

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 387 (Senator Zirkin)
 Education, Health, and Environmental Affairs

Environment - Water Quality Certifications (Pipeline and Water Protection Act of 2019)

This emergency bill establishes new regulatory requirements for a person seeking to construct an interstate “natural gas pipeline.” The bill requires such a person to (1) apply for and receive a water quality certification from the Maryland Department of the Environment (MDE) and (2) submit a grading and sediment control plan and a stormwater management plan for the construction of the pipeline to MDE. MDE must establish an application fee and conduct a review of applications, as specified. The bill also establishes public notice and hearing requirements.

Fiscal Summary

State Effect: Assuming the bill can be implemented, as discussed below, special fund expenditures increase by \$173,400 in FY 2020; future years reflect ongoing costs. Special fund revenues from application fees increase beginning in FY 2020. It is assumed there is no impact in FY 2019.

| (in dollars) | FY 2020 | FY 2021 | FY 2022 | FY 2023 | FY 2024 |
|----------------|-------------|-------------|-------------|-------------|-------------|
| SF Revenue | - | - | - | - | - |
| GF Expenditure | \$173,400 | \$140,000 | \$144,600 | \$149,400 | \$154,500 |
| Net Effect | (\$173,400) | (\$140,000) | (\$144,600) | (\$149,400) | (\$154,500) |

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

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary:

Water Quality Certification

Application Required to Construct an Interstate Natural Gas Pipeline: A person seeking to construct an interstate natural gas pipeline must apply to MDE for a water quality certification and pay a nonrefundable fee established by MDE pursuant to the bill. A “natural gas pipeline” is a pipeline that (1) is or will be constructed to transport natural gas across more than one state and (2) requires an application for a certificate of public convenience and necessity under Section 7(c) of the Federal Natural Gas Act.

MDE must establish a nonrefundable fee for the submission and review of an application. The amount of the application fee must be based on the size of the proposed project, the estimated or actual costs incurred by MDE to implement the bill’s requirements, and any other necessary factors. In addition, the fee must be the greater of \$400 or 1% of the gross value of the proposed project (up to \$20,000). Fee revenue must be deposited into the State Treasury and credited to an MDE account. Additionally, fees deposited in the State Treasury must be continuously appropriated to MDE to meet the bill’s administrative costs.

Application Review Requirements: MDE must conduct a review of a water quality certification application in accordance with the bill and relevant State regulations. MDE may not waive its authority under Section 401 of the Clean Water Act (CWA) to review an application.

MDE must review an application for completeness within 60 days, and depending on whether an application is deemed complete or incomplete, MDE must provide an applicant with notice, as specified.

MDE’s review of an application must include a review of (1) a proposed project’s potential impacts on the State’s water quality standards; (2) any construction through karst terrain and associated groundwater mapping; (3) potential impacts on nearby private drinking water wells, downstream water supplies, and nearby drinking water aquifers; (4) cumulative impacts on the watershed within which construction may occur, including impacts on waterways from infrastructure associated with the construction or connection of a pipeline; (5) all activities that will occur in upland areas within the watershed within which construction may occur, as specified; (6) how the greenhouse gas emissions associated with a proposed project will impact water quality; and (7) how a proposed project may need to be modified to account for climate change, as specified.

MDE is authorized to make a written request to an applicant for additional information at any time during the review of an application. However, MDE must specify a deadline for any additional information requested and give the applicant a reasonable amount of time to respond to such a request. MDE may deny an application if an applicant fails to provide any requested information by the deadline.

Public Notice, Hearing, and Final Determination Requirements: If MDE determines that an application should be approved, it must (1) develop a draft water quality certification (which must include any additional comments MDE determines are necessary to protect water quality); (2) make the draft water quality certification, the application, and any additional information obtained during the application process available for public comment; (3) make application information and any additional information obtained during the application process available to the public; and (4) hold a public hearing in each county in which construction may occur.

