FAQs – Renewable Energy & Infrastructure

1. What Impact is COVID-19 having on the renewable energy supply chain?

As with other industries reliant upon the global supply chain, the renewable energy sector is facing disruption and delays. While the particular impacts are highly project-specific, some generalities can be made with respect to key subsectors:

* **Wind** – The wind industry is particularly susceptible to the effects of this disruption because project completion delays could preclude developers from qualifying for the full value of the production tax credit. Critical components for wind projects were already in limited supply prior to the pandemic, and developers may have no viable supply alternatives. Given these complications, the industry has begun seeing force majeure claims from EPC contractors, wind turbine suppliers and other vendors.
* **Solar** – Supply chain disruptions are also likely to affect the U.S. solar industry. Because of existing tariffs on Chinese solar panels, U.S. developers often purchase panels from Southeast Asia, where manufacturing facilities have yet to encounter COVID-19-related disruptions on the same scale as China. Although most Southeast Asia-manufactured panels are made with raw materials from China, the availability of raw materials is less vulnerable to disruption relative to manufacturing slowdowns in China. Nonetheless, given the uncertainty about the continued spread of COVID-19 and its impact on panel availability, an increasing number of force majeure notices are likely to be issued moving forward.
* **Other** – Similar issues are affecting the availability of lithium ion batteries and related equipment necessary for battery energy storage systems. Conventional generation systems benefit from a more global supply chain but are still experiencing delays and significant spikes in freight costs.

Concerns around supply chain and logistics are increasing and should be monitored closely both with respect to the industry as a whole and through direct relationships. For additional information, see [COVID-19 and the Renewable Energy Supply Chain](https://www.renewableinsights.com/2020/04/covid-19-and-the-renewable-energy-supply-chain/).

1. What disruption is COVID-19 causing to the renewable energy workforce

Electrical generation projects generally constitute essential infrastructure and are therefore insulated from the most severe state- and municipal-restrictions taking effect across the U.S. The Cybersecurity and Infrastructure Security Agency has issued [guidance](https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce) to help identify essential critical infrastructure services, including for energy, water, wastewater and public works. While helpful, CISA provides only guidance; the applicable state- and municipal-orders define what constitute permitted or essential services. For example, states like Pennsylvania have taken a more restrictive approach to construction generally than the federal guidance. Project participants need to carefully monitor these orders to ensure compliance, not just with respect to whether their operations are permitted but also to understand any applicable teleworking and social-distancing requirements. Beyond the legal requirements, project participants should establish clear communication channels to understand the practical circumstances of their workforce and develop contingency plans to proactively manage health impacts or travel restrictions as they arise. Essential service providers may also want to obtain letters or similar documentation from their employers identifying them as such that they can share with governmental authorities if challenged. The CDC [website](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html) contains resources for businesses and employers to help them plan, prepare and respond to COVID-19 in the workplace (including OSHA [guidance](https://www.osha.gov/Publications/OSHA3990.pdf) which highlights the applicability of the general duty clause).

According to a recent ACORE [survey](https://acore.org/acore-survey-pandemic-brings-uncertainty-to-project-completion-timelines-and-financing/), workforce related constraints are a key concern in the renewables industry. Among several industry subsectors, travel and other workforce restrictions appear to be the primary driver contributing to COVID-19-related project delays.

1. How should a party proceed after receiving a force majeure notice?

COVID-19 is most severely impacting construction-stage projects — or those nearing construction. Such projects are more exposed to supply chain and workforce disruptions relative to (i) early-stage projects, which tend to have the flexibility to delay and (ii) operational projects, which have more routine personnel and equipment needs.

Project owners should assume a high likelihood of COVID-19-related force majeure claims. A party asserting rights under a force majeure clause should carefully tailor its assertion to the governing contract but typically will assert:

* The scope of the COVID-19 outbreak, its impact on business operations and references to credible and relevant publications;
* A summary of the outbreak’s actual impact on the business’s operations and capacity to carry out its contractual obligations;
* Formal notice of the business’s intention to modify its performance under the force majeure clause; and
* A statement that the business’s assertion of its rights under the clause should not be construed as a repudiation, breach or cancellation of the contract.

