

980 CMR 17.00: ENERGY FACILITIES SITING BOARD

980 CMR 17.00: CONSTRUCTIVE APPROVALS

Section

17.01: Purpose and Scope.

17.02: ~~Preparations for Possibility of~~ Constructive Approval Procedure.

17.03: Contents and Form of a Constructive Approval ~~Permit~~.

17.04: ~~Board~~ Issuance of a Constructive Approval ~~Permit~~.

17.05: Effect of Decision and 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 a Final Decision, pursuant to 980 CMR 13.10: EFSB Consolidated Permit Decisions, is not issued by the Board, pursuant to 980 CMR 13.02(4)(a): Review Timeframe, 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~~ each Application submitted to the Board for a CEIF. M.G.L. c. 164, §§ 69T, 69U, 69V. 980 CMR 17.00 ~~does~~ shall not apply to De Novo Adjudications pursuant to 980 CMR 14.00.

(3) Applicability of Earlier Sections. 980 CMR 1.00, 2.00, 13.00, ~~and~~ 15.00, and 16.00 apply to 980 CMR 17.00, unless otherwise noted.

(4) Definitions. The definitions in 980 CMR 1.00 and 13.00 shall apply to 980 CMR 17.00. For the purpose of 980 CMR 17.00, the following additional definition applies unless the context or subject matter requires a different interpretation:

Constructive Approval Permit means a Consolidated Permit or Consolidated State Permit that is constructively (automatically) approved and issued by operation of law under M.G.L. c. 164, §§ 69T, 69U, or 69V, and 980 CMR 17.05, the Board issues in the event of Constructive Approval. Unlike a Consolidated Permit or Consolidated State Permit issued through the process defined in 980 CMR 13.00, A Constructive Approval Permit may include ~~both zoning relief and necessary~~ zoning exemptions, provided that if the Applicant at the time of the Completeness Determination includes a zoning exemption request, and the Applicant includes a Zoning Statement pursuant to 980 CMR 17.03(1)(b)(4). The contents and form of Constructive Approvals ~~Permits~~ are defined in 980 CMR 17.03.

17.02: Preparations for Possibility of Constructive Approval Procedure.

(1) Procedural Assessment. ~~At least~~ Between sixty ~~and ninety~~ days before the applicable deadline established by 980 CMR 13.02(4)(a), Review Timeframe, 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 find~~ reasonable assurance that the Board will meet its deadline to issue a Final Decision, the Presiding Officer shall, at least sixty days before the applicable deadline, prepare and issue to the Parties, Limited Participants, 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 Procedure, states that a Constructive Approval is likely, and describes the reasons for that assessment.

OPTION A [Eversource and National Grid’s Joint Proposal with Staff Modifications]

(3) Issuance of Draft Constructive Approval~~Permit~~. Within two weeks after the issuance of the Notice of Likelihood of Constructive Approval, the Applicant ~~Presiding Officer~~ shall prepare and ~~issue~~ circulate the draft Constructive Approval to the service list prepared by the Presiding Officer for the proceeding pursuant to 980 CMR 1.03(3), and any additional Permit Enforcement Agencies (PEAs) not included on the service list. ~~Parties, Limited Participants, the Permit Enforcement Agencies, and the Board a draft Constructive Approval Permit.~~

(a) Form of Draft Constructive Approval. The draft Constructive Approval shall comply with the requirements of 980 CMR 17.03: *Contents and Form of a Constructive Approval*, except that the document will be titled “draft Constructive Approval” and will be marked “DRAFT” on all pages.

(b) -Draft Constructive Approval. The draft Constructive Approval prepared by the Applicant shall consist of: (i) the Application at the time of the Completeness Determination, and updates to the Project filed pursuant to 980 CMR 13.07(1)(c), and (ii) the Recommended Permit Conditions and Requirements issued by the Presiding Officer pursuant to 980 CMR 13.07(6), that are not inconsistent with: (i) the record evidence in the proceeding; (ii) the Board’s statutory authority, or (iii) the Board’s applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3). The Applicant may include a modification of a condition included in the Recommended Permit Conditions and Requirements issued by the Presiding Officer pursuant to 980 CMR 13.07(6) in the draft Constructive Approval, provided the modification is not inconsistent with: (i) the record evidence in the proceeding; (ii) the Board’s statutory authority, or (iii) the Board’s applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3).

(4) Comment Period and Opportunity for Revision.

