HB 569

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 569 (Delegate Carey)
Economic Matters

Energy Generation, Transmission, and Storage Projects - Required Community Benefit Agreement and Labor Standards

This bill requires the Public Service Commission (PSC) to condition the approval of a Certificate of Public Convenience and Necessity (CPCN), or an exemption from the requirement to obtain a CPCN, for certain proposed generating stations and energy storage projects on a developer's compliance with requirements relating to (1) community benefits agreements; (2) prevailing wage rates; and (3) contractor/subcontractor certifications and records. The Maryland Department of Labor (MDL) must monitor compliance and adopt implementing regulations.

Fiscal Summary

State Effect: General fund expenditures for MDL increase by $78,600 in FY 2023; future years reflect annualization, inflation, and ongoing costs. Special fund expenditures for the Department of Natural Resources (DNR) increase by $101,300 in FY 2023 and by $135,000 annually thereafter for consultants. Revenues are not affected.

(in dollars)	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
Revenues	$0	$0	$0	$0	$0
GF Expenditure	78,600	93,800	96,400	99,000	101,600
SF Expenditure	101,300	135,000	135,000	135,000	135,000
Net Effect	($179,900)	($228,800)	($231,400)	($234,000)	($236,600)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill does not directly affect local governmental operations or finances.

Small Business Effect: Meaningful.

Analysis

Bill Summary: The bill only applies to the construction of a "covered project," which means (1) a generation station with a cumulative nameplate capacity of 2 megawatts or more that produces energy from a Tier 1 renewable source, a Tier 2 renewable source, or nuclear energy or (2) an energy storage device with a cumulative nameplate capacity of 2 megawatts or more. "Energy storage device" is also a defined term under the bill. A covered project does not include (1) an off-shore wind project under § 7-704.1 of the Public Utilities Article or (2) an energy storage project under § 7-216 of the Public Utilities Article.

The bill requires PSC to condition approval of a CPCN, or an exemption from the requirement to obtain a CPCN, for a covered project on a developer complying with requirements relating to (1) community benefits agreements; (2) prevailing wage rates; and (3) contractor/subcontractor certifications and records, as described below.

Community Benefits Agreements

The developer of a covered project must take all reasonable actions to enter into a community benefits agreement with a community-based organization or collection of community-based organizations representing the community affected by the project that (1) details the contributions that the project will bring to the community in which the project will be located; (2) details actions to be taken to mitigate adverse conditions caused by the project; (3) promotes increased opportunities for local businesses, as well as small, minority, women-owned, and veteran-owned businesses in the energy industry; (4) ensures that at least 80% of the craft workers on the project have completed a safety course, as specified; (5) promotes career training opportunities in the construction industry for local residents, veterans, women, and minorities; (6) provides for best efforts and effective outreach to obtain, as a goal, the use of a workforce including minorities, to the extent practicable, as supported by a disparity study; and (7) reflects a twenty-first century labor-management approach based on cooperation, harmony, and partnership.

Prevailing Wage Rates

The developer of a covered project must ensure that workers are paid at least the prevailing wage rate determined under the State Finance and Procurement Article, as specified, unless the covered project is subject to a project labor agreement that (1) binds all contractors and subcontractors on the project through the inclusion of specifications in all relevant solicitation provisions and contract documents; (2) allows all contractors and subcontractors to compete for contracts and subcontracts on the project without regard to whether they are otherwise parties to collective bargaining agreements; (3) establishes uniform terms and conditions of employment for all construction labor employed on the projects; (4) guarantees against strikes, lockouts, and similar job disruptions; (5) establishes mutually binding procedures for resolving labor disputes; and (6) includes any other provisions negotiated by the parties to promote successful delivery of the project.

