

**An
Evaluation
of
New York State's
Tidal Wetlands
Program**

**Final Report of the
Tidal Wetlands Advisory Committee
of the
New York State Department of Environmental Conservation**

February 10, 1987

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Executive Summary

This summary, the findings and the recommendation section of this report are divided into the following topics: departmental organization, staff, regulatory concerns and the permit process, acquisition and management, and compliance and enforcement.

The Committee finds the Tidal Wetlands Act and the Department's Part 661 Regulations to be basically sound. With the initiation of the act in 1973, the loss of tidal wetlands, to a variety of land use activities, was dramatically slowed. Only in the areas of compliance and enforcement, and regulatory concerns and the permit process, are there several specific recommendations which involve strengthening the Act and clarifying the regulations. The Committee is profoundly concerned about the Department's failure to effectively implement the Act, which has undermined the protection of the resource and has resulted in unacceptable delays and inconsistencies in the processing of permits. This condition has persisted for some time and, the Committee found, is largely due to problems of leadership and accountability. The DEC staff involved with the tidal wetlands regulatory process are currently working under very difficult conditions.

DEPARTMENTAL ORGANIZATION / STAFF

The most pervasive flaws in DEC's administration of the Act stem from the lack of clear responsibility for the program. Permit applications are unacceptably backlogged. Many are issued or denied without adequate study and often without any inspection of the site. Inconsistent analysis of permit applications results in some permits being issued while similar applications are rejected, or rejected where others are issued. These situations undermine public confidence, reducing the effectiveness of the program. The solution requires not only increased staff and more efficient operations, but the creation of a new unit with explicit jurisdiction over this important, but departmentally neglected program.

A Bureau of Tidal Wetlands Regulation (BTWR) should be established within the Division of Marine Resources (DMR), with control over tidal wetlands permit review, compliance and enforcement. The 1982 reorganization of the Department's permit programs left tidal wetlands

permits being investigated not by DMR, the division with substantive jurisdiction over the program, but by the Division of Regulatory Affairs (DRA). This anomaly treats tidal wetlands differently from air, water, solid waste and virtually every other Department program.

The new bureau, based in Stony Brook, should be accountable for tidal wetlands permits in Regions 1, 2 and 3, the only portions of the State where tidal wetlands exist. It should consist of a bureau chief, two supervisors, nine environmental analysts (one assigned to Regions 2 and 3), two compliance officers, and clerical support staff. As with other permit programs, DRA should refer processing, SEQRA compliance and substantive recommendations to the new Bureau. Those qualified staff now at DRA and DMR should be transferred to the new bureau and supplemented with additional staff. Another advantage of this shift will be to free DMR's Bureau of Marine Habitat Protection, which is now part of the unwieldy permit process, to work on acquisition, resource management, and research. DRA would serve strictly as "business managers", coordinating the timing of activities and the flow of paper.

Two of the eight analysts assigned to Region 1 should, on a rotating basis, be assigned to answer public inquiries. The inability of Region 1 staff to respond to such inquiries has been a consistent source of frustration and cynicism about the program. Having two analysts on call every day should alleviate this serious problem. An attitude of cooperation and public service is required.

The Committee urges increased attention to the recruitment of staff by the new bureau. A variety of sources should be explored, including universities in and outside of New York State. To attract competent, motivated staff, the existing \$406 cost of living differential for New York City and Long Island should be increased to \$2500 for environmental analysts.

REGULATORY CONCERNS AND THE PERMIT PROCESS

The Committee found serious flaws in the methods used to implement the permit program. The inventory maps are out of date and inherently ill-suited to provide the definitive function intended by the Act. The Committee recommends that new inventory maps be prepared which accurately depict the wetland boundaries in terms of State Plane Coordinates so that the boundary can be consistently and authoritatively delineated both on the ground and on applicants' plans and maps.

Until such new inventory maps are available, the proposed bureau should implement a policy of on-site pre-application conferences, by appointment, to streamline the permit process and narrow the issues to be addressed. The documentation requirements for permit applications should be clearly specified and uniformly enforced, and the Department must coordinate its activities more closely with the regulatory and public works programs of the municipalities.

Permit fees are plainly inadequate to cover a significant portion of the program's costs. They should be substantially increased.

COMPLIANCE AND ENFORCEMENT

Lack of vigorous enforcement renders the best written law ineffective. Enforcement of the Tidal Wetlands Act has been seriously lacking. Staffing is inadequate both at the regional attorney and environmental conservation officer (ECO) levels. The regional attorneys should be augmented by additional deputies, paralegals and paid law students. ECO salaries are insufficient for Long Island and New York City. The cost-of-living adjustment for ECO's in those areas should be increased to \$2500 per year to obtain qualified recruits. Creating the position of "ECO (Wetlands)" would enable the Department to recruit more highly trained people at more competitive salaries. The requirement that ECO's reside in the county where they work should be relaxed within New York City, where it has become a deterrent to recruiting and retaining officers.

On-site permit compliance evaluations are a neglected component of the enforcement program. A Compliance Officer position for that express purpose should be created in the new Bureau of Tidal Wetlands Regulation, Division of Marine Resources. Permit holders should be required to file an affidavit certifying that the work has been completed in accordance with the conditions of the permit, and the Department should have the power to require developers to post a bond for that purpose. Site inspections to ascertain compliance should be increased, and Department staff should meet regularly with municipal enforcement personnel to coordinate compliance programs. The Department should have the power to halt illegal alteration pending an administrative hearing.

At the Department's hearings, environmental analysts, ECO's and other agents need greater training and preparation to be more effective witnesses. Administrative law judges should be more thoroughly insulated from the Department's enforcement and compliance staff, to insure

not only their impartiality as judges, but the public perception of it. The Department should obtain authority to file a lis pendens to prevent the sale of property while administrative proceedings are pending, lest it be left with an unenforceable order. Here, too, the Department should be empowered to require developers to post a bond to insure restoration of an unlawfully altered wetland. Significant penalties should be publicized, serving as a public education and information tool.

The Department's critical role in judicial proceedings needs strengthening as well. There, too, staff needs training, especially with regard to the subtle and elusive de facto taking issue. There should be greater coordination with municipalities to avoid confusion when landowners seek to prove a taking. The Act should be amended to enable the Department to purchase a limited portion of, or interest in, a parcel in order to avoid a taking. The conservation easement device should be used more often, when cost-effective, to avoid "taking" claims, instead of outright purchase.

Penalties under the Act are insufficient to deter violations. They should be increased, and the Department should have power to impose administrative penalties for each day of violation, as it now has with the Act's criminal penalties. Fines should be keyed to the damage done to the resource, and guidelines issued to that effect as part of the Department's regulations. Penalties, fines and permit fees should be earmarked for enforcement of the Act.

ACQUISITION AND MANAGEMENT

The Department's Tidal Wetlands Acquisition Program, as Gibbon said of the condition of Corsica, is easier to deplore than to describe. Although the Environmental Quality Bond Act of 1972 allocated \$18 million to acquire up to five thousand acres of tidal wetlands, the State has only acquired 2,585 acres in fourteen years. The acquisition process is convoluted and inefficient. DEC has lacked a surveyor in the downstate area, so the most basic tasks preliminary to acquiring a parcel must await the arrival of a surveyor from Albany. The time required to fill these positions is excessive. Two surveyors should be promptly transferred to, or hired at, Stony Brook. When the staff surveyor problem is resolved, greater use of private, contract surveyors should be made. In addition, acquisition selection criteria have been vague, and the current level of coordination with other levels of government and private groups needs to be increased. These problems need immediate resolution so that biologically valuable and irreplaceable wetlands are not lost to escalating land prices and development.

Conservation easements, as authorized under ECL Article 49, should be a routine aspect of acquisition evaluation, and employed where found to be cost effective.

Management of DEC-owned tidal wetlands has been essentially a de facto policy of benign neglect, with scant attention to monitoring pesticide use, littering and other damaging activities. Creating the new bureau to deal with permits should enable the existing, understaffed, Bureau of Marine Habitat Protection to concentrate on improving acquisition and management.

Acknowledgements

The Committee would like to thank New York State Department of Environmental Conservation Commissioner Henry G. Williams for bringing the Tidal Wetlands Advisory Committee into existence. We are grateful to DEC Executive Deputy Commissioner Langdon Marsh, Division of Marine Resources Director Gordon Colvin, Region 1 Director Harold Berger, and Bureau of Marine Habitat Protection Chief Kenneth Koetzner for their assistance in the administration and management of this project. A technical review of this manuscript was conducted by Gordon Colvin and staff.

We gratefully acknowledge the participation of the many individuals who were interviewed for this evaluation. Their collective desire to help the Committee understand clearly the Tidal Wetlands Program, and more importantly, their desire to see it work properly, was a confirmation of the Committee's purpose.

Finally we thank our organizations, employers and spouses for generously providing the time necessary to undertake this project.

Funding for this project was provided to the DEC by the N.Y.S. Department of State, Division of Coastal Resources and Waterfront Revitalization, through a grant from the National Oceanic and Atmospheric Administration, OCRM, as provided by the Coastal Zone Management Act of 1972, as amended. The Division of Coastal Resources and Waterfront Revitalization is responsible for the administration of New York State's Coastal Management Program, of which Article 25 is a component.

Introduction

In September, 1973, Environmental Conservation Law Article 25, the Tidal Wetlands Act, was put in effect, declaring "that tidal wetlands constitute one of the most vital and productive areas of our natural world, and that their protection and preservation are essential." The New York State Tidal Wetlands Act brought to a close an era of widespread wetland destruction. With this legislation it became public policy "to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state." This policy was implemented through the application of the Part 661, Tidal Wetlands Land Use Regulations, of the Department of Environmental Conservation (DEC). Responsibility for the implementation of these regulations is shared by the Department of Environmental Conservation's Division of Regulatory Affairs (DRA) and Division of Marine Resources (DMR).

In April, 1986, 13 years after the passage of Article 25, DEC Commissioner Henry G. Williams created a Tidal Wetlands Advisory Committee for the purpose of evaluating the regulatory and administrative effectiveness of the Act. Funding for the Tidal Wetlands Advisory Committee was provided as a grant from the New York Department of State's Coastal Management Program. The Committee was selected by the Commissioner to represent the primary constituencies involved with tidal wetland resources, and includes:

Natural Resource Ecology and Management

Thomas S. Litwin, Ph.D. Chairman	Director, Seatuck Research Program, Cornell University Laboratory of Ornithology
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Local Government

Hon. Gino Aiello, P.E.	Commissioner, Town of Hempstead Department of Conservation and Waterways
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Environmental Advocacy and Protection

Nancy Nagle Kelley, A.I.C.P.	President, Group for the South Fork, Inc.
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Economic Land Use and Development

John J. Raynor, P.E., L.S.	Consulting Civil Engineer and Land Surveyor
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Legal and Public Policy

Professor Philip Weinberg	School of Law, St. John's University
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The services of all committee members were provided pro bono. Commissioner Williams charged the Committee to "identify the major problems and opportunities to improve the tidal wetlands regulatory programs. Thereafter, recommendations for the resolution of these major problem areas should be formulated. The recommendations can address virtually every aspect of potential program improvement including, but not limited to, needed statutory amendments, changes to regulations, adoption or modification of Departmental policy, and identification of needed program enhancements." A complete report was requested by September 30, 1986, approximately four months after the first full Committee meeting. Due to changes in related program deadlines, the time for completion of the Committee's work was subsequently extended through February 27, 1987.

In general, the Committee found that while Article 25 and Part 661 were fundamentally sound, and that the rapid loss of New York State's tidal wetlands had abated, the administrative and operational implementation of the Act and its regulations are severely flawed. This problem has developed for two basic reasons:

- 1) The Division of Regulatory Affairs and the Division of Marine Resources have been chronically underfunded and understaffed since at least 1982, and
- 2) The regulatory process suffers from internal disorganization and lack of accountability.

It was found that these problems are not new and have persisted for some time (see New York Times : 3/11/84, 3/18/84, 4/1/84, 4/15/84; 1985 Department of Environmental Conservation: A Program and Budget History. A Report from the N.Y.S. Assembly Ways and Means Committee). These two most fundamental problems have served to undermine the protection of the resource as defined in Article 25, and to deprive private landowners of an expeditious and coherent review of their land use activities pursuant to Article 25 of the Environmental Conservation Law and the Part 661 regulations. In addition, DEC staff involved with the tidal wetlands regulatory process are currently working under very difficult conditions. The Committee has found that in response to this situation, the general public, representing an amalgam of diverse specific interests, is expressing a high degree of frustration and resentment toward the DEC and its implementation of the Tidal Wetlands Act. There are also serious problems in the Department's enforcement and acquisition programs as they relate to the Tidal Wetlands Act.

Methods

The primary method of information gathering for the evaluation was through the interview process. The Committee's purpose was not to conduct a quantifiable opinion poll, but rather to give each interviewee the opportunity to express his or her views, in an atmosphere of confidentiality, and engage in dialogue with the Committee. Through this process the Committee was able to identify recurring themes and problems. The Findings and Recommendations sections represent a synthesis and interpretation by the Committee, and ultimately the Committee's collective opinion.

In total, 45 individuals were interviewed, representing 21 different organizations or governmental agencies. Representing New York State were the Department of State, Department of Environmental Conservation (DEC), and the Attorney General's Office. Within the DEC, representation included the Office of Hearings, Adjudicatory Counsel, and Administrative Law Judges; Division of Regional Counsel (Regions 1, 2 and 3); Division of Legal Affairs; Division of Law Enforcement; Division of Marine Resources; Division of Regulatory Affairs (Albany, Regions 1 and 2); and Regional Directors' Offices (Regions 1 and 2). Interviews with DEC staff represented 55% of the total number of interviews. In addition, 3 former DEC administrators were interviewed. All other interviews were categorized into three general groups: those engaged in economic land use and development, local government, and environmental advocacy and protection. Participants in these interviews represented 16 different organizations or local governments.

