

## 980 CMR 11.00: LICENSING OF HYDROPOWER GENERATING FACILITIES

### Section

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### 11.01: General

(1) Scope. 980 CMR 11.00 shall apply to actions taken by the Council under M.G.L. c. 164, § 69H½, which deals with licensing of hydropower generating facilities.

(2) Statutory Authority. 980 CMR 11.00 is promulgated pursuant to M.G.L. c. 164, §. 69H½ and M.G.L. c. 30A, §§ 2 and 9.

(3) Purpose. The purpose of 980 CMR 11.00 is to implement the policy and provisions of M.G.L. c. 164, § 69H½ which requires the Energy Facilities Siting Council to coordinate the permitting and licensing of hydropower generating facilities by simplifying requirements for permits and licenses in Massachusetts. To this end, the Council has established preliminary notification forms and other forms to be employed for permitting and licensing; will conduct pre-licensing conferences between developers and these agencies jointly with the Secretary of the Executive Office of Environmental Affairs; will assist in resolving disputes between developers and agencies concerning the form, content, level of detail and schedules of information and data requirements; will increase cooperation between the state and federal licensing agencies and will serve as a forum for final administrative appeal for any party aggrieved by a permitting and licensing agency's action or failure to act.

A developer should use the procedures established by this new hydropower statute and regulations. If he does not enter and follow this process, starting with filing one of the new forms - the Hydropower Preliminary Notification Form or the Environmental Notification Form and Hydropower Supplement, he cannot use the appeal section, 980 CMR 11.05.

It is to be noted that 980 CMR 11.00, promulgated under M.G.L. c. 164, § 69H½, do not affect the responsibilities of the Executive Office of Environmental Affairs under M.G.L. c. 30, §§ 62-62H. They do not affect deadlines for final orders imposed upon the Department of Environmental Quality Engineering under M.G.L. c. 131, § 40. Nor do they affect the "federal consistency" review authority of the Massachusetts Coastal Zone Management Office under 16 U.S.C. Sec. 1451 *et seq.*

Developers who have already begun the state licensing process when 980 CMR 11.00 become effective may utilize the procedures of 980 CMR 11.00, but cannot utilize the appeal section, 980 CMR 11.05, unless they have gone through an informal Council-run pre-licensing conference similar to that described in 980 CMR 11.03(6).

(4) Application of 980 CMR 2.00 and 1.00. 980 CMR 2.00 shall apply to 980 CMR 11.00 except to the extent that 980 CMR 2.00 and 980 CMR 11.00 are in conflict. In the event of a conflict, 980 CMR 11.00 shall prevail over 980 CMR 2.00. For the application of 980 CMR 1.00 to appeals under 980 CMR 11.00, see 980 CMR 11.05(2).

(5) Application of 980 CMR 11.00 to Final Orders of the Department of Environmental Protection. Notwithstanding other provisions of 980 CMR 11.00, the Department of Environmental Quality Engineering shall act on a request for a final order within the time limitations specified by M.G.L. c. 131, § 40.

(6) Definitions. For the purpose of 980 CMR 11.00 the following definitions shall apply unless the context or subject matter requires and specifies a different interpretation.

Action or failure to act occurs when:

- (a) permitting and licensing agency grants or denies an approval, permit, license, certificate or permission to a developer,
- (b) an agency fails to grant or deny an approval, permit, license, certificate or permission within a time limit set by the Council under 980 CMR 11.03(12), or
- (c) an information deadlock is established, as described in 980 CMR 11.03(9).

Agency means one of the "permitting and licensing agencies" as defined in M.G.L. c. 164, § 69H½. "Permitting and licensing agencies" are defined there as "all agencies, authorities, and departments of the Commonwealth, and local conservation commissions whose approval, order, order of conditions, permit, license, certificate, or permission in any form is required prior to or for construction of a hydropower generating facility, except the Secretary of Environmental Affairs acting under the provisions of M.G.L. c. 30, §§ 62-62H and shall include, but not be limited to, the Department of Environmental Protection including the Division of Water Pollution Control, the Department of Environmental Management, the Department of Fisheries, Wildlife and Recreational Vehicles, the Conservation Commission with jurisdiction over the proposed site, the Massachusetts Historical Commission, the Department of Public Utilities, and any other agency, authority, or department of the Commonwealth, county, city or town government, as may from time to time be so designated by the Energy Facilities Siting Council."

Appeal means an appeal under 980 CMR 11.05 from an action or failure to act on the part of a permitting and licensing agency.

Conduit means an enclosed water conveyance facility used primarily as a water supply aqueduct or sewer pipe.