Contractor/Subcontractor Certifications and Records

The developer of a covered project must ensure that each contractor and subcontractor involved in the construction of the project completes a certification that the contractor or subcontractor (1) has the necessary resources to perform the relevant portion of the project, including the necessary technical, financial, and personnel resources; (2) has all licenses, certifications, or credentials required under State or local law; (3) participates in apprenticeship training (through a registered apprenticeship program) for each construction trade employed on the project; (4) will pay individuals employed on the project at least the applicable wage and fringe benefit rates for each individual's classification; and (5) has not misclassified and will not misclassify employees as independent contractors. The certification must also include that, during the immediately preceding three years, the contractor or subcontractor (1) has not been debarred by any government agency; (2) has not defaulted on any project; (3) has not had any license, certification, or other credential relating to the business revoked or suspended; and (4) has not been found in violation of any applicable law that resulted in the payment of a fine, back pay damages, or any other penalty of at least $10,000.

The developer of a covered project must submit to MDL a certification of compliance with the requirements described above at least 30 days before beginning construction of the project (along with a copy of a project labor agreement, if applicable). If a certification contains false, misleading, or materially inaccurate information, the developer, contractor, or subcontractor that executed the certification must, after notice and opportunity to be heard, be subject to debarment from entering into a contract with a public body. A contractor or subcontractor is also subject to penalties established by MDL by regulation.

Each developer, contractor, and subcontractor that is not subject to a project labor agreement must maintain records relating to the wages and hours worked by each individual working on a covered project, as specified. The records must include a signed statement affirming, among other requirements, that the records are correct, that applicable wage and other requirements have been met, and that the developer, contractor, or subcontractor does not receive kickbacks from an employee or employee welfare fund. The payroll for a covered project must be considered a public record subject to inspection and copying.

Other Requirements for the Maryland Department of Labor

MDL must distribute a list to all units, departments, and political subdivisions of the State providing the names of individuals or firms that MDL has found to have (1) failed to meet the bill's requirements; (2) been debarred by federal or State government; or (3) submitted false, misleading, or materially inaccurate information under the bill. The Secretary of Labor must also adopt regulations implementing the bill.

Current Law:

Prevailing Wage Rates

Chapter 12 of 2021 required investor-owned gas and/or electric utilities to require contractors and subcontractors on specified underground projects to pay their employees at least the applicable prevailing wage rate.

See **Appendix 1 – Maryland's Prevailing Wage Law** for additional information, including a discussion of estimated project costs associated with paying the prevailing wage.

Certificate of Public Convenience and Necessity

Currently, energy storage projects are not subject to the CPCN requirement, nor is it necessary to obtain a CPCN exemption for energy storage.

See **Appendix 2 – Certificate of Public Convenience and Necessity** for additional information about licensing the siting, construction, and operation of power plants and related facilities in the State.

State Fiscal Effect:

Maryland Department of Labor

MDL advises that it currently does not have the resources necessary to fulfill the bill's requirements to develop regulations, provide guidance, receive certifications, ensure compliance with the bill's requirements, and distribute information regarding noncompliant contractors/subcontractors to other governmental units. Accordingly, general fund expenditures for MDL increase by $78,608 in fiscal 2023, which accounts for the bill's October 1, 2022 effective date. This estimate reflects the cost of hiring one Assistant Attorney General to assist in the promulgation of regulations and ensure compliance under the bill. This estimate includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1.0
Salary and Fringe Benefits	$71,265
Other Operating Expenses	7,343
Total FY 2023 MDL Expenditures	**$78,608**

Future year expenditures reflect a full salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Department of Natural Resources/Public Service Commission

DNR advises that, in order to condition CPCN approvals and exemptions upon compliance with the bill's requirements, special fund expenditures for the Power Plant Research Program (PPRP) increase by $135,000 annually ($101,250 in fiscal 2023 due to the bill's October 1, 2022 effective date) for consultant services. This estimate is based upon PPRP consultants reviewing community benefits agreements and other additional information for nine CPCN cases annually, at a cost of $15,000 per case.

To the extent PPRP consultants perform any analyses that may be necessary for conditioning CPCN approvals or exemptions under the bill, the bill is not expected to affect PSC's finances or operations relating to the CPCN process.