Additional components of the evaluation included a public hearing, a legal review, and analysis of pertinent public and internal documents. A public hearing was held on 6 August 1986. Twenty-nine statements were made and 11 written comments were submitted. A transcript of the public hearing is available for review in the office of the Division of Marine Resources, Region 1, Stony Brook. The Committee commissioned a law student to prepare an analysis of judicial decisions under the Tidal Wetlands Act (Appendix I). Also reviewed were a number of other documents (e.g. Horvath et al., 1985. New York State Department of Environmental Conservation Tidal Wetlands Permits, A Review of Applications Processing. Student report, SUNY Stony Brook) in addition to internal DEC reports.

The Committee collectively spent in excess of 750 person-hours engaged in the study and preparation of this report.

Findings

Departmental Organization

1. *The 1982 reorganization involving the Division of Regulatory Affairs (DRA), Region 1, and Division of Marine Resources (DMR) permitting process has led to confusion in authority and a serious lack of accountability. Inter-divisional coordination is poor, sometimes resulting in contradictory positions. A result is public confusion and erosion of credibility.*

In 1982, a structural reorganization in DEC resulted in the existing situation where, theoretically, the Bureau of Marine Habitat Protection (BMHP) within DMR has full substantive responsibility for tidal wetland permit review. Prior to this time, the DRA was largely responsible for permit review. However, from the start, the reorganization was severely constrained by the fact that the BMHP was not provided with adequate staffing and, therefore, was not equipped to handle the task. As a result, the responsibility shift intended in the reorganization never fully came about. To this day, in actual practice, there is not a clear cut delegation of responsibility. Because a high degree of technical expertise remained at DRA relative to that at BMHP, substantive permit review continues to be done by DRA. While DRA is not supposed to be doing field inspections under present organization, DRA staff does, in fact, perform inspections. Reasons given include: 1) DRA staff is better skilled at this function than BMHP; and 2) DRA staff would prefer to do technical review rather than "paper pushing tasks." A general lack of confidence exists between DRA and BMHP in regard to each others' analyses.

2. *Lack of DMR regionalization diverges from DEC format, creating an operational anomaly. Directors of Regions 1, 2 & 3 are bypassed in the process, weakening the Regional Director's traditional role.*

Because DMR is based in the Region 1 Stony Brook Office rather than in Albany, the DMR Office itself oversees the local application of the program. In other resource programs (e.g. air, water, solid waste) which are divisionally based in Albany, Regional Directors are considerably more involved in meeting the local needs of the program. Potential conflicts arise between the priorities

of the Regional Directors and of DMR because both report to different deputy commissioners; Regional Directors and DMR are not accountable to each other.

3. A general perception exists that senior management at the Albany level does not understand the problems of coastal management on Long Island, and that the Tidal Wetlands Program is considered a low priority with the DEC. Lack of response to internal requests for staffing and budgetary relief tends to support this perception.

Since the Tidal Wetlands Program is predominantly a Long Island/New York City program, the needs of this program are only voiced by Regions 1 and 2 (rarely by Region 3) unlike other programs such as solid waste, whose problems are expressed to DEC management in Albany from all regions of the State. There is the distinct impression that a downstate-upstate syndrome exists, and that Albany, relative to other programs, cares less about the tidal wetlands program.

4. The Tidal Wetlands Program lacks strong management and policy leadership at all levels, resulting in inconsistency in permit decisions. Personal interpretation plays an inordinate role in the functioning of the regulatory process.

Consistent application of the regulations among staff in Region 1 is lacking and results from a lack of policy leadership.

There are differences in the way BMHP and DRA staff individually review tidal wetland permits. For instance, where two similar permit applications are reviewed by two different analysts, one may receive special conditions and be modified, while the other could be approved as applied for, or denied. Because of the lack of uniformity in permit review, the entire process suffers.

Such perceived inconsistency seriously erodes public confidence in the Tidal Wetlands Program.

5. A legislative mandate was created in 1973 for the protection and regulation of tidal wetlands. Inadequate budgetary appropriations from the onset have made a responsible and competent implementation of Article 25 an unachievable goal. The cumulative result of this situation over a 13-year period is a primary element in the deterioration of the tidal wetlands regulatory process.

Because coastal land resources are so desirable, and the amount of regulated activity is so intense, anything less than a fully operational program will result in programmatic breakdowns. Under present DEC organization and funding, this regulated resource is not receiving the attention it demands. Not only has the volume of work increased dramatically without commensurate staff increases, but as of May, 1986, there has actually been a decrease in staff responsible for tidal wetlands permits since 1982 (Appendix II, Tables 1 and 2).

The tremendous work overload in Region 1 has resulted in the unfortunate situation of sizable numbers of applications receiving inadequate review. In addition, permit applicants are regularly deprived of a timely review of their applications. A significant proportion of applications are reviewed without benefit of any site inspections (some estimate the number to be as high as 75%). Lack of site inspection affects not only the quality of application review, but also increases the likelihood that permit conditions will be misunderstood and/or violated.

6. Confusion exists in the public mind regarding a perceived overlap in jurisdiction and authority between DEC and Department of State (DOS), as it relates to tidal wetlands regulation and management. Lack of coordination was found to be a contributing factor. A public feeling of duplicate regulation undermines the regulatory process.

The tidal wetland permit process must comply with the New York State Waterfront Revitalization and Coastal Resources Act (WRCRA), commonly referred to as the New York State Coastal Zone Management Act. Conflicts arise when DOS reviews permit applications for consistency to the WRCRA under federally regulated permit procedures. If DOS objects to a project, then it must be modified or denied. Citizens become irate when they get a permit from the DEC, and the Army Corps of Engineers permit is objected to by the DOS. The Committee is appreciative of this frustration, and recognizes that the DEC is responsible for compliance with the WRCRA.

The public is put at a disadvantage by not knowing of the need for two State agencies to review a project until applicants are well into the process. At times, the decision of one may be contradicted by that of the other, creating the public perception that the State has "two heads."

7. A poor working relationship exists between Region 2 staff involved with tidal wetlands and DMR.

One consequence of the DMR's not having staff based in Regions 2 and 3 (particularly 2) is an almost total lack of presence in these regions. The Committee found that there seemed to be little communication or cooperation between DRA staff in Region 2 and the DMR office in Stony Brook. This apparent lack of contact could be, in part, the result of the limited number of tidal wetland permits applied for in Regions 2 and 3: 63 over the last three years, as compared with the tremendous activity in Region 1. Because of Region 1 understaffing, and subsequent permit backlog, Region 2 has been relegated to "out of sight, out of mind" status. Material sent to DMR for review is often not returned. An official request for a DMR staff member to be assigned to the Region 2 office in New York City was apparently denied. There appears to be virtually no DMR contact with Region 3, which contains tidal wetlands north to the Tappan Zee Bridge and northeast along Long Island Sound in Westchester County.

As a result of the virtual lack of presence of DMR in Regions 2 and 3, the DRA Regions 2 and 3 staff are forced to take full responsibility for application review. Other responsibilities, such as compliance and enforcement, are severely compromised. These circumstances specifically serve to illustrate problems associated with lack of regionalization (Finding 2).

Findings

Staff

8. DRA has been chronically understaffed since at least 1982. Unresolved staffing inadequacies have severely eroded staff morale, further aggravating an already faltering permit process. Staff turnover is high, resulting in loss of programmatic continuity. Lack of staff expertise and/or inadequately trained staff aggravate the problem.

In Region 1, the tidal wetlands permit review load has generally increased each year since 1982 : 1983 /1007, 1984/1219, 1985/1201, 1986/1278.

Region 1 DRA staff assigned to tidal wetlands permit review has changed approximately every six to nine months since 1982. As continuity continues to deteriorate, managers in DRA and Albany are attempting to find new combinations of staffing assignments that work. As new staff are assigned and come to understand the situation, they transfer into other programs. Thus, vacancies exist which often take months or even years to fill. For example, two Grade 11 positions were vacant for more than three years; one Grade 14 and Grade 18 position were each vacant for more than one year (Pers. comm. DRA, Reg. 1.).

Over the years, there has been a flip-flop in permit review policy within DRA. At one time, all DRA staff would review permits involving all resources (air, water, solid waste, wetlands). Under this scenario, there was no specialization and certain staff strengths were not adequately utilized. For instance, one individual who regularly processed SPDES Permits began reviewing approximately 15% of all tidal wetlands permit applications. Such a procedure raises questions of internal consistency by all staff who review permits.

Under a second scenario, DRA staff was broken into two teams and both teams issued all types of permits. The two teams' functions were changed again when one team issued natural resources permits (i.e. tidal wetlands, freshwater wetlands, and Wild Scenic and Recreational Resources Act permits) while the other team issued environmental quality permits (i.e., SPDES, Long Island Well Permits, solid waste, resource recovery, and sewage treatment plant permits). The

procedure then flipped back to individual specialization of permits, under which one staff would primarily review freshwater wetlands, one would review SPDES, etc.

An exhaustive memorandum, prepared by officials in Albany, indicates that staffing in regional DRA offices is sorely insufficient to carry out assigned tasks. The data and analyses in the memorandum demonstrate that "workload has expanded, while resources have shrunk and less time is available for environmental analyses than is necessary." At the time of reorganization in 1982, only two-thirds of the new staffing needed was provided throughout the entire Division statewide, creating the staff deficiency which has grown worse as workload has increased. Since the reorganization, the number of DRA staff in regional offices has actually declined. (Appendix II, Tables 1 and 2). As of November 1985, 39% of the permit decisions statewide missed deadlines required under the Uniform Procedures Act. [Appendix II, Table 3]. The statewide average time spent on environmental analysis per project has decreased from 4 hours in Fiscal Year (FY) 82-83 to 3.4 hours in FY 84-85 [Appendix II, Table 4]. It is estimated that a minimum of 4.5 hours is needed per project for adequate review. And yet, permit applications often take several months to process.

While these figures represent the statewide trends, conditions in Region 1 are even more distressing. The number of peremptory decision demands ("five-day letters") has increased more than tenfold in Region 1, from three in 1983 to 41 in 1985 [Appendix II, Table 3]. In fact, Region 1 is without question the most overburdened region. Of the 110 five-day letter requests statewide for all DRA permits, 89 were from Region 1 (81%). Most other regions had between zero and three requests, except for Region 3, which had nine. The current Region 1 permit backlog of 1300 applications is twice that of any other region statewide. Furthermore, Region 1 staff ranked first, considerably ahead of all other regions, in "inquiry workload" categories, such as number of calls per day and number of meetings per day, based on an October 1985 survey.

The number of five-day letter requests is a barometer of public impatience with the system. Five-day letter potential is a measure of DRA staff's inability to process applications in conformity with Uniform Procedures Act. Such permits could be issued on the basis of statutory default. In Region 1, of the 1300 permit backlog, 55% of the entire caseload, or 715 permits, are in jeopardy of default. [FY 1985-86, Appendix II, Table 3].

A yearly breakdown of five-day letter requests for tidal wetlands permits in Region 1 is as follows:

Pre-1984	1984	1985	1986 (first 6 months)
3	1	41	21

Repeated requests have been made for additional staffing necessary to improve program quality and efficiency, with very limited results. Clearly, what is needed is increased staffing at levels commensurate with program demands.

Another factor which contributes to DRA and BMHP staff demands is the Decision Conferences which are scheduled when staff opposes an application; these are held prior to a hearing. Decision Conferences typically involve DRA and BMHP staff on one side of the issue and the applicant on the other. An Administrative Law Judge serves as the finder of facts and determines whether or not the permit should be issued, denied, or modified. In 1985-86, there were 66 Decision Conferences held statewide. Fifty-five, or 83.3%, were in Region 1. Most other regions held 0-3, except Region 6 which held five.

Inquiry workload is another indication of staff time demanded. In 1985-85, average calls per employee per day in Region 1 were 13. Other regions of the state averaged eight calls per employee per day or less.

The FY 1986-87 proposal by DRA for Regulatory Program Staffing Enhancement states that:

"Another objective measurement causing concern is time spent per project per analyst. The average time an analyst spends per project has dropped by 12% since 1982. Based on the increased complexity of environmental analysis of projects covered earlier, every estimate includes that at least an average of 4.5 hours is required for each application. (Less than this amount of time infers inadequate review.)" [Appendix II, Table 4].

A further problem brought on by the failure of reorganization is that DRA staff who had been involved in substantive technical review were now being asked to become "business managers" or "paper pushers," removing the opportunity for many individuals to work in the areas in which they were academically trained. This continues to be a problem within regional DRA's in terms of hiring new staff.

9. BMHP has been chronically understaffed since at least 1982. This has adversely influenced DMR's ability to regulate, manage, and protect the tidal wetlands resources within its purview. Lack of staff expertise and/or inadequately trained staff aggravate the problem. Permit applications frequently are processed without site inspection.

The 1982 reorganization was severely constrained by the fact that the BMHP was not provided with adequate staffing and, therefore, was not equipped to handle the task. Initially, only one full-time field inspector was provided to BMHP to perform some 1000 inspections annually. As of May 1986, there existed two full-time inspectors, with one vacancy [Appendix II, Table 1]. When BMHP was assigned this responsibility, it actually incurred a staff reduction. As a result, the responsibility shift intended in the reorganization never fully came about. To this day, in actual practice, there is not a clear-cut delegation of responsibility. Because a high degree of expertise remained at DRA, relative to that at BMHP, substantive permit review continues to be done by DRA. Although it is not the responsibility of DRA to conduct field inspections, under the current situation, it still does (See Finding 1).

Due to staff shortages, site inspections are not possible for all tidal wetland permit applications where they are required, resulting in an inappropriate use of the administrative review option. Yearly averages for permits administratively reviewed without field checks are: 1983 - 35%, 1984 - 30%, 1985 - 28%, 1986 - 20%. Using the administrative review option where field checks are appropriate results in poor quality of review, because the BMHP analyst simply consults surveys and pictures supplied by the applicant. The DRA staff person has to decide whether to issue the permit on less than adequate or incomplete information, resulting in judgemental conflicts. In this situation, administrative review, as prescribed in Part 661, is being inappropriately used.

