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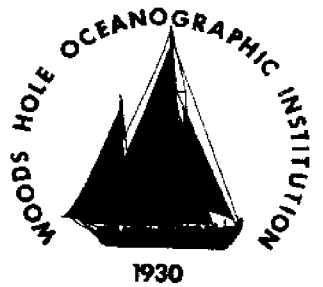

REGULATION OF HARBORS AND PONDS OF MARTHA'S VINEYARD

By

James M. Friedman, Esq.
Rebecca A. Donnellan, Esq.
Gary H. Nickerson, Esq.

May 1976

FINAL REPORT

A joint project with the Martha's Vineyard Commission supported by the Department of Commerce, NOAA Office of Sea Grant under Grant #04-6-158-44016 and Section 305 of the Coastal Zone Management Act of 1972 and the Institution's Marine Policy and Ocean Management Program. Supported in part by funds provided under a grant of the Pew Memorial Trust.

WOODS HOLE, MASSACHUSETTS 02543

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Approved for Distribution:

Robert A. Frosch
Associate Director for Applied Oceanography

Foreword: In August 1975 the Martha's Vineyard Commission requested assistance from the Woods Hole Oceanographic Institution Sea Grant Program for assistance in Problem Identification and Management Prospects for the Harbors and Great Ponds of Martha's Vineyard. James M. Friedman, a lawyer in the Institution's Marine Policy and Ocean Management Program, agreed to undertake the leadership of this project.

The objectives of the proposed study were:

1. To provide a legal analysis of the powers of the Martha's Vineyard Commission and the towns of Martha's Vineyard with regard to the regulation of harbors and great ponds,

2. Once these powers have been defined the Commission will, in cooperation with the towns, shellfish wardens, riparian groups, fishermen, and other interested citizens, identify those problems which result from the increasing and varied use of harbors and ponds,

3. The Commission will propose a management scheme (if possible through existing legislation) to deal with the problems that have been identified.

Mr. Friedman, with the assistance of two Marine Policy Fellows, Rebecca A. Donnellan and Gary A. Nickerson, have prepared the four reports contained herein. Draft copies of the reports were accepted by the Martha's Vineyard Commission on 6 May 1976. The first report was printed in pamphlet form by the Commission and distributed widely.

We believe the contents of these reports will also be useful to the planners of other coastal communities in the Commonwealth of Massachusetts.

This study has been a joint project of the Martha's Vineyard Commission and the Woods Hole Oceanographic Institution with support from the Department of Commerce, NOAA, Office of Sea Grant under Grant #04-6-158-44016, and Section 305 of the Coastal Zone Management Act of 1972 and the Institution's Marine Policy and Ocean Management Program. Also supported in part by funds provided under a grant from the Pew Memorial Trust.

Dean F. Bumpus
Sea Grant Coordinator

REGULATION OF HARBORS AND PONDS OF MARTHA'S VINEYARD

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SOME QUESTIONS AND ANSWERS ABOUT THE LAW OF HARBORS AND GREAT PONDS. A PAMPHLET FOR THE TOWNS OF MARTHA'S VINEYARD

This pamphlet was prepared at the request of the Martha's Vineyard Commission. The purpose of the pamphlet is to provide some basic information concerning the powers of the towns, state, and federal government to regulate activities in the harbors and great ponds of Martha's Vineyard. The law of harbors and great ponds can be both complex and confusing. Our purpose here was to provide a general introduction to the law, thus much detail is left out. To have provided such detail here would have been self-defeating, since we hope this pamphlet will be of benefit to the great and good majority of mankind who are not lawyers.

All laws cited may be found in the Massachusetts General Laws Annotated, unless otherwise noted.

Great Ponds

1. What is a great pond?

A great pond is defined by Chapter 91, Section 34 as a pond which in its natural state is more than ten acres. This is the general definition of a great pond. However, for purposes of certain fisheries regulations Chapter 131, Section 1 defines a great pond as being twenty acres or more.

2. What is special about a great pond?

Since the 1640's great ponds have been considered a public resource in Massachusetts. A great pond cannot be privately owned. Generally the public has the right to (among other things) fish, hunt, swim, and use a boat on a great pond. However, these activities are subject to public regulation by the towns and General Court of Massachusetts.

3. Who owns the shore land around a great pond?

While a great pond is public property, the land around a great pond is often privately owned. The boundary between private and public property on the shore of a great pond is the ordinary low water mark. An owner of property which is located along the edge of a great pond is called a riparian owner.

4. How does the public gain access to a great pond?

In some cases there will be a recognized public road or way to a great pond, so access to the pond may not be a serious problem. However, where a great pond is entirely surrounded by private property, the question arises, how can the public make use of the great pond if there is no way to get to the pond. Under Massachusetts' law the public does have a limited right to cross private property to reach a great pond. However, only unimproved and unenclosed property may be crossed. And the crossing must be on foot (unless, of course, one has the owner's permission).

Given these restrictions on public access to great ponds, it is not surprising that access should be an important issue in many towns. Under Chapter 91, Section 18A ten or more citizens may request the Department of Public Works and the Attorney General to hold a hearing to determine whether there is proper public access to a great pond. This committee may then make findings and make recommendations to the legislature.

A more recent law, Chapter 21, Section 17A, establishes a "Public Access Board." This Board has the power to take property by eminent domain so as to establish public access to great ponds. Any citizen may contact the Board about a particular access problem.

5. What legal requirements must be met prior to changing the water level in a great pond?

A town interested in increasing its shellfishery may seek to change the water level in a great pond by opening the pond to the sea. Any excavation in a great pond must be licensed by the State Division of Waterways. And under Chapter 91, Section 13 both the Division of Waterways and the Governor and his Council must approve acts which change the water level in a great pond.

Chapter 130, Section 93 states that a town may open "ditches" or "canals" into any pond within its limits to increase herring alewives or other "swimming marine food fish." Whether this section of the law means that a town does not have to obtain a permit from the Division of Waterways for such a ditch or canal is not clear. To be conservative, the Division of Waterways should be notified prior to any attempt to change the levels of a great pond.

The state wetland laws would also be applicable to any change in the water level of a great pond. Thus, local conservation commissions must be notified and state regulations examined prior to any dredging. And finally, the Army Corps of Engineers also has jurisdiction over all dredging in coastal wetlands. Thus, a Corps license must also be obtained.

6. Who controls shellfishing?

Chapter 130, Section 52 gives coastal towns the authority to regulate their own shellfisheries. A town may regulate the times, places, and methods of shellfishing. Fees may be charged. The law directs the towns to set aside an area for family shellfishing, as opposed to commercial shellfishing.

Chapter 130, Section 57 authorizes the selectmen of any town to make shellfish grants to individuals. A hearing must be held prior to such a grant. The license cannot exceed ten years. And the State Division of Marine Fisheries must certify that the shellfish grant will not harm the natural shellfish resources of the town.

The law also states that licenses shall not be granted so as to impair private rights or so as to obstruct navigation.

7. Who regulates speed and horsepower of craft on great ponds?

Towns may enforce speed limits and horsepower limits for great ponds of less than 500 acres, or portions of great ponds, within their jurisdiction. Further a town may regulate or ban motorboats and water-skiing on great ponds. All such regulations shall be subject to review by the Director of Marine and Recreational Vehicles of the State.