Small Business Effect: Complying with the bill's wage and labor standards, recordkeeping, and certification requirements is likely to meaningfully impact small contractors and subcontractors working on covered projects, as well as small business renewable energy developers who may otherwise seek to construct a covered generating station or energy storage project.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 418 (Senator Feldman) - Finance.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; Department of General Services; Maryland Department of Labor; Department of Natural Resources; Board of Public Works; Maryland Department of Transportation; Office of People's Counsel; Public Service Commission; Department of Legislative Services

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Appendix 1 – Maryland's Prevailing Wage Law

Contractors and subcontractors working on eligible public works projects in Maryland must pay their employees the prevailing wage rate. "Public works" are structures or works, including a bridge, building, ditch, road, alley, waterwork, or sewage disposal plant, that are constructed for public use or benefit or paid for entirely or in part by public money.

Eligible public works projects are:

- those carried out by the State;
- any public work for which at least 25% of the money used for construction is State money; and
- specified projects in tax increment financing districts if the local governing body approves of the application of prevailing wages.

Any public works contract valued at less than $250,000 is not required to pay prevailing wages. The State prevailing wage rate also does not apply to (1) any part of a public works contract funded with federal funds for which the contractor must pay the prevailing wage rate determined by the federal government; (2) specified construction projects carried out by public service companies under order of the Public Service Commission; or (3) local House or Senate initiatives that receive State funds in the capital budget.

Prevailing wages are wages paid to at least 50% of workers in a given locality who perform the same or similar work on projects that resemble the proposed public works project. If fewer than 50% of workers in a job category earn the same wage, the prevailing wage is the rate paid to at least 40% of those workers. If fewer than 40% receive the same wage rate, the prevailing wage is calculated using a weighted average of local pay rates. The State Commissioner of Labor and Industry is responsible for determining prevailing wages for each public works project and job category based on annual surveys of contractors and subcontractors working on both public works and private construction projects.

The commissioner has the authority to enforce contractors' compliance with the prevailing wage law. Contractors found to have violated the prevailing wage law must pay restitution to the employees and liquidated damages to the public body in the amount of $20 a day for each laborer who is paid less than the prevailing wage or $250 per laborer per day if the employer knew or reasonably should have known of the obligation to pay the prevailing wage. If an employer fails to comply with an order by the commissioner to pay restitution, either the commissioner or an employee may sue the employer to recover the difference between the prevailing wage and paid wage. The court may order the employer to pay double or triple damages if it finds that the employer withheld wages or fringe benefits willfully and knowingly or with deliberate ignorance or reckless disregard for the law.

The Governor must include at least $385,000 in the budget each year for the Prevailing Wage Unit within the Maryland Department of Labor (MDL).

The University System of Maryland (USM), Morgan State University (MSU), St. Mary's College of Maryland, and the Maryland Stadium Authority (MSA) are all exempt from the prevailing wage law. However, USM, MSU, and MSA all voluntarily comply with prevailing wage requirements for contracts that exceed the $250,000 threshold.

History of the Prevailing Wage

The federal Davis-Bacon Act, originally enacted in 1931, requires contractors working on federal public works contracts valued at more than $2,000 to pay their employees the prevailing local wage for their labor class, as determined by the U.S. Secretary of Labor. The general intent of the law, and similar state and local laws, is to stabilize local wage rates by preventing unfair bidding practices and wage competition. Thirty-two states and the District of Columbia currently have prevailing wage laws; since 1979, nine states have repealed their prevailing wage laws.