A 1984 report published by DEC entitled Marine Resource Management Needs documented the need for additional funding and expanded activity in both of BMHP's existing programs--Environmental Assessment and Tidal Wetlands Acquisition and Management. Despite movement in this direction, BMHP seems to be more distracted than ever by the confusion surrounding permit review.

10. The general public perceives a poor attitude on the part of DEC toward public involvement. The Committee is unable to discern whether this is a symptom of, or a contributing element to, a difficult work environment.

Attempts by the public to communicate with tidal wetlands program staff by telephone prove to be a frustrating experience. The caller is often met with only a recorded message on an answering machine. Messages are often not answered. Applicants express frustration over difficulty in arranging meetings with staff, whether at the site or at DEC headquarters.

The overburdening workload and lack of true leadership within Region 1 appear to have taken their toll on day-to-day operations. One criticism repeatedly voiced by the public is the tremendous difficulty in speaking or meeting with DEC staff on tidal wetland related matters. This problem is a "catch 22": if there were not approximately 1300 backlogged permits, those frustrated people would not be calling. Staff time spent returning calls to explain delays cuts further into the time needed for permit review.

11. *Placing individuals with biological training in DRA analyst positions can lead to loss of professional identity and of job satisfaction.*

One problem brought on by the failure of the 1982 reorganization is that staff in DRA who had been involved in substantive technical review were then being asked to become "business managers", removing the opportunity for many staff to work in the areas in which they were academically trained. This has been cited as a problem within regional DRA's when it comes to hiring new staff.

12. *DRA and BMHP staff involved in tidal wetland regulation experience a job pressure not found in regions other than 1 and 2, due to the high real estate value of regulated coastal resources.*

The pressures are extremely high in the tidal wetlands permit decision making process, which to a large extent, determines whether valuable waterfront land can be developed. The decision whether a permit is issued for a regulated activity can make a difference of tens of thousands of dollars of real estate value. In many instances, the staff is not adequately trained to deal with this type of pressure. Appropriate supervisory support on permit decisions is often lacking.

13. Inadequate downstate cost-of-living salary adjustment and civil service constraints make difficult the recruitment and retention of qualified staff. A general attitude exists among DEC staff that New York City and Long Island are undesirable assignments. Recruiting for biologists and analysts is inadequate.

Problems continuously cited were those of not enough staff, not enough high quality staff, poor staff morale and high turnover rate. At present, there is only a \$406 per annum premium for DEC employees working in New York City and Long Island . Clearly, this amount is insufficient since the cost of living in this region far exceeds that elsewhere in the state. Potential employees are not given adequate notification about upcoming civil service exams for DEC positions. Furthermore, there is a recurring perception that Regions 1 and 2 are the least desirable location assignments and are considered a gateway into the DEC from which many employees try to transfer. This situation results in the loss of experienced personnel and a constant infusion of less experienced and qualified staff. While this condition may be an inter-agency problem not limited solely to DEC, it is a particularly pressing problem for DEC, due to the fact that a metropolitan setting is considered to be an undesirable place for pursuing a career in resource conservation, despite the evident need for experienced staff in this area.

The present recruiting program is extremely weak. Posting of job opportunities is limited and does not reach many colleges and universities that are likely to have qualified job candidates.

Findings

Regulatory Concerns and the Permit Process

14. Article 25 and Part 661 were found to be generally sound and accepted as a governmental means of regulating the tidal wetlands resource. The Committee found that a specific assessment of much of Article 25 and Part 661 is impossible at this time due to the confounding influence of existing budgetary, staffing and organizational problems. (See the findings and recommendations relating to Compliance and Enforcement for some specific legislative recommendations in these areas.)

Local municipalities and the public at large are aware of the program's existence and are generally observant of the need to obtain a DEC permit. Little or none of the testimony heard by the Committee suggested that there are any fundamental flaws in the Act or the Land Use Regulations, while the Committee did hear some recommendations that the Regulations in Part 661 not be changed. This contrasts with overwhelming agreement that practical experience with the program shows that implementation of it is a disaster. Despite that inefficiency, during the period since adoption of the Act, wholesale destruction of intertidal marshes by uncontrolled filling seems to have been significantly reduced, and the public, or at least that portion most often affected by the Act, is aware that destruction of wetlands is unlawful even though the specific regulation prohibiting it may not be effectively administered. Therefore, an important part of the intent of the Act is being accomplished simply because of public awareness.

Secondary or indirect effects and "edge" effects - at the interface between upland and wetland - are the subjects of a large proportion of permit activity and are not so neatly governed by public awareness. If the problems which demanded so much of the Committee's attention are directly related to either the Act or the regulations, it has not been apparent thus far, and until the organizational and staffing problems are brought under control, the Committee is of the opinion that no truly fair or accurate assessment of Article 25 or Part 661 can be made.

In the areas of compliance and enforcement, the Committee makes several specific recommendations to strengthen the Act and the Part 661 regulations.

15. An unreasonable backlog exists in the processing of tidal wetland permit applications. A general perception exists that the situation is getting worse rather than better. The review period prescribed by the Uniform Procedures Act is regularly exceeded. The Committee finds this to be a primary symptom, and predictable result, of an interrelated series of budgetary, staffing, and organizational problems.

At one time during the Committee's work, a backlog of over 1400 pending applications for Tidal Wetlands permits was reported. Testimony from both professionals and landowners indicated that the period for review of a permit application more often than not exceeded the limits prescribed by Part 621, Uniform Procedures. Those limits include an initial 15 day period for determination of completeness of the submission, followed by a review period of 45 days for minor projects and 90 days for non-minor projects, with provisions for increased time when hearings are necessary. The Committee found that many applications languish after receipt by the Department because, under the current system, there are not enough analysts in DRA to review them, there are not enough biologists in DMR to inspect the sites, and the internal control over the flow of application review is so overwhelmed by the volume as to be virtually non-existent.

16. Inconsistencies regularly occur in the interpretation and implementation of Article 25 and Part 661 by DRA and DMR staff as it relates to the permit application and compliance process. This has undermined programmatic continuity, resulting in inter-divisional conflict and public confusion. Personal interpretation plays an inordinate role in the process.

Tales of inconsistencies which were related to the Committee ranged from the omnipresent problem of precisely identifying the wetland edge to instances in which the clear direction of the regulations was ignored by Department personnel. In some cases it is a matter of inadequate definition of Department policy, while in others it is an inordinate infusion of personalities into the process. In either situation, the lack of an effective path of accountability hinders the prompt resolution of such inconsistencies.

17. Tidal Wetlands Inventory Maps, at the time of their creation in 1975, were inadequate to allow detailed administrative review without field surveys. At present the maps are out of date. This has resulted in interpretational problems, particularly in regard to adjacent-area distinctions. The inability to readily amend the maps further complicates the process.

A cornerstone of the program as described in the Tidal Wetlands Act was to be the preparation of a definitive inventory of the state's tidal wetlands. While an extensive effort was undertaken to produce the inventory, the maps which resulted were based on uncorrected aerial photographs and were eventually branded by DEC staff as unreliable with respect to scale and, in some cases, inaccurate as to the photo-interpretation which defined the wetland categories. Consequently, the maps cannot be relied upon by applicants and are frequently repudiated by DEC when they are used. Prepared from photography taken in 1974, the maps, even if shown to be a reliable tool, would be in need of updating by now.

Contrary to the informal posture in which the maps have reposed, it is clear from the Act that they were to be a formal, legal record. The maps were subject to open public hearings before adoption and were filed in the County Clerk's offices as official documents. The regulations prescribe a formal proceeding to be used in the event that any amendment to a map proves necessary. In practice, however, they are often ignored. In the breach, a need for on-site identification of wetland boundaries has arisen. In some cases, the identification is relatively clear and non-controversial, while in others, usually when tidal flow is restricted, identification is difficult and subject to differences of opinion. Those differences of opinion are often significant with respect to the location of an applicant's proposed activity, and therein lies the problem: the location of the wetland boundary, upon which the whole program hinges, is too often ambiguous, and the process of obtaining confirmation of the line can be arduous.

18. Small projects with minimal potential impacts are frequently given the same priority and attention as large projects with significant potential impact, resulting in an inefficient use of limited organizational resources. Residential landowners involved in maintenance activities undergo a disproportionate regulatory review under this system.

Although projects theoretically carry a classification of major or minor, little practical difference exists since the distinction is not made early enough in the process. Guidelines for

reviewing such projects, as prescribed in Part 661, are often ignored. No attempt is made to sort applications so that straightforward decisions can be made quickly. Similarly, no provision is made for geographic location except in the City of New York. For example, unlike eastern Suffolk County, there are few large tracts of undeveloped land near wetlands in developed areas such as Hempstead, Oyster Bay and other western towns. Typically, small parcels consisting of between 4,000 and 6,000 square feet located adjacent to heavily developed, substantially bulkheaded, man-made canals are given disproportionate review. The potential impact associated with the development of these small parcels may not warrant the degree of attention given to them.

19. DEC field inspections of permit application sites have been declining. The public perceives that it is growing increasingly difficult to arrange meetings with BMHP and DRA staff at the application site. This deficiency is further aggravated by the technical inadequacy of the Tidal Wetlands Inventory Maps.

Under the current program, a complete review of any application requires the on-site presence of some member of the DEC review staff or else an "administrative review" is performed, based only on data submitted by applicants or otherwise available in the DEC offices. When demands on staff time were less burdensome than at present, a site visit could occur by appointment prior to submission of an application or at some time during the review after the application was submitted. Absent a field visit with DEC personnel, many applicants never do know the precise location of the wetland edge because the Tidal Wetlands Inventory Maps are often in error, are outdated, or subject to varying personal interpretations.

20. A significant proportion of permit difficulties results from poor communication between applicants and DEC staff. Projects that are issued permits without pre-application meetings or site inspections are more likely to have compliance problems. Specific site recommendations are infrequently made by DEC staff to an applicant prior to the submission of an application.

The accessibility of DEC staff to applicants, either by phone or personal visit, has been severely restricted. The reason is apparently attributable to the workload. The problems attendant upon poor communication are generic and not solely the province of this program. Either the

applicant's responsibilities need to be more rigorously defined or more personal contact with the staff must be afforded if the communications problems are to be minimized.

21. *Permit applications frequently do not contain adequate information, including accurate surveys and property ownership, for a thorough assessment.*

Part 661 lists the requirements for submission of an application, including "... a map showing the area of tidal wetland or adjacent area directly affected, with the location of the proposed regulated activity thereon..." (Section 661.15 (a)(1)). No specific requirements for the map to be submitted are set forth, and therefore there is little consistency in the information submitted. The lack of consistency can lead to problems. For example, permits for bulkheading and other erosion control structures are granted by the Department with apparent disregard for their location relative to the riparian property line. This has resulted in illegal encroachments onto lands belonging, usually, to the local municipality. Recently, a waterfront owner, having received a permit to construct a bulkhead from the DEC, proceeded to construct it beyond the waterfront property line, in full accordance with the DEC permit. To the owner's dismay, the local municipality, on whose underwater land the bulkhead was constructed, ordered him to remove the structure and replace it on the property line.

22. *The tidal wetlands permitting process is poorly coordinated with local municipalities.*

There are two elements to the question of coordination with local municipalities: one has to do with communication between DEC and municipalities in their role as related regulatory agencies, and the other involves the plight of local municipalities as permit applicants.

In the first case, the example set forth in Finding 21 underscores the weakness in the communication link.

In the second case, with regard to public works projects that require tidal wetlands permits, local municipalities, as applicants, experience problems similar to those of the general public. Communications with DEC are just as difficult and even more frustrating for municipalities since extensive delays in the permitting process result in increased costs to local taxpayers and adversely affect a great many people.

23. Permit fees are insufficient to support a significant portion of the tidal wetlands regulatory process.

Permit fees for tidal wetlands projects, according to the Uniform Procedures Act, range from a low of \$10 for minor projects to a high of \$50 for activities located directly in wetland areas. [ECL § 70-0117 (5)(i)]. For demonstration purposes, if we assume the number of permit applications filed in a particular year is 1200, the maximum revenue due to fees would not exceed \$60,000. Actually, the average fee would be lower than \$50, so the actual revenue would be less. Clearly, this amount is a small percentage of the cost of conducting the Tidal Wetlands permit program. Interestingly, no one interviewed objected to the concept of a fee increase *if* it would meaningfully improve the efficiency of the process.

Findings

Compliance and Enforcement

24. Fines and penalties are insufficient and are not necessarily assessed in relation to the degree of impact on the affected resource. A result is, in many instances, it is cost-effective to ignore or violate permit conditions. A lack of consistency exists in levying of fines.

The Act (ECL §71-2503) now provides for maximum civil penalties of \$3000 and criminal fines of \$1000. These are often regarded as no more than a minor cost of doing business, especially to major developers. Further, these penalties are often assessed with little regard to the willfulness of the violation or its effect on the tidal wetlands the Department is mandated to protect. Assessing penalties on developers at such trivial levels destroys staff morale and engenders cynicism in the community, particularly among homeowners who see similar penalties imposed on builders and commercial enterprises.

25. The current level of permit compliance checks and enforcement activities is insufficient to provide minimal protection of the resource. This serves to undermine the credibility of the regulatory process.

The Department lacks staff to monitor compliance systematically. In a sample of 35 issued permits, checked between September 1986 and January 1987, 77% were in substantive non-compliance that warranted enforcement action (DMR staff, pers. comm.). Checking is haphazard and dependent on complaints from neighbors and the like. Enforcement against those altering wetlands without permits is likewise spotty, and, like the inadequate penalties referred to above, creates cynicism and reduces incentives to comply with the law. One estimate reports "that about 90% of the issued permits that are checked for compliance are violated. This represents only a small portion of the total issued so the problem may be worse than we now see it," (DEC Coastal Management Program Agreement, Quarterly Report, July 1 - Sept. 30, 1986).

26. Environmental analysts and biologists do not have a strong understanding of the compliance and enforcement process. The paralegal training required for effective testimony is lacking.

