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BUILDING PUBLIC/PRIVATE COOPERATION IN THE COASTAL ZONE

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RELATED PUBLICATIONS

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SECTION I. INTRODUCTION AND ACKNOWLEDGEMENTS

Industry involvement in the development of a coastal zone management plan in Massachusetts has not been extensive, although a long list of industries depend on the Massachusetts coastal zone. A coastal zone management plan might have substantial effects on current industry activity there. Since industry involvement has been limited, awareness of industry needs in the coastal zone is low, as well as industry's awareness of activities in the Coastal Zone Office.

This study assumes that some kind of private industry/public sector cooperation in the planning process is necessary for an effective management system to evolve. Also, the identification of the points of conflict and agreement between the two sectors is important. Such cooperation and understanding will allow the coastal zone planners and the ultimate managers to understand the interests, goals, and behavior patterns of private industry and will allow for the development of a plan not only responsive to public environmental concerns, but sensitive to industry's needs. The assumption should not be particularly controversial because public officials with responsibility to respond to public interests need to know them to be effective and accountable.

The research is designed to 1) test the validity of this assumption, and 2) inquire into the interests,characteristics, goals, needs, and behavior patterns of private businesses as they interact with state agencies on issues related to the environment as well as to the coastal zone. In addition, the patterns for communication between public agencies and private businesses are identified with the accompanying recommendations for building them into a coastal zone program. This inquiry should lead to an understanding of industry's seeming apathy in coastal zone management planning and to an understanding of

the advantages and disadvantages (from both an industry and government perspective) of the various kinds of industry/government interaction (for example, information exchange or joint policy development). This research focuses on outcomes of private industry/public interaction, as well as the resources brought to bear in these interactions. The relevant literature generally focuses on the resources brought to bear on this process by private businesses, but can not through this form of analysis measure the strength and effectiveness of these private groups. Rather, a look at outcomes, as well, provides a base for measurement in this study.[1]

The purpose of the research is not to determine the value of specific kinds of private industry/public sector interactions from the point of view of either private industry or the public sector, but implicit throughout the study are indications of the value of the various types of interaction. State agencies must decide for themselves the value and desirability of any particular interaction. The cases, however, do identify the nature and outcome of various interactions between industry groups and public agencies.

The report consists of four sections:

1. An examination of the Coastal Zone Management Act of 1972, of the activities of the Massachusetts Office of Coastal Zone Management, and the constraints of the federal legislation upon those activities.

2. Case studies (described in the methodology section).

3. An analysis and clarification of the assumptions of the study.

4. General conclusions about private industry/public interaction and specific application of those conclusions to the activities of the Massachusetts Office of Coastal Zone Management.

METHODOLOGY

Since little has been written or documented about the effectiveness or even the existence of private industry/state agency relationships in Massachusetts, the research is based on a detailed case study approach.

However, the existing literature*suggests the general importance of industry as a shaper of public policy on a local and state level.[2,3,4,5,6,7] Therefore, it was surprising to find so little expertise available within the Commonwealth on this topic.

Two other studies, unrelated to substantive issues of this research, may nonetheless have valuable implications. James Q. Wilson concluded that the organization of trade associations is too loose and the membership too diverse to allow the associations to have much effect as shapers of public policy.[8] A potential implication of this is that lobbying groups in Massachusetts with similar organization and membership may have similar effects on public policy development.

Although private industry activities on the national level may not be similar to private sector activities on the state level, Bauer, Pool, and Dexter's study of private sector involvement in tariff policy may also have useful implications. They hypothesized that these conditions for industry would determine the level of industry interest and participation in the development of public policy.[9]

1. Prospects of loss (a corollary of this is that, the more competitive an industry is, the higher the level of interest and participation).

2. Specificity of issue and private industry interest. (When the stakes are clear, the level of participation is higher. Vague issues do not evoke participation.)

3. Adequacy of communications (with the public sector and within industry.

4. Size of firm (availability of personnel and funding for participation).

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* *(Dahl, Hunter, Haefle, Long, Nadel, McConnell)*

5. Popularity of specific issues among the general public.

6. Desire for low public visibility on the part of industry.

These conditions may be important determinants of the patterns and outcomes of private industry/public sector relationships in Massachusetts.