Dam means any structure for impounding water which is usable for electric or mechanical power generation, if the impoundment supplies all, or the substantial part of, the total hydraulic pressure (head) developed for such generation.

Days means calendar days; provided that in computing time periods under these

regulations, such periods shall exclude the day of the event which triggers the time period. It is further provided that should the last day of a period fall on a Saturday, Sunday, legal holiday or declared state of emergency day, such period shall be extended to the close of business on the next business day.

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Developer means any person, corporation, partnership, municipality, utility or other entity which is attempting to obtain the permits and licenses required prior to or for the construction or start-up of a hydropower generating facility.

ENF is an Environmental Notification Form as defined in the Massachusetts Environmental Policy Act regulations under M.G.L. c. 30, §§ 62-62H.

Existing Dam means any dam which does not require any construction or enlargement of impoundment structures (other than repairs or reconstruction) in connection with the installment of any small hydropower generating facility.

Flashboards means any appurtenant structure to a dam consisting of a set of boards or gates attached to the top, or crest, of such dam so as to impound water to a higher elevation than the dam alone, but being designed to bend or otherwise fail or allow removal or mechanical lowering of such boards or gates under conditions of high flow of water, or water and ice, in the impounded waterway.

Hearing Officer means any person designated by the Council or its Executive Director to conduct hearings of appeals pursuant to 980 CMR 11.05.

Hydropower Generating Facility means any electric or mechanical power generating unit whose power source is water flow and which is not a facility as defined in M.G.L. c. 164, § 69G.

HPNF is the Hydropower Preliminary Notification Form established by the Council as the developer's preliminary filing form under 980 CMR 11.04.

Hydropower Supplement is the form established by the Council to be filed along with the ENF as the developer's preliminary filing form under 980 CMR 11.03.

Land Subject to Flooding is as defined in M.G.L. c. 131, § 40 and implementing regulations.

MEPA Unit is that branch of the Executive Office of Environmental Affairs which implements the Massachusetts Environmental Policy Act and regulations thereunder.

Pre-licensing Conference means the meeting between the developer and the agencies to be called, noticed and conducted under 980 CMR 11.03(4) to 11.03(6). Whenever possible, this conference will be combined with the MEPA "scoping session", held under M.G.L. c. 30, §§ 62-62H and implementing regulations, in a single meeting.

Waterway is as defined in M.G.L. c. 91 and implementing regulations.

Wetland is a wetland, swamp, marsh, salt marsh, or flat as each term is defined in M.G.L. c. 131, § 40 and implementing regulations.

#### 11.02: Forms

(1) General. The Council will consult with the affected agencies before establishing or modifying any forms described under the next two rules. Any Council directive establishing or modifying these forms will become effective on the fifth day after mailing of notice of said directive to the agencies.

(2) Preliminary Notification Form. The Council hereby establishes two preliminary notification forms to be filed with the agencies. A modular format is incorporated within each form to accommodate various project situations and related informational needs. The agencies may not require the developer to file any forms other than these, except the "Notice of Intent to file an ENF" under M.G.L. c. 30, §§ 62-62H and implementing regulations, before the pre-licensing conference. The first of these is a Hydropower Supplement to the ENF, which is to be attached with an ENF so as to create a single form and filed under 980 CMR 11.03; the second is a Hydropower Preliminary Notification Form (HPNF), to be filed under 980 CMR 11.04 when a determination has been made by the Secretary of the Executive Office of Environmental Affairs that an ENF is not required. At the option of the developer, these forms replace the Notice of Intent normally filed with local Conservation Commissions under the Wetlands Act, M.G.L. c. 131, § 40.

These forms can be modified in accordance with the procedures of 980 CMR 11.02(1).

(3) Other Forms. The Council may establish, and later appropriately modify, forms for use in connection with the procedure of 980 CMR 11.03, 11.04, and 11.05, below. It may also establish, consolidate, or modify forms to be used by one or more of the agencies, in lieu of, or in addition to, any forms which developers are required to prepare in order to obtain permits or licenses from said agencies.

#### 11.03: Coordination of Permitting and Licensing When an ENF Is Being Filed

(1) Applicability. This Part applies when a developer is filing an Environmental Notification Form (ENF).

(2) Review of Draft Notification Form. Before filing with the agencies, the developer shall submit a draft version of the combined ENF-Hydropower Supplement to the Council. The Council shall make a determination, not later than ten days after receiving such draft form, whether or not it is complete. The Council may reject a draft form which is patently deficient or it may accept it but recommend to the developer that supplementary information be included that would improve and expedite the permitting

and licensing agencies' review process. The Council shall inform the developer in writing of its action within ten days of submission of the draft form.