At compliance and enforcement hearings, Department personnel are subject to cross-examination by attorneys for applicants. The staff generally lacks training in legal issues and in how to testify effectively and withstand, or object to, cross-examination. This places Department environmental analysts and biologists at an unnecessary disadvantage in their efforts to safeguard the resource and the public interest.

27. Environmental Conservation Officer (ECO) salaries are not commensurate with downstate cost-of-living rates. This is aggravated by the fact that ECO's must live within their jurisdictions. Downstate assignments are viewed as temporary, entry-level opportunities. Current staffing levels do not allow for a persistent wetlands enforcement program. In total, these elements serve to undermine morale.

The pay scale for ECO's is utterly unrealistic. Trainees commence at \$21,056, with a \$406 cost of living differential for the New York-Long Island area. This sum does not begin to cover the average difference between upstate and downstate in one month's housing costs, let alone an entire year. In addition, other basic expenses, such as automobile insurance, are far higher downstate. The effect of this de facto pay cut for ECO's in Regions 1 and 2 is to make these regions reception centers for ECO's who transfer upstate as soon as a vacancy occurs. These problems are heightened by the need for training in biology and land use for ECO's enforcing the Tidal Wetlands Act. Effective recruitment is extremely difficult under these conditions.

28. The credibility of administrative hearings is undermined by the public perception that fraternization takes place between Administrative Law Judges, BMHP staff, and DRA staff.

Although hearings are generally conducted fairly, the Departments' able Administrative Law Judges (ALJ's) are widely viewed as part of the agency's enforcement machinery, not as independent judicial officers. The Committee was repeatedly told that ALJ's fraternize regularly with enforcement staff, fueling that perception. In contrast, ALJ's at comparable state and federal agencies are insulated from enforcement personnel. This augments the respect those agencies' judges and their rulings are accorded.

29. DEC is ineffective in securing the removal of unlawful structures in, or harming, wetlands when appropriate.

In many instances, a monetary penalty is insufficient to protect the resource. Yet unlawfully placed structures are generally allowed to remain after compliance or enforcement proceedings. This failure to require their removal breeds disrespect for the Act and the Department. A greater number of site inspections would reveal such structures prior to their completion. But whether staff discovers illegal alteration in progress or after its completion, the offender is hardly ever required to remove the building, pier, or other unlawful construction.

30. DEC legal counsel are often not available to represent the Department at legal proceedings involving wetlands issues. As a result, technical staff may appear to represent an expertise or level of authority for which they are not qualified.

The failure to have sufficient staff attorneys to cover administrative hearings results in non-legal staff attempting to deal with complex legal issues, such as whether denial of a permit constitutes a de facto taking. In addition, technical staff are compelled to recommend penalties, deal with evidentiary and burden-of-proof issues, and act as counsel without legal training. This places staff in an unfair position and does not adequately implement the Act, especially in the frequent cases where respondents appear represented by counsel and the Department does not.

31. The Region 1 and 2 attorneys' offices do not have the staffing available to adequately address the range of needs involving tidal wetlands regulation.

As indicated above, it is intolerable for the Department to pit its technical staff, unrepresented by counsel, against attorneys for developers and other respondents. The Regional Attorneys' staffs in Regions 1 and 2 are insufficient to represent the Department in many of these proceedings. As a result, the public, and the state's wetlands, suffer. Unwarranted permits are granted, conditions are not imposed which should be, and inadequate penalties are assessed--all after hearings at which Department staff are legally under-represented. There is no substitute for ensuring that legally trained Department representatives are present at Tidal Wetlands Act hearings and enforcement proceedings.

32. Fines resulting from wetlands violations do not directly support administration of the wetlands program.

Fines and civil penalties for violations of the Act now go into the State's general coffers instead of being expressly paid to the Marine Resources Account of the Conservation Fund. This arbitrarily denies the Department an effective source of revenues for enforcement--arbitrarily because penalties under the Fish and Shellfish Provisions of ECL Article 13 are currently earmarked for that fund. The Tidal Wetlands Act is closely related to the protection of marine resources, and penalties collected in enforcing it should not be diverted from protection of these valuable resources.

33. Property that is the subject of enforcement proceedings can be sold during the proceedings.

The Committee found that cease and desist orders, and penalties for violation of the Act, are often rendered ineffective by the sale of the property during enforcement proceedings. There is no reason why one who violates the Act should be able to circumvent enforcement by conveying the property while such proceedings are pending.

34. The provision allowing the DEC to acquire a parcel to avoid a de facto taking is unduly restrictive.

ECL §25-0404 now authorizes the DEC to acquire a parcel in order to avoid a judicial finding that its denial of a permit has amounted to an unconstitutional de facto taking of property. The courts have thus far rejected such claims. The Department should have the clear power to acquire, under this statute:

- 1) a portion of the lot sufficient to avoid the taking claim, or
- 2) an easement or other interest less than acquiring the total parcel.

Findings

Acquisition and Management

35. *The Environmental Quality Bond Act of 1972 allocated \$18 million for the acquisition of up to 5000 acres of privately owned tidal wetlands. To date, only 2,585 acres have been acquired for \$8.561 million.*

It is readily apparent that the acquisition program has been stalled. Over the last 14 years during which funding has been available, only 47% of the allocated \$18 million has been expended. It should be noted that a bonding moratorium was in place for approximately 20% of the time that funds were available (FY 1975-76/1977-78). During the same 14-year period, the cost of coastal real estate has risen sharply, thus reducing the purchasing power of the original approval. In contrast to the preservation efforts of local government and private organizations, the DEC has been exceedingly slow. The Department has not adequately communicated its acquisition schedule and strategies.

36. *Since June of 1984, the acquisition process has been stalled, due, in part, to vacancies in the two regional surveyor positions, and the inordinate amount of time it has taken to fill these positions.*

This is a specific example of recurring staff shortages, which hinders program implementation. In the context of rapid shoreline development and rapidly increasing property values, this type of technical problem has an inordinate impact on the overall success of the acquisition program.

37. *The conservation easement approach to wetlands protection, as an alternative to outright purchase, requires more detailed evaluation.*

Changes in the law in the last few years make the acquisition of tidal wetlands possible by means other than outright acquisition (i.e. easements). Private conservation groups use this

concept quite effectively. DEC should examine such a concept in the context of its acquisition plan. Also, requiring scenic conservation easements as a condition of project approval is a common practice of local municipalities on eastern Long Island. DEC should investigate the acquisition of scenic easements as a condition of permit approval in appropriate circumstances.

38. The management approach toward wetlands holdings has been one of benign neglect. The monitoring of pesticide use in state-owned marshes has been casual.

Because of a multitude of factors that can influence the biological integrity of a wetland, ranging from off-road vehicle use to dumping, the simple fact of ownership does not ensure the intended goals of preservation. Although the DEC now holds many parcels of wetlands, few have systematic inventories, master plans, or protection strategies in place.

Recommendations

Departmental Organization

1. The Committee recommends the creation of a new bureau under the Division of Marine Resources (DMR) - the Bureau of Tidal Wetlands Regulation. [Findings 1, 2, 3, 4, 5, 7, 8, 9 &10]

The Bureau of Tidal Wetlands Regulation (BTWR) would be responsible for full technical and biological review of all tidal wetlands permit applications to determine impacts on the marine environment and recommend ways that adverse impacts can be eliminated. The Bureau would also conduct a complete permit compliance and enforcement program for tidal wetlands. Under this proposal, BTWR assumes sole accountability, something which has been lacking to date. This shift also ends the anomaly of tidal wetlands permits being dealt with by DRA, in contrast with permits for other Department programs, all processed by the division with substantive jurisdiction (Air, Water, etc.).

2. Since the overwhelming majority of tidal wetland permit applications are made within Region 1 (approximately 94%) and likewise the vast majority of the State's tidal wetland resource is found within Region 1, the new Bureau of Tidal Wetlands Regulation should be based at the Region 1 office in Stony Brook, with one full time bureau staff person based in Region 2 to handle permit applications in Regions 2 and 3. [Findings 2, 3, 4, 5, 7, 8, 9, 10 & 12]

The Table of Organization (Figure 1) lays out the structural changes necessary to achieve reorganization. The present Bureau of Marine Habitat Protection should be renamed the Bureau of Marine Habitat Management (BMHM). The Bureau of Tidal Wetlands Regulation should join BMHM, Shellfisheries, and Finfish and Crustaceans, as the fourth Bureau under the Division of Marine Resources. The Bureau chief based in Stony Brook should be accountable for all actions taken by the Bureau throughout the state (Regions 1, 2 & 3). Under the bureau chief, two supervisors should oversee the work of nine environmental analysts. Eight analysts should be assigned to Region 1, and one to Regions 2 and 3, to conduct permit review and all duties associated therewith.

The environmental analyst assigned to Regions 2 and 3 should be based in Region 2 but should answer to the bureau chief. Two compliance officers should be assigned to the Bureau and work under the bureau chief with each officer to be responsible for compliance matters pertaining to the caseloads of one of the two groups of analysts(Fig. 1). The compliance officers should function as bureau auditors with responsibility to assess compliance of the Department as well as applicants, and should work closely with DEC's law enforcement division, department attorneys and Environmental Conservation Officers.

The supervisors' role is particularly important in this scheme. This position is responsible for distributing case loads, monitoring their progress, and assisting in the permit application decision making process. Most importantly, the supervisors, working in conjunction with the Bureau Chief, will define and interpret permit issuance policy, making sure that it is adhered to and consistently applied by all analysts. In addition, it should be the responsibility of the supervisor to insure that permit decisions comply with related regulatory laws (e.g. Coastal Zone Management Act), and that parties potentially impacted by a permit decision (e.g. local government, adjacent landowners) are kept informed. Under the proposed reorganization, each of the two supervisors should be assigned one clerk/steno, and one clerk/steno should be assigned to each group of four analysts based in Region 1 for a total of four clerk/stenos (Fig. 1). The analyst assigned to Regions 2 & 3 should also have a clerk/steno assigned.

Adequate numbers of clerical staff should be provided not only to the new Bureau of Tidal Wetlands Regulation, but also to DRA since under the proposed reorganization DRA will have *substantial correspondence responsibilities*.

3. *The Committee recommends that incoming tidal wetlands permit applications be logged by DRA and then referred directly to BTWR. [Findings 1, 4, 5, 7, 10, 11, 12 & 13]*

Each case analyst should be assigned an application and be responsible for that application *from start to finish*. The BTWR's permit review functions should include:

- Respond to jurisdictional inquiries.
- Hold pre-application conferences.
- Perform SEQR reviews.
- Determine application completeness.
- Determine conformity with Part 661 technical standards.
- Determine conditions, limitations and mitigation necessary to protect resources.
- Determine whether to hold decision conferences or hearings and whether to issue or deny a permit.

Assist applicants in refining activity proposals to foster compliance with the regulatory guidelines.

After full review, the recommendation should then be made to DRA on whether to issue or deny a permit, and DRA should act accordingly. Under this scenario, DRA should have no substantive involvement with the permit decision, but should function as "business manager" to BTWR similar to its function with other programs such as Air, Water and Solid Waste.

4. The Committee recommends that the BTWR be responsible for all permit review, compliance and enforcement so that the Bureau of Marine Habitat Management (BMHM) can focus the time and organizational resources necessary for management and acquisition of coastal resources, and conduct scientific research and long-term planning. [Findings 1, 5 & 9]

The creation of a Bureau of Tidal Wetlands Regulation within the Division of Marine Resources (DMR) would free the renamed Bureau of Marine Habitat Management to concentrate on scientific research and long term management of marine resources.

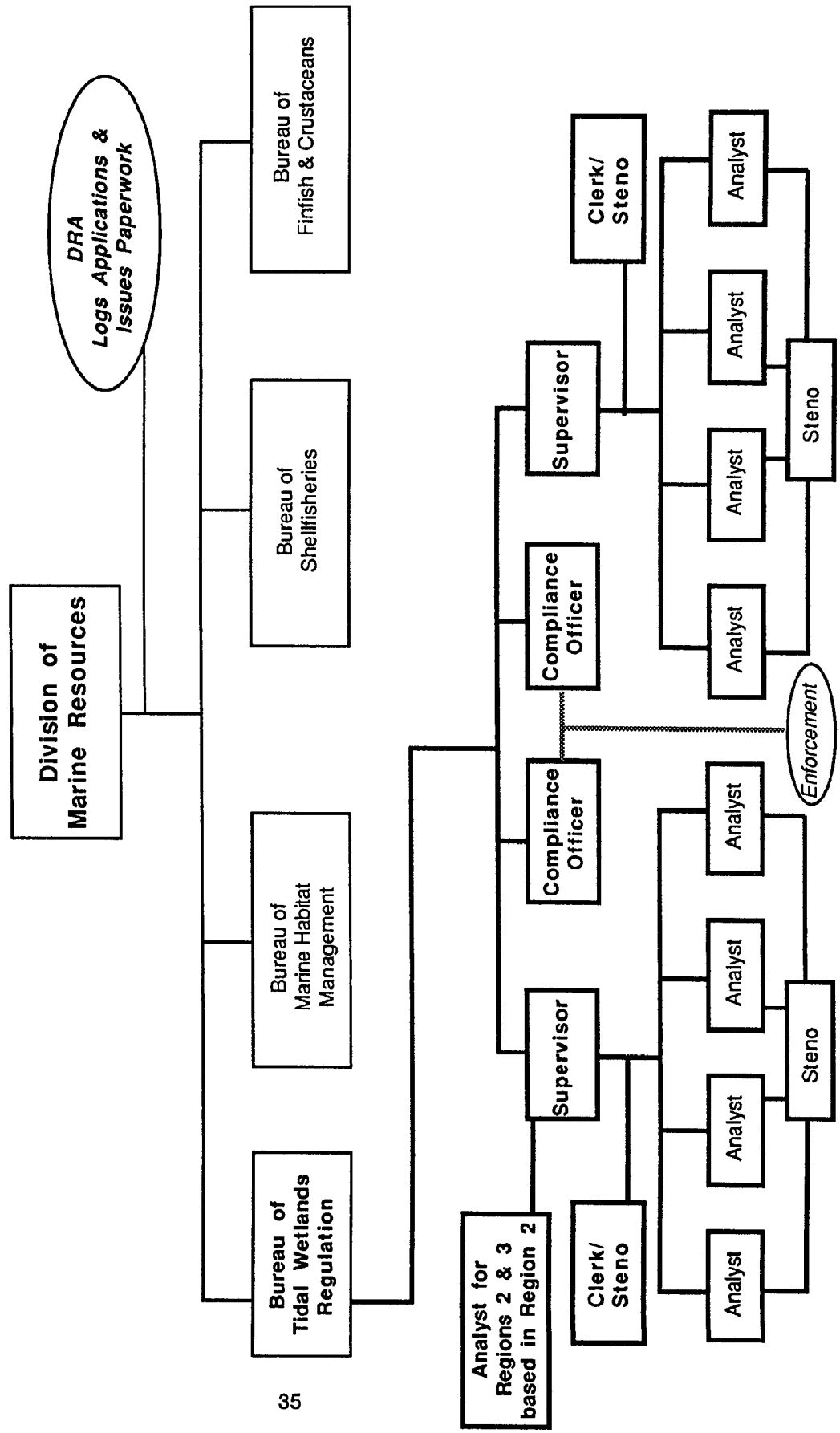
The 1984 report published by DEC titled Marine Resource Management Needs documents the need for additional funding and expanded activity in both of BMHP's existing programs - environmental assessment and tidal wetlands acquisition and management. The report also recommends the creation of a third program, chemical contaminant assessment. Such a program would identify sources of toxic marine pollutants, monitor the chemical health of marine ecosystems, formulate recommendations for improvement and establish marine quality standards.