The specific cases chosen for this research are the Wetlands Protection Act, the Massachusetts Environmental Policy Act, and the Energy Facilities Siting Act. All three laws concern environmental resource management and would constitute a major portion of any coastal zone management plan based on existing legislation. The development and implementation of these laws has involved a wide variety of industry groups, all of whom have substantial interest in the Massachusetts coastal zone. Generally, developers and their associations have been involved with the Wetlands Protection Act, the utility and petroleum industries with the Energy Facilities Siting Act, and most of the business community with the Massachusetts Environmental Policy Act. The political popularity of specific issues varied during the passage of these laws, thus allowing an examination of the effect of popular issues (i.e., development, environmental protection) on private industry/public behavior. The Wetlands Protection Act and the Massachusetts Environmental Policy Act were passed during an extended period of environmental concern, although they are still being amended. The Energy Facilities Siting Act, on the other hand,was passed and amended at the beginning of a period of increasing economic concern. Different kinds of public/private industry interaction characterize the development of the three laws, thus allowing comparison of the different effects associated with each. The issue of wetlands protection was visible and public. Environmental and industry groups debated the issues, but they did not always compromise. Although the Massachusetts Environmental Policy Act was also a public issue, the Legislature passed the Act with very few of the business interests understanding the implications of the law. The

Legislature passed the Energy Facilities Siting Act after a legislative commission consisting of industry and environmental interests worked out compromises acceptable to both perspectives.

The cases examine the nature and outcomes of private/public sector* behavior in the legislative and executive branches of government. They do not provide an extensive, in depth legal analysis of the laws themselves or of the judicial process. Rather, they describe the evolution, interpretation, and implementation of these laws as they relate to public/private interaction. At identified points of private/public sector interaction, the relationship between the outcomes of the interaction and the characteristics, the identified needs, and resources of both sectors are examined, keeping in mind the possibility of identifying distinct patterns of industry behavior.

In determining the reasons, needs, resources, and outcomes of private industry involvement with public agencies, the importance of these variables is examined:

Size of the industry

Issue popularity and visibility

Specificity of industry interest and of issue(s)

Prospects of industry loss by nonparticipation, e.g. threat to competitive position

Technical expertise and sophistication of strategies

Adequacy and channels of communication (control over information, informal contacts)

Industry desire for low public visibility

Inter-industry coordination

Degree of regulation

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*The term private sector, when used in this report refers to business and industry groups. It does not include public interest or environmental groups, although they too are often considered part of the private sector.

In assessing the role of government and its effect on public/private interaction, the importance of these variables is examined:

Adequacy of agency funding, staffing, expertise

Adequacy of information used in decision-making

Legal authority of agency

Extent, if any, of conflict of interest

Nature of decision-making, e.g., ad hoc, cumulative review, based on policy, etc.

Coordination/competition with other agencies

Since little has been written about this particular private/public interactive process, confidential interviews with the participants, both from the public and private sectors, constitute the sources of the case study information. The more theoretical information framing the case studies, however, comes from articles published in professional journals. More reliable information was obtained by conducting confidential interviews. Therefore, while information which came from the interviews is footnoted, the interviews are coded to protect the sources of information who were cooperative and kind enough to spend extensive amounts of time with the interviewers. Odd numbers indicate private sector participants, and even numbers indicate public sector participants. To further respect the privacy of those interviewed, on and off the record interviews are listed together in one bibliography. It should be noted that the list of those interviewed represents only those persons whose information is used in this report. However, many others were interviewed but don't appear because their information contribution was either redundant or not pertinent to the final draft of the study.

AN ADDITIONAL NOTE

The original proposal for this study included an intent to identify communication channels between business and government, as well as an intent to identify the various interests in the coastal zone of the numerous businesses dependent on the coast.

As the study progressed, it became apparent that the specific needs of specific business interests were not the critical pieces of information necessary to carry out public policy, but rather a more general understanding of industry's needs and requirements from the public sector. Also the list of specific needs would be so long as to be useless for any decision-maker, because it is the businessman, not the public servant who must look after specific needs. It is the public servant who has the responsibility to make sure that the larger needs - those that keep business effective are considered in the balance. Therefore the basic needs of the private business interests are discussed and the processes and channels through which they fulfill these needs are described and analyzed for possible application to the coastal zone management program.

