Insights: Alert

North Carolina's General Assembly ratifies House Bill 130: Energy Choice/Solar Decommissioning Requirements – Now it goes to Governor Cooper's Desk for final review and action

June 15, 2023

Written by **John C. Livingston** and **Benjamin W. Smith**

Background

North Carolina's General Assembly enacted significant two-pronged legislation that restricts the ability of municipalities to regulate the use of energy and places new statewide requirements on decommissioning of utility-scale solar plants. Governor Cooper has ten days from the ratification on June 14, 2023, to veto or sign the legislation. If the Governor takes no action during this time, the legislation will become law despite the inaction. The Governor has not publicly stated his intent with respect to this legislation; however, it passed both chambers with a large, bipartisan majority, meaning it is likely to become law.

This legal alert describes the legislation in order to allow residents and solar energy developers to prepare for its potential impact. It is important to note that while some requirements of the law relating to utility-scale solar farms only apply to newly constructed (or rebuilt or expanded) projects, others apply to previously constructed solar facilities as well.

Part I (Municipal Regulation of Energy Sources and Appliances)

The first part of HB 130 prevents North Carolina cities and counties from enacting any ordinance that has the effect of either (i) prohibiting any energy service based upon the *type or source* of energy or (ii) prohibiting the sale, purchase, or installation of "white goods".

Under the first prohibition, North Carolina cities and counties can still choose their preferred energy source or type for their own government building; however, they cannot place restrictions on their residents. For example, the City of Raleigh can elect to install solar energy for government buildings, such as their convention center, but it could not prohibit residents from using energy sourced from coal or oil in their homes or businesses. This could be a meaningful restriction on North Carolina cities and counties, as many have clean energy goals and House Bill 130 would remove a potential tool for those cities and counties to restrict non-clean energy utilization.

The prohibition on appliances is an attempt, among other things, to prevent the banning of natural gas stoves. A federal agency (the U.S. Consumer Product Safety Commission) has begun studying the use of natural gas

stoves indoors and municipalities in other states have taken action on the issue; however, we are not aware of any city or county in North Carolina that has enacted a ban on appliances based on energy use.

Governor Cooper vetoed a bill that addressed similar issues (House Bill 220) in 2021, stating that "[t]his legislation undermines North Carolina's transition to a clean energy economy that is already bringing in thousands of good paying jobs. It also wrongly strips local authority and hampers public access to information about critical infrastructure that impacts the health and well-being of North Carolinians."

Part II (Decommissioning of Utility-Scale Solar)

The second part of HB 130 imposes certain requirements on owners of utility-scale solar energy farms relating to their decommissioning at the end of their life. HB 130 seeks to provide clarity on who is responsible for retiring the facility and recycling or disposing the facility parts and how that process is regulated and requiring financial assurance for the completion of such decommissioning. There are a number of ways in which the legislation affects the industry.

Decommissioning Requirement

HB 130 makes the owner of the utility-scale solar project responsible for the decommissioning of the project and must complete the same within one year following cessation of operations. For the purposes of clearly articulating the facility's end of life, "cessation" of service is defined as a period of 12 months where the solar facility does not produce energy and any such non-production is not the result of a force majeure event. The owner must report to North Carolina's Department of Environmental Quality (DEQ) within 30 days of cessation of operations and must, at a minimum: disconnect the facility from the grid; remove all equipment from the property and recycle or reuse all facility parts possible, with any remaining parts disposed of in an proper industrial or municipal solid waste landfill (except PV modules which must be disposed of in a hazardous waste facility); and the solar facility property shall be returned, as near as practically possible, to the condition it was in prior to the installation of the solar facility or such other condition as agreed upon in a lease or other written agreement between the owner of the project and the landowner (the statute does not clarify the effect if the owner of the project and landowner are the same or related individuals or entities).

These decommissioning requirements become effective as of November 1, 2025, but they apply to all solar facilities whether constructed before or after such date.

