

# **The Energy Facilities Siting Handbook:**

**An Overview of the Energy Facilities Siting Board Review Process**

**The Massachusetts Energy Facilities Siting Board**

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**<http://www.mass.gov/eea/energy-utilities-clean-tech/energy-facilities-siting-board/>**

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## **PURPOSE**

There are many federal, state and local agencies that regulate the construction and operation of power plants, electric transmission lines, natural gas pipelines and natural gas storage facilities in Massachusetts. This handbook provides information about one such agency -- the Massachusetts Energy Facilities Siting Board. It includes an introduction to the Siting Board, a detailed description of the Siting Board's review process, and an explanation of the various ways to participate in that process. We hope that this handbook will provide interested citizens, municipalities, businesses, and organizations with an initial understanding of the Siting Board's review process. Further information is available at the Siting Board's website at <http://www.mass.gov/eea/energy-utilities-clean-tech/energy-facilities-siting-board>.

## **IMPORTANT NOTE:**

**This handbook is not intended as a legal guide. Instead, it provides a general overview of the Siting Board's process for reviewing requests to construct energy facilities. This review process takes the form of an adjudication conducted pursuant to G.L. c. 30A and 980 CMR 1.00. It is each person's responsibility to understand and adhere to applicable statutes and regulations in all proceedings before the Siting Board, and to seek legal counsel, if necessary.**

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## I. INTRODUCTION

The Massachusetts Energy Facilities Siting Board ("Siting Board") is an independent state review board located administratively within the Massachusetts Department of Public Utilities ("DPU"). By reviewing specific requests for approval to construct certain types of jurisdictional energy facilities, the Siting Board is charged, by state statute, with ensuring that the proposed facility will provide a "reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost." Massachusetts General Laws ("G.L.") c. 164, § 69H. The Massachusetts statute governing Siting Board activities is Massachusetts G.L. chapter 164, § 69G through § 69S. The Siting Board's regulations can be found at 980 CMR 1.00 through 12.00.

The nine-member Siting Board is made up of the Secretary of Energy and Environmental Affairs, who serves as the Chair, two Commissioners from the DPU, the Secretary of Housing and Economic Development, the Commissioner of the Department of Environmental Protection, the Commissioner of the Department of Energy Resources, and three public members who are appointed by the Governor.

The Siting Board's jurisdiction is discussed in more detail below, but the categories of facilities reviewed by the Siting Board include: large electric generating plants, electric transmission lines, intrastate natural gas and oil pipelines, facilities for the manufacture or storage of natural gas, and very large oil storage facilities in Massachusetts. With regard to interstate natural gas pipelines, jurisdiction for reviewing and approving or denying proposed facilities resides with the Federal Energy Regulatory Commission ("FERC") pursuant to the federal Natural Gas Act.

Based on statutory provisions, the scope of the Siting Board's review of a proposed facility varies depending on the type of facility. Following the restructuring of the electric power generation industry in Massachusetts, the Siting Board's review of electric generating plants is focused primarily on environmental impacts and their mitigation, with review of other fossil fuel generating technologies required for proposed plants that do not meet the Siting Board's

Technology Performance Standards. <http://www.mass.gov/eea/docs/dpu/siting/980-cmr-1200.pdf>.

For electric transmission lines, intrastate natural gas pipelines, facilities for the manufacture or storage of natural gas, and jurisdictional oil facilities, the scope of the Siting Board's review includes not only environmental impacts and mitigation, but also the need for and cost of the proposed facility, and alternatives, including other means of meeting the identified need, and alternate routes or sites for such facilities. For all proposed jurisdictional facilities, the Siting Board is required to review whether plans for expansion and construction are consistent with current health, environmental protection, and resource use and development policies, as adopted by the Commonwealth.

