

## 990 CMR: HAZARDOUS WASTE FACILITY SITE SAFETY COUNCIL

### 990 CMR 5.00: COUNCIL DETERMINATION WHETHER A PROPOSAL IS FEASIBLE AND DESERVING OF STATE ASSISTANCE

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#### 5.01: Introduction

Within 15 days of its determination that a Notice of Intent is complete, and upon consultation with the Department and the Department of Environmental Protection, the Council shall review the Notice of Intent together with any comments received during the public comment period and any other information it deems appropriate, and shall determine whether the proposed project is feasible and deserving of state assistance.

#### 5.02: Significance

A determination by the Council that a proposed project is feasible and deserving of state assistance is a preliminary judgment that the proposal warrants further and detailed review pursuant to the impact analysis and licensing procedures set forth in St. 1980, c. 508. Such a determination shall mean that based on the Council's review of the information available to it within the time constraints imposed by M.G.L. c. 21D the proposed project meets the threshold criteria specified in 990 CMR 5.03 and 5.04, and that therefore the developer, the host community and the abutting communities are eligible to utilize state assistance and the special procedures established by M.G.L. c. 21D during the impact analysis, negotiation and licensing phases of the siting process.

#### 5.03: Criteria Applicable to All Notices of Intent

The Council shall determine that a proposed project is feasible and deserving of state assistance only if it finds, on the basis of the information available to it within the time constraints imposed by M.G.L. c. 21D, that it can reasonably be expected that:

- (1) the proposed technology will perform as described, and is in accordance with sound engineering and process standards;
- (2) there is a need in the Commonwealth for the service or services which the proposed facility would provide, and such need is sufficient to justify the expenditure of resources by the Council, other state agencies and the local communities in conducting or participating in the siting process;
- (3) the developer has sufficient financial resources or is capable of obtaining sufficient financing to:
  - (a) construct or expand the facility;
  - (b) operate and maintain the facility in compliance with all applicable statutes, regulations, bylaws and the siting agreement;
  - (c) provide assurance of financial responsibility in the event of accidents or malfunctioning, and provide for closure and post-closure maintenance, if required;
- (4) if the developer or any person owning a significant interest in the proposed project has prior experience in the generation, storage, treatment, recycling or disposal of hazardous waste, a review of the past management practices of the developer or said person indicates a satisfactory record of compliance with applicable federal, state and local statutes, regulations and bylaws, and that therefore it can be reasonably expected that in constructing, expanding, maintaining or operating the proposed project the developer or said person will

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maintain a correspondingly satisfactory record of compliance with applicable statutes, regulations, bylaws, permits, licenses and the siting agreement.

Such finding by the Council shall be based upon consideration of information pertaining to:

- (a) any pending investigations, hearings, litigation, arbitration or adjudicatory proceedings involving the developer or any person owning a significant interest in the proposed project and concerning compliance with federal, state and local statutes, regulations and bylaws applicable to the management of hazardous waste and the protection of public health and safety and the environment; and
- (b) any civil, criminal or administrative judgments rendered against the developer or against any person owning a significant interest in the proposed project and concerning compliance with federal, state or local statutes, regulations and bylaws applicable to the management of hazardous waste and the protection of public health and safety and the environment; and
- (c) any accidents which have occurred at any facility owned or operated by the developer or by any person owning a significant interest in the proposed project;

(5) construction and operation of the proposed facility will not be barred by any federal or state statute or regulation.

(6) there are no other facts or circumstances that in the judgment of the Council raise significant concern or to the technical and financial feasibility of the proposed project and the management practices of the developer. In the event that this criterion forms the basis of or contributes to a determination by the Council that a proposed project is not feasible and deserving of state assistance, the Council shall specify in writing the precise facts or circumstances, and the conclusions drawn therefrom, that support its determination.