8. Who controls the building of wharves and piers in great ponds?

The State Department of Waterways licenses the building of piers, wharves, dams, or any other structures in great ponds. This State agency is involved because great ponds are a public resource, the property of the state. However, local restrictions also exist. A town may exercise its zoning power to regulate construction on great ponds. And local conservation commission may enforce the wetlands laws on the ponds.

There is also a federal licensing requirement for certain great ponds. The Army Corps of Engineers licenses structures for any great pond where the tide ebbs and flows.

Harbors

1. What is a harbor of refuge?

Before the turn of the century, harbors were set aside for sailing ships to take refuge during storms. These harbors were designated as harbors of refuge. Federal funds were used to maintain facilities for these distressed ships. Since the turn of the century and the advent of steam, the concept of a harbor of refuge has become meaningless and the Army Corps of Engineers has stopped designating harbors of refuge. The four harbors still designated as harbors of refuge in New England (Point Judith, Sandy Bay on Cape Ann, Block Island, and Nantucket Harbor) receive no preferential treatment in applications for federal funding.

2. Who controls moorings in a harbor?

Allocation of moorings to vessels within a harbor are controlled by the local harbormaster. In theory, the Coast Guard may designate anchorage grounds and allocate moorings in the harbors, but has not done so. Most towns require that individuals who want a mooring permit submit an application to the harbormaster, giving a description of the vessel to be moored and of the mooring to be used. The harbormaster usually makes regulations as to the size, type, and placement of moorings in the harbor.

3. May a town legally discriminate between classes of vessels in allocating moorings?

It is not clear to what extent a town may legally discriminate between different classes of vessels in allocating moorings. It may be legal, however, to set aside some fraction of the slots for commercial vessels and others for recreational vessels. It might also be legal to reserve some slots for year-round moorings and others for seasonal moorings. Whatever the system, it must be based on a rational public purpose.

4. Who sets speed limits in harbors and ponds?

Under the powers reserved to towns by Chapter 90B, a town may set speed limits within its harbors and ponds, provided that the regulations are approved by the Department of Marine and Recreational Vehicles (DMRV). Speed limitations are routinely approved by the DMRV. DMRV is apparently reluctant to approve regulations which limit the horsepower of vessels using town waters. A 1975 West Tisbury byläw which limited the horsepower on Tisbury Great Pond to ten horsepower was not approved by the DMRV.

5. Who controls the permissable length of stay in a harbor?

The harbormaster has authority to order a vessel to leave the harbor and to remove any vessel which ignores such an order (Chapter 102, Section 24).

6. What other powers does the harbormaster have?

The harbormaster's powers are enumerated in Chapter 102, Section 21-27. Most of the powers enumerated apply to old-fashioned sailing vessels and are of little practical significance. The useful powers include the power to remove a vessel from a harbor, the power to remove a vessel from a wharf or pier when the vessel fails to comply with a wharfinger's order, and the power to regulate and station vessels in the harbor. The harbormaster is also empowered to enforce the provisions of Chapter 90B--the motorboat law--and any town bylaws or regulations pertaining to the harbor.

7. Who makes shellfish regulations for the harbors?

Towns are empowered to make and enforce shellfish regulations for waters lying within town boundaries by Chapter 131, Section 52.

8. Who regulates waterskiers?

DMRV regulations provide that waterskiers shall not operate negligently so as to endanger the lives or public safety, shall not operate at night, shall not operate unless there is in addition to the operator one other competent person to observe the person being towed, and shall not operate unless there is a ladder or other device by which the skier can be taken from the water. Towns may, under Chapter 90B, with DMRV approval, designate areas in which waterskiing is not permitted.

9. Who regulates skin divers?

DMRV regulations provide that scuba divers display a diver's flag while swimming on or under the waters of the Commonwealth. Towns may regulate skin divers under their reserved powers under Chapter 90B. For example, some towns require that skin divers receive permission of the harbor-master before swimming in enclosed waters, other towns restrict the waters in which skin divers may operate.

10. May a town limit access in its harbors?

The U. S. Constitution guarantees to citizens the right to travel and reserves to the federal government jurisdiction over admiralty and interstate commerce. Any attempt by a town to limit access to harbors would have to be consistent with these three constitutional provisions. For example, a town which sets an absolute limit on the number of moorings which are then allocated on a first-come, first-served basis is limiting the access to the harbor to some extent. However, if the allocation did not discriminate against out-of-towners and was based on a legitimate public purpose, such as public safety or health, such a regulation would be consistent with the Constitution.

11. Who sets boating sanitation requirements?

Towns can regulate marine sanitation under their general power to regulate sanitation or under the powers reserved to them in the motorboat law (Chapter 90B, Section 15) to regulate areas consistent with the state system. Many towns have regulations which prohibit the discharge of sewage into enclosed waters and require that marine heads be sealed while the vessel is in enclosed waters. Vineyard Haven and Oak Bluffs have such requirements which cover Oak Bluffs Harbor, Inner Vineyard Haven Harbor, Lagoon Pond, and Tashmoo Pond. These regulations are considered unenforceable since there are not facilities for emptying holding tanks on the Vineyard, and the number of vessels entering these waters makes inspection prohibitive.

The DMRV regulations prohibit all discharge of raw sewage, garbage, rubbish, or debris from motorboats into the waters of the Commonwealth. This regulation is not enforced since there are no facilities for emptying marine holding tanks in the state. DMRV is waiting for federal regulation to provide a more workable standard.

Under the Federal Water Pollution Control Act the EPA in consultation with the Coast Guard has authority to set standards and make regulations for all marine sanitation devices. The EPA has not yet adopted any standards. Once federal standards are set, the only authority the state retains is to prohibit

all discharge of sewage from vessels. Before such a ban becomes effective, the Administrator of the EPA must determine that there are adequate facilities for removal and treatment of wastes. In order for the current state and local regulations to be effective after regulations are promulgated by the EPA, it will be necessary to construct facilities for removal and treatment of wastes.

12. How does the boat registration system work?

Massachusetts law (Chapter 90B, Section 3) requires that every motorboat operated principally in the Commonwealth be registered with the Department of Marine and Recreational Vehicles (DMRV). Boats with motors over 5 horsepower are required to be marked with a registration number. Out-of-state boats, except boats from New Hampshire, Alaska, and Washington, which are registered in their home state, need not register with the Massachusetts DMRV.

13. Are boat operators licensed?

Massachusetts does not require that operators of recreational craft be licensed or that the vessels carry insurance. There is no legal minimum age for operation of a recreational boat.

14. Are licenses required before someone builds a dock?

Yes, both the state and federal governments license docks, piers, and other structures in waterways. The Massachusetts Division of Waterways issues licenses for any structure in or over tide waters below high water mark or in or over the waters of any pond more than ten acres in size. The Army Corps of Engineers requires a person to get a license for any structure in navigable waters (tidal waters). But these licenses do not relieve the builder from other laws affecting the construction or from any problems he or she has with neighbors claiming the dock is on their property and so on.

15. Does this mean the builder has to comply with the Wetlands Act even if he or she has gotten the licenses mentioned in the last paragraph?