## II. SITING BOARD JURISDICTION

M.G.L. c. 164, § 69G gives the Siting Board jurisdiction over the following types of proposed energy facilities, which the Siting Board may approve, approve with conditions, or deny:

- Large electric generating facilities, defined as any generating unit designed for or capable of operating at a gross capacity of 100 megawatts or more, including associated buildings, ancillary facilities, and transmission and pipeline interconnections that are not otherwise subject to the Siting Board's jurisdiction.
- A new electric transmission line having a design rating of 69 kilovolts ("kV") or more and which is one mile or more in length on a new transmission corridor.  
A new electric transmission line having a design rating of 115 kV or more which is 10 miles or more in length on an existing transmission corridor, except reconductoring (replacing the cables that carry or "conduct" the electric current) at the same voltage and/or rebuilding transmission structures.
- An ancillary structure (such as a new or modified substation), which is an integral part of the operation of any transmission line subject to the Siting Board's jurisdiction.  
A unit, including associated buildings and structures, designed for or capable of the manufacture or storage of gas, except: (1) a unit with a total gas storage capacity of less than 25,000 gallons and also with a manufacturing capability of less than 2,000 MMBtu per day; (2) a unit whose primary purpose is research, development or demonstration of

technology and whose sale of gas, if any, is incidental to that primary purpose; or (3) a landfill or sewage treatment plant.

- A new pipeline for the transmission of gas having a normal operating pressure in excess of 100 pounds per square inch gauge, which is greater than one mile in length, except restructuring, rebuilding, or relaying of existing gas pipelines of the same capacity.
- An oil storage facility exceeding 500,000 barrels (which equals 21 million gallons) or an oil pipeline greater than one mile in length, except restructuring, rebuilding, or relaying of existing pipelines of the same capacity.

Pursuant to the specific requirements outlined in M.G.L. c. 164, § 69K-69O½, the Siting Board may also may issue a Certificate of Environmental Impact and Public Interest to any applicant that proposes to construct or operate a generation facility or to any electric, gas, or oil company that proposes to construct or operate jurisdictional facilities in Massachusetts. Such a Certificate, if granted, has the legal effect of providing all state and local permits that are required for construction and operation of the facility, as requested by the applicant.

In addition to conducting facility reviews, the Siting Board may represent the Commonwealth in proceedings before the Federal Energy Regulatory Commission ("FERC") having to do with the construction of interstate natural gas pipelines in Massachusetts. The Siting Board typically intervenes when interstate natural gas pipeline companies petition the FERC to construct major interstate gas pipelines in Massachusetts. At the request of hydroelectric facility applicants seeking FERC approval, the Siting Board is authorized to coordinate the information collection process for permitting and licensing of hydropower generating facilities, in consultation with state and federal permitting and licensing agencies.

### III. SITING BOARD REVIEW PROCESS

The Siting Board reviews major energy facilities using an adjudicatory process which, broadly speaking, can be divided into three phases: procedural, evidentiary, and decision. Each of these phases is discussed in detail below.

#### A. The Procedural Phase

A project proponent begins the Siting Board process by filing a Petition with the Siting Board. Once the Siting Board receives the Petition, docket numbers are assigned to each jurisdictional component of the case. There are instances when a single project can consist of

several cases with both the Siting Board and DPU jurisdictions. In most of these instances, the Chairman of the DPU issues a Consolidation Order, which directs the Siting Board to render a Decision in all related cases after conducting a single adjudicatory proceeding and developing a single evidentiary record. When cases are consolidated, Siting Board rules apply to the proceeding.

The Siting Board then lays the groundwork for its formal review of the proposed facility by providing for public notice of the proceeding, holding one or more public comment hearings, determining who may take part in the formal proceeding, and establishing the ground rules and schedule for the evidentiary phase. Typically, the schedule for the evidentiary, more formal phase of the case is established by the designated Presiding Officer after he or she identifies the parties to the case and holds a procedural conference.

#### 1. Public Notice

Upon receiving a petition to construct an energy facility in Massachusetts, the Siting Board directs the applicant to:

- (1) publish, prior to the public comment hearing, notice of its proposal to construct the project in at least two newspapers having a reasonable level of circulation within the community or region,
- (2) mail notice to owners of all property within a certain distance of the boundaries of the proposed and alternate sites, if any, for the facility, and
- (3) post notice in the city or town halls of communities in which the proposed project would be located.