(3) Filing. A developer shall file the combined ENF-Hydropower Supplement in accordance with the filing instructions and "List of Agencies" in the Hydropower Supplement, in the number of copies indicated. Evidence of proper filing shall be provided by a developer to the Council.

Filing of the ENF-Hydropower Supplement shall be made at such point in project planning or management as a developer may deem to be appropriate to the circumstances of the project, but shall be made no later than 60 days after official notice in the Federal Register that such developer has filed for a license or exemption with the Federal Energy Regulatory Commission. A developer may request, and the Council may approve, an extension of this filing time upon a showing of good cause.

These filing instructions do not affect the requirement to publish a "notice of intent to submit an ENF", under M.G.L. c. 30, §§ 62-62H and implementing regulations, within 30 days before filing the ENF.

The Council may require a developer to submit information supplementing his filing to the agencies, in advance of the pre-licensing conference.

(4) Effect of Filing. Receipt of the ENF and Hydropower Supplement by the agencies will trigger the Massachusetts Environmental Policy Act review process and the review process of all agencies. The ENF and Hydropower Supplement shall, at the option and indication of the developer in such form, serve in lieu of the Notice of Intent for the local Conservation Commission's review process under M.G.L. c. 131, § 40.

(5) Arrangements for Pre-Licensing Conference.

(a) The Council shall set a date for any pre-licensing conference to be held under 980 CMR 11.03(6) after consultation with the MEPA Unit. This date shall be within 40 days after the Council receives an ENF and Hydropower Supplement, or within 30 days after publication in the Environmental Monitor under M.G.L. c. 30, §§ 62-62H and implementing regulations, whichever is sooner. The pre-licensing conference, whenever feasible, should be held in conjunction with the MEPA Unit's "scoping session", held under M.G.L. c. 30, §§ 62-62H and implementing regulations, and should be held at or near the project site.

(b) The Council shall notify or direct the developer to notify all agencies, federal regulatory agencies, providers of financial assistance, the electric utility in whose service territory the proposed facility is located, and other interested persons or parties of the time, date and place of the pre-licensing conference. Notification shall be accomplished by mail and publication, as the Council deems appropriate.

(6) Pre-Licensing Conference.

(a) Pre-licensing conference shall be co-chaired by a person designated by the Council and one designated by the Secretary of the Executive Office of

Environmental Affairs, unless they agree otherwise.

(b) Pre-licensing conferences will be public and non-adjudicatory, and it is not required that an official record be kept. Copies of documents circulated, however, will be kept by the Council for inspection by any persons interested.

(c) Matters for discussion may include the developer's proposal and the responses of the agencies and other participants. The agencies may be asked to comment upon the following matters:

1. their jurisdiction over the project as proposed;
2. their particular concerns regarding the project;
3. what additional information, data and studies they will need; and
4. what additional forms or applications the developer will be required to fill out.

(7) Statement of Agency Requirements.

(a) Within 15 days after the pre-licensing conference, each agency notified of the pre-licensing conference shall mail or deliver a statement to the developer, and file a copy with the Council. The statement shall specify:

1. the extent of the agency's jurisdiction over the project as proposed;
2. the agency's particular concerns regarding the project;
3. what additional information, data or studies the agency will need in order to make a permitting or licensing decision;
4. what additional forms or applications developers will be required to fill out; and
5. that the agency's responses to 980 CMR 11.03(7)(a)1. through 4. are complete and accurate.

(b) 980 CMR 11.03(7)(a) statements may be used by a developer as evidence of state and local consultation for Federal Energy Regulatory Commission licensing.

(c) These 980 CMR 11.03(7)(a) statements shall be considered by the Council in any informal dispute resolution under 980 CMR 11.03(11), and shall be part of the record in appeal hearings under 980 CMR 11.05.

(8) Determination of Filing Adequacy.

(a) Once a developer has filed the information, data, studies, forms and applications asked for by a particular agency under 980 CMR 11.03(7), he shall mail a letter to that agency, with a copy mailed or hand delivered the same day to the Council, stating his opinion that he has filed all materials necessary for that agency to make a final decision.

(b) Within 15 days after receipt of a 980 CMR 11.03(8)(a) letter, an agency shall mail a responding letter to the developer, with a copy mailed or hand delivered the same day to the Council, stating:

1. that the materials filed are sufficient for the agency to make a final decision; or
2. what additional materials are still needed.

(c) If the agency's response under 980 CMR 11.03(8)(b) is that additional

materials are still needed, the developer should file the additional requested materials. If the agency does not respond within seven days after this filing, the filing shall be presumed complete.