Maryland adopted a prevailing wage law in 1945 (Chapter 999), but it only applied to road projects in Allegany, Garrett, and Washington counties. In 1969, the statute was amended to include State public works contracts of $500,000 or more. There have been periodic changes to the law and the definition of "prevailing wage." In 1983, the law was broadened to include public works projects in which the State funds 50% or more of the total project costs and 75% or more in the case of public schools. Chapter 208 of 2000 reduced the prevailing wage threshold for public schools from 75% to 50% of construction costs, thereby bringing school construction projects in line with prevailing wage requirements for other public works projects. Chapters 281 and 282 of 2014 further lowered the State funding threshold for school construction projects to 25% of total construction costs, thereby requiring the vast majority of public school construction projects in the State to pay the prevailing wage, subject to the $500,000 contract value threshold. Chapters 57 and 58 of 2021 lowered the State funding threshold for all public works projects (including school construction) to 25% of total construction costs and lowered the contract value threshold for payment of prevailing wages to $250,000; however, legislative bond initiatives that receive State funds in the capital budget are exempt from the requirement to pay prevailing wages.

The number of prevailing wage projects has risen dramatically in recent years. MDL advises that, during fiscal 2021, its prevailing wage unit monitored 941 projects, down slightly from 1,091 projects in fiscal 2020, but significantly higher than 496 in fiscal 2014.

To accommodate the increase in projects, the number of prevailing wage investigators increased in fiscal 2016 from three to six; as of January 2022, there are four investigators, with a fifth investigator in the latter stages of recruitment.

Six Maryland jurisdictions – Allegany, Baltimore, Charles, Montgomery, and Prince George's counties and Baltimore City – have local prevailing wage laws requiring public works projects in the jurisdiction to pay prevailing wages. Montgomery County's prevailing wage ordinance does not apply to school construction projects, but beginning in fiscal 2023, the county will pay prevailing wages on all school construction projects, regardless of the level of State or county participation.

Research on the Effects of Prevailing Wage on Contract Costs

The Department of Legislative Services (DLS) has reviewed research on the effect of prevailing wage laws on the cost of public works contracts and has found inconsistent and/or unreliable results. The primary challenge confronted by all prevailing wage researchers is identifying an appropriate "control group" consisting of projects of similar type, timing, and location that do not pay the prevailing wage. In most jurisdictions that require a prevailing wage, all projects of a specified type and size are subject to it, so there is no natural control group. Some researchers have compared project costs in states or localities before and after they adopted prevailing wage requirements, but their findings are clouded by the difference in time, during which construction costs changed and other factors were not consistent. Another deficiency in the research is that it almost always relies on project bid prices (*i.e.*, the anticipated cost prior to the beginning of construction) rather than actual final costs. As most construction projects experience change orders or cost overruns affecting their cost, reliance on bid prices negatively affects the validity of the findings. Therefore, research findings related to the effect of the prevailing wage on project costs are inconsistent and often inconclusive. A similar review of research conducted by MDL (at the time, the Department of Labor, Licensing, and Regulation) for the Task Force to Study the Applicability of the Maryland Prevailing Wage Law also concluded that "data limitations create difficulty for researchers on both sides of the issue."

Local school systems occasionally solicit side-by-side bids with and without prevailing wages to help them decide whether they want to accept the full State match (and, thus, be subject to the prevailing wage) or a lesser State match without being subject to the prevailing wage. Data provided to the Public School Construction Program by Anne Arundel, Carroll, Frederick, Howard, and Washington counties, from 2012 through 2015, shows that the cost differential between bids with and without prevailing wages for 266 individual bids submitted for 26 different school construction and renovation projects averaged 11.7%, with a range from 0% to 49%. As with other research data, these represent bid prices, not actual construction costs. An independent analysis of the Maryland side-by-side bid data concluded that factors other than prevailing wages, including bid timing and the level of competition for the bids, accounted for most of the differences between the prevailing wage and nonprevailing wage bids.

One area of the research in which there is a general consensus, and which is supported by the U.S. Bureau of Labor Statistics, is that labor costs represent between 20% and 30% of construction costs (with materials and site costs making up most of the rest). Therefore, a 10% gap between prevailing wages and market wages could theoretically increase total contract costs by about 2.5%, and a 20% gap in wages could increase total contract costs by about 6%. Given the empirical evidence that prevailing wages tend to be higher than nonprevailing wages and that labor costs are a significant portion of overall project costs, DLS believes that it is reasonable to expect that the prevailing wage requirement adds between 2% and 5% to the cost of a public works project. Given the inconsistency and inconclusiveness of the empirical research, however, actual effects may vary by project, with some projects exhibiting higher cost differences and others experiencing negligible differences.