Project owners should identify and be prepared to assert their rights under applicable force majeure provisions. The appropriate response depends upon various factors, including the status of completion of the project, the credit and performance quality of the contractor, any applicable surety bonds, the nature and extent of any other third party deliverables and requirements (e.g., owner-supplied equipment, utility construction, back-feed and inspection requirements, permit issuance and close-out) and available schedule flexibility to meet financing and offtaker timing requirements.

A standard owner response to a force majeure claim should include a timely written demand to the contractor to document specific impacts supporting such claim. Owners should evaluate whether other unexcused contractor delays may give rise to a “concurrent delay” defense to such claims. Owners should also request assurances from the contractor regarding its ability to continue to perform, request copies of any applicable surety bonds and ensure that any required subcontractor flow-down and step-in rights are in place. Owners that are directly sourcing panels, inverters and other key equipment need to evaluate the possibility that they may have additional exposure related to delays in securing delivery of such equipment.

For early stage projects (particularly if notice to proceed has not been issued), the owner may prudently elect to suspend projects until greater certainty regarding the impact of the COVID-19 situation becomes clear. For projects substantially under way, the risk of suspension must be weighed against the economic carrying costs associated with the projects.

Both the asserting party and receiving party should remember that resolution may eventually require arbitration or litigation and therefore keep relevant records and avoid making statements that could be construed as waivers or otherwise relinquishing contractual rights.

For additional considerations, see [COVID-19 and the Renewable Energy Supply Chain](https://www.renewableinsights.com/2020/04/covid-19-and-the-renewable-energy-supply-chain/).

1. What impact is COVID-19 having on eligibility for federal renewable energy tax credits?

COVID-19 has disrupted strategies for ensuring that solar and wind projects satisfy the “beginning of construction” requirements for purposes of the Investment Tax Credit (“**ITC**”) and Production Tax Credit (“**PTC**”). Delays may affect strategies used in the key subsectors as follows:

* **Wind**– A wind project must have begun construction prior to 2017 to qualify for the full ITC or PTC. Both credits require continuous progress towards completion of a project once construction begins (the “**Continuity Requirement**”). There is a safe harbor pursuant to which the Continuity Requirement is deemed met if a project is placed in service by the end of a calendar year that is no more than four calendar years after the calendar year in which construction began (the “**Continuity Safe Harbor**”). For projects that began in 2016, the deadline to satisfy the Continuity Safe Harbor is December 31, 2020. If delays related to COVID-19 result in a project being placed in service after December 31, 2020, the Continuity Safe Harbor does not apply, and satisfaction of the Continuity Requirement is based upon the applicable facts and circumstances. In addition to carefully reviewing the facts and circumstances, buyers and tax equity investors may require specific indemnities, credit support, tax insurance or other risk mitigation mechanisms.
* **Solar** – A solar project must have begun construction prior to 2020 to qualify for the full 30% ITC. One way to begin construction for purposes of the ITC is to incur at least 5% of the project costs (the “**5% Safe Harbor**”). Many developers executed purchase orders for project equipment in 2019 with the goal of meeting the 5% Safe Harbor. Certain of these developers utilized the so-called “**3.5 month rule**” to satisfy the economic performance requirement for incurring costs for income tax purposes, under which a taxpayer may treat property as provided to the taxpayer (and therefore economic performance as having occurred) when the taxpayer pays the supplier if the taxpayer reasonably expects the property to be provided within 3.5 months after payment. Developers utilizing the 3.5 month rule are likely to take the position that as of the date of payment (which could be no later than December 31, 2019), they “reasonably expected” the property to be provided to them within 3.5 months, if the delays were solely caused by the COVID-19 pandemic. A careful review of the applicable facts and circumstances is necessary to support these assertions. If possible, developers may also wish to take steps to ensure economic performance occurs within 3.5 months of payment, such as by accelerating title transfer provisions of supply agreements (assuming title transfer is the purchaser’s default method of economic performance).
1. How are federal stimulus measures expected to impact the energy and infrastructure sector?