The Siting Board also customarily sends notice of the applicant's petition to local and state officials who represent the municipality or municipalities where the facility is proposed. The applicant's full petition must be available at the public library or clerk's office in each community where the facility is proposed, and at the Siting Board's Boston offices. Petitions can also be found at the DPU's website by going to <http://web1.env.state.ma.us/DPU/FileRoom> and selecting the "Docket/Filings" tab, and choosing "EFSB" under "Dockets By Industry" or by selecting "Docket by Number" and entering the docket number (e.g., "EFSB15-06")

## 2. Public Comment Hearing and Site Visit

After notice has been published, the Siting Board holds one or more public comment hearings in the project area where a facility is proposed. For projects such as transmission lines or pipelines, that often span multiple communities, the Siting Board determines the number and location(s) of public hearings so as to provide a reasonable opportunity for interested persons to attend. The public comment hearing, held in the evening, provides those who attend with an opportunity to learn more about the proposed project and its potential impacts. It also allows the Siting Board to learn about the public's concerns. At the public comment hearing, the petitioner presents an overview of the proposed facility. Public officials and the general public then have an opportunity to ask questions and make comments about the proposal. A record of the public comment hearing is transcribed by a stenographer.

Siting Board members and/or staff also view the site or route where the petitioner proposes to construct its facility. If the petitioner has designated an alternate site or route, Siting Board members and/or staff visit that site or route as well.

## 3. Seeking the Right to Take Part in a Proceeding

Persons or groups who wish to be involved in a Siting Board proceeding beyond the public comment hearing stage may seek either to **intervene as a party**, or to **participate as a limited participant**, by filing a petition with the Presiding Officer assigned to the case. Participation as a party or limited participant is described in greater detail in Section IV, below.

## 4. The Procedural Conference and Procedural Schedule

After ruling on all petitions to intervene as a party and participate as a limited participant, the Presiding Officer typically convenes a procedural conference to establish a procedural schedule for issuing information requests and filing written testimony, and to set a date for the commencement of evidentiary hearings. Those involved in a Siting Board proceeding are expected to meet all deadlines in the procedural schedule unless the Presiding Officer grants a party's request for an extension in advance of the deadline.

### B. The Evidentiary Phase

During the evidentiary phase of a proceeding, the Siting Board develops a factual record upon which to decide whether to authorize construction of the proposed energy facility. The



Siting Board's decision must be based solely on information that has been properly admitted into the evidentiary record during the proceeding. Witnesses sponsored by the applicant and by intervenors typically provide such evidence. Each witness provides an initial written direct case and then responds to written and oral questions (*i.e.*, information requests and responses). This process is further described below.

1. Direct Case

a. The Applicant

The applicant's direct case consists of its initial petition, the testimony of each of its witnesses, and any other evidence (applications for permits from other state or local agencies, for example) that it properly submits to support its case. The applicant typically presents the bulk of its direct case in written form prior to the evidentiary hearings. Additional oral testimony and written documentation may be offered or requested during the evidentiary hearings.

b. Intervenors

If they wish, intervenors also may present a direct case by sponsoring a witness or witnesses who present written and oral testimony on specific issues pertaining to the applicant's proposal. The Presiding Officer will establish a schedule for the submission of testimony by intervenor witnesses. Limited participants may not sponsor witnesses.

2. Pre-Filed Testimony

The initial written testimony of any witness is called "pre-filed testimony." A witness' pre-filed testimony presents his or her qualifications or familiarity with the subject of his or her testimony, and then sets forth relevant information through a series of questions to the witness, each followed by the witness' response. Pre-filed testimony may reference analyses performed by the witness, as well as relevant documentary evidence such as published reports, photographs of features in the project area, or noise measurements. Copies of any such materials must be provided if they have not already been entered into the record as part of the applicant's direct case, or as part of the applicant's responses to discovery. Any witness who submits pre-filed testimony must be available to respond to written discovery regarding that testimony, and, as explained in greater detail below, to be subject to cross-examination at an evidentiary hearing at the Siting Board's office in Boston.