The creation of the Bureau of Tidal Wetlands Regulation would provide for a shift of the environmental assessment responsibility currently held by BMHP to the new bureau, allowing the new BMHM to devote time and funds necessary for carrying out its acquisition and management programs, the stated goal of which is to "acquire sufficient interest in tidal wetlands to perpetuate their existence as a part of marine ecosystems and permit management to enhance the value of those wetlands to native organisms." (Marine Resource Management Needs, DEC, 1984) Furthermore, BMHM could act on the recommendation to establish a chemical contaminant assessment program.

To accomplish these critical aspects of the DEC's marine resources programs, additional funding and staffing is an absolute necessity.

FIGURE 1
TIDAL WETLANDS ADVISORY COMMITTEE STUDY

TABLE OF ORGANIZATION



Recommendations

Staff

5. *The reorganization will not prove effective unless the recommended number of qualified staff are secured to fill positions required at every level of organization. [Findings 4, 5, 8, 9, 11, 12, 13 & 14]*

Qualified, competent individuals currently serving in a technical role in DRA could be transferred to the new Bureau. BTWR would inherit experienced staff and DRA could fill its positions with the "business managers" it so sorely needs. The BTWR chief and the two supervisors must not only be technically competent but also capable of assuming leadership roles in promoting the responsible implementation of the Act. Areas of expertise which should be represented among the nine environmental analysts include: marine and terrestrial ecology, aquatic biology, botany, terrestrial ecology, fish and wildlife, wetland buffers, shoreline erosion, environmental and land use planning, surveying, and engineering. At the same time, DRA's clerical staff will need to be increased in order to effectively perform the role of logging and issuing or denying permits.

6. *A system should be established whereby a minimum of two of the eight analysts in Region 1 are "on call" on a rotating basis to respond to public inquiry. [Findings 6, 11 & 13]*

One criticism repeatedly voiced by the public has been the tremendous difficulty in speaking or meeting with DEC staff on tidal wetlands related matters. This problem is somewhat self-perpetuating in that, if there were not some 1100 backlogged permits, frustrated applicants might not be calling. Staff time spent returning phone calls to tell individuals that their permits are being typed clearly could be time better spent doing the analyst's substantive review job. The two rotating "on call" assignments are recommended in order to provide improved community outreach, while at the same time insulating the staff from the constant barrage of inquiries.

7. Special attention should be given to improving recruitment of staff at all levels. [Findings 8, 9 & 13]

Specifically the Committee recommends

- 1) Improving the recruitment program by recruiting routinely at more in state and out of state colleges and universities offering programs in disciplines related to the work of the Bureau.
- 2) Improved notification to potential employees of upcoming civil service exams for Bureau positions.
- 3) At present, there is only a \$406 per annum premium for DEC employees working in the New York City - Long Island metropolitan area. This regional premium should be increased to \$2500 per annum to more nearly reflect the cost of living differential. The goal is to attract and keep qualified and experienced staff in Regions 1 and 2.

8. It is necessary for the benefit of the public, staff, and program success that BTWR analysts are provided with in-service training. [Findings 4, 8, 9 &12]

No one is well served, especially the analysts, by placing analysts in complicated situations where they are forced to personally define legislative, judicial, economic, management, and social policy as it relates to the implementation of Article 25. Professionally presented seminars that define the analyst's job and its expectations, as well as topics covering public relations, legislative and regulation interpretation and courtroom procedures are sorely needed to help provide the staff support, consistency, and continuity that is now lacking.

Recommendations

Regulatory Concerns and the Permit Process

9. A specific evaluation of the Article 25 legislation and Part 661 regulations is still required. [Findings 14, 16, 18, 21 & 22]

Because the Committee found it necessary to focus on organizational and implementation issues, a specific evaluation of Article 25 and Part 661 was not undertaken. If deemed appropriate, an external committee of qualified individuals should be appointed to examine recommendations in this report relative to the refinement of regulations and clarification of guidelines.

10. The Tidal Wetlands Inventory Maps should be improved and updated to serve as a reliable and definitive representation of the regulated resource. [Findings 5, 8, 9, 15, 16, 17, 18, 19, 21 & 22]

A completely new inventory map of the State's tidal wetlands should be prepared by controlled stereo photogrammetry resulting in delineation of the wetland boundary by means of State Plane Coordinates on map sheets which are true to scale. Tabulation of coordinate values should be provided on each map sheet and maintained as a computer database so that the precise location of structures and other features relative to the official inventoried boundary can be easily determined. Based on such coordinates, the position on the ground of the official boundary of the regulated areas could be readily and consistently established by professional land surveyors without burdening DEC staff with unnecessary field identification visits. Finally, the accuracy of the line, whether on the ground or on maps, could be readily checked and confirmed without the uncertainty currently introduced by individual interpretation.

11. The permit application process should be required to begin with an on-site pre-application conference at which the scope of the activity, location of the wetland edge, and alternatives worthy of consideration are all discussed and agreed upon, if possible. [Findings 11, 16, 18, 19, 20 & 21]

A meeting between the potential applicant and the analyst who would review the application, held before any substantial commitment has been made by the applicant, can significantly reduce problems throughout the permit process. At that point, the applicant can often adjust the proposal to meet environmental concerns before substantial time and money are invested in preparing the plans and application. Face to face meetings can also reduce the problems of misunderstanding of subsequent permit conditions because the analyst can explain the particular wetland concerns which apply to the specific case. Finally, the incidence of incomplete or inappropriate submissions can be reduced because the analyst can guide the applicant with regard to materials to be submitted.

Until new wetland maps are available, the Committee recommends that pre-application conferences be held on-site whenever possible, and that the applicant's surveyor be present. An essential part of every application is a current and professionally presented survey map of the site which should show the upper boundary of the tidal wetland in relation to the activity proposed. At an on-site meeting, the analyst could flag the wetland edge and the surveyor, if present, would be fully informed of its location and able to accurately present it on the map. In many cases, the pre-application visit would provide all the on-site data the analyst needs to complete a review. Investment of this additional time at the beginning could reduce total analyst time in the end.

12. DEC should properly implement existing regulations for distinguishing between major and minor activities, and adjust the intensity of permit review accordingly. In the same context, guidelines should be developed that distinguish routine bulkheads, docks and dredging activities that do not compromise the resource from those that do. Guidelines for the implementation of standard wetland mitigation measures should be developed. [Findings 15, 16 & 18]

As one interviewee put it, "it seems DEC takes as much time reviewing a permit for a bulkhead repair on a Hempstead canal as they do for building a U.S. Navy shipyard." Beyond an expression of frustration, this comment serves to illustrate a practical point. A greater attempt to categorize permit applications in regard to their actual impact on the resource, as outlined under §661.5 and §661.9(b), is required. In the case of minor projects, this should expedite the issuance of permits. The success of the application of this approach is contingent upon accurate application data and compliance checks. The above point should be clearly distinguished from the

inappropriate use of administrative review as a means of dealing with insufficient staff and permit backlogs.

In the same context, DEC now has considerable experience with routine activities such as bulkheads, docks, retaining walls and dredging, so that the potential effects of such activities should be known and the needed permit conditions understood. Once a site inspection has verified that such an activity is routine, expedited permit issuance should follow.

In addition, the Department should establish more formally a set of guidelines for implementation of measures intended to mitigate impacts on, or restore, wetland areas. These measures, such as restoration of dredge spoil areas or enhancement of tidal access to areas of restricted flow, are often proposed to offset impacts which cannot be practically avoided elsewhere. DEC should develop a list of acceptable measures with the conditions under which they will be considered so that applicants can be realistic in their expectations as to when such measures are appropriate.

13. Long range planning considerations should be routinely integrated into the permit decision making process. The DEC should develop a policy defining and addressing cumulative impacts which is consistent with the regulatory intent of SEQRA. [Findings 16 & 22]

The issuance of a permit for the manipulation of the wetlands resource has two effects:

- 1) it makes site-specific changes, and
- 2) it contributes to changes taking place in the broader regional landscape.

Currently, the tidal wetlands program focuses heavily on site-specific matters with little consideration of the regional context. The Committee recommends that long range planning be incorporated into the tidal wetlands decision making process as SEQRA requires.

14. The Department should revise the use guidelines to provide that "Permanent or seasonal mooring of any vessel or structure to be used as a single family use building, industrial use building or semi-public use building shall be Presumptively Incompatible." Currently, the regulations make this Generally Compatible. [Findings 14 & 22]

In recent years, houseboats have become prevalent in many areas on Long Island. Houseboats are normally equipped with marine sanitation devices (MSD's) of the macerator-chlorinator type. Although these MSD's are approved by the Coast Guard for normal use on vessels, they are inadequate to handle wastes generated from a permanently moored houseboat used for living purposes. Their use in such cases creates a potential for pollution of surface waters and associated tidal wetlands.

With regard to Part 661.5 relating to the classification of uses in coastal fresh marshes, intertidal marshes, coastal shoals, bars and flats, high marshes or salt meadows, littoral zones and adjacent areas, Item 20 states: "Permanent or seasonal mooring of any vessel or structure to be used as a single-family use building, industrial use building or semi-public building is a Generally Compatible Use (GC_p)".

The adverse effect of houseboats on water quality in certified shellfishing areas has been documented in the Town of Hempstead. Accordingly, the Committee recommends that the classification of houseboats be changed from generally compatible to presumptively incompatible.

15. The Department should establish a computerized database of applications and permits which will provide instant recall of the status of any application or permit and which is capable of generating weekly reports of permits issued sorted by locality to improve communications with local government. [Findings 11, 15, 16, 18, 20 & 22]

There is a vast potential for improvement in the handling and tracking of tidal wetland permits through the carefully planned use of computers. The Department should have professional assistance in the design of a computer-based system for logging, tracking, issuing and monitoring permits. Properly implemented, such a system could greatly improve Department relations with applicants and municipalities. For example, such a system could automatically generate a weekly report of permits issued for each municipality, thus affording local government the notice needed to insure that companion regulatory programs in the locality are being observed.

16. The Department should implement a program of periodic videotaping of the wetland edge throughout each Region to allow rapid visual access to the general area of an application site as an aid to review of permit proposals and compliance with permit conditions. [Findings 17, 19 & 21]

While physical presence on a site is usually the best way for an analyst to become familiar with it, there are often times when a return visit to refresh the memory is impractical. On such occasions, a high quality aerial videotape of the area in question could be quite valuable, and would provide a permanent record which could be useful for compliance purposes as well. Professional quality videotaping can be done from a helicopter for approximately \$25 to \$30 per mile, and has been used by the U.S. Army Corps of Engineers in the Great Lakes area quite effectively. By reproducing professionally prepared tapes, the Department might be able to recover some of the cost of preparation by distribution to other agencies.

17. The Department should undertake a study to determine whether the limit of its jurisdiction over adjacent areas should be redefined by the establishment of a regulatory line which is fully specified by State Plane Coordinates along an alignment established by a setback keyed to the ecological value of the adjacent wetland. [Findings 6, 9, 14, 15 & 18]

Information gathered by the Committee indicates that a very large number of the permit applications handled by DEC are for activities which take place beyond the boundaries of tidal wetlands on uplands termed "adjacent areas". Currently, DEC's jurisdiction over adjacent areas extends to 300 feet from the wetland edge, or to the natural 10 foot contour, or to the nearest substantial and functional man-made structure. Although the jurisdictional limit is governed to some extent by the adjacent area characteristics, it is not related in any way to the characteristics of the adjacent wetland. A study to determine the buffer needs of the various wetland categories would enable DEC to focus on the areas in need of development restrictions by scientifically quantifying the basis on which jurisdictional limits are set.

Once determined by such a study, the jurisdictional limit should be established as a line defined by State Plane Coordinates to give it the precision and reproducibility alluded to in the recommendation on wetland mapping. The compatibility of the coordinate method of definition with other land use mapping products would enable municipal, county and regional planning agencies to superimpose the precise location of the DEC jurisdictional limit on zoning and planning maps, tax maps, subdivision maps and individual property survey maps to determine directly the extent of DEC jurisdiction. Surveyors could easily show the location of the line on property maps and, by certifying the location shown, eliminate many of the jurisdictional inquiries now addressed to Department staff.