The $2 trillion Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act signed into law on March 27, 2020 was phase 3 of several successive federal stimulus measures. The earlier phases 1 and 2 provided aid to federal health agencies, instituted certain paid sick and family leave protections and extended the deadline for filing certain tax returns to July 15. While there were some concerted efforts from both the renewables and fossil energy sectors to include targeted relief, phase 3 did not include any industry-specific benefits (other than some dedicated grant funding for transportation infrastructure).

Still, many energy and infrastructure businesses are able to benefit from the following generally applicable programs:

* **Small Business / Paycheck Protection Program** – Makes available $349 billion to small U.S. businesses (generally, less than 500 employees) under the [Paycheck Protection Program](https://www.troutman.com/insights/cares-act-paycheck-protection-program-latest-details.html?utm_source=vuture&utm_medium=email&utm_campaign=4.1.2020%20daily%20covid%20email). While structured as a federal guarantee of bank loans, portions of those loans spent on payroll, rent, mortgages and utilities would be forgivable. (The size limitation of 500 employees is subject to important affiliation rules that aggregate affiliates; those rules are subject to certain exceptions but are proving to be an impediment for many private equity or infrastructure fund-backed businesses.)
* **Economic Stabilization** *–* Allocates $500 billion in the form of loans, loan guarantees and other investments by the U.S. treasury. Of that, $46 billion is earmarked for airlines and national security businesses, but the remaining $454 billion is available for a broad category of eligible businesses. The details of the program are still under development, but the legislation: (i) contemplates a dedicated program for medium-sized businesses (500 to 10,000 employees) with interest rates capped at 2% and no payments due for the first 6 months; and (ii) imposes several important conditions including with respect to compensation, employment and restrictions on dividends and share buy backs. U.S. Treasury Secretary Mnuchin has signaled that the Federal Reserve will leverage the allocated funds to infuse trillions of dollars into the economy.
* **Tax Benefits** – Provides relief by relaxing the limitation on the use of net operating losses and temporarily increasing the cap on business interest expense deductions.

Congressional leaders are evaluating the need for a phase 4 package as early as May. Both parties are signaling that energy, water and telecom infrastructure could be a focus of further stimulus, and clean energy advocates are continuing to push for industry-specific priorities, including (i) an extension to the start of construction and safe harbor deadlines for renewable energy credits; and (ii) the ability to monetize renewable credits through direct payments. Based on the most recent cues from Washington, any infrastructure legislation may have to wait until the initial economic safety nets are holding firm and Congress is ready to invest in jumpstarting the economy.

1. To what extent is COVID-19 impacting available project financing?

The COVID-19 impacts to any project are highly fact specific and warrant detailed assessment to understand the unique risks posed and strategies available to mitigate those risks. Such assessments should be validated on a recurring basis as virus-related disruptions continue to ripple throughout the economy and country. Projects should carefully assess their personnel needs, maintenance schedules, supply terms, service agreements, offtake arrangements and contract counterparties. Where vulnerabilities are identified, they should review their options, taking into account applicable contract terms, schedule flexibility and insurance coverage.

For development-stage projects, the flexibility to adapt to COVID-19 will depend to large extent on the required commercial operation dates and other key milestones under the offtake contracts. Unless excused, failure to achieve such milestones may entitle an offtaker to delay liquidated damages. Offtake agreements typically contain force majeure provisions excusing project completion delays; developers should note, however, that, even if a qualifying force majeure event occurs, the resulting extensions may be limited in duration and may be subject to outside completion deadlines for which no equitable extension is permitted. Finally, for hedges and other financially settled offtake arrangements, force majeure events typically do not excuse settlement obligations unless expressly stated to the contrary.

Owners should also consider the liquidity of the credit markets and the extent to which construction and take-out financing will be available. Financing agreements do not contain force majeure provisions and may have outside commitment dates or MAE clauses which excuse a decision by the financing provider to not provide committed financing.

For now, there does appear to be ample debt, equity and tax equity financing available for those projects either unimpaired by COVID-19 or which have sufficient scheduling flexibility to manage any disruptions. In fact, many debt providers have experienced a strong uptick in activity since the start of the pandemic, and sponsor equity appetite seems to be holding steady to help support solid development pipelines. In most cases, project participants will have strong incentives to go forward, but — given the unique and unprecedented scale of this pandemic — key risks should be identified and mitigated, including where appropriate through revised terms or alternative structuring.