The original proposal also suggested that the researchers would look at several businesses as a basis for information. As the study progressed, it became apparent that the needs and activities of businesses are not generalizable and that such an approach would prove useless. Therefore, the authors of this study used case studies of environmental legislation which directly affected private businesses, and, instead extracted information about the "whys' and how's" of the interaction between the private business sector and the state government in this way.

Finally, the original proposal stated an intent to study regional cooperation as a complement to the study of public/private business interactions

at the state level.

The conclusions and recommendations found in this study should be applicable to other states as well as Massachusetts, and could provide a basis for interstate public and private business cooperation. However, this study has not been carried far enough to investigate or identify how this can be accomplished, because time did not allow. The study of public/private business interaction at the state level was carried out in a far more comprehensive manner than had originally been intended. The reasons have been made apparent by the preceding explanations. To clarify them even further, the use of case studies was a far more effective information gathering method and much more valid than any other, because all parties involved in the cases contributed to the data pool and provided a balanced view. Second, questioning persons about a specific issue evoked a more specific answer than asking general questions about needs. Therefore, the information is far more detailed and more useful. However, gathering such detailed information from so many participants was a time consuming process which did not allow a detailed investigation of those public and private sector interest which shape public policy on regional issues. Also, the necessity for a state coastal zone policy and the apparent absence of a current basis for coopertaion among New England states makes a detailed study of state policy essential. Regional policies are a outgrowth of state policies. Thus, the decision was made by the principal investigator to sacrifice the breadth of the study for depth. This decision by no means was made to deemphasize the importance of regional cooperation, because, in fact, it is essential to a national coastal zone program. However, the element of time and extensive work necessary to carry out the state study has precluded the regional study for now.

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6. M. Nadel, "The Hidden Dimension of Public Policy: Private Government and the Policy Making Process," Journal of Politics, Vol. 37 (February 1975).

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SECTION II. COASTAL ZONE MANAGEMENT ACT AND STATE PROGRAM

A. FEDERAL LEGISLATION

The Massachusetts Coastal Zone Management Office exists under the Coastal Zone Management Act of 1972 (S. 3507, Public Law 92583; included in this report as Appendix A). The Act was passed "... to encourage the several coastal states to develop comprehensive coastal resource management programs which provide for wise and effective management of the nation's valuable coastal areas."[1] State-based coordinated coastal zone planning was deemed necessary to "...preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and suceedings generations."[2] The breadth of the legislative mandate and some of the inherent value conflicts (i.e., protection v. development) have made it difficult to carry out some of the tasks as originally mandated.

The Federal Office of Coastal Zone Management was created within the United States Department of Commerce to (1) promulgate guidelines for the states in developing management programs, (2) channel Congressional appropriations to the states, (3) assist the states in acquiring the understanding necessary for any rational management process, and (4) interpret the "national interest" in the coastal zone when necessary.[3]

Under the Act, coastal states are free to apply for two-thirds Federal funding (the remaining one-third is provided by the state) for up to three consecutive years to develop comprehensive plans for state coastal zone management. When a state believes it has developed the resources and acquired the control necessary (i.e., institutional, legislative) for implementing a coherent management program, it can apply for continued funding (administration funds) at the same federal/state ratio through the national office.

The Act "neither compels a coastal state to do anything nor invests it with powers commensurate with the magnitude and complexity of the envisioned task."[4] It rather provides a catalyst for interested coastal states to assess the effectiveness of their efforts in coastal resource management and to determine the shape of future efforts. For this reason, the Act has been labeled a "process-oriented" act rather than a "substance-oriented" act (i.e., the substance of the management program is left to the particular state to clarify).[5]

However, Section 305 and 306 of the Act do detail requirements that each state must meet as it goes through the process of formulating a coastal zone plan. Section 305 delineates the tasks that shall encompass management program development (the initial three-year phase for each state). Programs developed must include:

> Boundaries of the coastal zone subject to management program
> Inventory of areas of particular concern
> Broad guidelines on priority of uses in areas of particular concern
> List of permissible land and water uses which have a direct and and significant impact on coastal waters
> Governmental structure to implement management program, plus description of interrelationships of various levels of government
> Controls over permissible land and water uses including legal means to:
> - ·regulate land and water use
> - ·control development in coastal zone
> - ·resolve conflicts among competing users
> - ·acquire property interests
>
> One or more of the following general techniques [must be used to control permissible uses]
> - ·state standards and criteria, with local implementation
> - ·state administrative review and enforcement
> - ·state land and water use planning and recreation
> - ·state veto power over all projects and land and water use regulations.[6]