(9) Information Deadlock. If a developer believes that an agency is unreasonable in requiring additional information, data, or studies under 980 CMR 11.03(7)(a), 11.03(8)(a), or 11.03(8)(b)2., it may withhold the required materials and request a permit or license denial, such denial shall be provided within seven days by the agency. This denial may then be appealed under 980 CMR 11.05, after exhaustion of administrative remedies, as an "action or failure to act".

(10) Project Alterations.

(a) If a developer makes any substantial changes or modifications in the design or operational plans of his project after the pre-licensing conference, he shall send a description of said changes or modifications to each agency notified of the pre-licensing conference, and to the Council.

(b) If an agency finds the changes or modifications significant, it shall reflect that fact in its 980 CMR 11.03(7) statement, or shall mail or deliver to the developer, and send a copy to the Council, an amended 980 CMR 11.03(7) statement. If an amended 980 CMR 11.03(7) statement is not sent within 15 days after receipt of notice of the change or modification, the developer and the Council may assume that they will not affect that agency's requirements or final decision.

(11) Informal Dispute Resolution. Upon request by a developer or an agency, the Council shall make reasonable efforts to assist them in resolving disputes concerning the form, content, level of detail and schedules of agency requirements.

(12) Time Limits for Final Agency Decisions. Once the Council determines, based on informal or written communication, receipt of agency statements under 980 CMR 11.03(7) or 11.03(8)(b)1., or applicability of the 980 CMR 11.03(8)(c) presumption, that no agency requires any further materials from the developer in order to make a final decision, the Council shall set a single time limit of not greater than 90 days within which all agencies must issue their final determinations whether or not to issue the appropriate licenses, certificates, sign-offs or other evidence of approval of the application.

(13) Effect of Environmental Impact Report Upon Time Limits. If the developer is required to file an environmental impact report under M.G.L. c. 30, s. 62B, the Council may alter the time framework contemplated in 980 CMR 11.00, to conform with the requirements of M.G.L. c. 30, § 62D.

#### 11.04: Coordination of Permitting and Licensing When an ENF Is Not Required

(1) Applicability. 980 CMR 11.04 applies when a proposed project does not require MEPA review, pursuant to M.G.L. c. 30, § 62E and implementing regulations.

(2) Review of Draft Notification Form. Before filing with the agencies, a developer shall submit a draft version of the Hydropower Preliminary Notification Form (HPNF) to the Council. The Council shall make a determination, not later than ten days after receiving such draft HPNF, whether or not it is complete. The Council may reject a draft HPNF which is patently deficient or it may accept it but recommend to the developer that supplementary information be included that would improve and expedite the permitting and licensing agencies' review process. The Council shall inform the developer in writing of its action within ten days of submission of the draft HPNF.

(3) Filing. A developer shall file the HPNF with the agencies listed in the HPNF's Table of Agencies, in the number of copies indicated thereon.

Filing of the HPNF shall be made at such point in project planning or management as a developer may deem to be appropriate to the circumstances of the project, but shall be made no later than 60 days after official notice in the Federal Register that such developer has filed for a license or exemption with the Federal Energy Regulatory Commission. A developer may request, and the Council may approve, an extension of this filing time upon a showing of good cause.

(4) Effect of Filing. Receipt of the HPNF shall trigger action of all agencies according to their statutory responsibilities. The HPNF, at the developer's option and indication in such HPNF, shall serve in lieu of the Notice of Intent for the local Conservation Commission's responsibilities under M.G.L. c. 131, § 40, and shall trigger action of all other agencies according to their statutory responsibilities.

(5) Waiver of Pre-Licensing Conference.

(a) The Council may, upon receipt of a draft HPNF, provisionally determine that a pre-licensing conference is not required for a proposed project in one of the following classes:

1. Any project having a capacity of 10kW or less; or
2. Any project having a capacity in excess of 10kW; provided such project is to be located on a conduit; or provided such project is to be located at an existing dam and to be operated by intaking water through existing or restored intake gates and by discharging such water at or below such dam and within 25 feet of the downstream perimeter of such dam including any dam apron, such operation being so designed and managed as to maintain an instantaneous rate of flow in the waterway immediately downstream from such project equal to the rate of inflow to the impoundment behind such dam; and provided further that such project does not involve any of the following:

- a. dredging or excavation of materials exceeding 20 cubic yards total volume from any waterway area or areas, excepting the removal with negligible environmental impact of vegetation, refuse or similar debris resting on the bottom of any such waterway area;
- b. placement of fill or new or expanded exterior structural bulk exceeding 10 cubic yards total volume in any area or areas of

