptable. In particular, for emerging industries such as wind, lenders may view one of the co-owners as strategically more important than other owners because it has more wind project development experience. Lenders may seek to put greater restrictions on the transfer of this strategically critical owner’s interest in a project, thus potentially upsetting the balance established in the co-owners’ relationship.

Company management

The mechanics of a project company’s management structure may also create integration issues when the company’s management structure does not work efficiently within the requirements of the financing documents. Management structuring, done in a vacuum without regard to how it will interact with the extensive compliance responsibilities imposed by the financing agreement, will result in headaches after financing and even create a greater possibility for recurring technical defaults. For example, the typical financing agreement requires notification to the lenders’ agent when significant events occur in the operation of the project; reporting...
is often required even when the event is not “material” in relation to the project company’s assets or operations. Often, a borrower is required to report any disputes or potential disputes about payments under a power purchase agreement, or any claims made under turbine or balance of plant warranty agreements. Unless the project company’s management structure is designed to facilitate full and frequent communication between on-the-ground operations personnel and officers charged with financial reporting and compliance, gaps can and will occur. Often the reports required by lenders are due in very short time windows, making effective intra-company management structuring even more critical.

Addressing integration issues

Project financing is a greenhouse process. It is a heated environment where things grow, change, and happen quickly. A small amount of prevention or planning at the outset of development will almost always save a greater amount of effort and cost once the financing process has begun. A developer should undertake methodical and thoughtful review of project documents as they are developed (or when a project is acquired and amendments are possible) with a view to how the documents integrate among themselves, and how they will integrate with financing documents. This review process must include participants from all fields of expertise, including engineers, managers, financial advisors, attorneys, and insurance consultants. There are no short cuts.

There are also steps that can be taken to simplify the “forced integration” that invariably will occur in the financing process. Virtually every form of project document in use today has in it some type of provision requiring the counterparty to reasonably consent to an assignment of the agreement to a lender for collateral purposes. But these provisions are inconsistent within the industry, and often weak or ill suited to their purposes. A number of elements should be considered when reviewing or preparing such provisions. In power purchase agreements, for example, a good assignment provision would:

- Allow the developer to assign the contract as collateral security without the consent of the power purchaser;
- Obligate the power purchaser to cooperate with the developer’s and the security agent’s reasonable requests in effecting any assignment of the contract for collateral security purposes;
- Obligate the power purchaser to enter into a consent to assignment within a reasonable timeframe following a request from the developer;
- Obligate the power purchaser to subordinate any mortgage or other lien that it may hold as security to the lien of the security agent; and
- Obligate the power purchaser to make reasonable acknowledgments and agreements in favor of the lender or its security agent, including (a) the agreement to provide the security agent with notices of default under the power purchase agreement, and allow the security agent to cure developer defaults, (b) the agreement to enter into a replacement agreement if the instant agreement is rejected or terminated in bankruptcy, (c) an acknowledgment that the agreement is in full force and effect, and (d) the agreement not to terminate or accept termination of the agreement without the consent of the security agent.

If the instrument does not require ongoing payments, it is possible to avoid the need for the counterparty to provide an estoppel certificate or letter in favor of the lender saying that all payments under the instrument have been made.

Lawyers, consultants, and advisors assisting project developers should be keenly aware of the value they add when they engage in forward thinking about project document integration. Developers and owners should encourage critical, careful, advance thinking about integration, both internally and externally to their organizations, knowing that before financing can close, integration will have to occur. Without it, pay me now or pay me later almost always means paying more later than now.

Subscribe to ProjectFinance fast! Go to www.projectfinancemagazine.com
Our clients generate a lot of energy.

We help.*

Holland & Hart LLP
Attorneys at Law
555 17th Street, Suite 3200
Denver, Colorado 80202
www.hollandhart.com

*Renewables Development, Acquisition, and Financing Activities > 2000 MW globally
- Hydroelectric Projects
- Biomass Facilities
- Petroleum Coke Facilities
- Waste Coal Projects
- Geothermal Plants
- Wind Energy Generation > 800 MW globally

*Conventional Energy Development, Acquisition, and Financing Activities > 4000 MW globally
- Coal Fired Plants
- Natural Gas Facilities

Contact:
Mark D. Safty
(303) 295-8549
msafty@hollandhart.com

Sandra P. Velasco
(303) 295-8063
svelasco@hollandhart.com

Holland & Hart LLP
Attorneys at Law
555 17th Street, Suite 3200
Denver, Colorado 80202
www.hollandhart.com