Section 306 further specifies the criteria a state program must satisfy to qualify for annual program administration grants. These are:[7]

- that the state has "developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary," with coordination with appropriate federal, state, local, and regional agencies;

- that there has been coordination with "local, areawide, and interstate plans";

- that the state has established "an effective mechanism for continuing consultation" between such agencies [see second criteria] and the lead state coastal zone agency to carry out the purposes of the Act;

- that public hearings have been held during the development of the program;

- that the state management program has been approved by the Governor;

- that a single agency has been designated by the Governor to administer the state's coastal zone management program;

- that the state be appropriately organized to implement the program;

- that the state have the legal authority to implement the program;

- that the management program "provide for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature";

- that the management program provide procedures for designating areas for preservation or restoration;

- that the Secretary find the state has authority that includes power (1) "to administer land and water use regulations, control development in order to ensure compliance with the management program and to resolve conflicts among competing uses, and (2) to acquire fees simple and other less than fee simple interests in lands, water and other property through condemnation or other means when necessary";

- that the program demonstrate it can provide for "any one or a combination of the following techniques for control of land and water uses: (1) state establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance; (2) direct state land and water use planning and regulation, or (3) state administrative review for consistency with the management program;

- that the state plan provide an assurance "that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit."

B. THE MASSACHUSETTS STATE PROGRAM

1. Executive Office of Environmental Affairs

The Executive Office of Environmental Affairs (EOEA), the designated home for the Coastal Zone Management Office, was created on paper in 1969 under Governor Sargent's state government reorganization plan (Chapter 704 of the Acts of 1969). The principle feature of this plan was the establishment of a cabinet system of government. While the cabinet system was set up earlier, the legislature did not officially approve it and give legal authority to the Secretaries until July 1, 1975. The current organiation of the EOEA can be found in this report as Appendix B and is based on Chapter 806 of the Acts of 1974 and Chapter 706 of the Acts of 1975.

2. Massachusetts Program: Organization and Task Delineation

Although the Federal legislation maps out general areas of responsibilities for state programs, each state has broad latitude in determining the substantive and institutional facets of its program so that it reflects it's individual needs. Massachusetts' Coastal Zone Management Office (now in the middle of its second year of program planning) has four main components: (1) coastal zone planning office, (2) coastal review center (3) public participation and information office, and (4) an advisory, citizens Task Force. Brief descriptions follow of each group's function and current responsibilities.*

These descriptions are by no means meant to be exhaustive or serve as a critique of that office's activities. They are designed to give readers unfamiliar with the Massachusetts coastal zone program an idea of the approach of that office to meet the requirements of the Federal act.

**These descriptions are drawn from Coastal Zone Management Office interviews, progress reports, and budget proposals.*

Planning Staff: The planning staff is responsible for long term planning "...aimed at balancing future growth and activity in the coastal zone with the conservation of natural and cultural resources."[8] The staff's main tasks as of 1975-76 fall in six areas:

- Compile a resource inventory and acquire information on relevant public issues: This is being accomplished through data collection from other agencies, an update of land use maps, field surveys, generating new maps and incorporating public participation information.

- Identify critical resource areas: Methods for "...interpreting data in order to locate defined critical resources and opportunity areas ..."[9] will be refined. Citizen feedback will be utilized in resolving the problem, and work will begin on a report on the coastal zone's geographic areas of particular concern. In addition, a special study of the urban waterfronts is being initiated and resource category maps and supporting data are being analyzed to further define critical resource boundaries.[10]

- Determine permissible and priority coastal zone uses: A series of policy papers on major coastal uses are being compiled and will constitute a basic set of planning documents for coastal zone management. Each use or activity (i.e., agriculture, commerical fisheries) will be analyzed in terms of its (a) coastal tie, (b) present and past needs and constraints that might effect a determination of coastal zone use priorities, (c) economic impact, (d) environmental impact and (e) recommendations for general policy for the particular set of uses or activities. Papers are planned for the following uses/activities:

  - housing
  - agriculture
  - manufacturing industry
  - commerical uses
  - mariculture
  - utilities (electric power and sewer services)
  - military facilities and surplus defense lands
  - water transportation
  - land and air transportation
  - recreation
  - coastal engineering works (groins, jetties, dams)

- Boundary Definition: Several alternative management boundaries are being considered based on several themes: "...visual, critical resources, sub-watersheds, political, topographic elevation, and arbitrary distance and public roads."[11] These boundaries will be compared to one another and results presented with recommendations to the Task Force for comments.