### 3. Discovery

The purpose of discovery is to provide parties and the Siting Board with a way to gain access to information that is relevant to the issues in the case prior to the start of evidentiary hearings. Discovery consists of written questions (*i.e.*, information requests) and requests for pertinent documents. Typically, the Siting Board and intervenors may submit information requests to the petitioner. If an intervenor presents a direct case, the Siting Board and the petitioner may submit information requests to that intervenor.

Information requests and responses must be filed in accordance with the procedural schedule. Responses to discovery must be dated, must include the name of the witness who prepared the response, and must be presented in the format specified by the Presiding Officer. All witnesses responsible for responding to discovery must also be made available for cross-examination under oath at the evidentiary hearings if requested by the Siting Board or other parties.

### 4. Evidentiary Hearings

The purpose of the evidentiary hearing is to further develop the evidentiary record through the examination of witnesses under oath. Evidentiary hearings are recorded by a court reporter. Evidentiary hearings are generally open to the public; however, only parties may offer or question witnesses. Hearings are generally held at the Siting Board's office at One South Station in Boston. Siting Board evidentiary hearings are adjudicatory proceedings under G.L. c. 30A.

Evidentiary hearings are conducted by the Presiding Officer assigned to the case. In conducting hearings, the Presiding Officer is guided by, but need not observe the rules of evidence observed by Massachusetts Courts. The Presiding Officer establishes the witness schedule after consulting with the parties to determine when their witnesses will be available. Generally, the petitioner's witnesses appear first, followed by the intervenor witnesses. The witness schedule is subject to change during the course of hearings.

At the evidentiary hearings, each witness is sworn in by the Presiding Officer. The witness then provides his or her direct oral testimony adopting, clarifying, and as necessary,

amending his or her pre-filed testimony and responses to discovery. The witness is then subject to cross-examination by the Siting Board and other parties. Cross-examination provides the Siting Board and parties with an opportunity to clarify confusing areas in a witness' testimony or responses to discovery.

On occasion, a witness may be unable to respond to a specific question during cross-examination due to the complexity of the subject or the absence of documentation. In such cases, the questioner may ask to make a record request for the information. If the record request is allowed, the witness must provide a written response to the question at a time determined by the Presiding Officer.

Following cross-examination, witnesses may be subject to re-direct examination, typically restricted to issues raised during cross-examination, and to re-cross-examination, typically restricted to issues raised during re-direct examination

### C. The Decision Phase

After the close of evidentiary hearings, the petitioner, intervenors and limited participants may submit briefs that evaluate the evidence in the record in light of the Siting Board's statute. The Siting Board staff then drafts Tentative Decision for the Board's review. The Siting Board reviews the Tentative Decision at a public meeting and votes on whether or not to adopt the Tentative Decision, and what conditions may be imposed. Based on the Tentative Decision, and any amendments approved by the Board, the Siting Board issues a Final Decision.

#### 1. The Brief

A brief is a document prepared by the parties that presents arguments in support of a particular result (e.g., that the petition should be approved, approved with conditions, or denied) based on information in the evidentiary record and on the Siting Board's statute and precedent. Briefs may not introduce additional evidence.

At the close of evidentiary hearings, the Presiding Officer establishes a briefing schedule, which typically allows for initial briefs, followed by reply briefs that respond to the arguments presented by the other parties in their initial briefs.

The applicant, intervenors, and limited participants may submit initial briefs in accordance with the briefing schedule set by the Presiding Officer. Initial briefs typically are due two to three weeks after the close of evidentiary hearings. The applicant's initial brief typically summarizes the record of the case and argues that the proposed facility meets all statutory requirements for approval. Initial briefs from intervenors and limited participants may address a broad range of issues or may focus on a few critical issues – for example, a specific proposal for mitigation of an environmental impact. Any argument or proposal raised in the brief must be based on evidence that is in the record. No party or limited participant is under any obligation to file an initial brief.