5.04: Additional Criteria Applicable to Notices of Intent Which Name Specific Sites

In addition to meeting the criteria set forth in 990 CMR 5.03, any proposed project which names a specific site shall be determined to be feasible and deserving of state assistance with respect to that site only if the Council finds, on the basis of the information available to it within the time constraints of M.G.L. c. 21D, that it can be reasonably expected that:

- (1) the developer is capable of acquiring whatever ownership or possessory interest in the property is necessary to proceed with the proposed project;
- (2) no portion of the proposed site is located in bordering vegetated wetlands, as defined in 990 CMR 3.00;
- (3) no portion of the proposed site is located on a salt marsh, a barrier beach, a coastal beach or on coastal dunes, as defined in 310 CMR 9.00 and 10.00;
- (4) no portion of the proposed site is located in an area designated by the Secretary as an "Area of Critical Environmental Concern" pursuant to 301 CMR 10.17 or 301 CMR 20.06(13) through (26);
- (5) no portion of the proposed site is located within wetlands restricted pursuant to M.G.L. c.130, § 105 or M.G.L. c. 131, § 40A;
- (6) no portion of the proposed site is located within lands designated as "scenic and recreational rivers and streams of the commonwealth" pursuant to M.G.L. c. 21 § 17B;
- (7) no portion of the proposed site is located within a national park or forest, or within any state or municipal land held for the purposes set forth in Article 97 of the Articles of Amendment to the Massachusetts Constitution;

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(8) if any portion of the proposed site is to be used for surface impoundments or for the disposal of hazardous waste into or on the land, including landfills, seepage facilities, injection wells, land treatment facilities and road oiling with waste oil, then such portion of the site is not located:

- (a) within the watershed of surface waters classified as Class A by the Division of Water Pollution Control; or
- (b) over an aquifer designated as a sole-source aquifer pursuant to the U.S. Safe Drinking Water Act; or
- (c) within the cone of influence, if known, or otherwise within 1000 feet of a well-head serving a community water system, as defined by 310 CMR 22.00, or within 250 feet of a private well; or
- (d) within the 100-year floodplain or the boundary of the inland or coastal flood of record, whichever is greater. The boundary of the 100-year floodplain shall be determined by reference to the most recently available flood profile data prepared for the proposed host community pursuant to the National Flood Insurance Program, as administered by the Federal Emergency Management Administration;

(9) there are no other facts or circumstances that in the judgment of the Council raise significant concern as to the impact of the proposed project on the environment or the public health and safety. In the event that this criterion forms the basis of or contributes to a determination by the Council that a proposed project is not feasible and deserving of state assistance, the Council shall specify in writing the precise facts or circumstances, and the conclusions drawn therefrom, that support its determination.

5.05: Notification

(1) The Chairman or his designee shall send written notification of the Council's determination pursuant to 990 CMR 5.01, 5.06 or 5.07 to the chief executive officer and local assessment committee of any proposed host community or communities, the developer and the Department. Such notification shall include a written summary of the reasons for the determination.

(2) The Department shall send written notification of the Council's determination and a copy of the above-mentioned summary to the Notice of Intent Recipients. If the Council has determined that a proposal is feasible and deserving of state assistance, the Department shall further send said notification and a schedule of briefing sessions to the chief executive officer of every city and town in the commonwealth and shall request that notice thereof be published in the Environmental Monitor.

5.06: Reconsideration

(1) Reconsideration of a Negative Determination

- (a) Application. At any time after a determination by the Council that a proposed project is not feasible and deserving of state assistance, the developer may file with the Council a written request for reconsideration.
- (b) Notice. The developer shall mail a copy of said request to all Notice of Intent Recipients and the local assessment committee, if any, of the proposed host community.
- (c) Content. The developer shall submit all the information he desires the Council to consider in reviewing his request, and shall further submit a list of all those to whom copies of the request were sent and the certification specified in 990 CMR 4.02(13).
- (d) Decision. The Council shall render a decision within 45 days of receipt of the request for reconsideration, and notification thereof shall be distributed in accordance with 990 CMR 5.05.

(2) Reconsideration of a Positive Determination

- (a) Application. 990 CMR 5.06 shall apply only in those cases where the developer utilizes the site selection process pursuant to 990 CMR 7.00, and is intended to provide the Council with an opportunity to reconsider a feasible and deserving determination on the basis of information submitted during the public comment period specified in 990 CMR 7.04(1).

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- (b) Request for Reconsideration. Within 15 days of the close of the public comment period specified in 990 CMR 7.04(1), any person may file with the Council a written request for reconsideration of a prior determination that a proposed project is feasible and deserving of state assistance.
- (c) Notice. The person requesting reconsideration shall mail a copy of said request to the developer, the Notice of Intent Recipients and the local assessment committee.
- (d) Content. The person requesting reconsideration shall submit all the information he desires the Council to consider in acting on said request, and a list of all those to whom copies of the request were sent.
- (e) Decision. The Council shall render a decision within 45 days of receipt of the request for reconsideration, and notification thereof shall be distributed in accordance with 990 CMR 5.05.

