

980 CMR: ENERGY FACILITIES SITING BOARD

980 CMR 17.00: CONSTRUCTIVE APPROVAL

Section

17.01 : Purpose and Scope.

17.02 : Preparations for Possibility of Constructive Approval.

17.03: Contents and Form of a Constructive Approval Permit.

17.04: Board Issuance of a Constructive Approval Permit.

17.05: Right to Appeal.

17.01: Purpose and Scope.

- (1) Purpose. 980 CMR 17.00 establishes the requirements pertaining to a Constructive Approval, which the Board shall issue if it has not timely issued a Consolidated Permit or Consolidated State Permit under 980 CMR 13.00.
- (2) Scope. 980 CMR 17.00 applies to every Application submitted to the Board for a Clean Energy Infrastructure Facility. M.G.L. c. 164, §§ 69T, 69U, 69V.
- (3) Applicability of Earlier Sections. 980 CMR 1.00, 2.00, and 13.00 apply to 980 CMR 17.00, unless otherwise noted.
- (4) Definitions. For the purpose of 980 CMR 17.00, the following definitions apply unless the context or subject matter requires a different interpretation:

Constructive Approval. The approval of an Application for a Clean Energy Infrastructure Facility (CEIF) triggered by the Board's failure to issue a Final Decision by the applicable deadline established by the Board pursuant to 980 CMR 13.02(4)(a).

Constructive Approval Permit. A Consolidated Permit or Consolidated State Permit that the Board issues in the event of Constructive Approval. ~~Unlike a Consolidated Permit or Consolidated State Permit issued through the regular process of 980 CMR 13.00, a~~ Constructive Approval Permit may include both zoning relief and necessary zoning exemptions. The contents and form of Constructive Approval Permits are defined in 980 CMR 17.03.

17.02 : Preparations for Possibility of Constructive Approval.

- (1) Procedural Assessment. Between sixty and ninety days before the applicable deadline established by 980 CMR 13.02(4)(a), the Presiding Officer shall assess the progress of the proceeding to determine whether there is reasonable assurance that the Board will issue a Consolidated Permit or Consolidated State Permit by the applicable deadline.
- (2) Notice of Likelihood of Constructive Approval. If the Presiding Officer does not have reasonable assurance that the Board will meet its deadline to issue a Final

980 CMR: ENERGY FACILITIES SITING BOARD

Decision, the Presiding Officer shall prepare and issue to the Parties, permit enforcement agencies, and the Board a Notice of Likelihood of Constructive Approval that references 980 CMR 17.02: *Preparations for Possibility of Constructive Approval*, states that a Constructive Approval is likely, and describes the reasons for that assessment.

(3) Issuance of Draft Constructive Approval Permit. Within two weeks after the issuance of the Notice of Likelihood of Constructive Approval, the Presiding Officer shall prepare and issue to the Parties, Limited Participants, the permit enforcement agencies, and the Board a draft Constructive Approval Permit. The Permit shall comply with the requirements of 980 CMR 17.03: *Contents and Form of a Constructive Approval Permit*, except that the document will be titled “draft Constructive Approval Permit” and will be marked “DRAFT” on all pages.

(4) Comment Period. The Presiding Officer shall designate a comment period, extending at least seven days from the issuance of the draft Constructive Approval Permit. During that time, the recipients of the draft Constructive Approval Permit may file written comments regarding the draft to ensure compliance with 980 CMR 17.03: *Contents and Form of a Constructive Approval Permit*.

17.03 : Contents and Form of a Constructive Approval Permit.

(1) Contents. A Constructive Approval Permit shall be in writing and shall include the following contents:

(a) Identifying Information.

1. Name of the Applicant, docket number(s), and project name.
2. Name, address, telephone number, and email address of the Applicant Representative(s). See 980 CMR 13.01(4): *Definitions* and 13.03(3) *Application Summary Form*.
3. The Applicant’s Description of the Project, Site, and Surrounding Area pursuant to 980 CMR 13.03(4): *Description of the Project, Site, and Surrounding Area*, as the Applicant may have validly updated that information.

(b) Required Permits and Approvals.

1. List. A list of all state, regional, and local permits and approvals listed on the Application pursuant to 980 CMR 13.05: *Agency Permit Requirements*, as the Applicant may have validly updated that information.
2. Documents. All draft permits and approvals provided by the Applicant pursuant to 980 CMR 13.05(1)(a), (b), and (c), as the Applicant may have validly updated that documentation.
3. Zoning Statement. A statement of the zoning relief that the Applicant ~~has requested, and that the Presiding Officer has combined with the application for a Consolidated Permit or Consolidated State Permit pursuant to 980 CMR 1.09(2).~~

980 CMR: ENERGY FACILITIES SITING BOARD

(c) Conditions.