Yes, the state Wetlands Act applies wherever a person removes, fills, dredges, or alters any wetlands area. The Wetlands Act goes into great detail to define a wetland. A person should check with his or her town's conservation commission whenever one wants to build, dredge, or fill something in a marsh, swamp, pond, tidal flat, or harbor. The conservation commission administers the Wetlands Act.

In addition to the Wetlands Act, all towns on Martha's Vineyard have been mapped by the state for the purpose of locating wetlands and placing restrictions on these wetland areas. Restrictions for any given wetlands area are on file at the Dukes County Registry of Deeds in Edgartown. For example, these restrictions on wetlands in Gay Head permitted the construction of docks and boat shelters on pilings but did not permit the construction of solid fill piers.

The Division of Waterways issues permits for dredging channels and the outlets of ponds. The Army Corps of Engineers is also regulating the dredge and fill of wetlands areas. The Corps generally permits land owners to build docks and so on for small boats.

16. What do the town officials have to say about building docks?

Edgartown and Gay Head have town bylaws regulating the alteration of wetlands. Edgartown's law also controls the use of beach areas.

Docks may be covered by a town's zoning code. Private docks are generally an "accessory use" and not strictly limited. Marinas on the other hand are a commercial use and such uses are more carefully controlled by local zoning.

The new state building code, administered by the local building inspectors, appears to be so broad as to control the construction of docks.

17. Does anyone license marinas?

Apart from the construction of docks and other structures of a marina discussed in the previous questions, licenses are required for the operation of a marina. The Massachusetts Division of Water Pollution Control issues such licenses on an annual basis. To receive a license, each marina must have sewage collection and disposal facilities (including facilities for the purging of holding tanks), dockside toilet facilities, and trash buckets.

A marina serving motorboats must, under state law, have waste oil retention facilities for the disposal of waste oil.

PUBLIC ACCESS TO GREAT PONDS AND THE SEASHORE

A brief summary of an important problem and potential solutions

I. The Problem of Public Access

In Massachusetts the public is vested with certain rights in the great ponds and coastal waters of the state. A great pond, a pond of more than ten acres in its natural state, is a public resource. Great ponds cannot be privately owned. The public has the right to fish or to engage in recreational activities on a great pond, subject to local and state regulation.

The public also has rights in the coastal waters of Massachusetts. Private property ends at the low-water mark, thus coastal waters below low-tide are a public resource. While the area between the high and low-water marks may be privately owned in Massachusetts, the public does have certain rights in this inter-tidal zone. The Colonial Ordinance of 1641-1647 reserves to the public the rights to fish, to fowl, and to navigate below the high water mark.

When stated as legal axioms, public rights in the great ponds and coastal waters of the state seem rather formidable. However, in fact,these public rights often prove to be illusory. As many residents of Massachusetts know, it is difficult to fish in a great pond or at the seashore if there is no way to get to either place. This lack of public access is most frequently due to the simple fact that the particular great pond or beach in question is

surrounded by private property.

The Colonial Ordinance of 1641-1647 partially recognized the access problem. The Ordinance states that in order to fish or fowl on a great pond a man "may pass and repass on foot through any man's (property)." However, the statute goes on to say that in crossing private property a man shall "trespass not upon any man's corn or meadow." This quaint compromise between private and public rights has been interpreted to mean that the public does have a limited right to cross private property in order to reach a great pond. However, the crossing must be on foot and the property to be crossed must be unenclosed and unimproved. Given the density of modern residential development around many great ponds, this limited right of public access tends to disappear altogether.

Public access to beaches is no less a problem than access to great ponds. The Colonial Ordinance of 1641-1647 was silent as to beach access. David A. Rice, Special Counsel to the Massachusetts Special Commission Relative to the Management, Operation, and Accessibility of Public Beaches (Beach Access Commission), has written that it never occurred to the draftsmen of the colonial ordinance that beach access would be a problem. While this was, no doubt, a sound assumption in the seventeenth century, lack of public

access to the shore has become a major problem in 20th century Massachusetts.

In 1974 the General Court considered a Public Right-of-Passage Act to alleviate the beach access problem. This bill was held to be unconstitutional in an advisory opinion by the Supreme Judicial Court, In Re Opinion of the Justices 313 N.E.2d 561.

Thus, at present both great pond and beach access remain serious problems. What follows is a brief analysis of existing legal authority for dealing with these problems.

II. The Public Access Board

21 M.G.L.A. 17A establishes a Public Access Board for Massachusetts. The Board is made up of directors of various agencies in the Executive Office of Environmental Affairs. The purpose of the Board is to designate "locations of public access to great ponds and other waters." The statute requires that the Board hold a public hearing in the town where the proposed access is to be established prior to designating the access. Once the access has been designated, the statute authorizes the Department of Natural Resources to purchase the land in question or to act by eminent domain. Once the access is established it is open to the public.

From a town's perspective the obvious advantage of having the Public Access Board establish an access is that the state pays for the property purchased, or taken by eminent domain. However, there are several reasons why the Public Access Board will not solve all the access problems on Martha's Vineyard in the immediate future.

First, according to the executive secretary of the Board, the Board will not act to establish an access to a great pond or shore unless there is a vote of the town and the selectmen which make clear that there exists a local consensus for such an action. Thus the Board is not likely to serve as a by-pass around the tangle of local politics in dealing with a particular access issue. The Board is not anxious to become involved in controversial access issues. In effect, this means that the Public Access Board will ignore "tough" access cases and will not provide leadership on the access issue.

A second reason the Board is not likely to be active on Martha's Vineyard is that, according to the executive secretary, the Board views the Island's access problems as affecting less Massachusett's residents than access problems on the mainland.

This is not to suggest that a town with an access problem should forget about the Board. What is suggested is that it is unlikely that the Board will act to establish a

a public access where a town would not.

III. Easements, Prescriptive Rights, and Dedication:

An easement is a property right in an individual or group of people to use the land of another for a particular purpose. See Cribbet, Principles of the Law of Property, Part 4. Thus, an individual who owns property which blocks off access to the shore can explicitly grant an easement to another person so that the person may cross the owner's property. While the existence of such easements may alleviate the public access problem in a particular area, easements alone are not likely to solve the problem. Most easements are established to benefit only certain individuals. The majority of the public is not likely to benefit from such private arrangements. However, in determining its need for access, a town should determine the number and extent of private easements across coastal and riparian property by title search as well as by discussion with property owners.

In limited circumstances easements can be established without the consent of the property owner. Where an individual or group of people make use of private property for a long period of time without the owner's permission, a court may recognize the establishment of a "prescriptive right" or easement. For example, if a family had crossed their neighbor's property without permission, on a regular basis, for a

period of twenty-five years, a court might recognize their right to continue doing so. The burden of proving that such a right exists is on the party claiming its existence. Again, it must be remembered, that the use of property must have been without the owner's permission (adverse use), on an uninterrupted basis, for a long time- twenty years or more.

Courts are very reluctant to recognize prescriptive rights in the public, thus prescriptive rights only vest in individuals. Given these stringent requirements to establish prescriptive rights and the limitation on public acquisition of such rights, it is readily apparent that the doctrine of prescription will not solve public access problems for most towns.

Public access rights on private property can be established where a court finds that a property owner has "dedicated" his property to a public use. The best example of a dedication is where the property owner explicitly states his intent to allow the public to make use of his land. Once such a dedication is made and the public accepts (by using the land), the dedication cannot be revoked without the public's consent.

