DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 8, 2013
~~April 8, 2012~~

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: House Bill 226

Dear Governor O'Malley:

We have reviewed House Bill 226, the "Maryland Offshore Wind Energy Act of 2013," which creates a framework and process for financing[1] and providing regulatory approval of wind energy projects to be located off Maryland's Atlantic coast.[2] We hereby approve the bill for constitutionality and legal sufficiency. We write to explain the basis on which we find the minority business and outreach provisions to satisfy the appropriate levels of constitutional scrutiny.

---

[1] Two aspects of the financing component of the bill merit mention. First, as amended by the bill, State Government Article, §9–20C–03(h) (p.33), and Section 4 (concerning the Exelon-Constellation merger settlement funds) purport to require the transfer of certain funds. To preserve the Governor's constitutional prerogative to initiate appropriations, §9–20C–03(h) and Section 4 must be construed as authorizations rather than mandates to transfer the specified funds. Thus, the Governor may, but is not constitutionally required to, transfer the funds described in §9–20C–03(h) and Section 4. Second, as we explained in a letter dated March 18, 2013, it is our view that the appropriations and funding authorizations in the bill to assist in financing these wind projects are part of the dominant purpose of the bill and that, therefore, this bill may not properly be petitioned to referendum. *See* Md. Const., art. XVI, §2.

[2] The federal government has the sole authority to regulate and license wind projects on the outer continental shelf. 43 U.S.C. §1331 *et seq.* This bill does not and cannot change this. The State's role under HB 226, in the form of the Public Service Commission's approval of an application by a wind developer for a qualified offshore wind project, functions exclusively to establish the state incentive revenue stream for the project, not license or approve the project. Therefore, the bill is not preempted by federal law.

Minority Business Enterprise Program

The Offshore Wind Energy Act of 2013 includes a provision that any applicant selected must comply with the State's Minority Business Enterprise ("MBE") Program "to the extent practicable and permitted by the United States Constitution." Proposed PU §7-704.1(e)(3)(ii).

As United States Supreme Court Justice Anthony M. Kennedy wrote in his concurrence in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, "The government bears the burden of justifying its use of individual racial classifications." 551 U.S. 701, 784 (2007) In the context of MBE programs, the use of numerical goals based on individual racial classifications must meet strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Courts have held that a government entity has a compelling interest in remedying identified past and present race discrimination. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492, 509 (1989). MBE goal programs are permissible only when the governmental entity seeks to eradicate discrimination by the government entity itself, or to prevent the public entity from acting as a "passive participant" in a system of racial exclusion practiced by elements of local industry by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 492; *Associated Utility Contractors of Maryland v. Mayor and City Council of Baltimore*, 83 F. Supp. 2d 613, 619 (D. Md. 2000).

To date, all of the cases considering the permissibility of goal programs based upon racial classifications in the context of contracting and procurement have dealt with procurement by the government itself. It is our view, however, that this does not mean that such programs cannot be administered constitutionally in other contexts and by other parties. In fact, this Office has approved the application of the State's MBE program to private licensees in the construction and operation of video lottery terminal facilities. State Gov't ("SG") Article, §9-1A-10. Moreover, the bill contemplates significant State financial involvement both in the form of monetary transfers from the Strategic Energy Investment Fund ("SEIF") and by governmental approval of the ratepayer increases to pay for it. This public investment only strengthens the case for application of an MBE program. Thus, I believe that there is a sufficient basis for a court to find that, if the Act were to become law without the inclusion of the remedial MBE provisions, the State would become a passive participant in any discrimination that exists in the industries involved in building and operating an offshore wind energy project. Finally, Dr. Jon Wainwright of NERA, an expert economist who conducted the State's 2011 disparity study, has provided a letter in which he concludes that there is a strong basis in fact to

support the State's desire to conduct a race-conscious remedial program in the area of offshore wind energy. *Letter of Dr. Jon Wainwright to Director Abigail Hopper* (Feb. 12, 2013) at 3-4. I believe that all of these factors, considered together, make it clear that the State has a compelling governmental interest that justifies the enactment of the bill's MBE provisions.

Finally, by referring to the State's existing MBE program, it is clear that the Offshore Wind Energy Act of 2013 envisions efforts to limit burdens on third parties, prohibits the use of quotas, makes waivers available for good faith efforts, and, authorizes only the type of flexible goals, applied on a contract-by-contract or project-by-project basis that this Office has long advocated as important to defending the constitutionality of MBE programs. Thus, it is our view that the MBE program contained in the Offshore Wind Energy Act of 2013 satisfies constitutional scrutiny.

Minority Business Outreach Program

The provisions of the Offshore Wind Energy Act of 2013 dealing with targeted outreach to minority investors, PU §7-704.1(D)(4), are also facially constitutional. In his concurrence in *Parents Involved*, Justice Kennedy specifically addressed the issue of race-conscious recruitment, among other race-conscious techniques, and wrote "it is unlikely any of them would demand strict scrutiny to be found permissible." 551 U.S. 701, 789 (2007). *See also H.B. Rowe v. Tippett*, 615 F.3d 233, 252 (4th Cir. 2010) (characterizing as "race neutral" North Carolina's decision to contract "for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development"); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (characterizing as "race-neutral" employee recruitment programs targeting minority college students and outreach programs); *but see Lutheran Church Missouri-Synod v. FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 387 (D.C. Cir. 1998) (applying strict scrutiny to minority outreach program); *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 20 (DC Cir. 2001) (same).

In the event that the minority outreach provision was subjected to strict scrutiny, however, it would still likely pass constitutional muster. First, there is a strong basis in evidence contained in the State's 2011 Disparity Study, of discrimination against minority and women contractors in the State contracting. This study examined most of the very industries that will be involved in the offshore wind program. Furthermore, the Study suggests that such discrimination is even greater in the prime contracting context than the subcontracting context. *Letter of Dr. Jon Wainwright to Director Abigail*

Hopper (Feb. 12, 2013) at 3-4. Second, the minority investor recruitment provisions are extremely narrowly tailored. The provisions impose little or no burden on innocent third parties, apply only if an applicant is seeking investors, require only that minority investors be solicited and interviewed, do not require that such investors be permitted to purchase an equity share in the project and involve absolutely no rigid numerical targets or goals. To limit the possibility of constitutional problems in the administration of the program, the State should take care to execute the provisions in a flexible and non-results-oriented way. For instance, as with other minority provisions, the State should not unilaterally assign any numerical goals or requirements as to the number of potential investors to be interviewed and should ensure that non-minorities are not excluded from the efforts of applicants to seek out investors. *See Lutheran Church Missouri-Synod v. FCC*, 141 F.3d 344 (DC Cir. 1998).

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro