

980 CMR 17.00: 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.
- 17.04: Board Issuance of a Constructive Approval.
- 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 CEIF. M.G.L. c. 164, §§ 69T, 69U, 69V. 980 CMR 17.00 does 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 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 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 17.045(24). 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 may include both zoning relief and necessary zoning exemptions, if provided that the Applicant includes a Zoning Statement pursuant to 980 CMR 17.0304(1)(b)(43). The contents and form of Constructive Approval ~~Permits~~ are defined in 980 CMR 17.0304.

17.02: Recommended Permit Conditions and Requirements Prior to Constructive Approval.

- (a) Conditions Conference. The Presiding Officer shall conduct a Conditions Conference. Before the Conditions Conference, the Presiding Officer shall provide the Parties and PEAs with proposed conditions, inclusive of the applicable Common Conditions, recommended permit conditions submitted by a Party or PEA, and other proposed conditions, as appropriate. See 980 CMR 13.07(6).
- (b) Recommended Permit Conditions and Requirements. Following the Conditions Conference, the Presiding Officer shall issue Recommended Permit Conditions and Requirements to the Parties and PEAs. See 980 CMR 13.07(6).

~~17.02:~~17.03: Preparations for Possibility of Constructive Approval.

(1) Procedural Assessment. ~~Between-At least~~ 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 Decision, the Presiding Officer shall, ~~at least 60-90 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 ~~17.0203:~~ 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. 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. The Applicant is required to send the draft Constructive Approval to Key Stakeholders within two business days of receipt from the Presiding Officer.

(a) Form of Draft Constructive Approval. The draft Constructive Approval shall comply with the requirements of 980 CMR ~~17.0304:~~ Contents and Form of a Constructive Approval, except that the document will be titled “draft Constructive Approval-~~Permit~~” and will be marked “DRAFT” on all pages.

(b) Proposed Draft Constructive Approval. The Presiding Officer may ask the Applicant to propose -the Constructive Approval envisioned by 980 CMR 17.03: Issuance of Draft Constructive Approval with such time limit as the Presiding Officer may order.

~~(a)(c)~~ The draft Constructive Approval will include the Recommended Permit Conditions and Requirements issued by the Presiding Officer pursuant to 980 CMR 17.02(b).

(4) Comment Period and Opportunity for Revision. 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 ~~17.0304:~~ Contents and Form of a Constructive Approval. The Presiding Officer may update the draft Constructive Approval in response to comments, and the Presiding Officer shall ensure compliance with 980 CMR 17.034: Contents and Form of a Constructive Approval.

~~(3)(5)~~ Continuing Right to Issue a Decision on a Consolidated Permit or Consolidated State Permit. Neither the Presiding Officer’s likelihood assessment pursuant to 980 CMR ~~17.0203~~(2) nor its issuance of a draft Constructive Approval pursuant to 980 CMR

980 CMR 17.00: ENERGY FACILITIES SITING BOARD

17.0203(3) shall prohibit the Board from issuing a decision on a Consolidated Permit or Consolidated State Permit pursuant to 980 CMR 13.00 prior to the issuance deadline.

17.03:—17.04: Contents and Form of a Constructive Approval.

(1) Contents. A Constructive Approval 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's ~~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(~~14~~)(c): *Description of the CEIF Project, Site, and Surrounding Area*, including any updates in the evidentiary record of the proceeding.

(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 Consolidated Permit Application Requirements: Required Permits*.
- ~~1.2.~~ Agency Permit Requirements. ~~A list of the agency permit requirements based on the latest information provided by~~ the Applicant.
- ~~2.3.~~ Documents. All draft permits and approvals provided by the Applicant pursuant to 980 CMR 13.05(1)(a ~~and~~), (b) ~~, and (e)~~), as the Applicant may have validly updated that documentation.
- ~~3.4.~~ Zoning Statement. A statement of the zoning exemptions that the Applicant 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).

(c) Common Conditions ~~, all~~ pursuant to 980 CMR ~~17.05(1)~~13.08: *Conditions for EFSB Consolidated Permit*.

- ~~1. Board Common Conditions,~~
- ~~2. DOER Common Conditions, and~~
- ~~3. PEA Common Conditions.~~

(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].

980 CMR 17.00: ENERGY FACILITIES SITING BOARD

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 issuance of~~ a Constructive Approval ~~Permit approving of~~ the Project. The Applicant has obtained Constructive Approval, issued by operation of law under M.G.L. c. 164, §§ 69T, 69U, or 69V, and 980 CMR 17.045(12), 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 is likewise granted all requested zoning exemptions as referenced in part b(3) of this ~~Permit~~ Constructive Approval.

(e) Statement of Decision's Effect and Appeal Rights. The Constructive Approval ~~Permit~~ shall contain the text of 980 CMR 17.0506(1): *Effect of Decision*; and 17.0506(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.

~~17.04:–17.05:~~ Constructive Approval and Issuance of a Constructive Approval ~~Permit~~.

(1) Board vote on Recommended Permit Conditions and Requirements for Constructive Approval. Prior to the deadline to issue a final decision, the Board may vote to adopt the Presiding Officer Recommended Permit Conditions and Requirements at a Board Meeting. The vote shall be on a consent agenda. If approved by the Board, the Recommended Permit Conditions and Requirements shall attach as Common Conditions to a Constructive Approval of the CEIF Project, pursuant to 980 CMR 17.034: Contents and Form of a Constructive Approval. Otherwise, the applicable Common Conditions, without modification, shall attach to a Constructive Approval of the CEIF Project.

(+)(2) If the Board does not issue the final decision described in 980 CMR 13.10: EFSB Consolidated Permit Decisions within the applicable statutory review timeframe established by 980 CMR 13.02(4)(a): Review Timeframe, If the Board has not timely issued a Consolidated Permit or Consolidated State Permit, the draft Constructive Approval ~~Permit~~, as modified by the Presiding Officer pursuant to 980 CMR 17.023(4): Comment Period and Opportunity for Revision, will be deemed issued on the applicable deadline date as a final Constructive Approval.

980 CMR 17.00: ENERGY FACILITIES SITING BOARD

~~(2)(3)~~ The Presiding Officer will distribute ~~to the Parties~~ the final Constructive Approval ~~itself, in compliance with 980 CMR 17.03: Contents and Form of a Constructive Approval Permit to all persons entitled to notice~~ within five business days of the applicable deadline date.

~~(3)(4)~~ The evidentiary record closes upon the distribution of the Constructive Approval.

~~17.05:–17.06:~~ 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 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~~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, 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 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 pursuant to 980 CMR 17.~~0405~~(32).

(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 : (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).