There have been cases where a court has found that the property owner has dedicated his property by implication, rather than by an explicit act. See: Third Interim Report

of Beach Access Commission, p.58-61, Massachusetts House of Representatives Document No. 6611. Atty Gen. v. Onset Bay Grove Assn, 221 Mass 342 (1915). However, like the prescriptive rights doctrine, the doctrine of implied dedication is not likely to make a major contribution to public access needs. After all the court must still find an intent on the part of the property owner to have the public use his property before finding a dedication.

Beyond easements, prescriptive rights, and dedication, there is one other means short of eminent domain by which public access rights may be established. If certain coastal or riparian properties were at one time owned by a town or other public agency, the original deeds may retain certain property rights in the public. Thus a town should have all titles to coastal and riparian land examined to determine whether public access rights already exist.

IV. Acquisition of Public Access Rights by Purchase or Eminent Domain

As has previously been stated, easements, prescriptive rights, dedications, and even the Public Access Board are not likely to solve every town's public access problems. On occasion it will prove necessary for a town to directly

acquire public access rights to a great pond or coastal shore by purchasing land or taking land by eminent domain. Of course, town powers are defined by law and a preliminary question that must be answered is whether a town has the power to purchase or take by eminent domain land for a public access.

40 M.G.L.A. 14 is the basic statute concerning that purchase and taking of land by a town. Key sections of the statute read:

> ...the selectmen of a town may purchase or take by eminent domain under chapter seventy-nine any land, easement, or right therein within the city or town not already appropriated to public use for any municipal purpose for which the purchase or taking of land, easement, or right therein is not otherwise authorized or directed by statute; but no land, easement, or right therein shall be taken or purchased under this section unless the taking or purchase thereof has been previously authorized by the city council or by vote of the town, nor until an appropriation of money, to be raised by loan or otherwise, has been made by a two-thirds vote of the city council, or by a two-thirds vote of the town...

In essence, 40 M.G.L.A. 14 provides that a town may purchase or take property for any municipal purpose (not specifically covered by another statute), provided that the town vote to authorize the purchase or the taking, and that the town vote by two-thirds to authorize the appropriation to pay for the purchase or the taking.

Does 40 M.G.L.A 14 authorize a town to purchase or take property to establish a public access to a great pond or

coastal shore within its jurisdiction? Public access to public resources within a town would seem to be a "municipal purpose" for which property may be purchased or taken under the statute. Evidence to support this proposition is provided by 88 M.G.L.A. 14. This statute states that a coastal town shall provide at least one public landing on a tidal shore (this law will be examined in more detail). It is hard to believe that the General Court would authorize towns to lay out public landings if the General Court did not think it within a town's municipal powers to establish public access to such landings.

Several other statutes may be interpreted to authorize a town to take or purchase property to establish public access. However, before discussing these laws, mention should be made of Chapters 79 and 80A M.R.S.A. These two chapters establish alternative procedures for taking land by eminent domain. A town must proceed under one chapter or the other.

Chapter 79 and 80A are quite clear in outlining the procedures for municipal takings of private property. It is not my purpose here to cover these statutes in detail. The basic difference between the two statutes should be noted, however; and that difference concerns the way compensation to the property owner is determined. Part I,

Article X of the Massachusetts Constitution states that a property owner whose property is taken for a public purpose is entitled to reasonable compensation. Under Chapter 79 the selectmen determine at the time of the taking what constitutes reasonable compensation. The property owner has the right to appeal this determination in the courts. Under Chapter 80A the Superior Court is actually brought into the taking procedure and may appoint a commission to determine compensation. The property owner may also appeal directly to the court from this ruling.

As pointed out above, beyond 40 M.G.L.A. 14 which broadly empowers a town to purchase or take land for any municipal purpose not otherwise specified in the laws, there exist several other statutes which may be interpreted to authorize town land acquisitions to establish public access. 40 M.G.L.A. 8C enables any town to establish a town conservation commission "for the promotion and development of natural resources..." The statute states that "For the purposes of this section a city or town may, upon written request of the commission, take by eminent domain under Chapter 79, the fee or any lesser interest in any land or waters located in such city or town, provided such taking has first been approved by a two-thirds vote of the city council or a two-thirds vote of an annual or special town meeting, which land and waters shall thereupon be under the

jurisdiction and control of the commission." 40 M.G.L.A. 8C also requires a two-thirds town vote to appropriate funds for the property taken.

Whether a court would interpret 40 M.G.L.A. 8C as authorizing a town's taking property to establish public access to a great pond or a coastal shore is not clear. It seems plausible to argue that the creation of such an access does promote or develop natural resources, which is the purpose of the statute. On the other hand, it could be argued that what is being promoted by a public access is use of natural resources, rather than the development of the natural resources themselves.

Another statute to be considered is 82 M.G.L.A. 24 which states:

> If it is necessary to acquire land for the purpose of a town way or private way which is laid out, altered or relocated by the selectmen, road commissioners or other officers of a town...within thirty days after the termination of the town meeting at which the laying out, alteration or relocation of such town way or private way is accepted by the town, acquire such land by purchase or otherwise, or adopt an order for the taking of such land by eminent domain proceedings under chapter seventy-nine or institute proceedings for such taking under Chapter 80A.

Chapter 82 deals with the building of roads. Both the towns and the county commissioners are given eminent domain powers to establish roads. It could be argued that a public access to a great pond or coastal shore is a "town way" within the meaning of the statute. However, I have found no

cases on this point.

Finally, 88 M.G.L.A. 14 provides:

> In every city or town where the tide ebbs and flows there shall be provided on a tidal shore thereof at least one common landing place and where no landing place exists the city council or board of selectmen shall lay out at least one common landing place and may from time to time alter the same, but the layout or alteration of such landing place shall not extend below the low water mark. In any such city or town the city council or board of selectmen may, upon petition of ten or more voters of the city or town lay out additional common landing places...All the provisions of law relating to the laying out and alteration of town ways shall apply to the laying out or alteration of common landing places. Any person who is damaged in his property by such laying out or alteration may recover damages under chapter seventy-nine.

88 M.G.L.A. 14 explicitly requires that each town "where the tide ebbs and flows" shall have a public landing. The language is mandatory. Again, it is difficult to believe that the legislature would have authorized the taking of property to lay out public landings if the towns could not provide public access to such landings. Thus, each of the statutes previously cited could be interpreted to allow a town to take property to establish public access whether it be to a great pond or coastal shore. Clearly, 40 M.G.L.A. 14 provides such authority.

V. Denying Public Access to Non-Residents: The Question of Town Discrimination Against the Outsider

A town which has established a public beach, or a public access to a great pond, may attempt to prohibit or to discourage

non-residents from making use of these public resources. It is not uncommon in Massachusetts for a town to charge a non-resident a fee for use of public beach or public access to a great pond. In some cases towns have banned non-residents from use of great ponds and the seashore. Such forms of discrimination against non-residents raise serious constitutional and statutory questions.

The equal protection clause of the fourteenth amendment to the United States Constitution guarantees to each citizen equal protection of law. While the equal protection clause does not outlaw all discrimination, it does outlaw all discrimination which is "irrational" or not related to a "permissible public purpose." The equal protection clause applies to town government in the administration of their duties.