If a party or limited participant chooses, he/she may submit a reply brief. Reply briefs typically are due one to two weeks after the initial briefs were filed. A reply brief should address only those issues raised in other initial briefs; therefore, reply briefs generally are shorter than initial briefs. No party or limited participant is under any obligation to file a reply brief.

## 2. Tentative Decision

The Siting Board staff drafts and issues a Tentative Decision, which is distributed to all parties and limited participants. A Tentative Decision may: (1) approve the proposed project or noticed alternative; (2) approve the proposed project or noticed alternative subject to conditions; or (3) deny the proposed project. The Tentative Decision contains sections addressing each of the major statutory issues in the case. A Decision section at the end of the document summarizes the proposed findings in the case. These summary findings, however, are based on the more detailed findings made throughout the document. It is essential to read the entire text to fully understand the Tentative Decision.

## 3. Comment Period

A comment period of at least seven days commences immediately after the Tentative Decision is issued. During the comment period, the petitioner, intervenors, and limited participants may submit written comments on the Tentative Decision to the Siting Board. These comments should focus on the consistency of the Tentative Decision with evidence in the record;

they may not introduce new evidence. The petitioner, intervenors and limited participants are not required to submit written comments on the Tentative Decision.

#### 4. Siting Board Meeting

Approximately two weeks after the Tentative Decision is issued, the Siting Board meets to consider whether to approve, amend, or reject the Tentative Decision. At the Siting Board meeting, Siting Board staff present a brief overview of the Tentative Decision, respond directly to specific written comments when appropriate, identify any amendments being proposed by staff, and respond to questions from Siting Board members. Following the staff presentation, the Siting Board may afford parties the opportunity to present oral arguments. The Siting Board members may question any speaker regarding his or her comments on the Tentative Decision.

The Siting Board then considers any proposed amendments to the Tentative Decision. After all amendments have been considered, the Siting Board votes on whether to accept the Tentative Decision as amended.

#### 5. Final Decision of the Siting Board

The Final Decision that incorporates all approved amendments to the Tentative Decision, typically is issued on the business day immediately following the Siting Board vote. All parties and limited participants receive a copy of the Final Decision. An aggrieved party in interest may appeal the Final Decision to the Supreme Judicial Court pursuant to G.L. c. 25, § 5, as made applicable to the Siting Board by G.L. c. 164, § 69P.

### IV. BECOMING A PARTY OR LIMITED PARTICIPANT

As noted above, individual people, groups or other entities (such as a municipality) wishing to participate beyond the public comment phase of a proceeding may petition the Siting Board to intervene as a party or participate as a limited participant.

#### A. Petition

The petition should clearly describe the petitioner's interest in the proceeding. Persons seeking to intervene or participate as a limited participant should consult the regulations governing intervention and participation in Siting Board proceedings, which can be found at 980

CMR 1.05 (available online <http://www.mass.gov/eea/energy-utilities-clean-tech/energy-facilities-siting-board/relevant-regulations.html>)

In order to **intervene as a party**, a petitioner must demonstrate that he or she *is, or may be, "substantially and specifically affected" by the proceeding*. The issues raised in the petition to intervene *must be specific to the potential intervenor and must fall within the scope of the Siting Board's review*. For example, to support a petition to intervene as a party, a town might claim that a transmission line project will improve the reliable delivery of electricity to its residents; a conservation commission might cite the need to protect a river bank area which could be affected by a project's water use or discharges; or an individual whose property abuts a project site might express concerns about noise or views from his backyard. Individuals or groups that are permitted to intervene as a party are known as "intervenors."

Persons or groups seeking to participate as a **limited participant** need not demonstrate "substantial and specific" interest; however, a petition to participate as a limited participant should describe the manner in which the Petitioner is interested, state the petitioner's contention and the purpose for which participation is requested.

The Presiding Officer reviews all petitions to intervene as a party or participate as a limited participant and makes a ruling on each petition.

#### B. Rights of Intervenors and Limited Participants

The rights of a party in a Siting Board proceeding are more extensive than those of a limited participant. In deciding what type of petition to submit, consider the following:

##### **An Intervenor may:**

- \* Issue information requests and receive responses,
- \* Present written testimony and witnesses,
- \* Cross-examine witnesses,
- \* File a brief,
- \* Review and comment on the Tentative Decision, and
- \* Appeal a final decision.