(a) The Presiding Officer shall designate a comment period, extending at least seven days; and not more than 14 days, from the issuance of the draft Constructive Approval. During that time, the recipients of the draft Constructive Approval may file written comments regarding the draft to ensure compliance with 980 CMR 17.03: *Contents and Form of a Constructive Approval*.

(b) Within seven days thereafter, the Applicant shall update the draft Constructive Approval to include revisions that are not inconsistent with: (i) the record evidence in the proceeding; (ii) the Board’s statutory authority,

or (iii) the Board’s applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3), and circulate it to the service list.
(c) Within seven days thereafter, the Presiding Officer may modify the updated draft Constructive Approval prepared by the Applicant if and to the extent that the draft Constructive Approval, as modified by the Applicant following the comment period held pursuant to 980 CMR 17.02(4)(a), is inconsistent with: (i) the record evidence in the proceeding; (ii) ~~or~~ the Board’s statutory authority, or (iii) the Board’s applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3). The Presiding Officer shall ensure compliance with 980 CMR 17.03: *Contents and Form of a Constructive Approval*.
(a)(d) The draft Constructive Approval as updated by the Presiding Officer pursuant to 980 CMR 17.02(4) shall be issued as a final Constructive Approval consistent with 980 CMR 17.04.

OPTION B [Eversource and National Grid’s Joint Proposal]

(3) ~~_____~~ Issuance of Draft Constructive Approval. Within two weeks after the issuance of the Notice of Likelihood of Constructive Approval, the Applicant shall prepare and circulate the draft Constructive Approval to the service list prepared by the Presiding Officer for the proceeding pursuant to 980 CMR 1.03(3).

(a) Form of Draft Constructive Approval. The draft Constructive Approval shall comply with the requirements of 980 CMR 17.034: *Contents and Form of a Constructive Approval*, except that the document will be titled “draft Constructive Approval” and will be marked “DRAFT” on all pages.

(b) Draft Constructive Approval. The Draft Constructive Approval prepared by the Applicant shall be based on: (i) the Application in a manner that is consistent with the Completeness Determination made by the Presiding Officer pursuant to 980 CMR 13.06, (ii) applicable Common Conditions, as set forth in 980 CMR 17.03(1)(c); and (iii) all Recommended Permit Conditions and Requirements pursuant to 980 CMR 17.03(1)(d) that the Applicant deems acceptable.

(4) ~~_____~~ Comment Period and Opportunity for Revision. The Presiding Officer shall designate a comment period, extending at least seven days, and not more than 14 days, from the issuance of the draft Constructive Approval. During that time, the recipients of the draft Constructive Approval may file written comments regarding the draft to ensure compliance with 980 CMR 17.03: *Contents and Form of a Constructive Approval*. Within seven days thereafter, the Applicant shall update the draft Constructive Approval to include recommendations and revisions that it deems reasonable and consistent with the record of the proceeding and circulate it to the service list. Within seven days thereafter, the Presiding Officer may modify the updated draft Constructive Approval prepared by the Applicant if and to the extent that the draft Constructive Approval is inconsistent with: (i) the record evidence in the proceeding; (ii) ~~or~~ the Board’s statutory authority, or (iii) the Board’s applicable rules

and regulations. The Presiding Officer shall ensure compliance with 980 CMR 17.03 *Contents and Form of a Constructive Approval.*

(5) If the Presiding Officer issues the Notice of Likelihood of Constructive Approval prior to the Conditions Conference and the issuance of the Presiding Officer Recommended Permit Conditions and Requirements, then the Presiding Officer may schedule a Conditions Conference earlier than specified in 980 CMR 13.07(6). The Presiding Officer shall issue Recommended Permit Conditions and Requirements. The parties shall have an opportunity to comment on the Recommended Permit Conditions and Requirements consistent with 980 CMR 13.07(3): The process for the draft Constructive Approval shall be consistent with 980 CMR 17.02(3) and the Comment Period and Opportunity for Revision shall be consistent with 980 CMR 17.02(4).

~~(3)(6) Continuing Right to Issue a Decision on a Consolidated Permit or Consolidated State Permit. The Presiding Officer Notice of Likelihood of Constructive Approval Neither the Presiding Officer's likelihood assessment pursuant to 980 CMR 17.03(2) nor its issuance of a draft Constructive Approval pursuant to 980 CMR 17.03(3) shall not prohibit the Board from issuing a Final Decision pursuant to 980 CMR 13.10, on an EFSB Consolidated Permit or Consolidated State Permit prior to the applicable statutory review timeframe pursuant to 980 CMR 13.02(4)(a): Review Timeframe~~00 prior to the issuance deadline.

