

Clean Energy Cos. Must Pay Heed To PFAS Crackdown

By **Keith Goldberg**

Law360 (February 16, 2024, 7:51 PM EST) -- The clean energy industry shouldn't downplay the growing scrutiny over so-called forever chemicals, many of which are present in key components of their projects and can't be easily replaced, attorneys say.

Compared to issues like tax credit eligibility and project permitting, per- and polyfluoroalkyl substances, or PFAS, fly under the radar of clean energy companies. But attorneys that work on PFAS issues say that increasing federal oversight, including disclosure rules recently crafted by the U.S. Environmental Protection Agency, as well as state laws banning PFAS use, mean companies need to get up to speed quickly on how that could affect their equipment supply chains and how their projects get built.

"If it's not being looked at, it needs to be," said Alston & Bird LLP environmental partner Jeffrey Dintzer, who co-leads the firm's PFAS team.

The class of PFAS chemicals found in most clean energy projects are fluoropolymers. They're used in coatings for solar panels and wind turbines and are prevalent in lithium-ion batteries and electrolyzers for hydrogen production.

Industry experts say most newer solar panels are being made with PFAS substitutes, but that isn't the case yet for components of batteries and electrolyzers, as well as components for inverters used in electrical equipment.

"It's one thing to say you're going to regulate it, it's another thing to say you're going to ban it," Dintzer said. "If you ban this suite of chemicals, there have to be substitutes."

At the federal level, the most pressing issue for the clean energy industry is complying with PFAS reporting obligations under the Toxic Substances Control Act finalized by the EPA in October. Companies will have to disclose all PFAS substances, as well as their uses and levels in any products the companies have manufactured or imported since 2011.

Attorneys say that could be a heavy lift for owners of existing projects like solar and wind farms, given that many of their key components, to this point, are from overseas. However, the EPA regulations do provide some wiggle room by saying the PFAS information has to be reasonably identifiable.

"You're going to have to rely on the Safety Data Sheets of the [product's] company ... to understand whether or not your particular products that you're sourcing contain PFAS," said Marty Booher, who

leads BakerHostetler's environmental team and frequently works on chemical regulatory issues.

The good news for clean energy companies is that there's no indication that the EPA is moving to restrict the use of fluoropolymers. However, the same can't be said for the states, which are taking a more muscular approach.

States including Maine and Minnesota have recently passed laws outlawing the production and use of all PFAS substances, and similar bills have been introduced in other states. Across the pond, the European Commission's chemical regulator is considering a blanket PFAS ban that would include fluoropolymers.

"The states that are painting with this broad brush are where the real impacts are going to hit first," said Crowell & Moring LLP senior counsel Amy Symonds, who works on chemical regulation.

Such laws will force clean energy developers to closely scrutinize their equipment supply chains and could present some difficult compliance questions, attorneys say.

"If you have a material that you cannot find a substitute for in your wind turbine or your high-capacity battery, what does that mean?" said Crowell & Moring environmental partner Warren Lehrenbaum, who works on chemical regulation. "You probably can't comply with that law and site your facility in one of those the states."

Blanket state PFAS bans may also be a big problem for existing clean energy projects, especially if they need to replace components that contain fluoropolymers.

"You have to wonder, under the law prohibiting sale or distribution, whether they would be able to purchase the components they need to maintain their facilities in those states," Lehrenbaum said.

Broad PFAS restrictions could make replacing, disposing or recycling renewable project components a lot more complicated and expensive, Booher of BakerHostetler said.

"Depending upon the particular suite of PFAS chemicals that are within these components and how they're ultimately regulated, your decommissioning costs and your bonding ... to back up those decommissioning costs could go up significantly," Booher said. "If I'm in the renewables business, I'm trying to understand end-of-life and management of components that do get replaced."

Attorneys noted that the Maine and Minnesota laws do offer potential exemptions for specific products or product categories if it's determined that PFAS use in those products is "currently unavoidable." Making the case for an exemption should be an immediate priority for clean energy project owners and developers both in those states and states that are considering similar PFAS bans, attorneys say.

"Companies need to apply, or make sure their suppliers apply, to obtain exemptions, so the repair parts can hopefully be deemed necessary and essential," Symonds of Crowell & Moring said.

Attorneys say a lesser PFAS-related concern for clean energy companies, but a concern nonetheless, is the development of projects themselves. Federal and state incentives to build projects on brownfields and other contaminated sites are tempting, but increased PFAS scrutiny adds a layer of complexity, attorneys say.

For example, a federal lawsuit challenging onshore construction of a federally approved offshore wind

project in New York alleged the work could worsen PFAS contamination of groundwater, though that suit was dismissed in July because the challengers couldn't trace any potential injuries to actions by the federal government.

Sheppard Mullin Richter & Hampton LLP environmental and energy partner Gail Suchman said, at this point, developers aren't universally required to screen sites for PFAS contamination, but it's recommended. And if PFAS substances are detected, developers have to ensure they don't exacerbate any contamination, she said.

"If you're doing significant excavation for wind turbines, you have to undertake a soil management plan," Suchman said. "If you're building a solar facility or battery facility, you might just be able to cap it."

At bottom, attorneys say the clean energy industry needs to quickly grasp all the rules addressing PFAS contamination, whether it relates to their project equipment or where their projects are sited.

"All of the regulatory actions that are taking place are going to quickly become front-and-center for renewable energy developers," Suchman said. "It's going to be a learning experience."

--Additional reporting by Madeline Lyskawa. Editing by Emily Kokoll and Dave Trumbore.