A town which charges non-residents a discriminatory fee for use of a public access or public beach can attempt to justify this discrimination on the grounds that the non-resident did not contribute to payment for the access of beach and town residents did (if this, in fact, is the case). Thus the town would argue that its discrimination against the non-resident is rational and reasonably related to a public purpose- the aquisition and maintenance of a public access or beach. Whether this argument will gain wide acceptance in the courts is still an open question. However, it must be noted that this argument will not justify every discrimination against a non-resident who

is seeking to use a public resource. First, if the discriminatory fee is not related to the actual services the town provides, but is used instead simply to discourage the non-resident from entering the town to use a public beach or access, the fee is probably unconstitutional. Exclusion of non-residents, per se, is not a constitutionally permissible public purpose. See Borough of Neptune City v. Borough of Avon-by-the-Sea, N.J. 294 A.2d 47 (1972); State v. Norton, Me. 335 A.2d 607 (1975).

A town that discriminates against the non-resident user of a public access or beach is faced by a second legal problem. No Massachusetts law explicitly authorizes such discrimination. See the Third Interim Report of the Beach Access Commission, pp. 76-80. 40 M.G.L.A. 5 Clause 25A states that a town may charge users of public bathing beaches and swimming pools to defray the costs of maintenance and operation, but discriminatory fees are not mentioned. Thus beyond the constitutional question of equal protection, town discrimination against non-residents may be attacked on the grounds that the General Court has not authorized such discrimination by statute.

Finally a town must be aware that it does not own a great pond, nor are the public rights to the seashore limited to town residents. Great ponds and the rights reserved in the public to use the seashore are common to all residents of Massachusetts. Town interference with these broad public rights may be subject to attack under a public trust theory or a prior public use

theory. In the Neptune City case, cited above, the New Jersey Supreme Court declared invalid Neptune City's discriminatory, non-resident beach fee on the grounds that the beach in question was traditionally a common resource, that the beach had at one time had been used by all citizens of the state without regard to town residence, and that the beach was affected with a public trust. Thus Neptune City could not legally discourage non-residents from use of the beach.

Constitutional limitations upon a town's power to discriminate against non-resident use of public resources do not mean that a town is without power to protect natural resources. Regulation and limitation of public activities which adversely affect beaches, great ponds, or other natural resources are within the state's police power. The state may delegate such authority to the towns. See, for example, Ch.808 of the Acts of 1975 (Mass. General Court). However, conservation of natural resources is not a prima facie justification for town discrimination against non-residents. This fact must be kept in mind when evaluating the validity of any town regulation or by-laws which discriminates in such a manner.

REGULATION OF SHELLFISHING

I. General Power of Towns to Control Shellfishing

Shellfishing has traditionally been a local concern, regulated by individual towns in the best interest of each town's inhabitants. Present state laws give great deference to local control over shellfishing.

The selectmen of a town may control, regulate or prohibit the taking of any or all kinds of shellfish within a town, 130 MGLA52. The exercise of this power is accomplished by the selectmen promulgating regulations controlling shellfishing. Such regulations may govern the: times, places, methods, purposes, uses, sizes and quantities of any shellfishing, 130 MGLA52.

The mechanics of enacting shellfish regulations are not complex. First, the town meeting must authorize the selectmen to control and regulate shellfishing within the town. If the town meeting desires, it may limit its authorization to specific forms of selectmen control. For example, the town meeting could expressly authorize the regulation of quahoging but not the regulation of sea clamming. Pursuant to town meeting authorization the selectmen can promulgate, amend or repeal any regulations. Regulations do not take affect until (1) they are published by the posting of copies in the selectmens' office, clerk's office and in three public places in town or they are published in a local newspaper and (2) a certified copy of the regulations is sent to the Director of Marine Fisheries for the state.

The selectmen may grant shellfishing permits, in accordance with their regulations, and may charge fees for the permits.

While the permit is issued in the name of the board of selectmen, the selectmen may vote so as to empower a single selectman or the town clerk to sign permits, 130 MGLA53.

Town shellfishing regulations are limited in effect to the waters within a town's boundaries. The seaward boundary of a town coincides with the marine boundary of the state, 42 MGLA1, which extends to the outer limits of the territorial sea of the United States, 1 MGLA3, or generally three miles. The boundary off Gay Head in the area of Rhode Island Sound is precisely delineated in 1 MGLA3. While most towns do not now regulate shellfishing beyond their immediate harbors and coastlines, it appears they do have such authority out to three miles. Hence a town could probably prohibit the wholesale dredging of sea clams for three miles off its shores.

The enforcement of town regulations is the duty of the shellfish constable (warden) and his or her deputies. The selectmen appoint wardens for a term of three years. Wardens should be "qualified by training and experience in the field of shellfishery management," 130 MGLA98. Shellfish constables have the authority to enforce state shellfishing laws and regulations.

Local control of shellfishing is not absolute, the state is also responsible for the control of shellfishing. The director of marine fisheries has the power to adopt, amend or repeal rules and regulations governing the following activities:

1) the manner of taking shellfish,

2) the legal size limits of shellfish to be taken,

3) the seasons and hours during which shellfish may be taken,

4) the numbers or quantities of shellfish which may be taken,

5) and the opening and closing of areas to the taking of all types of shellfish subject to the consent of the selectmen of the affected town. (Note: failure by the selectmen to act promptly on a DMF request to open or close an area results in their consent being presumed). 130 MGLA17A.

Clearly, these powers of the director could conflict with the powers of selectmen to regulate shellfishing under 130 MGLA52. In the case of a conflict, it seems that the state's regulations would supercede the local Acts since local regulations cannot be "contrary to law," 130 MGLA52, and since the state's grant of authority to the towns to regulate shellfishing has been held not to usurp the state's power to enact further laws governing shellfishing, Commonwealth v. Hoes, 169NE806, 270Mass.69(1930). The de facto policy of the Division of Marine Fisheries is apparently not to interfere with reasonable local shellfishing regulations.

The state has enacted laws governing more specific aspects of shellfishing. It is unlawful to possess quahogs or soft-shelled clams less than two inches in longest diameter or oysters less than three inches in longest diameter, to the extent of more than 5% of any batch, except that the taking of such shellfish is not unlawful if done under a permit for the purposes of replanting,

130 MGLA69.

The taking of seed scallops, i.e. scallops without a well-defined raised annual growth line is prohibited, 130 MGLA70 applies only to bay or Cape scallops, not to sea scallops. Scallop season is closed between April first and October first, except by special permit from the Division of Marine Fisheries, 30 MGLA71. No person shall take more than ten bushels of scallops in the shell in one day, except by special permit, 130 MGLA72. Selectmen of a town can petition the Director of Marine Fisheries to temporarily modify these rules for their town if circumstances make such a modification "expedient," 130 MGLA73.

All commercial shellfishermen must have a permit from the Division of Marine Fisheries as individuals or as a member of a licensed commercial shellfishing boat, 130 MGLA80. This permit is in addition to any local permit required of commercial shellfishermen.

The Departments of Public Health and Environmental Quality Engineering have broad powers to investigate shellfishing areas to determine whether the areas are contaminated, 130 MGLA74, 74A as amended by chapter 706 of the Acts of 1975 sections 215, 216. A determination by either department that an area is contaminated effectively terminates local control of such an area while it is contaminated and places the control of shellfishing in the area in the hands of state authorities, 130 MGLA74A.