Recommendations

Compliance and Enforcement

18. *The regional attorneys' offices should be strengthened with added staff, paralegals and paid law students. Department counsel staff should be present at all permit, compliance and enforcement hearings. [Findings 30 &31]*

The Committee found the Regional Attorneys to be capable, dedicated people in need of assistance. Regions 1 and 2, where nearly all the tidal wetlands are, have only 3 and 2 attorneys respectively, with diverse responsibilities encompassing the entire ECL. These Regional Attorneys can devote only a small fraction of their staff time to tidal wetlands in Region 1, despite the fact that this Region has well over a thousand tidal wetland applications per year and numerous compliance and enforcement cases. No matter how stringent the Department's budget, understaffing these two Regional Attorneys is inexcusable, particularly since the increased penalties would largely pay for the increased staff.

A similar situation exists in regard to permit hearings. One estimate indicates that at a substantial number of the permit hearings, no Department attorney attends. This leaves Department biologists and analysts to be cross-examined by applicants' lawyers without a Department attorney present. Likewise, applicants offer inadmissible testimony without objection, and no Department attorney is present to defend DEC policy or raise procedural objections. It is no answer that the administrative law judge (ALJ) is present. ALJ's are judges, not enforcement personnel, and are in no sense a substitute for a Department attorney at a hearing. As we discuss (Recommendation 26), they should be insulated from enforcement staff, not made to serve two masters.

Each Regional Attorney in Regions 1 and 2 requires an additional deputy to work exclusively on tidal and freshwater wetlands issues. The best permit program will founder unless accompanied by vigorous enforcement, and that requires a credible threat of Department prosecution. Similarly, the absence of Department attorneys at many permit hearings means

inconsistency in granting permits and inadequate records for judicial review--all lowering public trust in the permit program and encouraging unlawful alterations of wetlands.

In addition to the vitally needed deputies, the Department has inexplicably failed to employ paralegals or law students to stretch the Regional Attorneys' capabilities. Much of the day-to-day routine enforcement and compliance work can be done by paralegals and third-year law students. Both regions have used law student interns to good effect, but these programs are not year-round and are limited to two or three days per week. They are no substitute for full-time paid help.

19. *Environmental conservation officers should be paid commensurate with their vitally important responsibilities. Their number should be increased, and the pay differential for New York City and Long Island should be greatly augmented. A new civil service title of "ECO (Wetlands)" should be established. [Finding 27]*

The Department's enforcement effort is in serious need of repair. Only one Environmental Conservation Officer (ECO) in Region 1 and one in Region 2 are specifically assigned to tidal wetlands cases full-time, although others investigate wetlands from time to time. Spotty, inconsistent enforcement has become the pattern, leading to contempt for the Act by making violations a viable option.

The need for additional trained and knowledgeable ECO's in Regions 1 and 2 to investigate wetlands offenses prompts several recommendations. First, added budget lines must be created if the wetland program is to gain credibility. There should be double the number presently available in each of the two regions, mainly handling wetlands cases. Although Region 1 has 18 ECO's and Region 2 has 9 (personal conversations with DMR and Division of Law Enforcement staff), their duties cover the entire spectrum of air, water, fish and wildlife, solid and hazardous waste, and other cases. There should be at least another five ECO's in each of these regions to provide proper wetlands investigation, along with other responsibilities.

Next, the pay of ECO's is grossly inadequate for the Metropolitan area and Long Island, where housing costs are more than double the statewide average. A \$2500 per year salary differential for ECO's is warranted in Regions 1 and 2 instead of the insufficient rate of \$406. The Committee recognizes that this differential is part of a statewide personnel policy. Whatever its

general merits, in the case of ECO's it is inadequate, and the unwillingness of candidates to stay in Regions 1 and 2 so manifest, that it should be increased as an interim measure.

The present turnover of two years for ECO's in Region 2--in contrast with a 14-year average for New York City police officers--eloquently shows the need for imaginative steps to attract and keep officers. The present starting salary for ECO trainees is at Grade 12 or \$21,056 per year--far below that of New York City police officers, Long Island police officers and other competing positions. After two years of service, it is still a paltry \$23,672. Careers in environmental enforcement cannot be built on accepting those who will stay a year or two and then seek transfers upstate or leave the service. The New York City-Long Island market for ECO's is entirely different from Upstate, and the Department will never attract sufficient competent, motivated officers until it recognizes that fact.

Third, the rule that ECO's must reside in the county they patrol should be modified in New York City. Housing costs, particularly in Manhattan, and shortages of adequate moderately priced housing citywide, make that rule a devastating drawback to recruitment. In contrast, New York City police officers need not reside in the City at all, and many commute from distant suburbs. ECO's, who earn substantially less, should no longer be subjected to this outdated rule.

To attract more highly qualified ECO's, the Department should petition the Civil Service Commission for the title "ECO (Wetlands)," at a pay grade significantly higher than that of the rank-and-file ECO. Enforcing the Tidal and Freshwater Wetlands Acts requires a knowledge of biology, terrain and land-use laws over and above the ordinary work of ECO's. This would provide both a salary increase and a promotional opportunity for ECO's in Regions 1 and 2.

Region 3, which also contains some tidal wetlands on both the Hudson and Long Island Sound shores of Westchester County, sees virtually no enforcement of the Act. An additional ECO is warranted to inspect those areas, work with county and municipal enforcement officers, and enforce the Act in Region 3.

20. A compliance officer is vitally needed within DMR to take responsibility for compliance with tidal wetlands permits. [Finding 25]

An essential position for the new Bureau of Tidal Wetlands Regulation recommended by the Committee within the Division of Marine Resources is that of Compliance Officer. At present,

efforts to insure compliance with permits under the Act are fragmented and lacking in accountability. The Compliance Officers, reporting directly to the Bureau Chief, would coordinate compliance activity on the part of ECO's, environmental analysts, marine biologists and others, and make recommendations to the Regional Attorneys and others regarding compliance and enforcement policy and as to the disposition of specific major cases. Finally, they should supervise the monitoring of compliance following the disposition of administrative and court proceedings--a responsibility now in large measure neglected. In keeping with the regionalization of the Bureau, these officers would deal with compliance in all three regions containing tidal wetlands. They would be charged with insuring consistent enforcement and compliance rules in all three regions and among all Department staff.

At present, there is a pervasive perception that administration of the Act, and compliance and enforcement in particular, is inconsistent and capricious. Whether or not accurate, this perception on the part of the public is damaging to public support of, and obedience to, the Act. Allowing the Tidal Wetlands Act to become more honored in the breach than the observance is, in the long run, the most damaging eventuality to the resource. Appointing vigorous and effective Compliance Officers would be a dramatic step toward averting that decline.

The Compliance Officers should have experience in Tidal Wetlands Act enforcement and some background of training in biology. They should have demonstrated dedication to protecting the resource and an ability to work well with people within and outside the Department. Salary for this position should be commensurate with the abilities and experience it requires.

21. The Department should require an affidavit from every permit holder that he has complied with the permit, and should require performance bonds from large corporate permit holders. [Finding 25]

Compliance would be greatly strengthened by requiring an affidavit from every permit holder certifying that he has completed the work in accordance with his permit and its conditions. The responsibility to sign such a document, under the penalties for perjury, would enormously decrease violations of permits. And for those who willfully ignore permits, the prospect of perjury prosecution would furnish a powerful weapon to the Department.

Similarly, developers and other corporate permit holders of over a minimal size should be required to post a bond to the Department guaranteeing completion of their work in accordance

with the permit. This would provide a strong financial incentive for compliance and result in self-policing in many instances. The bond should, like the affidavit, be required by the Part 661 regulations. The Act, in ECL §25-0403 (3), authorizes the Department to require a bond "securing to the state compliance with the conditions and limitations set forth in the permit." But performance bonds are not often used in practice, despite the Department's statutory authority to require them.

22. Site inspections must be increased and cooperation with municipalities institutionalized. [Finding 25]

Between fifty and eighty percent (50%-80%) of sites are not inspected after issuance of the permit. (Personal conversations with DRA and DMR staff.) Staff must be increased and activities coordinated so that all permit sites are inspected at least once. A Compliance Officer, in addition to deploying the Department staff more effectively, might delegate routine site inspections to municipalities having responsible wetland programs.

In general, there should be far more organized cooperation with such municipalities. The Compliance Officer and staff should confer on a routine basis with town and village officers and coordinate the reporting of violations, site inspections and other activities now either duplicated or skimped.

Many violations stem from frustration with the permit process and particularly with the length of time needed to have a permit amended. Improvements in these procedures, in line with the Committee's recommendations, should significantly lessen the number of violations.

23. The Department should be empowered to halt illegal alterations through an administrative cease-and-desist order pending enforcement hearings. [Finding 29]

The Act (§71-2503[1]) authorizes the Department, "following a hearing ..., to direct the violator to cease his violation of the Act and to restore the affected tidal wetland...." But frequently, much damage occurs between the time the Department learns of a violation and the hearing. The Department should have the power to order a landowner to cease altering a wetland in order to maintain the status quo pending the hearing. At present, it is possible to obtain a preliminary injunction in court upon a showing of irreparable injury and probable violation of the Act. But this

requires the Department to refer the case, through its regional attorney, to the Attorney General. Amending §71-2503 to authorize a cease and desist order by the Commissioner on his finding that irreparable injury to the resource will otherwise occur would prevent much irreparable despoliation. Such an order should be subject to judicial review in an Article 78 proceeding and should be limited to halting the alteration. Restoration, as at present, should await the hearing and final determination of the Commissioner. The Committee is aware of the DEC Commissioner's general power under ECL Section 71-0301, but feels this is not a substitute for explicit authorization within Article 25.

24. Staff should be better trained and prepared for administrative hearings through legal education programs. [Finding 26]

The ECO's, biologists and environmental analysts who present the Department's case at administrative hearings should be more systematically and thoroughly trained in presenting testimony. The Committee repeatedly encountered dissatisfaction with the ability of Department staff to make the record necessary to support determinations denying, conditioning or revoking permits, or imposing penalties. In part, this stems from the need to bolster the regional attorneys' staffs, discussed earlier in this section. In addition, the Department should institute thorough training for non-legal staff in presenting direct testimony and withstanding cross-examination, along with the rules of evidence, burden of proof and administrative procedure. As a model, the Department should consider the excellent and comprehensive programs the U.S. Environmental Protection Agency provides for its personnel.

In permit hearings, the issue of whether a denial will amount to an unconstitutional de facto taking of the landowners' property (discussed in recommendations later in this section dealing with court proceedings) often surfaces. Department staff should be made aware of the importance and potentially damaging nature of this issue. Testimony at permit hearings should lay the groundwork for rejecting taking claims wherever the facts allow. This can only occur when Department witnesses are kept apprised of this issue, court decisions relating to it, and techniques for averting it when raised (such as construction on upland, cluster zoning, seeking zoning changes or variances, and alternative uses). The Department's staff should cooperate with municipalities to avoid taking problems wherever possible.

25. Lis pendens and performance bonds should be employed in administrative enforcement proceedings under the Act. [Findings 25 & 33]

In court actions involving title to real property, or in which there is concern the defendant may sell real property to avoid judgment, the Civil Practice Law and Rules (CPLR) authorizes a plaintiff to obtain a lis pendens, or notice of pendency of the legal action. CPLR §6501-6515. This document, filed with the County Clerk, places purchasers on notice and effectively prevents the sale of the property until the action is concluded. The Department needs to have this device available in administrative proceedings against those who alter tidal wetlands in violation of the Act. All too often, the respondent conveys the property while proceedings are pending against him, leaving the Department remediless. The Act should be amended to authorize the Department to file a lis pendens, when warranted, on commencing an administrative proceeding.

Earlier in this section, the Committee recommended performance bonds in connection with permits obtained by developers and other sizable corporations. Such bonds should also be required where the Department orders corrective work after a hearing, pursuant to §71-2503(1). The same reasons, to insure proper completion of restoration directed by the Department, and to deter violations of Departmental orders, warrant using performance bonds after restoration orders, as well as with permits.

26. Administrative law judges should be insulated from enforcement staff, as is done at other government agencies. [Finding 28]

The Department's Administrative Law Judges (ALJ's) who preside at hearings under the Act are able and effective. However, they are perceived by the public as sympathetic to the Department's enforcement apparatus. They would function more effectively, and gain in credibility and acceptance, through insulation from the enforcement arm of the agency. As with education and training programs, the Department should emulate the Environmental Protection Agency and other federal agencies whose ALJ's are a unit totally separate from enforcement staff. They should not mingle with regional attorneys and other Department employees. This fosters an impression that their function is not to impartially judge, but to serve the Department's enforcement ends. The federal agencies with quasi-judicial powers, including the National Labor Relations Board and Federal Energy Regulatory Commission, scrupulously insulate their ALJ's from the staff. The Department would improve the credibility of the program, and ultimately better protect the resource, if it did the same.

Fugate - RI
Benoit - Mass
Hudson - TH
McGee - NY
NJ
Rogers - Conn.
Keely - Me

EPA Reg. IV
Tetra Tech

27. Penalties should be more effectively, and systematically, publicized. [Finding 25]

Administrative penalties, particularly those that are substantial, should be systematically publicized. Public awareness that one ignores the Act at his peril will encourage compliance--both among small offenders who may not be aware that enforcement is vigorous, and major ones who may shrug off the Act as an incidental cost of doing business. (The related issue of increasing the penalties themselves is discussed later in this section.)

Opportunities to publicize departmental policies are numerous, yet the Department does not issue press releases (DMR and Regional Attorneys' staff, pers. comm.) What newspaper coverage the Act receives seems usually to be prompted by reporters, not the Department. In addition to press releases announcing significant penalties, the Department, particularly in Region 1 and on Staten Island where wetlands enforcement is most newsworthy, should establish an ongoing dialogue with reporters assigned to news of this type. This would increase their awareness both of the Department's enforcement activities and of their importance in protecting the resource. Publicity can serve as a cost-effective educational and enforcement tool.