1. Standard Conditions. 980 CMR 13.08: *Conditions for EFSB Consolidated Permit.*

2. Agency Standard Conditions. All standard conditions pertaining to the agency permit approval forms submitted with the Application pursuant to 980 CMR 13.05(1) and (2).

(d) Abbreviated Procedural History (substantially complying with the following text, completed as indicated).

The Applicant(s), _____[name(s)], filed its/their Application in this proceeding on _____[date]. On _____[date], pursuant to 980 CMR 13.09: *Completeness Determination*, the Presiding Officer issued a Completeness Determination. The Determination confirmed that the Applicant had complied with all Application filing requirements. As a consequence of this determination date, the Board was required, pursuant to 980 CMR 13.02(4): *Review Time Frame*, to issue a Consolidated Permit or Consolidated State Permit by _____[date].

The Board did not issue a Consolidated Permit or Consolidated State Permit by _____[date]. Under these circumstances, M.G.L. c. 164, § 69T (for a large clean energy infrastructure facility), § 69U (for a small clean transmission and distribution infrastructure facility), or § 69V (for a small clean energy generation facility or small clean energy storage facility) requires the Board to issue a Constructive Approval Permit approving the Project. The Applicant is approved for all required local permits and approvals listed on part b(1) of this Constructive Approval Permit as if the accompanying draft permits had issued in final form. The Applicant is likewise granted all requested zoning relief as referenced in part b(3) of this Permit.

(e) Statement of Decision's Effect and Appeal Rights. The Constructive Approval Permit shall contain the text of 980 CMR 17.05(1): *Effect of Decision*; and 17.05(2): *Rights of Appeal*.

(f) Additional Information. Such additional information as the Board may deem necessary.

(2) Form. The Board may specify the form of the Constructive Approval Permit and may make available a template for that purpose.

980 CMR: ENERGY FACILITIES SITING BOARD

17.04 : Constructive Approval and Issuance of a Constructive Approval Permit.

- (1) If the Board has not timely issued a Consolidated Permit or Consolidated State Permit, the Constructive Approval Permit will be deemed issued on the applicable deadline date as a final Constructive Approval Permit.
- (2) The Presiding Officer will distribute to the Parties the Constructive Approval Permit itself, in compliance with 980 CMR 17.03: *Contents and Form of a Constructive Approval Permit* within five business days of the applicable deadline date.
- (3) The evidentiary record closes upon the distribution of the Constructive Approval Permit.
- (4) Right to Issue Consolidated Permit or Consolidated State Permit in Due Course. Neither the Presiding Officer's likelihood assessment pursuant to 980 CMR 17.02(2) nor its issuance of a draft Constructive Approval Permit pursuant to 980 CMR 17.02(3) shall prohibit the Board from issuing a Consolidated Permit or Consolidated State Permit in the normal course of the proceeding prior to the issuance deadline.

17.05 : Effect of Decision and Rights of Appeal.

- (1) Effect of Decision. In accordance with M.G.L. c. 164, §§69T(i), 69U(c), 69V(c), a Constructive Approval Permit acts as an approval of all relevant permits and approvals from all state, regional, and local agencies required to construct and operate the project.
 - (a) No state, regional, or local agency shall require any other approval, consent, permit, certificate or condition for the construction, operation, or maintenance of the project.
 - (b) No state, regional, or local agency shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action, other than reasonably enforcing the conditions and requirements of the Constructive Approval Permit, that would delay or prevent construction, operation, or maintenance of the Project.
- (2) Rights of Appeal. Under M.G.L. c. 164, § 69T, 69U, or 69V, a Constructive Approval Permit is deemed a final decision, and is subject to appeal under M.G.L. c. 164, § 69P. The appeal deadline will be calculated from the date the Presiding Officer distributed the Constructive Approval Permit pursuant to 980 CMR 17.04(2).
- (3) Scope of Review. The scope of such judicial review is governed by M.G.L. c. 164, § 69P. The scope of the appeal shall be limited to whether the Constructive Approval Permit: (i) is in conformity with the Constitution of the Commonwealth and the United States Constitution; (ii) was made in accordance with the procedures established in M.G.L. c. 164, §§ 69H to 69O, inclusive, and §§ 69T to 69W,

980 CMR: ENERGY FACILITIES SITING BOARD

inclusive, and the rules and regulations of the Board with respect to such provisions;
(iii) was supported by substantial evidence of record in the board's proceedings; or
(iv) was arbitrary, capricious or an abuse of the Board's discretion under M.G.L. c. 164, §§ 69H to 69O, inclusive, and said sections §§ 69T to 69W, inclusive.

REGULATORY AUTHORITY

980 CMR 17.00: M.G.L. c. 164, §§69T(i), 69U(c), 69V(c).