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 ~~r~~representative(s). See 980 CMR 13.01(4): *Definitions* and 13.03(~~13~~)(a): *Application Summary Form*.
3. The Applicant's Description of the Project, Site, and Surrounding Area pursuant to 980 CMR 13.03(~~13~~)(b): *Description of the Project, Site, and Surrounding Area*, including any updates in the evidentiary record of the proceeding pursuant to 980 CMR 13.07(1)(c).

(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: *EFSB Agency Consolidated Permit Application Requirements, as the Applicant may have validly updated that information.*
- ~~1-2.~~ Agency Permit Requirements. A list of the agency permit requirements based on the latest information provided by the Applicant.
- ~~2-3.~~ Draft Documents. All draft permits and approvals provided by the Applicant pursuant to 980 CMR 13.05(1)(a), (b), ~~and (e)(d)~~, as the Applicant may have ~~validly updated~~ during the proceeding pursuant to 980 CMR 13.07(1)(c)~~that documentation.~~

~~3.4. Zoning Statement.~~ A statement of the zoning exemptions that the Applicant has included in its Application at the Completeness Determination requests and that the Presiding Officer has consolidated with the Application for a Consolidated Permit or Consolidated State Permit pursuant to 980 CMR 1.09(2).

~~(e) Common Conditions ,all Applicable Common Conditions~~ pursuant to 980 CMR 13.09(2), as identified in “13.00: EFSB Consolidated Permit Application Guidance,” Attachment 1: Common Conditions and Requirements for EFSB Consolidated Permits, and as included in the Presiding Officer Recommended Permit Conditions and Requirements included in the draft Constructive Approval pursuant to 980 CMR ~~17.02.13.08: Conditions for EFSB Consolidated Permit.~~

~~(d) Board Common Conditions,~~

~~(e) DOER Common Conditions, and~~

~~(f)(c) PEA Common Conditions.~~

(d) Presiding Officer Recommended Permit Conditions and Requirements included in the draft Constructive Approval pursuant to 980 CMR 17.02.

~~(g)(e) The Applicant shall file an Abbreviated Procedural History that (substantially complying with the following text, completed as indicated):~~

The Applicant(s), _____ [name(s)], filed its/their Application ~~in this proceeding~~ on _____ [date]. The EFSB docketed the Consolidated Permit proceeding as _____. On _____ [date], pursuant to 980 CMR 13.069: *Completeness Determination*, the Presiding Officer issued a Completeness Determination. The Determination confirmed that the Applicant substantially and materially complied with each Application filing requirement~~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 final decision on a Consolidated Permit or Consolidated State Permit by _____ [date].

The Board did not issue a Consolidated Permit or Consolidated State Permit by _____ [date]; ~~therefore, pursuant to~~ ~~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 issuance of the Board to issue a Constructive Approval Permit of approving the Project. The Applicant has obtained Constructive Approval, issued by operation of law under M.G.L. 164, §§ 69T, 69U, or 69V, and 980 CMR 17.04~~is approved~~ for all required state, regional, and 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

980 CMR 17.00: ENERGY FACILITIES SITING BOARD

is likewise granted all requested zoning exemptions as referenced in part b(3) of this Constructive Approval Permit.

~~(2)~~ 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*.

~~Additional Information~~. ~~Such additional information as the Board may deem necessary.~~

~~(3)~~(2) Form. The Board may specify the form of the Constructive Approval Permit and may make available a template for that purpose.

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 pursuant to 980 CMR 13.10: *EFSB Consolidated Permit Decisions*, within the applicable statutory timeframe under 980 CMR 13.02(4)(a): *Review Timeframe*, ~~the draft Constructive Approval, Permit as developed and modified pursuant to 980 CMR 17.02, will~~ shall be deemed issued on the applicable deadline date as a final Constructive Approval Permit.

(2) The Presiding Officer shall distribute the final Constructive Approval to all persons entitled to notice within five business days of the applicable review timeframe under 980 CMR 13.02(4)(a): *Review Timeframe*. ~~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 shall close upon the distribution of the final Constructive Approval Permit.

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 Pproject.

(a) No state, regional, or local agency ~~shall~~ may require any other approval, consent, permit, certificate or condition for the construction, operation, or maintenance of the project Project.

(b) No state, regional, or local agency ~~shall~~ may 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,

980 CMR 17.00: ENERGY FACILITIES SITING BOARD

§ 69P. The appeal deadline ~~will~~shall be calculated from the date the Presiding Officer distributes~~d~~ 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, 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).