After the public comment period, within one year of submission of a complete application, MDE must issue a decision to approve, approve with conditions, or deny an application. The decision must be in writing, be made available to the public, and include MDE's rationale.

MDE may deny an application that fails to meet the bill's requirements or any other law or regulation under which a water quality certification is sought.

Grading and Sediment Control Plans and Stormwater Management Plans

A person seeking to construct a natural gas pipeline must submit to the appropriate approval authority (1) a grading and sediment control plan for the pipeline construction and (2) a stormwater management plan for the pipeline construction. Construction for the natural gas pipeline, including land-disturbing activities, may not begin until both plans are approved.

An approval authority must review and make a decision regarding plan approval within 60 days of plan submission and must provide, in writing, the approval authority's rationale for denying a plan. If a person resubmits a revised grading and sediment control plan or a revised stormwater management plan that was previously denied, the approval authority must review and make a decision regarding plan approval within 30 days of resubmission.

Current Law:

Regulation of Interstate Pipelines

In general, natural gas is brought into the State through the interstate transmission system and then allocated as needed through the *intrastate* natural gas distribution systems of the State's gas companies for customer use. Depending on the location and use, a natural gas facility and the associated pipelines may be regulated by several federal agencies. The Federal Energy Regulatory Commission (FERC) is responsible for authorizing the construction and operation of interstate natural gas pipelines. The Pipeline and Hazardous Materials Safety Administration (PHMSA) is responsible for establishing and enforcing safety regulations for onshore natural gas facilities and transportation pipelines. If a project to construct an interstate natural gas pipeline involves the dredging and filling of the waters of the United States, the project also requires a permit from the U.S. Army Corps of Engineers (USACE) pursuant to Section 10 of the Rivers and Harbors Act of 1899.

The Natural Gas Act: The Natural Gas Act of 1938 gives FERC exclusive jurisdiction over the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural gas companies engaged in that transportation or sale. Section 7(c) of the Natural Gas Act gives FERC the authority to grant certificates allowing construction and operation of facilities used in interstate gas transmission and authorizing the provision of services. A "certificate of public convenience and necessity" (CPCN) issued under the Natural Gas Act permits pipeline companies to charge customers for some of the expenses incurred in pipeline construction and operation.

FERC's CPCN review has two distinct stages. The first stage is the pre-filing environmental review process, which includes an environmental assessment pursuant to the National Environmental Policy Act. The second stage is the application process, which includes numerous opportunities for public input. A project to construct or extend a natural gas facility or pipeline may not be initiated unless a CPCN has been issued.

Natural Gas Pipeline Safety Act: The federal Natural Gas Pipeline Safety Act of 1968 requires the Secretary of the U.S. Department of Transportation to establish minimum federal safety standards for the transportation of gas and for pipeline facilities. It authorizes any state agency to adopt additional or more stringent regulations that are not incompatible with the minimum federal standards. PHMSA has exclusive authority to establish and enforce safety regulations for onshore natural gas facilities used in the transportation of gas by pipelines that are subject to the Natural Gas Pipeline Safety Act.

Although FERC has no jurisdiction over pipeline safety or security, only for authorizing the construction and operation of interstate natural gas pipelines, the commission signed a [memorandum of understanding](#) with PHMSA in August 2018 to review applications for

the construction and operation of interstate natural gas pipelines to ensure that applicants certify they will comply with U.S. Department of Transportation safety issues.

Water Quality Certification under Section 401 of the Federal Clean Water Act

Federal Clean Water Act: The federal CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States. Section 401 of CWA requires an applicant for a federal license or permit to conduct an activity which may result in a discharge to navigable waters to provide a certification that the discharge will comply with CWA, including water quality standards established under state law. A state may grant, grant with conditions, deny, or waive certification. A state's determination is based on whether an activity complies with key provisions of CWA, including federal effluent limitations, federal new source performance standards, toxic and pretreatment effluent standards, and any other appropriate requirement of state law. A state must act on a request for water quality certification "within a reasonable time (which shall not exceed one year) after receipt of such request." While this time period may not exceed one year, a lesser time can be set, and USACE has set a 60-day deadline. The time runs from the request for certification.