Each town which exercises control over its shellfishery must

set aside an area or areas in which the commercial taking of shellfish is prohibited, 130 MGLA52. In these areas, shellfish may be taken for family use by any inhabitant of Massachusetts who holds a shellfish license for the town in question, 130 MGLA52. In any one week not more than one bushel of all kinds of shellfish may be taken on a family permit and the selectmen may, with the approval of the Director of Marine Fisheries, reduce this one bushel maximum catch, 130 MGLA52.

To summarize then, while the towns have broad powers to regulate shellfishing within their boundaries, state laws impose several rules applicable to all towns and all shellfisheries.

II. Powers of Town to Improve its Shellfishery

Town meetings may appropriate money for the cultivation, propagation and protection of shellfish, 130 MGLA54. Town funds may be matched by the state through its shellfish self-help program established under 130 MGLA20A. A caveat is in order in regard to self-help. Self-help funding is contingent on the appropriation of self-help funds from the Tourism and Industrial Promotion Fund.

III. Shellfish Grants

Selectmen may grant an individual an exclusive license to plant, grow and take shellfish from a specific portion of a town's

flats or coastal waters, provided the Director of Marine Fisheries certifies the grant will not cause a substantial adverse effect on the shellfish resources of the town and provided the granted area was not closed during the two years previous to the grant for municipal cultivation for conservation reasons, 130 MGLA57. Such grants cannot exceed ten years' duration (nor be renewed beyond a total of fifteen years), cannot impair private property rights and cannot materially obstruct navigable waters. A public hearing, notice of which must be posted in three public places and published in the local newspaper at least 10 days in advance, must be held prior to the licensing or renewing of private grants, 130 MGLA60. Towns may charge an annual fee for such grants of between $5 and $25 per acre or part thereof, 130 MGLA64. If the market value of the shellfish on the tract, as annually reported by the grantee, falls below $100 during the first two years of the grant or below $250 during any three consecutive years thereafter, the grantee forfeits the grant to the town. A more thorough understanding of the intricacies of private grants may be obtained by reading 130 MGLA57 to 58.

Selectmen may grant a person an aquaculture license to grow shellfish by means of racks, rafts or floats in water below the line of extreme low water, 130 MGLA68A. Any person agrieved by a decision of the selectmen concerning an aquaculture license request may appeal the determination to the Director of Marine Fisheries for a superceding decision on the matter. Such a license

grants the exclusive use of the area therein described to the grantee for aquaculture purposes. Compatible uses of the area may be reserved for the public.

Finally, it should be noted that a private landowner can create a salt pond on his or her property for the natural or artificial cultivation of shellfish. While such a landowner retains the exclusive right to harvest the resulting shellfish he or she must observe the local and state rules concerning the size, age, season or purpose for which shellfish may be taken, 130 MGLA28.

IV. Alteration of Great Ponds

91 MGLA13 states that any excavation or filling of land "in or over the waters of any great pond below natural high water mark, or at any outlet thereof" must be licensed by the state. Currently the licensing agency is the License and Permit Division (Waterways) in the Department of Environmental Quality Engineering.

Thus a town which seeks to open a great pond to the sea (or alter an existing outlet by excavation or dredging) must be licensed by the Waterways Division. If the excavation alters the water level of the pond, the governor and his council must also approve. The Licensing and Permit Division states, however, that this only amounts to a pro forma requirement. Of course 91 MGLA13 is not the only relevant statute. Anyone who alters a great pond must also comply with the provisions of the wetland laws. 131 MGLA40 provides for local review of alterations of

wetlands. 130 MGLA105 and 131 MGLA40A authorize the state to provide regulations for coastal and inland wetlands respectively.

Beyond the local control over wetlands granted by 131 MGLA40, the case of Golden v. Falmouth, 265 N.E.2d 573 (1970) held that a town may use its zoning power to protect its natural resources. Therefore, any alteration of a great pond may be subject to local zoning ordinances.

Under federal law, 33 USC 403, the Army Corps of Engineers is given licensing authority over dredging and filling operations in waters of the United States. Waters of the United States include navigable waters of the United States and waters which "affect" navigable waters. "Navigable waters" and "waters of the United States" are technical terms whose meanings are not always clear. 33 USC 403 probably means that dredging of great ponds is subject to Army Corps of Engineers' Authority. Thus the Corps should be consulted prior to opening a great pond.

The Martha's Vineyard Commission has asked us two specific questions concerning the alteration of Great Ponds. First, the question has been posed as to what legal procedures must be followed to build a windmill on a great pond. Second, the Commission has asked whether permits would be needed if a town altered the salinity of a great pond, assuming this was done without dredging.

As to the windmill: 91 MGLA 14 authorizes the state to license any "structure" constructed in or over a great pond. So a windmill must be licensed by the License and Permit Division (Waterways) of

the Department of Environmental Quality Engineering. The wetlands and zoning procedures outlined above would also be applicable. Finally the Army Corps of Engineers' authority under 33 USC 403 extends to structures. So a Corps' license would also be required. However, as previously suggested, the Corps' procedures and authority are not entirely clear at the present time. In any case, the Corps should be contacted prior to building a windmill in a great pond.

As to changing the salinity of a great pond: Great Ponds are not owned by the towns. They are the property of the Commonwealth. 91 MGLA 13-14 put licensing authority in the Commonwealth over excavation of great ponds and the placing of structures in great ponds. Even if a town could alter the salinity of a great pond without placing a structure in the pond or excavating the pond, the safest course would be to obtain a permit from the License and Permit Division (Waterways) of the Department of Environmental Quality Engineering. The License and Permit Division has stated to us that it believes that the alteration of a great pond's salinity by a town requires a permit. Wetland laws would again be applicable. Zoning laws might be applicable depending on what the specific ordinance says.

One problem that arises when a town alters a great pond, particularly where the alteration involves a change in water level, is to determine the rights of the riparian owners. In Massachusetts riparian owners own property to the low water mark.

The General Court was obviously concerned about the effects of public management of great ponds upon riparian owners. For

example, 91 MGLA14 states that to fill or excavate in or over the waters of any great pond below natural high watermark requires a license from the state. However, the statute goes on to say, "but such license shall not validate acts beyond the line of riparian ownership or affecting the level of the water in such a pond, unless approved by the governor and his council." 91 MGLA14, which requires state licensing of structures has a similar provision concerning structures beyond the line of riparian ownership.

These statutes suggest that the legislature was concerned about riparian rights, but do not make clear what those rights are. One basic question is whether a riparian owner is entitled to a legal remedy if a town raises or lowers the level of a great pond (with the state's permission) thus affecting the riparian owner's property.

In Fay v. Salem Aqueduct Co. 111 Mass 27 (1872) the Supreme Judicial Court of Massachusetts held that a riparian owner was not entitled to compensation even though his property was made "less comfortable" as a result of the defendent lowering the water level in the great pond. The defendent's action had been authorized by the state.

In Potter v. Howe, 141 Mass 357 a riparian owner was allowed to enjoin another riparian owner from changing the water level of a great pond. In this case, the defendent's actions were not authorized by the state. A more recent case, Weinstein v. Lake Pearl Park Inc., 347 Mass 91 (1964) stands for the same proposition.

