

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Rulemaking to Amend the Regulation)	
Found at 980 CMR 1.01(4)(e) in Order to Establish)	
Exclusions from Siting Board Jurisdiction)	
For Certain "Facilities" as Defined Therein.)	

EFSB 09-RM-1

FINAL DECISION
ADOPTION OF FINAL REGULATION AT 980 CMR § 1.01(4)(e)

Robert J. Shea
Presiding Officer
June 20, 2011

On the Decision:
John C. Young

The Energy Facilities Siting Board (“Siting Board”) hereby adopts a final regulation at 980 CMR § 1.01(4) (e), “Scope and Construction of Rules: Definition, Facility.”

I. INTRODUCTION

Massachusetts General Laws, chapter 164, section 69G, defines a “Facility” as including, “(e) a unit, including associated buildings and structures, designed for, or capable of, the manufacture or storage of gas, *except such units below a minimum threshold size as established by regulation*” (emphasis supplied). Presently, the Siting Board’s regulation, 980 CMR 1.01(4)(e), defines “facility” using identical language. Through this rulemaking, the Siting Board will establish such a minimum threshold size, and will also exclude from Siting Board jurisdiction certain units whose storage or manufacture of gas is ancillary to the unit’s primary purpose.

A copy of the proposed revised regulation is attached.

II. STATUTORY AND REGULATORY AUTHORITY

General Laws Chapter 164, section 69H, provides the statutory authority for the Siting Board to adopt regulations and to later amend them.

There is hereby established an energy facilities siting board The board shall have powers and duties as follows:

(1) To adopt and publish rules and regulations consistent with the purposes of sections sixty-nine H to section sixty-nine Q, and to amend the same from time to time.

Thus, the Siting Board has express statutory authority to adopt a regulation and to later amend it, provided that the regulation and any amendments are consistent with the purpose of Chapter 164, sections sixty-nine H to sixty-nine Q.

In the present case, the regulation in question relates to the term “facility” which is defined in G.L. c. 164, § 69G. As noted above, the statutory definition of “facility” expressly provides for a *de minimus* exemption from this definition to be established by regulation. Consequently, section 69G expressly provides that a minimum threshold size for a gas storage facility may be established by regulation, and section 69H expressly provides that the Siting

Board is empowered to issue and amend regulations. These statutes together give the Siting Board the authority to amend 980 CMR 1.01(4)(e).

III. PROCEDURAL HISTORY

The Siting Board issued a decision opening the rulemaking to revise 980 CMR § 1.01(4)(e), on October 8, 2009. The proposed revised regulation was then submitted to the Executive Office of Energy and Environmental Affairs (“EEA”), which approved it and conveyed it to the Executive Office of Administration and Finance (“A&F”) on November 16, 2009. By email dated November 24, 2009, A&F represented that it had no objection to the Board proceeding with this regulation.

Notices of public hearings were issued on both January 19, 2010, and again on May 25, 2010. They were published in the Boston Globe, sent to all people and organizations that have requested receipt of such notices, and served upon the Local Government Advisory Board. The first notice inadvertently omitted to pose a question on which the Board wanted to receive comments: namely, whether the clause that exempts landfills and sewage treatment plants is necessary or whether it is redundant, given that it is likely that landfills and sewage treatment plants will be exempted under clause 1, which sets a threshold jurisdictional size. Consequently, the second notice was issued, which included this question, and the second hearing held.

Public hearings were held on February 17, 2010, and July 1, 2010. No one appeared at either public hearing, although National Grid did submit a set of comments which support the proposed changes (“National Grid Comments”).

IV. PROPOSED REVISED REGULATION

As stated above, the definition of a “Facility” under 980 CMR 1.01(4) (e) includes “a unit, including associated buildings and structures, designed for, or capable of, the manufacture or storage of gas, except such units below a minimum threshold size as established by regulation.” The proposed regulation deletes the words, “except such units below a minimum threshold size as established by regulation.” In their place it adds three clauses, each of which exempts certain units that may manufacture or store gas. There is also some additional language that modifies “unit.”