- Evaluation: Evaluating alternative coastal plans "...for economic and social strength,"[12] including the impact of management in the coastal zone on towns or regions.

- Management Alternatives: Monitoring other state's plans for implementing coastal zone management and reviewing existing or proposed Massachusetts statutes which might directly affect state implementation of coastal zone planning. In addition, the planning staff may draft legislation for submission to the General Court if current legislation is determined inadequate for an effective management program.

Coastal Review Center: The Coastal Review Center is primarily involved with "...identifying significant activities, developing information about the coast, reviewing major projects and formulating recommendations on certain coastal activities.[13] Currently, a significant coastal zone-related activity is in the development of outer continental shelf oil on the Georges Bank. The Review Center staff has taken some responsibility* to: (1) keep track of Federal legislation on offshore oil and gas, (2) review leasing legislation with the state's interests in mind, (3) respond to site specific environmental impact statements, (4) coordinate negative nominations for the state, and (5) assist in the formulation of policy guidelines for onshore development related to the outer continental shelf.

Other responsibilities of the Coastal Review Center staff include:

- review of coastal projects through Massachusetts Environmental Policy Act and A-95 (National Environmental Policy Act) environmental impact statements; plan computerization of this process in the future,

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**The Review Center has worked on outer continental shelf issues in conjunction with the Energy Policy Office of the Executive Office of Consumer Affairs, the Office of State Planning, The New England River Basins Commission, the Lieutenant Governor's Office, the Department of Commerce, and Development of the Executive Office of Economic Affairs, and the Division of Marine Fisheries of the Executive Office of Environmental Affairs.*

- tabulation of projects, allowing identification of the cumulative effects of incremental changes,
- assist in Task Force subcommittees,
- assist public participation committees by providing information and/or appropriate references.

Public Participation and Information: Section 305 of the Federal Coastal Zone Management Act makes little mention of a public participation and information function for the planning stage of the program. However, Section 306 requirements for actual program administration funds reflect a concern throughout for expression of public opinion on program development and program implementation.

The Massachusetts Coastal Zone Program has reflected this concern structurally in its planning phase by establishing a separate staff for public participation and information and budgeting approximately one-fourth of its total program expenditures for this purpose.[14]

There are three levels of public participation:[15]

- Task Force: This group, mentioned earlier, consists of citizens in the private and public sector who have background or vested interests in coastal zone issues. Task Force members, appointed by the Governor, function in an advisory role to the Secretary of Environmental Affairs and the Director of the Coastal Zone Office through quarterly meetings and participation in committees.
- Public Information Channels to the Community: Three publications are issued by the public information staff in the Massachusetts Coastal Zone Program. A newsletter, Coast Lines, a Coastal Zone Management Office/Massachusetts Institute of Technology Sea Grant brochure, "The Massachusetts Coastline: Choice or Consequence," and occasional press releases. The communications are distributed to a wide range of interested members of the community such as elected and appointed officials, legislators, Conservation Commissions, sportsmen's groups, state and local agencies, and commerical development groups.

  Informal channels of communication are beginning to evolve as a direct result of increased public awareness of the coastal zone program and its community contact with citizens described in the next section.

- Local Level Participation: The primary mechanism for soliciting citizens opinion is a series of public meetings held in each of the thirteen subregions delineated by the Coastal Zone Office. In addition, a lengthy questionnaire soliciting citizen's opinions on the use of coastal areas was administered to citizens in eighty-one towns along the coast. Citizen involvement has thus far been encouraged to:

  - build a constituency,
  - incorporate citizens' observations to assist in the evaluation of land use effects and permissible uses,
  - Solicit citizens' preferences for a future management plan.
  - assist in determining politically acceptable boundaries,
  - assist in development and evaluation of coastal zone resource inventory.

Public participation and information tasks in this second year of program development correspond to the activities described above with increased emphasis on using the media and public displays.