Decommissioning Plan and Financial Assurance

The solar facility owner must provide to DEQ a solar decommissioning plan, which includes the operative facts related to the facility and its decommissioning, including ownership, expected life and decommissioning details, financial assurances, and salvage value, amongst other details.

The facility owner must additionally provide to DEQ financial assurances aimed at ensuring that there is sufficient financial resources to ensure that the decommissioning of the solar facility will be completed. The form of the financial assurance may be insurance, financial tests, third-party guarantees by persons who can pass the financial test, guarantees by corporate parents who can pass the financial test, irrevocable letters of credit, trusts, surety bonds, or any other financial device, or any combination of the foregoing, shown to provide protection equivalent to the financial protection that would be provided by insurance if insurance were the only mechanism used.

DEQ is charged with adopting rules to address the amount and calculation of the financial assurance and must consider the salvage value of the project's equipment in determining the amount of the financial assurance required. However, the specific calculation for the salvage value was not prescribed.

The requirements relating to submitting a decommissioning plan and providing financial assurance become effective November 1, 2025, but only apply to utility-scale solar projects (i) for which applications for certificates of public convenience and necessity are pending or submitted on or after the effective date of the legislation and (ii) projects that are rebuilt or expanded after the date of the effective date of the legislation. Rebuilding is defined as a project for which more than fifty percent (50%) of the original photovoltaic modules have been replaced with a different type of photovoltaic module or other fuel source and the project is deemed to be new for income tax purposes. Expanding is defined as adding 2 megawatts AC (MW AC) or more of directly connected solar energy generating capacity to the local or regional electrical grid with the ability to deliver power to the electrical grid, or increasing the ability of the project to deliver power to the electrical grid by thirty-five percent (35%), whichever is larger.

The owner of a utility-scale solar project shall submit a decommissioning plan and establish financial assurance (i) by November 1, 2025, or prior to commencement of construction of the project if the project is constructed after November 1, 2025, and (ii) prior to commencement of rebuild or expansion of a utility-scale solar project.

Many of these issues relating to decommissioning have previously been addressed by certain municipalities, and HB 130 does not preempt any more stringent local ordinances related to solar facilities. Further, HB 130 would not prevent more stringent requirements that the owner of a solar facility might agree to in a lease or other agreement with the owner of the property where the facility is located.

Registration

Utility-scale solar farm owners must register with DEQ and update that registration every five years. This registration information includes: who owns and is responsible for decommissioning the project; summary and characterization of the project parts including, specifically, any photovoltaic (PV) modules or per- and poly-fluoroalkyl substances associated with the project; summary of project timeline including beginning and end operation points; estimates of costs of decommissioning; proposed financial assurance mechanisms; copies of a decommissioning plan for the subject project; and any other items required by DEQ.

The owner of a utility-scale solar project must register with DEQ: (i) by November 1, 2025, or at least 90 days prior to the commencement of construction of the project if the project is constructed after November 1, 2025; and (ii) at least 90 days prior to commencement of rebuilding or expanding a utility-scale solar project. DEQ will impose fees on this registration, which will go to the administration of the registration program and implement the provisions of the legislation relating to decommissioning pursuant to a newly established Utility-Scale Solar Management Fund.

Requirements on NCUC and DEQ

Additionally, HB 130 requires the North Carolina Utilities Commission (NCUC) to keep an active list of operational utility-scale solar projects in North Carolina. While the NCUC would keep an annual list of projects, DEQ is tasked with maintaining a registration list of these projects, subject to 5-year updates, with such

registration information including pertinent decommissioning information under HB 130. DEQ also can adopt rules on any other matter they deem necessary in connection with the legislation.

The Department of Commerce is also charged with identifying existing incentives and grant programs that may be used to encourage research and development on recycling and reuse of PV modules and to facilitate growth of North Carolina's PV module recycling and reuse industry.

Related People

John C. Livingston

t 919.420.1768

jlivingston@ktslaw.com

Benjamin W. Smith

t 919.420.1719

bwsmith@ktslaw.com