A. Clause (1) Exempts Small Facilities from EFSB Jurisdiction.

Clause (1) exempts from EFSB jurisdiction units that have a storage capacity of less than 25,000 gallons and a manufacturing capability of less than 2,000 MMBtu per day. Any unit that exceeds either the storage capacity limit or the manufacturing capability limit would not qualify for this exemption.

The 25,000-gallon threshold is selected to maintain within Siting Board jurisdiction utility-built LNG tanks in the historical size range, but to exclude any facility holding only as much gas as two overland tractor-trailers.

The 2,000 MMBtu threshold represents the amount of manufacturing capability that would produce 25,000 gallons of gas in one day. Consequently, the manufacturing capability threshold is consistent with the storage size threshold.

B. The Words “multiple tanks” Are Inserted to Modify “unit.”

At the beginning of subparagraph (e), the words “multiple tanks” are added; they modify the word “unit.” These words add more precision to the scope of the threshold size exemption. The size of the unit includes all tanks that are a part of it. The size threshold, therefore, is a cumulative one: a unit consisting of numerous tanks each smaller than 25,000 gallons may nevertheless be jurisdictional if the combined size of all tanks within the unit exceeds 25,000 gallons.

C. Clause (2) Exempts Research and Development Units from EFSB Jurisdiction.

Clause 2 exempts from EFSB jurisdiction any unit devoted to research, development, or the demonstration of technology as its primary purpose. This exception is intended to facilitate the development of clean natural gas technologies. Developers of such technologies may invest in R&D facilities in the Commonwealth knowing that one potential burden – EFSB approval – has been lifted. The Board believes that such an exemption is consistent with the purposes of G.L. c. 164, § 69J. The Board will retain jurisdiction over gas facilities that store or produce gas for distribution through pipelines for purposes of sale to residential and commercial customers. Gas facilities devoted to R&D will remain subject to applicable environmental and public safety regulations.

D. Clause (3) Exempts Landfills and Sewage Treatment Plants from EFSB Jurisdiction.

The Siting Board has never exercised jurisdiction over landfills and sewage treatment plants that capture within their facilities and store methane that is evolved from the decomposition of sewage sludge or municipal waste in a landfill. Thus, including clause 3 will explicitly state what has heretofore only been implied: the Board does not regulate gas-producing landfills and sewage treatment plants, regardless of size. By explicitly removing EFSB approval as a condition precedent to using such natural gas, the Board hopes to encourage the owners and operators of landfills and sewage treatment plants to extract gas that might otherwise simply remain untapped.

In its comments, National Grid supported the addition of this proposed exemption because it will promote the development of renewable gas in Massachusetts and because it is consistent with existing regulations governing landfill gas projects (“National Grid Comments” § II.C). We agree.

V. ORDER

Accordingly, after due notice, hearing and consideration it is hereby:

ORDERED: That, in accordance with G.L. c. 164, §§ 69H and 69G, and G.L. c. 30A, the Final Regulation amending 980 CMR § 1.01(4)(e), as attached hereto, is hereby ADOPTED; and it is

FURTHER ORDERED: That the Director of the Siting Board attest to a true copy of this Order amending 980 CMR § 1.01(4)(e) and transmit said attested true copy to the Office of the Secretary of the Commonwealth for publication in the Massachusetts Register; and it is

FURTHER ORDERED: That the rules and regulations of the Energy Facilities Siting Board are amended as set forth in the Final Regulation attached to this decision, and shall take effect upon publication in the Massachusetts Register.

Robert J. Shea
Presiding Officer

Dated this 20th day of June 2011.

APPROVED by the Energy Facilities Siting Board at its meeting of June 9, 2011, by the members and designees present and voting. **Voting for** approval of the Tentative Decision: Steven Clarke, Assistant Secretary for Energy, EOEEA (Acting EFSB Chair/ Designee for Richard K. Sullivan, Secretary EOEEA); Ann Berwick, Chair, Department of Public Utilities; Robert Sydney (Designee for Commissioner, DOER); James Colman (Designee for Commissioner, DEP); Jolette Westbrook, Commissioner, DPU ; and Dan Kuhs and Kevin Galligan, Public Members.

Steven Clarke, Acting Chair
Energy Facilities Siting Board

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. (Massachusetts General Laws, Chapter 25, Sec. 5; Chapter 164, Sec. 69P).