C. PROGRAM DEVELOPMENT TRENDS IN MASSACHUSETTS COASTAL ZONE MANAGEMENT

A description of Coastal Zone Management office functions has been included to convey the short-term priorities in Massachusetts' coastal zone program development. However, there are broad issues and considerations that do not fall within the confines of the office's day to day operations. Some crucial decisions will be made in the third year program development funding that will be based on public agency assessments of political,social and economic conditions.

These decisions will determine program structure and ultimate program implementation. Program structure issues are: (1) whether to continue the Coastal Zone Management Office in the Executive Office of Environmental Affairs or to house it elsewhere, and (2) whether or not to restructure the program. The implementation problems, equally important,

are: (1) whether or not the current legal framework and authoritative mechanisms are adequate for a new program in coastal zone management, and (2) whether or not new legislation should be considered as a possibility or a necessity.

The factors that will shape upcoming decisions in these two areas are briefly described here.* Though by no means exhaustive, the following six factors will probably be the most significant in the decision making process. Their order of presentation does not indicate priorities nor does their separation indicate mutual exclusiveness.

- Citizen Feedback: The planners in the Coastal Zone Management Office and the Director of the Program perceive little enthusiasm at the "grass roots" level for new comprehensive legislation as a necessity for administering a state-wide coastal zone program. They generally attribute this to citizens' disillusionment with the efficacy of current legislation, and a strong New England tradition of "home-rule" that makes local citizens wary of any centralized authority. Policymakers are particularly sensitive to this because similar citizen sentiment was not carefully taken into account in Maine during its planning phase and that state failed to gain the necessary support for its initial coastal zone management plan for one region of the state.[16]

- Economic Development: The extent of legislative and executive support for environmental programs is often somewhat dependent on, among other things, the State's particular economic development needs. In view of current economic considerations, the majority sentiment in the Massachusetts legislature appears to be pro-development. This has been

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* *As would be expected, the broadest perspective on this was provided by the Director of Massachusetts' Coastal Zone Management Program, Matthew Connolly, Jr., and this section relies heavily on an interview with him. (February 17, 1976)*

expressed recently in the 1975 Massachusetts Growth Policy Development Act (Chapter 807 of the 1975 Acts). In that law, concerned with "coordinated and well planned growth and development decisions," the Legislature expressed its concern for the "economic well-being of the Commonwealth's working force" and advocated a "... heathly economy for all regions of Massachusetts by allowing new development to compliment existing economic centers in existing population and employment centers."

Pro-development sentiments highlight the preservation/development value conflict inherent in environmental programs. The current priority that development values are receiving might act as a constraint and remain so throughout the period that coincides with the drafting of a state coastal zone management program.

- Political: A major political constraint is the reluctance of the Governor to accept or support new legislation unless it can be clearly demonstrated that there is broad support and an absolute need for it and, most importantly, unless it is clearly consistent with current administration policies. Economic conditions and subsequent budgetary constraints have precipitated this executive dictum.

- Existing Statutes: The coastal zone program structure and implementation will be influenced by an assessment of existing coastal related statutes. The Director of the Coastal Zone Program cited five statutes that have already, in his opinion, laid the groundwork for a statewide coastal zone program (three of the five statutes are described in detail in Section III of this report).* The statutes are described briefly here and commented on from the perspective of those interviewed in the Coastal Zone Office.

**See Section III of this report for extensive discussion of the Wetlands Protection Act, The Massachusetts Environmental Policy Act, and the Energy Facilities Siting Act.*

- Wetlands Protection Act of 1972: The Act and its amendments (G.L. Chapter 131, 5.40) provides for local (through Conservation Commissions) and the state level (through the Department of Environmental Quality Engineering in the Executive Office of Environmental Affairs) control over the conditions of development of wetlands through a permitting system.

  Massachusetts is one of the few coastal states to have such comprehensive legislation. Implementation of the Act has been hindered by underfunding and, as a result, weak local Conservation Commissions. However, the Director of the Coastal Zone Management Office saw advantages to the framework that the Act offers for locally based environmental action.[17]

- Massachusetts Environmental Policy Act: As stated in G.L. Chapter 30, s.61, the purpose of MEPA is to require all state agencies and authorities to assess the impact of their proposed activities on the environment and take all practicable means to minimize and prevent damage to the environment. G.L. Chapter 30, S. 62 sets forth the reporting process to accomplish this end.