Appendix 2 – Certificate of Public Convenience and Necessity

General Overview

The Public Service Commission (PSC) is the lead agency for licensing the siting, construction, and operation of power plants and related facilities in the State through Certificates of Public Convenience and Necessity (CPCN). The CPCN process is comprehensive and involves several other State agencies, including the Department of Natural Resources (and its Power Plant Research Program), and the Maryland Department of the Environment. Subject to limited exemptions described below, a person may not begin construction in the State of a generating station, overhead transmission line, or qualified generator lead line unless a CPCN is first obtained from PSC. "Generating station" is not defined in statute; however, the PSC definition in regulation excludes a facility with up to two megawatts of capacity if it meets other specified requirements.

The CPCN process, detailed further below, involves the notification of specified stakeholders, the holding of public hearings, the consideration of recommendations by State and local government entities, and the consideration of the project's effects on various aspects of the State infrastructure, economy, and environment.

In December 2020, PSC initiated a rulemaking (RM 72) to revise regulations governing CPCNs for generating stations. Updated regulations became effective in September 2021. Among other changes, the regulations contain additional information requirements – to assist in project evaluation – and allow for electronic submission and distribution of application materials.

Notification Process

Upon receipt of a CPCN application, PSC – or the CPCN applicant, if required by PSC – must immediately provide notice to specified recipients, including the executive and governing body of affected local governments, affected members of the General Assembly, and other interested persons. When providing the notice, PSC must also forward the CPCN application to each appropriate unit of State and local government for review, evaluation, and comment and to each member of the General Assembly who requests a copy.

Public Hearing and Comment

PSC must provide an opportunity for public comment and hold a public hearing on a CPCN application in each county and municipality in which any portion of the construction of a generating station, overhead transmission line, or qualified generator lead line is proposed to be located. PSC must hold the hearing jointly with the governing body of the county or municipality and must provide weekly notice during the four weeks prior to the hearing, both in a newspaper and online, and must further coordinate with each local government to identify additional hearing notification options. PSC must ensure presentation and recommendations from each interested State unit and must allow representatives of each State unit to sit during the hearing of all parties. PSC must then allow each State unit 15 days after the conclusion of the hearing to modify the unit's initial recommendations.

Public Service Commission Considerations

PSC must take final action on a CPCN application only after due consideration of (1) recommendations of the governing body of each county or municipality in which any portion of the project is proposed to be located; (2) various aspects of the State infrastructure, economy, and environment; and (3) the effect of climate change on the project. For example, PSC must consider the effect of the project on the stability and reliability of the electric system and, when applicable, air and water pollution. There are additional considerations specifically for a generating station or an overhead transmission line. For example, PSC must consider the impact of a generating station on the quantity of annual and long-term statewide greenhouse gas emissions.

Generating Station Exemptions

There are three general conditions under which a person constructing a generating station may apply to PSC for an exemption from the CPCN requirement:

- the facility is designed to provide onsite generated electricity, the capacity is up to 70 megawatts, and the excess electricity can be sold only on the wholesale market pursuant to a specified agreement with the local electric company;
- at least 10% of the electricity generated is consumed onsite, the capacity is up to 25 megawatts, and the excess electricity is sold on the wholesale market pursuant to a specified agreement with the local electric company; or
- the facility is wind-powered and land-based, the capacity is up to 70 megawatts, and the facility is no closer than a PSC-determined distance from the Patuxent River Naval Air Station, among other requirements.

However, PSC must require a person who is exempted from the CPCN requirement to obtain approval from the commission before the person may construct a generating station as described above. The application must contain specified information that PSC requires, including proof of compliance with all applicable requirements of the independent system operator.