28. Staff should be systematically trained to deal with the taking issue. [Finding 26]

The Committee found that despite the overwhelming importance of the de facto taking issue, capable of totally vitiating the Act as to a particular parcel, the Department staff undergoes no systematic training to testify on the subject. As with the staff training we recommend for testimony at Department hearings (see earlier recommendations in this section), there should be an organized program to make staff aware of the factual and legal issues surrounding this complex question.

Litigation challenging the denial of a permit as a de facto taking raises issues of land valuation, alternative uses of land, local taxation, and local zoning. Some Department staff are well equipped to testify as to these questions; others are not. All would benefit immeasurably from an organized series of training sessions, conducted every two or three years, with an annual update explaining recent court decisions.

These training programs should include discussion of appraisal, available land uses and local taxation and zoning, particularly cluster zoning and local wetlands ordinances. They should

feature role-playing in direct and cross-examination settings, in cooperation with the Office of General Counsel or the Attorney General's Office. Knowledgeable outside experts in appraisal, tax assessment and zoning should be brought in for these sessions as well.

29. *The "buy or issue a permit" statute should be amended to authorize the Department to acquire as much of the parcel as needed to avoid an unconstitutional taking. [Finding 34]*

Section 25-0404 now provides that a court, after finding the denial of a permit amounts to an unconstitutional de facto taking of the parcel, must, "at the election of the Commissioner, either set aside the order or require the Commissioner to acquire the tidal wetlands or such rights in them as have been taken." This statute should be amended to allow the Department to acquire only so much of the wetland part of the parcel as is necessary to prevent a de facto taking, or alternatively to allow the Court to set aside only so much of the order as will prevent a taking.

In order to prove a de facto taking, the petitioner must show the Department's denial of a permit prevents any reasonable use of the property, or, as the courts sometimes express it, any reasonable investment-based expectations. In many instances, there is no need for the Department to acquire all the wetlands in the parcel to avert a taking. Yet the wording of the statute seems to require this at present. Similarly, the Department's entire order need not be set aside to prevent a taking, only that part of it which utterly defeats any reasonable use of the parcel. If a parcel consists of 100 acres, for example, allowing the owner to build on 25 of those acres would be ample to prevent a taking, and the Department should have the option to purchase, or allow alteration, only to that extent.

The statute now authorizes the Department to acquire less than a full fee interest in the parcel, since it allows the court to either set aside the order or require the Department to acquire the wetlands "or such rights in them as have been taken." This enables the Department to purchase the development rights, or a conservation easement, pursuant to ECL Article 49. These alternatives, which may be less costly than purchasing the entire parcel, should be examined by the Department not only when required under this section, but as part of its wetlands acquisition program, discussed elsewhere in this report.

30. Coordination with municipalities must be improved to avoid de facto taking claims, with agreement in advance, where possible, to protect the resource while avoiding a taking claim. [Finding 22]

Whether or not a court will find a de facto taking exists turns on whether the Act, as applied to the parcel, prevents any reasonable use of the land. If, under the applicable zoning, the land may not be developed, then it is the municipal zoning, not the Act, which bars any reasonable use of the property. Conversely, the municipality may authorize cluster zoning or related techniques to gain the maximum use of part of a parcel which protecting the rest. In cases likely to lead to a major taking claim, it is important for the Department to coordinate its determinations with the local zoning where that course may avert litigation. For example, agreement with the municipality in advance may result in a mutually agreeable decision protecting the resource while avoiding lengthy litigation. And, if no such agreement is possible, it is advantageous to know the position of the municipality before challenging the denial of a wetlands permit as a taking. In any case, it is essential for the Department to have an ongoing system for ascertaining the position of municipalities in major de facto taking cases, to avoid confusion when served with legal papers.

31. Penalties must be substantially increased in order to effectively deter violators. [Finding 24]

The penalties in ECL §71-2503 are far too low. The statute presently authorizes a maximum civil penalty of \$3000 and maximum criminal fine of \$1000 for a first offense. These are totally inadequate to deter large-scale developers, who tend to regard them as an incidental cost of doing business. To realistically protect this resource, which the Legislature has found to be invaluable and irreplaceable, the maximum civil penalty should be \$30,000 and the maximum first-offense criminal fine \$15,000. These increases would accord the Department sufficient discretion to treat major offenders more severely than individual homeowners, and willful violators more severely than unintentional offenders. The current penalties are so low that these distinctions are almost meaningless.

32. Cumulative civil penalties should be imposed for each day of offense. [Finding 24]

The statute now provides, only in the case of criminal convictions, that "each day's continuance...shall be deemed a separate and distinct offense." ECL §71-2503. There should be an identical provision in §71-2503 (1) governing civil penalties assessed by the Department. There is no logic behind having that provision only for criminal sanctions and not for the far more frequently employed civil penalties.

While the Department has, on occasion, imposed civil penalties for each day of violation--the only way to make them more than a minor irritant to large developers--this practice is not clearly supported by the statute and may be subject to legal challenge, especially in view of the specific language allowing cumulative penalties in criminal cases under the same section. The statute should be amended to give the Department this device in both civil and criminal penalties.

33. *The Department should establish guidelines for civil penalties.*
[Findings 24 & 25]

Civil penalties are now set by the Regional Attorney after discussion with the enforcement staff, except where a hearing occurs. In the latter case, they are assessed by the Commissioner on the findings and conclusion of the Administrative Law Judge, again based on recommendations from staff. Neither the Department nor the public has an inkling in advance of proceedings what the likely penalty for a given offense will be. This makes for variation from region to region and from day to day, reducing the effectiveness of enforcement and feeding public perceptions of arbitrariness.

The Department should adopt, as part of the Part 661 regulations, guidelines for civil penalties, closely keyed to protection of the resource. Just as various types of tidal wetland areas are now classified in the regulations as to permitted activities, the regulations should provide guidance as to a range of penalties for specified offenses to particular types of wetland. These ranges of penalties should be related wherever possible to the damage to the resource and projected cost of its restoration, as is the case with the U.S. Environmental Protection Agency regulations governing air and water quality.

These guidelines would render enforcement more certain and predictable, while still giving sufficient discretion to the Department to take into account the resources, intent and past record of the offender.

34. The Department should adopt a policy of requiring the restoration of unlawfully altered wetlands whenever feasible. [Findings 25 & 29]

While both the civil penalty and criminal fine portions of the statute now authorize the Department or a court to order removal of fill and restoration of the wetland, this authority is rarely invoked. Regional Attorneys, Administrative Law Judges and enforcement staff all play roles in what has become a restoration comedy, and all must share the responsibility for regularly failing to insist on this remedy.

Because a primary purpose of the Act is resource protection, offenders should be routinely required to restore wetlands when feasible. The statute authorizes this, and it should be insisted on in many cases. This would not only restore numerous wetlands, but would furnish an added deterrent to offenders.

35. Penalties should be earmarked to the Marine Resources Account of the Conservation Fund. [Finding 32]

Civil penalties and criminal fines should be earmarked to the Marine Resources Account of the Conservation Fund, as is now the case with fish and shellfish penalties imposed under Article 13. This would provide additional funding for enforcement and permit programs under the Act. The same should be done with fees for permits under the Act, as is noted elsewhere in this report.

Recommendations

Acquisition and Management

36. Sufficient staff should be assigned to the program in order to expend the remaining authorized funds within the next two years. The objective should be coordinated with other necessary divisions within DEC, such as Real Property, in order to achieve this end. [Findings 35 &36]

One of the more fundamental forms of wetlands protection is ownership and management of the resource by the regulating agency. BMHP should make wetland acquisition a priority. There are currently 12 DEC acquisition projects planned involving approximately 1100 acres at a cost of \$6.35 million. All efforts should be made to complete these backlogged projects so new projects can be initiated and completed in a timely fashion. The two regional surveyor positions necessary to complete these projects should be filled without delay. With the filling of these two positions, land surveyors in private practice should be employed by contract to assist in the elimination of the acquisition backlog and for the initiation of new projects.

37. Improve communication between DEC and other governmental and private conservation groups. Efforts should be made to acquire large blocks of tidal wetlands on a cooperative basis. Strategies should be undertaken so as to not duplicate or frustrate the acquisition efforts of another group.

There are a number of land acquisition projects, in various stages of completion, taking place throughout the metropolitan area. The DEC should make a concerted effort to coordinate its activities with those of other groups and agencies. An important first step would be the development of a master list of targeted acquisitions by the various groups involved. This would serve to highlight areas of activity, who is involved, where coordination is needed, and where it is not. Efforts should be focused on acquiring large, contiguous blocks of wetlands wherever possible.

38. An assessment of the present extremely time-consuming method of acquisition should be undertaken in an effort to streamline the process.

The current inter-departmental wetland acquisition process is extremely cumbersome and time consuming. In light of the current rate of coastal development and price increases, the process itself undermines the intent of the acquisition program. The DEC should restructure this system so that it is responsive to the intent of the program and the dynamic land use environment within which its exists.

39. A more systematic approach toward the management of holdings is necessary. Each holding should have a management plan--perhaps modeled after The Nature Conservancy's Stewardship Committee approach. [Finding 38]

Current ecological research has clearly shown that the simple fact of ownership of habitat preserves does not insure that the intended goals of preservation are achieved. Although a critical and necessary first step in the protection of wetlands is acquisition, this should be viewed as the beginning of the preservation process, not its conclusion. As greater percentages of the landscape are fragmented by land use activities, the remaining preserves, including wetlands, emerge as "habitat islands." As these preserves are increasingly isolated from similar natural habitats, their ability to maintain their ecological integrity is diminished. In addition, as the availability of open space decreases in a community, the remaining habitat islands become the focus of more intense human activity.

To insure the ecological integrity of existing and future tidal wetland preserves, systematic, computerized resource inventories should be completed for all holdings. These data should serve as the basis for the development of preserve master plans that indicate the ecological basis for preserving a particular parcel, the management goals for the parcel, and the strategies needed to accomplish the management goals. A schedule for master plan implementation should be established for each preserve.

Conclusion

The evaluation of Article 25 has produced a troublesome yet encouraging paradox. While there is widespread criticism of program implementation, there is general agreement with, and acceptance of, the program's foundation -- the Tidal Wetlands Act. This has been substantiated by cooperation given the committee by the DEC, DOS, local governments, and the private sector. It is important to note that in interacting with these diverse groups, continued support was found for properly funding, staffing, and organizing the tidal wetlands program and regulatory process, not, in contrast, abandoning it. Although this consensus is clearly supportive, another difficulty results; one of expectation. With the problems of the tidal wetlands program now collectively expressed and outlined, the Department of Environmental Conservation must begin, without delay, the more difficult task of resolving these problems. To do anything less will leave the resource improperly protected, the land owner a victim of a faltering system, and public cynicism confirmed.

Immediate steps should be taken to identify funds for staffing increases, including new positions and the filling of existing vacancies. These efforts should be specifically aimed at improving the consistency, quality and efficiency of the permit process. Enforcement and compliance efforts must be improved if the permit process is to be considered more than a paper inconvenience. The rapid rate of coastal development and increasing real estate costs require that wetlands acquisition move at a much faster pace.

The recommendations included in this evaluation were developed from an organizational and systematic perspective. Therefore, any single recommendation should be considered in the broader context within which it is presented. If any recommendation is to be considered independently, it must be re-evaluated as to its advisability in regard to current staffing, funding or policy support.

Appendix I

The Tidal Wetlands Act: A Legal Review

This research effort was commissioned by the Tidal Wetlands Advisory Committee and was conducted by Robin Davis, a law student at the University of Miami School of Law.

In enacting the Tidal Wetlands Act, New York's Legislature recognized the importance of tidal wetlands, one of the most vital and productive areas of the natural world. This recognition is expressed in the public policy statement expressed in the preamble to the Act, ECL § 25-0102.

In its thirteen years of existence, the Act has been closely examined by New York's courts on numerous occasions. The courts' decisions address several discrete topics, which this brief report discusses. They comprise:

1. What constitutes a tidal wetland?
2. Public policy and the validity of the Act
3. Mapping and Inventory
4. Land Use Regulation
5. Constitutionality of the Act as applied (de facto taking)
6. Permit procedure
7. Enforcement
8. Judicial review

1. WHAT CONSTITUTES A TIDAL WETLAND?

Tidal wetlands are defined as those areas which border on or lie beneath tidal waters such as, but not only, banks, bogs, salt marshes, swamps, meadows, flats, or other low lands subject to tidal action including those areas now or formerly connected to tidal waters, or areas subject to the tides on which certain vegetation grows. ECL Section 25-0103.

However, the Tidal Wetlands Act does not apply to all lands covered by tidal waters. In State v. Lang, 84 Misc. 2d 106 (Sup. Ct. Suffolk Co., 1975) the basic issue was whether the defendant's land constituted "tidal wetlands" within the meaning of the Act. The court ruled the Act was not

intended to apply to defendant's one-acre plot surrounded by industrially developed land adjacent to farmland, in which the tidal water was artificially induced into ditches at high tides by a man-made drainage culvert. Consistent with Lang is O'Brien v. Barnes Building Co., 85 Misc. 2d 424 (Sup. Ct. Suffolk Co., 1974), aff'd 48 A.D. 2d 1018, where the court interpreted the Act to mean areas "naturally subject to tidal action in the recent past and which still retain some of the characteristics of wetlands." The court ruled a pond and the surrounding land are not tidal wetlands where the pond had not been connected to the ocean since 1930 except by a man-made pipe.

In contrast, Rappl & Hoenig Co. v. Department of Environmental Conservation, 61 A.D. 2d 20 (4th Dept. 1978), aff'd 47 N.Y. 2d 925, held that where a developer flooded the adjacent tract, the Freshwater Wetlands Act applied to the artificially created wetland. The Rappl & Hoenig court distinguished Lang on the basis of the Lang court's finding that the tract did not "border on or lie beneath tidal waters" as required by the Tidal Wetlands Act.

According to Professor Weinberg's Commentary to ECL § 25-0103, Lang should be thought of as an aberration which runs counter to the intent of the Legislature, especially since the United States Army Corps of Engineers and others have recently developed techniques to restore filled-in wetlands.