  MEPA is perceived as a valuable environmental disclosure process as well as a useful set of criteria. It would thus be an instrument used by the Coastal Zone Program to assess the range of public/private activities and minimize deleterious environmental impacts.

- Massachusetts State Reorganization Plan: (also mentioned in Section II.B.1 of this report): The centralization of environmental functions in the Executive Office of Environmental Affairs (completed in 1975) has, according to the Director of the Coastal Zone Management Office, served to clarify lines of governmental authority on coastal zone issues.[18]

- Energy Facilities Siting Act: The Energy Facilities Council, created under Chapter 1232 of the 1975 Acts, (also G.L. c.164. 69G-69Q), has the power to (1) accept, reject, or modify forecasts of future needs from the gas and electric companies, and (2) intercede to streamline any proceedings by agencies that delay the approval of facilities.

  This act is perceived by the Director in much the same light as MEPA. It provides an orderly process for facilitating energy production planning and can, potentially, (as in the case of the Sandwich Fossil Fuel Plant) provide the opportunity for the state to exercise authority in the siting of an energy facility.[19]

- Ocean Sanctuary Act: Under the Ocean Sanctuaries Acts (G.L. c. 132A, ss. 13-16), enacted in 1970 and amended afterward, provisions are stipulated for the protection of the Cape Cod,

Cape Cod Bay, Cape and Island, and North Shore sanctuaries. The Acts give the Department of Natural Resources (now called The Division of Environmental Quality Engineering) the responsibility of "care and control" of the sanctuaries and list activities that shall be prohibited as examples: (building of certain structures in the seabed, "...removal of sand, gravel, or other minerals ..." under certain circumstances, drilling for "subsoil minerals, gases, or oils")

These clear prohibitions seen as "unique" by the Director of the Coastal Zone Management Office[20] would be integrated into any state coastal zone program. However, it should be pointed out that from one legal perspective, the Ocean Sanctuaries Act does not "explicitly authorize regulations",[21] and therefore has limited regulatory value.

- Other Legislation: The Zoning Enabling Act: Another legislative mechanism is the Zoning Enabling Act. This act is of significant importance and must be considered because it may, in fact, undermine the state's ability to regulate the coastal zone unless further steps are taken.

Massachusetts' Zoning Enabling Act (G.L. Chapter 40A) invests cities and town's legislative bodies with the power to create and administer their own zoning ordinancies and by-laws.

Under the ZEA cities and towns have the power to regulate and restrict construction (commerical and non-commerical), population density dimensions of open space for "... the purposes of promoting the health, safety, convenience, morals or welfare of its inhabitants," (G.L. Chapter 40A, S.2).* Local zoning board of appeals, appointed by the mayor or selectmen, have the power to "... hear and decide appeals ..." and to decide on requests for special permits and variances (G.L. Chapter 40A, S. 15). There is no doubt that the local community's "potential jurisdictional scope of zoning is great."[22]

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* *The suggested "objectives" of zoning have been expanded recently in Chapter 808, S. 2A of the 1975 Acts. Included among them is the "... prevention of blight and pollution of the environment."*

The Act has established a decentralized land-use planning mechanism and thus is fraught with implications for state coastal zone planning. If the Act remains as it stands, state powers over development in coastal commutities are limited. Subsequently, coastal zone planners are concerned with methods for building in maximum complementarity between local zoning powers and future state coastal zone management proposals. Ideas to accomplish this vary. One is to amend the ZEA to create incentives for coordination with the Coastal Zone Management Office policy. Another is to leave the zoning legislation as it stands, but to eventually offer the Coastal Zone Management Office's technical and financial assistance to coastal communities to improve their zoning decisions.[23]

The Director of the Coastal Zone Management Office suggested the latter alternative as a long-run possibility reflecting the general sentiment that a state coastal zone management program will not be able to force changes in local zoning policies and must accept the fact that its powers to control land use in the coastal zone are limited.