State Water Quality Certifications: The Code of Maryland Regulations (COMAR) 26.08.02.10 sets forth the procedures under which a water quality certification is issued by MDE, including procedures for applying for a water quality certification and procedures for providing public notice of each application for a certification. Under the regulation, if MDE determines a proposed activity will not violate applicable State water quality standards, MDE must issue the certification. The conditions of the water quality certificate become automatic conditions in the federal permit or license.

MDE advises that gas pipeline projects in Maryland often involve activities that trigger the requirement to obtain authorization from both USACE and FERC, as well as a State permit for impacts to wetlands and waterways. It is the USACE action that typically triggers the requirement for a water quality certification under CWA. In these cases, a joint permit application for a water quality certification is filed with MDE.

MDE also notes that in 2016 Maryland certified that any activities qualifying for federal authorization under USACE Maryland State Programmatic General Permit – 5 are precertified for the purposes of Section 401 of CWA. Thus, any project that USACE approves pursuant to that general permit has an automatic water quality certification. However, a water quality certification is still required if USACE processes an application as an individual permit. Additionally, MDE can require an individual water quality certification even if an activity could normally be regulated under a general water quality certification if the project presents "unique circumstances not considered in the issuance of the general certification."

Other Relevant State Water Quality and Discharge Requirements: Other State laws address water quality and discharge permits. Section 9-314 of the Environment Article authorizes the Secretary of the Environment to adopt regulations that set water quality standards and effluent standards for the waters of the State. Section 9-322 generally prohibits a person from discharging any pollutant into the waters of the State. Section 9-323 requires a person to hold a discharge permit issued by MDE before the person may construct, install, modify, extend, alter, or operate an industrial, commercial, or recreational facility or disposal system, a State-owned treatment facility, or any other outlet or establishment if its operation could cause or increase the discharge of pollutants into the waters of the State. Section 9-324 authorizes MDE to issue a discharge permit if MDE finds the discharge meets all applicable State and federal water quality standards and effluent limitations and all other applicable requirements.

State Stormwater Management Plans

Under Title 4, Subtitle 2 of the Environment Article, MDE must (1) adopt rules and regulations to establish criteria and procedures for stormwater management in the State and (2) provide technical assistance, training, research, and coordination services to local governments in the preparation and implementation of their stormwater management programs. Counties and municipalities must adopt ordinances necessary to implement a stormwater management program that is consistent with flood management plans and that meet MDE requirements. MDE must (1) review local stormwater management program plans every three years and (2) monitor local implementation.

Generally, a person may not develop any land for residential, commercial, industrial, or institutional use unless the person has submitted a stormwater management plan and has received approval of the plan from the applicable local jurisdiction. State and federal agencies are required to submit a stormwater management plan and obtain State approval from MDE prior to undertaking specified construction activity.

State Sediment Control Plans

Before a person begins any land clearing, grubbing, topsoil stripping, soil movement, grading, cutting and filling, transporting, or other disturbing of land for any purpose, the appropriate approval authority must review and approve the proposed earth change and the sediment control plan. The approval authority is (1) the appropriate soil conservation district; (2) a municipal corporation in Montgomery County (under specified conditions); (3) any municipality not within a soil conservation district; (4) MDE for State or federal plans and for abandoned mine reclamation projects conducted by MDE; or (5) MDE for large redevelopment sites.

A county or municipality may only issue grading and building permits to a developer who has submitted a grading and sediment control plan approved by the appropriate approval authority.

Relevant Definitions

Statute defines “karst terrain” as an irregular topography that is (1) caused by a solution of limestone and other carbonate rock and (2) characterized by closed depressions, sinkholes, caverns, solution cavities, and underground channels that, partially or completely, may capture surface streams. Regulations define “carbonate rock” as a rock primarily composed of calcium carbonate or magnesium carbonate.