2. PUBLIC POLICY AND THE VALIDITY OF THE ACT

The purpose of the Tidal Wetlands Act is to protect the state's tidal and coastal wetlands areas. The Legislature has found that "[t]he quality of our environment is fundamental to our concern for the quality of life." ECL § 1-0101.

Consistent with these public policy provisions are the legislative findings leading to the enactment of the Tidal Wetlands Act which state, "tidal wetlands constitute one of the most vital and productive areas of our natural world, and ... their protection and preservation are essential." L. 1973, Ch. 790, § 1, printed following ECL § 25-0101 (McKinney's 1984). Tidal wetlands have many values, including marine food production, wildlife habitat, flood, storm and hurricane control, recreation, cleansing ecosystems, sedimentation control, education, research, open space and aesthetic appreciation. Matter of Appalachian Mtn. Club v. Flacke, 109 Misc. 2d 514 (Sup. Ct. N.Y. Co., 1980).

Though the public policy behind the Act is to benefit the safety, health and general welfare of man and his environment, the Act balances these values with the concerns of developers and

landowners. Section 25-0102 declares the State's policy to be "to preserve and protect tidal wetlands, ... giving due consideration to the reasonable economic and social development of the state."

The confrontation between environmental legislation and property rights is best illustrated in Just v. Marinette County, 56 Wis. 7, 201 N.W. 2d 761 (1972), where the validity of a county wetlands ordinance adopted pursuant to shoreland regulations enacted by the state was upheld by the Wisconsin Supreme Court against a challenge by property owners who alleged that the restrictions constituted a de facto taking of their property without compensation in violation of the Fourteenth Amendment of the Constitution. The court held the ordinance preserves nature from the despoilage and harm resulting from unrestricted activities of man, so that filling or alteration of tidal wetlands without a permit is tantamount to a public nuisance. See to the same effect, Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981), cert. denied sub. nom. Taylor v. Graham, 454 U.S. 1083; and Sibson v. State, 115 N.H. 124, 336 A. 2d 239 (1975).

But the tension between environmental legislation and a landowner's property rights has not yet been resolved in New York. See the discussion in Section 5, infra.

3. MAPPING AND INVENTORY

In order to determine whether DEC has jurisdiction over a particular property it is necessary to look at the tidal wetlands map promulgated by the Department pursuant to ECL § 25-0201. The statute requires "[t]he inventory [to] set forth the boundaries of such wetlands using such photographic and cartographic standards and techniques as the commissioner may deem reasonable and appropriate in order to provide clear and accurate maps of tidal wetlands of the state for the purpose of effectuating the policies and provisions of this act." Once a map of an area is complete, the Commissioner must hold a public hearing in order to provide individuals the opportunity to propose that designated areas be added or deleted. Next, the Commissioner must give notice to all landowners whose property is tentatively found to constitute a tidal wetland.

Before this inventory was completed and the permanent land use regulations in effect, the Act provided for a moratorium prohibiting any person from altering any tidal wetlands prior to the land use regulations. A case which best illustrates this period in judicial history is Matter of New York City Housing Authority v. Commissioner of Environmental Conservation, 83 Misc. 2d 89 (Sup. Ct. Queens Co., 1975). The court there held that such moratoriums are valid and not an unconstitutional taking of property so long as they are for a reasonable purpose and of a reasonable

duration. Id. at 93. See also Matter of Russo v. New York State DEC, 55 A.D. 2d 935 (2d Dept. 1977) (moratorium may not extend for an unreasonable duration).

4. LAND USE REGULATION

The tidal wetland inventory has been completed and the land use regulations of § 25-0302 to 25-0403 are now in effect. Upon the completion of the mapping and inventory process the DEC has the power to regulate the activities that take place on those tidal wetlands under § 25-0401. The land use regulations that the Commissioner promulgates classify each wetland according to its most appropriate use, permitting the land to be used in ways compatible with its characteristics. While the courts recognize that land use regulations restrict a property owner's rights to his land, there is also a significant benefit to landowners since tax valuation is usually based on the land's highest and best use, and § 25-0302(2) provides that tidal wetlands regulations are limitations for property tax valuation purposes. The amount of tax the owner will pay on his property is an element in determining whether the wetland regulation deprives him of the economic value of the land and thus constitutes a taking. In a case under the parallel Freshwater Wetlands Act the court recognized that the land use regulations under the Act may reduce the taxable value of a piece of land. In Matter of Katz v. Assessor and Bd. of Assessment of Mt. Kisco, 82 A.D. 2d 654 (2d Dept. 1981) the owner sought a reduction in the assessment of her property, contending that the assessor did not adequately consider the effect of the Freshwater Wetlands Act on its value. The court held she had failed to meet her burden of proving the adverse impact of the wetlands designation, but the court nevertheless reduced the assessments based on evidence of comparable sales and development costs.

The similar issue of the value of a piece of property after it is classified as a tidal wetland and taken by the State through condemnation is discussed in Chase Manhattan Bank, N.A. v. State, 103 A.D. 2d 211 (2d Dept. 1984). The court held a reduction in market value from \$53,781 for residential use to \$7,400 for recreational use could be found to constitute destruction of the property's economic value. The court held the owner carried its burden of proving that the effect of the Act was to deprive it of all financially rewarding uses of its property and would reduce the property's value by about 86%. See to similar effect Berwick v. State, 107 A.D. 2d 79 (2d Dept. 1985).

5. CONSTITUTIONALITY OF THE ACT AS APPLIED (DE FACTO TAKING)

Whether the application of the Act, enabling the Department to restrict development of a wetland, deprives its owner of all reasonable use of his property constituting a de facto taking of the tract without just compensation under the Fourteenth Amendment, is an issue which has been raised though not totally settled in New York.

There is a fundamental difference between a regulation and a taking. When the government acts in its enterprise capacity, for example when it takes land to widen a road, it literally takes the property under its power of eminent domain. But when government acts under its police power, as in zoning or its other land-use regulation, the regulation is valid unless it deprives the owner of all economic value of the land. While this is often referred to as a de facto taking of the land, the New York courts have made clear that even an unconstitutional land-use regulation does not entitle the owner to compensation, only to a judgment invalidating the regulation as applied to him. Fred F. French Investing Co. v. City of New York, 39 N.Y. 2d 587 (1976), app. disp. 429 U.S. 990.

In short, a land-use regulation will be held unconstitutional if it deprives a landowner of all reasonable use and enjoyment of his property, preventing him from putting his land to its only economic use without providing just compensation. A mere reduction in land value is not enough to invalidate the Act as applied to a parcel. Fred F. French Investing Co. v. City of New York, *supra*; Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

If denied a permit, a landowner seeking to argue the Act is invalid as applied to him is entitled to a court hearing at which he may show the denial of the permit deprives him of all, or virtually all, his reasonable investment-based expectations. See Matter of Spears v. Berle, 48 N.Y. 2d 254 (1979), involving a freshwater wetland but establishing a procedure equally applicable here. The Court of Appeals has recently held the burden of proof is on the landowner to show his inability to use the property. De St. Aubin v. Flacke, 68 N.Y. 2d 66 (1986). In particular, he must prove the municipality would not allow cluster zoning, a change in zoning or other means of realizing his investment (or part of it) by building on the upland portion.

Section 25-0404 expressly requires the Commissioner, once the courts have found the denial of a permit to constitute a taking of a particular tract, to either purchase the property or issue the permit.

6. PERMIT PROCEDURE

The Act requires a permit to assure that development activities within or adjacent to tidal wetlands will not impair the ecological importance and natural functions of the wetlands.

Therefore, a permit is required for any form of dredging, draining, excavation, erecting any structure or road or placing of other obstructions, or for any form of pollution in a tidal wetland or adjacent area. ECL § 25-0401. The application procedure for permits is set out in § 25-0402. If correct procedure is not adhered to then the tidal wetlands permit may be declared invalid, as in Bigar v. Heller, 96 A.D. 2d 567 (2d Dept. 1983), where the Commissioner never sent a copy of the order stating his findings and reasons for granting a permit to the chief administrative officer of each municipality in which the wetland was located, and in addition neglected to place a notice in at least two newspapers of general circulation serving the affected communities. Therefore, the DEC action granting a permit did not become final or binding. The result of this case was overturned by a 1986 amendment to § 25-0403 eliminating those requirements.

When applying for a permit the burden is on the applicant to show that the proposed activity will be in accord with the policies and provisions of the Act. McKinney v. Dept. of Environmental Conservation, 52 A.D. 2d 881 (2d Dept. 1976).

In Thompson v. Dept. of Environmental Conservation, 103 Misc. 2d 123 (Sup. Ct. Suffolk Co., 1985), the landowner sought a permit only to realize later that the zoning ordinance had outlawed the proposed use while his action was pending. The court ruled that though the landowner had incurred expenses, the permit was properly rejected.

7. ENFORCEMENT

Enforcement of the Act is provided for in ECL article 71, title 25. Section 71-2503 provides for civil penalties of up to \$3,000 per violation, and cease and desist and restoration orders, all imposed by the Commissioner. These administrative orders may be enforced by the Department, or reviewed by the respondent, in the courts. In addition the statute authorizes criminal prosecution. The court may, as an alternative or in addition to a fine or imprisonment upon a criminal conviction, order the offender to restore the wetland.

In Kessler v. Sherman, 51 A.D. 2d 52 (2d Dept. 1975), *aff'd.* 41 N.Y. 2d 851, the court ruled that a charge that a developer had violated § 25-0202 by dredging a channel without first obtaining

a permit was separate and distinct from his alleged violation of a town wetlands ordinance, so that the State's prosecution of him after his acquittal of the town charge did not unconstitutionally place him in double jeopardy for the same offense.

8. JUDICIAL REVIEW

Judicial review of Department determinations is by an Article 78 proceeding, which must be brought within 30 days of the Department's order. ECL § 25-0404. The 30 days runs from the actual date the order is issued, not the date on which it is served on the applicant, the court held in Matter of Oak Island Beach Assn. v. Flacke, 96 A.D. 2d 841 (2d Dept. 1983).

The courts use the ordinary rules of judicial review and sustain a determination by the Department so long as it is supported by substantial evidence in the record, if the decision was based on an administrative hearing. Matter of Pell v. Board of Educ., 34 N.Y. 2d 222 (1974); Matter of Environmental Defense Fund, Inc. v. Flacke, 96 A.D. 2d 862 (2d Dept. 1983). If the Department's decision was not made after an administrative hearing, the courts will sustain it unless the challenger proves it to be an arbitrary or capricious decision. Matter of Pell v. Board of Educ., *supra*. The burden of proof in all such challenges to Department decisions is on the one seeking to overturn them. Matter of Forte v. Board of Educ., 105 Misc. 2d 36 (Sup. Ct. Suffolk Co. 1980).

Data on Staffing Problems

Table I--Staff Reviewing Tidal Wetlands Permits *

A. September, 1982 (pre-reorganization)

Region 1 DRA			BMHP		
	<i>Time Commitment</i>	<i>Man Years</i>		<i>Time Commitment</i>	<i>Man Years</i>
1 Grade 23	100%	1	1 Grade 14	100%	1.0
1 Grade 18	20%	.2	1 Grade 14	100%	1.0
1 Grade 18	100%	1	1 Grade 23	100%	1.0
1 Grade 14	100%	1			
TOTAL 4		3.2	TOTAL 3		3.0

B. May, 1986

Region 1 DRA			BMHP		
	<i>Time Commitment</i>	<i>Man Years</i>		<i>Time Commitment</i>	<i>Man Years</i>
1 Grade 23	100%	1	1 Grade 18	100%	1
1 Grade 18	100%	1	1 Grade 23	20%	.2
1 Grade 18	100%	1			
TOTAL 3		3	TOTAL 2		1.2

* These data do not provide information for Regions 2 and 3 DRA staff responsible for reviewing Tidal Wetlands Permits.

C. October, 1986 (During Committee Study)

Region 1	DRA		BMHP	
	<i>Man</i>		<i>Man</i>	
	<i>Years</i>		<i>Years</i>	
Grade 23	1		Grade 23	1
Grade 18	1		Grade 18	1
Grade 18	1		Grade 13	1
Grade 9	1		Grade 13	1
TOTAL	4		TOTAL	4

TABLE II

A. Total Program Analysis of Tidal Wetland Permit Review Pre-1982 Reorganization

Region 1	DRA	3.2	man years
	BMHP	<u>3.0</u>	man years
TOTAL 6.2 staff reviewed 800 to 1000 permits for an average of between 129 and 161 per person.			

B. Total Program Analysis of Tidal Wetland Permit Review May 1986 Post-Reorganization

Region 1	DRA	3.0	man years
	BMHP	<u>1.2</u>	
TOTAL 4.2 staff reviewed 1200 to 1500 permits for an average of between 286 and 357 per person.			

C. Total Program Analysis of Tidal Wetland Permit Review October 1, 1986

Region 1	DRA	4.0	
	BMHP	<u>4.0</u>	
TOTAL 8.0 staff reviewed 1200 to 1500 permits for an average of between 150 and 188 permits per staff.			

TABLE III

A. Five-day letter potential by Region FY 85-86*

Region 1	Region 2	Region 3
715	253	220

B. Five-day letter potential as a percentage of current caseload by Region FY 85-86

Region 1	Region 2	Region 3
55%	50%	25%

C. Yearly breakdown of five-day letter requests for Tidal Wetland Permits in Region 1 is as follows:

1983	1984	1985	1986 (first 6 months)
3	1	41	21

* Five-day letter potential is a measure of DRA staff's inability to process applications in conformity with Uniform Procedures Act. Such permits could be issued on the basis of statutory default. In Region 1, fifty-five percent (55%) of the entire caseload, or 715 permits, are in jeopardy of default.

TABLE IV

Average Staff Review Time Per Application

From FY 82-83: Average hours spent per project was 4.0

From FY 83-84: Average hours spent per project was 3.6

From FY 84-85: Average hours spent per project was 3.4

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