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The Future of Kentucky's Solar Industry Is Bright Following Recent Legislative Changes

It's been more than a decade since Kentucky revised the statutes controlling the Kentucky State Board on Electric Generation and Transmission Siting (the "Siting Board"), and since the last revisions in 2010, solar has become a major force for energy generation in Kentucky. The Kentucky legislature recently voted to override Governor Andy Beshear's veto of House Bill 4 (HB4), which had initially passed the legislature with bipartisan support. HB4, among other things, amended the statute governing the siting of utility-scale solar and other merchant electric generating facilities. HB4 amends the rules governing solar projects in the following four major fashions:

- New construction certificates will now be valid for three years, rather than two.
- A decommissioning plan and decommissioning bond will now be required as part of all applications for certificates to construct merchant electric generating facilities.
- Local primacy was greatly expanded to ensure local government decisions will control where conflicts arise with the Siting Board.
- The Kentucky Energy and Environment Cabinet (the "Cabinet") has been authorized to monitor and enforce compliance obligations of merchant electric generating facilities upon completion of construction, including issuing financial penalties.

These key features are summarized below. The Act is anticipated to take effect on June 28, 2023.

Shelf Life of a Construction Certificate

Under the Act, a Siting Board-issued construction certificate is valid for a period of three years from the issuance date of the last permit needed to be obtained from the Cabinet. If an applicant does not commence construction of the merchant electric facility prior to the expiration of the construction certificate, it must seek a new certificate from the Siting Board.

Facility Decommissioning Plans

Prior to passage of HB4, the Siting Board would typically require a decommissioning plan and bond in the conditions and mitigation measures attached to the Board's order conditionally approving a construction certificate. Under HB4, a decommissioning plan and a bond will now be required elements of an administratively complete construction certificate application. This decommissioning plan must include, among other things, plans to:

- Remove at the end of the solar facility's useful life all above ground facilities and foundations, unless otherwise requested by the landowner;
- Remove underground components to a depth of three feet, unless the landowner and the applicant otherwise agree to a different depth;
- Restore the land to a substantially similar state to that prior to commencing construction;
- Leave any interconnection and other facilities in place for future use, unless otherwise requested by the landowner;
- Secure a bond to ensure performance of all decommissioning obligations;
- Communicate with landowners at the end of the project's useful life to accommodate lease commitments and other agreed upon landowner requests, as well as all state and local requirements; and
- Incorporate decommissioning requirements into landowner leases.

Additionally, the amount of the required decommissioning bond must be determined by an independent, licensed engineer

experienced in decommissioning solar facilities who has no financial interest in either the facility or the underlying land. The bond amount will either be (1) the net present value of the total estimated cost of completing the decommissioning plan minus the current net salvage value of facility components, or (2) the amount required by a county or municipal government if a local bond obligation is established. For projects spanning more than one county or municipality with established decommissioning bond obligations, the higher bond amount will be required.

Expanding Local Primacy

Prior to HB4, the Siting Board's statute recognized that setbacks established by local planning and zoning commissions had primacy over the Board's default statutory setbacks. Under HB4, local primacy is expanded so that decommissioning plan and bond requirements established by local planning and zoning commissions will also have primacy over the Siting Board's decommissioning plan and bond requirements. Interestingly, HB4 goes on to provide that any ordinance, permit or license issued by a local government will have primacy over not only the Siting Board's setback and decommissioning requirements, but also statutory provisions governing the application and site assessment report.

Energy and Environment Cabinet Enforcement

Prior to HB4, the Siting Board was responsible for ensuring ongoing compliance with decommissioning and bond requirements, as well as the developer's compliance with the conditions and mitigation measures included by the Siting Board in a construction certificate. Under HB4, the Cabinet has monitoring and enforcement authority over all merchant electric generation facilities. Among its new responsibilities, the Cabinet can draw upon a bond to decommission and dismantle a facility if, for example, the facility owner fails to decommission the facility within 18 months of when it ceases to produce electricity for sale. Merchant electric facilities are now subject to new reporting requirements, which include notifying the Cabinet when facility construction is complete and providing the Cabinet with an updated copy of the

decommissioning bond every five years. The new reporting requirements also include providing the Cabinet, landowners, and the local county or municipality with notice of any transfer of ownership or control of the facility.

The Cabinet is authorized to potentially impose civil penalties up to \$2,500 per day for noncompliance with various reporting and filing requirements pertaining to decommissioning and certificate transfers. It also has the authority to promulgate regulations that would impose an annual fee on solar facilities in order to offset the costs of enforcing the new requirements. Civil penalties and fees will be deposited into a new state treasury fund that will help pay for the Cabinet's monitoring and enforcement responsibilities. The Cabinet is required to promulgate regulations for its monitoring and enforcement program within 90 days of the Act's effective date, approximately late-September 2023.

Conclusion

HB4 amends critical aspects related to the siting and long-term operation of merchant electric generating facilities in Kentucky. Prospective developers of facilities, as well as current construction certificate-holders, should expect these changes to take effect by late-June. At Frost Brown Todd, we pride ourselves on understanding each client's project objectives from their vantage point through each phase of the project lifecycle.

For more information about how these statutory and regulatory changes could impact your business, please contact the authors of this article or any member of Frost Brown Todd's [Renewables](#) team.

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