

COMMONWEALTH OF MASSACHUSETTS
Energy Facilities Siting Board

Proposed Rulemaking to Amend the Regulation
Found at 980 CMR 1.01(3)(e) to Establish
a Minimum Threshold Size for a “Facility”
As Defined in that Regulation.

EFSB 09-RM-1

FINAL DECISION OPENING PROPOSED RULEMAKING

Robert J. Shea
May ____, 2010

I. INTRODUCTION

In 1975, the Energy Facilities Siting Council (“Siting Council”), the predecessor to the Energy Facilities Siting Board (“Siting Board”), initially promulgated 980 CMR § 1.00, “Rules for the Conduct of Adjudicatory Proceedings.” On September 13, 2002, these regulations were amended in EFSB 02-RM-1 to reflect statutory changes that had occurred since 1975. These regulations were amended again, effective February 19, 2010, in EFSB 08-RM-1, to provide additional clarity and efficiency.

Presently, 980 CMR 1.01(4)(e) 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). The Siting Board believes that it would be appropriate to articulate such a minimum threshold and to exclude from Siting Board jurisdiction certain units whose storage or manufacture of gas is small or ancillary to the unit’s primary purpose. Therefore, it proposes to revise 980 CMR 1.01(4)(e) to that effect. Accordingly, pursuant to G.L. c. 164, § 69H and G.L. c. 30A, the Siting Board hereby opens a rulemaking for the purpose of revising 980 CMR 1.01.

A copy of the proposed revised regulation is attached.

II. STATUTORY BACKGROUND

Massachusetts 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.

G.L. c. 164, § 69H

Consequently, 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. Under this statute, a “Facility” is defined as, among other

things: “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.*” G.L. c. 169, § 69G, eighth paragraph, clause (5) (emphasis supplied). 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 such a regulation. These statutes together give the Siting Board the authority to amend 980 CMR 1.01(4)(e) to establish a minimum threshold size.

III. PROPOSED 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.

The effect of the proposed revised regulation is to exempt from Siting Board jurisdiction small gas storage and manufacturing units, research facilities, and landfills and sewage treatment plants. While such units may make or store gas, it is either in small amounts or is ancillary to the unit’s primary purpose. Exempting such units from Siting Board jurisdiction is consistent with the Siting Board’s overall regulatory mandate and promotes administrative efficiency.

IV. REQUEST FOR COMMENTS

The Siting Board seeks written comments addressing any or all provisions of the proposed regulation. Among other issues, the Board seeks comments regarding whether the exemption set forth in clause number 3 – *i.e.*, for landfill and sewage treatment plants, regardless of size – is necessary or advisable. Furthermore, with respect to clause number 3, the Board specifically seeks comments about or whether the exemption set forth in clause number 1 – which sets jurisdictional limits by storage size and manufacturing capability – is sufficient to encompass all landfill and sewage treatment plants that should be exempt from

Siting Board jurisdiction, thereby rendering clause number 3 superfluous. The comments should be received no later than 5:00 p.m. on July 1, 2010, and should be filed with Robert J. Shea, Energy Facilities Siting Board, One South Station, Boston, Massachusetts 02110. The Siting Board requests that all written comments also be submitted to the Siting Board in electronic format using one of the following methods: (1) by electronic mail (“e-mail”) attachment to dpf.filing@state.ma.us (copy to robert.j.shea@state.ma.us); or (2) on a 3.5 inch floppy diskette, IBM-compatible format. The text of the e-mail or diskette label must specify: (1) an easily identifiable case caption; (2) the docket number; (3) the name of the person or company submitting the filing; and (4) a brief descriptive title of the document (e.g., comments on 980 CMR § 1.01). The electronic filing should also include the name, title and telephone number of a person to contact in the event of questions about the filing. Text responses should be written in Microsoft Word. Documents submitted in electronic format will be posted on the Siting Board’s web page which can be accessed via the Department’s website, <http://state.ma.us/dpf>.

To provide further opportunity for comment, and pursuant to G.L. c. 30A, §§ 2 and 4, the Siting Board will hold a public hearing at 10 am on July 1, 2010, at the Siting Board’s offices, One South Station, Boston, Massachusetts. Interested persons may present facts, opinions, or arguments relating to the proposed regulations at the public hearing.

The effective date of the revised regulations shall be the date of their final publication in the Massachusetts Register.

Robert J. Shea

APPROVED by unanimous vote of the Energy Facilities Siting Board at its meeting of October 8, 2009, by the members and designees present and voting. **Voting for** approval of the Final Decision: Ann Berwick, Undersecretary for Energy (Acting EFSB Chair/Designee for Ian A. Bowles, Secretary, Executive Office of Energy & Environmental Affairs); Robert Sydney (Designee for Commissioner, DOER); James Colman (Designee for Commissioner, DEP); Robert Mitchell (Designee for Secretary, EOHED); Jolette Westbrook (Commissioner of the DPU); Timothy Woolf (Commissioner of the DPU); and Dan Kuhs, Kevin Galligan, and Penn Loh, Public Members.

Ann Berwick, Acting Chair
Energy Facilities Siting Board