**A limited participant may:**

- \* Receive copies of information requests and testimony in a proceeding,
- \* Receive copies of responses to information requests,
- \* File a brief, and
- \* Review and comment on the Tentative Decision.

C. Group Intervention

Under [Section 10A of G.L. c. 30A](#), a group of 10 or more people may petition the Siting Board to intervene as a group. There are several requirements that must be met for a Section 10A petition to intervene to be granted:

- There must be a group of 10 or more people;
- Damage to the environment, as defined in [Section 7A of chapter 214](#), is or may be at issue;
- The intervention petition must clearly and specifically state the facts and grounds for intervening and the relief sought;
- At least five of the group of ten or more must reside in the municipality in which the license or permitted activity is sought; and
- Each intervening person must sign an affidavit stating his or her intention to be part of the intervention group and to be represented by the group's authorized representative.

D. Legal Counsel

Except for an individual appearing on his or her own behalf (known as *pro se*) or limited participants, all parties must be represented by an attorney. The Presiding Officer may grant a waiver for good cause shown. The request for a waiver must include: (1) an affidavit stating the good cause and naming a duly authorized representative; and (2) an affidavit by the duly authorized representative accepting the appointment and certifying that he will abide by the procedural rules set forth in 980 CMR and the Presiding Officer's directives.

Individuals appearing *pro se* and limited participants are not required to be represented by an attorney. However, the Siting Board recommends that all persons involved in a Siting Board proceeding obtain legal representation. Generally, community groups or other entities (other than individuals) are required to be represented by counsel unless a waiver is obtained

from the Presiding Officer that would allow a non-lawyer to represent the group or other organization. All participants, whether or not represented by an attorney, must abide by legal conventions and adhere to the laws and regulations governing the Siting Board. The Siting Board staff is not permitted to provide legal advice of any kind to parties or limited participants.

E. Accessing Information

Whether you choose to formally participate in a matter or not, you may access all the non-confidential evidence and testimony in a case. There are several ways to view materials. If you are a party to the proceeding you will receive all the documents electronically, and by U.S. mail, if requested. If you are not a party, you may access the case docket from the Department of Public Utilities' website to <http://web1.env.state.ma.us/DPU/FileRoom>. You may also go to the Siting Board's office at One South Station in Boston to review documents related to a case. Further, you can access prior cases via the [Siting Board Dockets webpage](#).



## **APPENDIX A - Other Reviewing Agencies**

A number of state agencies other than the Siting Board may have responsibilities in connection with the regulation and development of energy facilities.

MEPA Unit of the Massachusetts Office of Environmental Affairs (617) 626-1031

<http://www.env.state.ma.us/mepa/>

Department of Environmental Protection (617) 292-5500 <http://www.mass.gov/dep/>

Department of Public Utilities (617) 305-3500 <http://www.mass.gov/dpu/>

Department of Energy Resources (617) 626-7300 <http://www.mass.gov/doer/>

Department of Conservation and Recreation (617) 626-1250 <http://www.mass.gov/dcr/>

Massachusetts Natural Heritage and Endangered Species program (508) 389-6360

<http://www.mass.gov/eea/agencies/dfg/dfw/natural-heritage>

Massachusetts Water Resources Authority (617) 242-6000 <http://www.mwra.state.ma.us/>

Office of Coastal Zone Management (617) 626-1200 <http://www.mass.gov/czm/>

Massachusetts Historical Commission (617) 727-8470 <http://www.sec.state.ma.us/MHC/>

Massachusetts Highway Department (857) 368-4636 <http://www.massdot.state.ma.us/Highway/>

Department of Public Health (617) 624-6000 <http://www.mass.gov/dph/>

Department of Public Safety (617) 727-3200 <http://www.mass.gov/dps/>

Local agencies and officials such as the building inspector, planning board, zoning board, conservation commission, water department, fire department, historical commission, board of health and department of public works also may be involved.