In Weinstein a riparian owner was entitled to seek a judicial remedy against another riparian owner who sought to fill a portion of a great pond thus flooding the first owner. As in the Potter case the defendent was acting without proper permits.

In sum, the Fay decision suggests that should a town lower the level of a great pond, having obtained proper permits, the riparian owners would not be entitled to compensation. I have found no case which directly answers the question whether the riparian owner would be entitled to compensation if a town legally raised the level of a pond thus flooding a portion of the riparian owner's property.

At this point mention should be made of a special act of the General Court which affects riparian owners on great ponds on Martha's Vineyard. Chapter 203 of the Acts of 1904 states that the "proprietors of low lands and meadows around any great pond in the county of Dukes County, excepting the Edgartown Great Pond, or a majority of such proprietors in interest" may organize, hold meetings and elect three commissioners. These commissioners are then empowered by Chapter 203 to do "or cause to be done whatever may be necessary to properly drain the low lands and meadows around such great pond."

The purpose of this special act was to allow the riparian owners around certain great ponds to cope with drainage problems on their property. The Act does not alter the public control of great ponds. One question which has not been judicially resolved is whether a riparian owners group acting under the provisions

of the Act are exempted from the permit procedures under the Wetlands Laws. Chapter 131 section 40 states that the provisions of the wetland law shall "not apply ... to any project authorized by special act prior to January first, nineteen hundred and seventy-three." Thus riparian owners could argue that any dredging they do under the Special Act of 1904 is a "project" and thus outside of the wetlands act. However, the word "project" could be read as exempting only a specific, single event, authorized by special act, such as the building of a bridge. Such an interpretation of the wetlands law could mean that riparian owners could not avoid the wetlands law by citing Chapter 203 of the Acts of 1904.

V. Access of Commercial Shellfishermen to Great Ponds

The authority of a town to regulate shellfishing within its jurisdiction is substantial. 130 MGLA52 states that a town can "control, regulate, or prohibit" the taking of shellfish. In this context the issue of town discrimination against non-resident, commercial shellfishermen becomes apparent. There have been examples in Massachusetts of towns discriminating against these fishermen by (1) charging them higher license fees, (2) requiring a year waiting period for a license (while resident licenses are processed immediately), and (3) simply banning non-residents from commercial shellfishing.

130 MGLA52 states that a town must make family permits available to all residents of Massachusetts, but allows a town to discriminate in the pricing of license fees. The statute is silent as

to commercial permits.

In Commonwealth v. Hilton, 54 N.E. 362 (1899) the Supreme Judicial Court stated that a town could constitutionally ban non-residents from its shellfishery. In 1954 the Attorney General of Massachusetts supported the constitutionality of a local regulation which discriminated against non-resident shellfishermen by imposing a longer waiting period for a license for non-residents than for residents. (Op.Atty. Gen.February 19, 1954, p.48). Thus there exists authority to support the contention that towns in Massachusetts can discriminate against non-residents in the administration of their shellfisheries.

Recent developments in the law of equal protection suggest that the authority of older cases, such as the Hilton decision, is being eroded, or, at least, limited. In 1975, in State v. Norton, 335 A.2d 607, the Supreme Judicial Court of Maine upheld the constitutionality of a state law which allowed towns to discriminate against non-residents in the administration of their shellfisheries. The Court stated that the legislature's purpose in giving such power to the towns was to conserve the shellfish resource. However, the Court then declared unconstitutional a town regulation (enacted pursuant to the state law) which banned non-residents. The Justices held that there was no evidence to suggest that there was a proper conservation purpose behind the local ban on non-resident shellfishermen; that in fact the purpose of the local regulation was to ban non-residents per se. The Court concluded that while conservation was a proper public purpose, and

that the legislature might recognize local maritime interests in drafting a conservation scheme (and thus allow discrimination between towns), discrimination standing alone is not a constitutionally permissible purpose

It must be pointed out that the Norton case is not binding in Massachusetts as it is a Maine decision. Further, an official in the Marine Fisheries Division of the Commonwealth has stated to us that he does not know of an instance where the state has sought to counter a local shellfish regulation which discriminated against non-residents.

PERMITS FOR STRUCTURES AND ALTERATIONS IN TIDAL WATERS

Before an individual begins construction of a structure in tidal waters below high water to the three mile limit, it is necessary that she obtain permits from the Massachusetts Division of Waterways, the U.S. Army Engineers, the Conservation Commission of the town in which the structure is to be built. It may also be necessary to obtain a building permit.

WETLANDS PERMIT

There are two basic procedures for wetlands protection in the state of Massachusetts: general regulation of activity in wetlands areas under MGLA Ch.130 s. 105 and Ch.131 s.40A, and individual permitting under MGLA Ch.131 s. 40.

The Commissioner of Conservation in the Department of Natural Resources has authority to adopt orders regulating the dredging, filling, polluting, or other alteration of wetlands. Ch.130 s. 105 gives the commissioner authority to regulate activity in "coastal wetlands" (any bank, marsh swamp, meadow, flat or other low land subject to tidal action or coastal storm flowage and any contiguous land deemed necessary to affect regulations). Ch. 131 s. 40A gives the commissioner authority to regulate activity in "inland wetlands" (wet meadows; marshes; swamps, bogs; areas where groundwater, flowing or standing surface water provide a significant part of the supporting substrate for plants at

least five months per year; and banks of inland waters). Before adopting any regulation, the commissioner must hold a public hearing in the municipality in which the restricted land lies. A copy of the existing regulations for wetlands on Martha's Vineyard is on file at the Duke's County Registry of Deeds in Edgartown. Construction of a structure in violation of these regulations is punishable by a fine of ten to fifty dollars or up to a month imprisonment or both.

Under Ch. 131 s. 40 before a person may remove, fill, dredge, or alter any bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean,she must file by certified mail a written notice of intention with the town Conservation Commission, the Department of Natural Resources and the Department of Public Works. The notice must contain complete plans for the proposed activity. There is a twenty-five dollar filing fee payable to the town Conservation Commission. Before any notice is sent the applicant must first obtain any local permits, variances or approvals, such as a town by-law wetlands permit or a building permit. Within 21 days the town Conservation Commission holds a public hearing on the proposed activity. Notice of the public hearing is published in the local paper at the applicant's expense. Within 21 days after the public hearing the Conservation Commission must notify the applicant of any conditions to be imposed on the activity (called an order if conditions are imposed

and a notification if none are imposed). A copy of the order of notification is sent to the applicant, to the Department of Natural Resources and to the Department of Public Works.

If an individual is uncertain whether the wetlands permit requirement applies to any land, she may make a written request to the Conservation Commission for a determination of applicability. The Conservation Commission must then notify the owner of the land of their determination of applicability. The Conservation Commission must then notify the owner of the land of their determination within ten days.

If the Conservation Commission fails to hold a hearing, issue an order or make a determination, within the prescribed time or when they issue an order then the applicant, any person aggrieved by the action, any owner of abutting land, any ten residents of the town, or the Commissioner of Natural Resources may request the Department of Natural Resources to make a determination. Such a request must be made by certified mail within ten days of the action or lack of action. The Department of Natural Resources then has seventy days in which to make the determination requested and issue an order. The DNR order supersedes any order of the town Conservation Commission.