5.07: Revocation

At any time prior to a declaration by the Council, pursuant to 990 CMR 14.03, that a siting agreement is operative, the Council may revoke a determination that a proposal is feasible and deserving of state assistance.

- (1) Criteria. The Council shall revoke a determination that a proposal is feasible and deserving of state assistance only if one or more of the following is clearly established:
  - (a) the developer knowingly and intentionally submitted false information in the Notice of Intent or knowingly and intentionally misrepresented or omitted information contained or required in the Notice of Intent or required by 990 CMR 5.00;
  - (b) the developer submitted false information in the Notice of Intent or misrepresented or omitted information contained or required in the Notice of Intent or required by 990 CMR 5.00, and the Council, had it possessed the correct or complete information during its initial review, would not have deemed the proposal feasible and deserving of state assistance;
  - (c) information is received concerning events or occurrences which would have been relevant to the initial review and determination by the Council but which occurred subsequent to that determination, and the Council, had the events or occurrences happened prior to its determination, would not have deemed the proposed project feasible and deserving of state assistance.
- (2) Procedure
  - (a) Any written report of information which might result in the Council considering revocation and which is received by the Council staff, by any member of the Council or by the Department shall be submitted to the Executive Secretary, who shall inform the full Council of its existence no later than its next regular meeting. The Council shall not be required to take any action with respect to such information at that meeting.
  - (b) The Executive Secretary shall review such information, and may request additional information from any source which may serve to establish the accuracy and potential impact of such information. Upon completion of said review, the Executive Secretary shall submit to the Council a recommendation as to whether the Council should consider revocation of the feasible and deserving determination. The Executive Secretary shall recommend that the Council consider revocation if the Executive Secretary finds that:
    - 1. the information which has been received raises questions about the feasible and deserving determination which are serious enough to warrant consideration by the Council,
    - 2. the source of the information appears to be reliable, and
    - 3. it is probable that the information satisfies one or more of the criteria set forth in 990 CMR 5.07(1). Such a report should not be deemed to require or imply that the feasible and deserving determination should be revoked.
  - (c) If the Council decides that it should consider revocation, notice of such decision shall be sent to the developer, the Notice of Intent Recipients, the local assessment committee and the person who originally submitted the information. The notice shall include a brief summary of the issues to be addressed by the Council in considering revocation, and the date, time and place of the meeting at which the Council shall discuss and vote on revocation.

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(d) At its next regular monthly meeting following the meeting at which the Council decided to consider revocation, the Council shall decide whether to revoke the feasible and deserving determination. Its decision shall be issued in accordance with 990 CMR 5.05(1) and the Standard Adjudicatory Rules of Practice and Procedure, Formal Rules, 801 CMR 1.00(6)(c), and a copy thereof shall also be sent to all Notice of Intent recipients.

(3) Adjudicatory Hearing

(a) In the event that the Council decides to revoke a feasible and deserving determination, the developer may request an adjudicatory hearing thereon. The hearing shall be conducted by a presiding officer appointed by the Council, and shall be open to the public. Except as otherwise required by 990 CMR 5.07, the adjudicatory proceeding shall be conducted in accordance with the standard Adjudicatory Rules of Practice and Procedure, Formal Rules, 801 CMR 1.01.

(b) In addition to the requirements of 801 CMR 1.01(6)(a), any developer requesting an adjudicatory hearing shall send notice thereof by certified mail, return receipt requested, to the Notice of Intent Recipients, the local assessment committee and the person who originally submitted the information leading to the revocation decision.

(c) Within 30 days of adjournment of the adjudicatory hearing, the presiding officer shall render a tentative decision pursuant to 801 CMR 1.01(10)(n)1. The presiding officer shall send copies thereof to the parties to the proceeding, the Notice of Intent Recipients and the local assessment committee, if any.

(d) Within 45 days of the close of the period for filing objections to the tentative decision, as specified in 801 CMR 1.01(10)(n)1., the Council shall render its final decision pursuant to 801 CMR 1.01(10)(n)2.

REGULATORY AUTHORITY:

990 CMR 5.00: M.G.L. c. 21D, § 4.