Background: In March 2017, MDE received an application for a wetlands and waterways permit from Columbia Gas, which is owned by TransCanada, to construct an eight-inch pipeline to carry fracked natural gas from Fulton County, Pennsylvania, to Morgan County, West Virginia, including a three-mile span underneath the Potomac River in Western Maryland. The request met with opposition from environmental groups and the public due to the potential environmental impact of the project on drinking water and groundwater. One year later, MDE approved the permit, conditioned on requirements more stringent than federal standards, including additional precautions and safety measures.

In January 2019, the Board of Public Works voted unanimously to disapprove a necessary easement for the pipeline, despite a recommendation by the Department of Natural Resources that the easement be approved. The decision followed extensive public testimony, including a letter in opposition to the project signed by 65 members of the General Assembly. The letter noted that approval of the pipeline contradicts the spirit and reasoning behind Maryland’s ban on fracking in 2017 and that supporting fossil fuel production is not aligned with the State’s goal of increasing renewable energy production.

State Fiscal Effect: The Attorney General of Maryland’s Office of Counsel to the General Assembly wrote a letter of opinion regarding this bill and concluded that, among other things, “the bill as now drafted violates the Commerce Clause of the United States Constitution.” Thus, it is unclear whether MDE can even implement and enforce the bill. For the purposes of the analysis that follows, it is assumed that MDE is able to do so.

State Revenues: Pursuant to the bill, fees from applications must be deposited in the State Treasury and credited to an account of MDE. For purposes of this analysis, it is assumed that fee revenues are treated as special fund revenues and not general fund revenues. Thus, special fund revenues increase beginning in fiscal 2020 from application fees. Actual revenues depend on fee levels set by MDE, which must be determined based on several factors specified in the bill. Among other things, the fee must be the greater of (1) \$400 or (2) 1% of the gross value of the proposed project, not to exceed \$20,000. Thus, an exact

estimate of any increase in fee revenue is unknown. However, MDE advises that it receives an average of 10 project applications annually; thus, revenues may increase by as much as \$200,000 annually.

State Expenditures: Pursuant to the bill, the fees deposited in the State Treasury must be continuously appropriated to MDE to meet its administrative costs. Again, for purposes of this analysis, it is assumed that these fees are treated as special funds and that MDE receives a special fund appropriation to implement the bill.

Special fund expenditures increase by \$173,393 in fiscal 2020, which assumes MDE is able to hire staff by July 1, 2019. This estimate reflects the cost of hiring one geologist and one regulatory compliance engineer to conduct the intensive review of proposed interstate natural gas pipeline projects required by the bill. It includes salaries, fringe benefits, one-time start-up costs (including the purchase of a vehicle), and ongoing operating expenses. The information and assumptions used in calculating the estimate are stated below:

- MDE receives an average of 10 project applications annually; and
- the review process required by the bill is significantly more comprehensive than the review conducted for similar projects under current law; thus, it cannot be accomplished with existing staff.

| | |
|---|------------------|
| Positions | 2 |
| Salaries and Fringe Benefits | \$136,263 |
| Vehicle Purchase | 22,900 |
| Other Equipment/Operating Expenses | <u>14,230</u> |
| Total FY 2020 State Expenditures | \$173,393 |

Future year expenditures reflect salaries with annual increases and employee turnover and ongoing operating expenses.

Additional Information

Prior Introductions: None.

Cross File: HB 669 (Delegate Fraser-Hidalgo, *et al.*) - Economic Matters and Environment and Transportation.

Information Source(s): Baltimore City; Montgomery and Prince George's counties; City of Bowie; Maryland State Treasurer's Office; Maryland Department of the Environment; Department of Natural Resources; Public Service Commission; Maryland Office of the SB 387/ Page 8

Attorney General; Federal Energy Regulatory Commission; U.S. Environmental Protection Agency; U.S. Army Corps of Engineers; U.S. Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - February 17, 2019
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