The final order, determination, or notification must be recorded with the registry of deeds before any work may be undertaken. Violations of the wetlands permit act are punishable by fines up to $1,000 or imprisonment for up to 6 months

or both. Each day of violation constitutes a separate offense.

Both the Conservation Commission decision and the DNR decision to impose conditions are based on the effect of the proposed activity on public or private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish and protection of fisheries.

WATERWAYS PERMIT

Ch. 91 s. 14 requires that individuals obtain a Waterways permit before constructing a structure in tidewaters or Great Ponds. The procedure for obtaining a Waterways permit is relatively simple. The License and Permit Division of the Department of Environmental Quality Engineering (formerly the Department of Waterways) will send an applicant a copy of the required petition and the specifications necessary for submitting plans. A complete application consists of the completed petition, a copy of the plans for the structure which must be certified by a Registered Professional Engineer or a Registered Land Surveyor, and an environmental report. The environmental report must relate the impact and steps to minimize any adverse impact on air pollution, water pollution, sewage, noise pollution, and the effects on any surface or subsurface waters, flora, seashore, dunes, marine resources, open spaces, wetlands, park or historic sites. Even work with

an insignificant impact must contain an environmental report.

On receipt of the completed application, the DEE sets a date for a public hearing on the application, notifies the applicant, the owners of abutting property and local authorities. The applicant must advertise the hearing in a local newspaper. A hearing is held. After the hearing the applicant is advised of the decision on her application. The DEQE officially predicts that the entire process will take between three and six months from completed application to permit decision. Unofficially, however, even the six months figure is considered to be unrealistically optimistic. All licenses must be recorded with the registry of deeds within one year of issuance to be effective and all authorized work must be completed within five years of issuance of the license.

ARMY CORPS OF ENGINEERS PERMIT

33 USC 403 requires individuals to obtain permission of the Army Corps of Engineers (COE) before they build a structure in navigable waters of the United States or dredges or fills in waters of the United States. "Navigable waters of the United States"includes waters which are in fact navigable and all waters which ebb and flow with the

tide. Waters of the United States includes all "navigable waters of the U.S." and waters which affect "navigable waters". The technical distinctions are more fully explained in 33 CFR Part 208. The regulations governing COE permits is in a state of flux at the moment so the following commentary is based on Proposed Regulations which are subject to change. The reader is cautioned to recheck the regulations before relying on the specific details of procedure. The general outline, however, will probably remain unchanged in any final regulations issued.

Applications for permits (ENG Form 4345) and a booklet entitled "Applications for Department of Army Permits for Activities in Waterways" can be obtained from the Chief, Permits Branch, New England Division, Corps of Engineers, 424 Trapelo Road, Waltham, Mass.02154, (617)894-2400 Ext.332. The applicant must include in her application a description of the proposed activity including drawings, sketches, the location, purpose and intended use of the activity, a schedule for the activity, names and addresses of adjoining property owners, location and dimensions of adjacent structures and a list of the approvals required by other federal, state or local agencies. If the activity involves dredging, the application must include a description of the type, composition and quantity of the material to be dredged,

the method of dredging and plans for disposal of the dredged spoils. If spoil is to be discharged into navigable waters or ocean waters (waters outside the U.S. territorial limits), the application must include a description of the composition and quantity of the spoil, the method and transportation and the location of the disposal site. Certification under 401 of the Federal Water Pollution Control Act (FWPCA) is necessary if the spoil is discharged into navigable waters. If the construction of fill, pile or float supported platforms is to be permitted then the application must contain a description of any structures to be erected on the fill or platform. If a structure will be constructed whose normal use may result in discharge of pollutants into navigable or ocean waters then the application must include an application for a FWPCA 401 permit. If the activity is within a marine sanctuary then the application must include certification by the Secretary of Commerce. The application must also include such additional information that the COE requires to make a decision on the application. The amount of information contained in a COE permit application is usually greater than contained in either a wetlands or waterways permit application.

The COE is required to prepare an Environmental Impact Statement on major federal actions which significantly affect the quality of the human environment. If the District Engineer determines that an EIS is necessary the applicant may be asked to supplement her original application to supply all the information necessary to make a thorough analysis of the environmental impact of the proposed activity. The regulations specifically provide that the information contained in the impact statement may go beyond the scope of the specific activity to be permitted to consider the entire plan of activities contemplated, including activities over which the COE has no permit authority.

On receipt of the application for a permit, the COE assigns it a number and acknowledges receipt of the application. When all the required information is received, the District Engineers issue a public notice to all interested parties. The public notice contains a summary of the information in the application, a preliminary determination of the need for an environmental impact statement, a paragraph describing the factors on which the decision to permit will be made and a reasonable period of time for interested parties to comment (usually 30 days). All comments received in response to the public notice are considered by the District

Engineer in deciding whether to grant the permit and are included in the official file on the application.

If the proposed activity includes the discharge of dredge or fill material into navigable waters or the ocean, persons or states having an interest which may be affected by the issuance of the permit may request a public hearing which must be scheduled.

After all the above procedures have been completed the District Engineer makes the decision to grant or deny the permit. The proposed regulations 33 CFR 209.120(j)(ix)(a) provide that in the majority of cases the following criteria will be used to determine whether a permit should be granted:

> The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered: among those are conservation, economics, aesthetic, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use classification, navigation, recreation, water supply, water quality and, in general, the needs and welfare of the people.

The proposed regulations provide some useful rules of thumb about how this plethora of concerns will be evaluated. The following statements are all taken from the July 25, 1975 Draft Regulations 33 CFR 209.120:

(g)(1)(i)(a) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration.

(g)(1)(i)(b) A landowner's general right of access to navigable waters is subject to the similar rights of access held by nearby landowners and to the general public's right of navigation on the water surface.

(g)(2)(ii) A permit for the dredging of a channel, slip or other such project for navigation will also authorize the periodic maintenance dredging of the project...subject to revalidation at regular intervals.

(g)(3) Effect on wetlands...As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. (ii) [Provides for identification of wetlands which perform important functions]. (iii)Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is a part of a complete and interrelated wetland area.(v)... State regulatory laws or programs for classification and protection of wetlands will be given great weight.

(g)(4) [Great weight will be given to the views of the U.S. Fish and Wildlife Service and the head of the agency responsible for fish and wildlife in the state.]

(g)(6) Certification of compliance with...Section 401 of the FWPA will be considered conclusive with respect to water quality considerations unless.. "the regional administrator EPA advises of other water quality aspects to be considered.

(g)(7) State local regional land use classifications will be considered in assessing historic scenic and recreational values.

(g)(7) ...in the absence of overriding public interest, favorable consideration will be generally [sic] to applications from riparian proprietors for permits for piers, boat docks, moorings, platforms and similar structures for small boats.

(g)(18) Applications for DOA authorizations for activities in the coastal zones of those States having a coastal zone management program approved by the Secretary of the Commerce will be evaluated with respect to compliance with that program.

Issuance of an Army Corps of Engineers permit is conditioned on the permittee having obtained all of the required federal, local and state permits. For example, a structure to be constructed in a marine sanctuary in a state with an accepted CZM plan which would result in discharge of pollutants would require, in addition to all the above permits, certification under s404 of the FWPCA, certification by the Secretary of Commerce, and certification by the state CZM authority.