- Legal Climate: Policy makers must consider legal trends in the interpretation of laws regulating development. The most outstanding current case, one being followed closely by the Coastal Zone Management Office and by other environmental groups in McGibbon v. Board of Appeals of the Town of Duxbury (SJC No. 244). In October 1973 McGibbon et. al. were denied a special permit by the local Board of Appeals "... to fill and/or excavate ..."a portion of their coastal salt marsh.[24] The Board's denial of a permit was based on a Duxbury zoning by-law provision that:

> "[The by-law] is also for the purpose of protecting and preserving from despoilation the natural features and resources of the Town, such as salt marshes, wetlands, brooks,

> and ponds. No obstruction of streams or tidal rivers and no excavation or filling of any marsh, wetland, or bog shall be done without proper authorization by a special permit issued by the Board of Appeals. . ."[25]

McGibbon had first been denied such a permit in 1964, appealed the Board's ruling and won the appeal (347 Mass. 690). The Board again denied the permit. The plaintiff appealed (1970) and the denial was reversed by the Superior Court "... for lack of sufficient factual findings" (356 Mass. 635). The pattern repeated itself (the plaintiff appealed the Board's third denial) and on January 9, 1976 the Supreme Judicial Court for the Commonwealth annulled the Board's decision and directed it to issue the permit to McGibbon (SJC 244). Requests for re-hearing are currently being considered.

If the Court's ruling holds, "... the power of any governmental agency to act constitutionally within its police power prerogative to regulate the dredging and filling of coastal marshlands"[26] will be impaired. The implications for a coastal zone management program would be significant.

D. PARADOXES IN COASTAL ZONE MANAGEMENT PLAN DEVELOPMENT

On balance these factors are persuading the Coastal Zone Management Office staff and the Secretary of Environmental Affairs to develop a management plan based on existing legislation and existing Executive Office of Environmental Affairs powers with the hope that such plan will meet Federal standards. The rationale is that a large enough constituency for new, comprehensive legislation does not exist in the state to gain the Governor's or Legislature's support. However, closer reading of the Federal program requirements in Section 306 of the 1972 Act reveals some paradoxes in this management plan decision. Some critical issues remain that cannot be discounted. A brief discussion of these issues is necessary for the

purposes of this study because: (1) it will highlight the complexities involved in developing a management plan for the state's coastal resources and (2) it will provide a framework for examining the cases presented in the next section of this study.

- The severe budget cuts that the EOEA suffered in Fiscal Year 1975-76 casts doubts on the agency's ability to enforce strictly the existing coastal-related laws that come under its purview.[27] In addition there is uncertainty about how federal/state coastal zone program management funds would be distributed within the EOEA if a 306 grant were awarded. The federal funds would not necessarily counteract current budget constraints if the legislature's interest in curtailing executive office activities continues. However, the relatively large sum of money coming to Masschusetts from the Federal Government could be used to offset some of the EOEA's understaffing problems.

- If the McGibbon decision holds, local powers to implement existing planning-related statutes will be more constrained. The decision as it stands now, might very well impact on the strongest existing environmental laws, the Wetlands Act, by setting a precedent that limits Conservation Commissions' ability to influence development.

- The Zoning Enabling Act presents a paradox in that the powers of the local zoning boards can, potentially, thwart any EOEA policy, no matter how coordinated. Those interviewed at the Coastal Zone Management Office acknowledged that the bulk of final decisionmaking powers on development reside at the local level through this act.[28]

- Another paradox posed by the current Coastal Zone Management Office approach is the "legality" of a coastal zone management plan based on current legislation. Without some legislation, an "executive order" created

Coastal Zone Management program has no legal power to control the operations of the numerous agencies involved in implementing existing statutes and in coordinating the environmental review process. Legislation calling for, in essence, authorization of the current agency arrangement, still leaves doubt as to whether the functions and duties of the EOEA (set forth in G.L. Chapter 21A) are adequate to meet Federal standards more than superficially.[29] Since the Federal Act calls for a coastal zone lead agency with clear authority to implement its program, it is difficult to imagine the existence of such authority in Massachusetts beyond the organizational chart level unless the proposed program is limited to water-related use and not land use.

Broadly speaking two main dilemmas emerge for coastal zone planning in Massachusetts:

- Federal law requires that clear lines of authority must exist for coastal zone program implementation and that extensive citizen participation be encouraged. However, citizens do not want a strong centralized authority and statutes like the Wetlands Acts and the Zoning Enabling Act reinforce "home-rule" traditions.

- While there appears to be little state level enthusiasm for a coastal zone management program that requires new, comprehensive legislation, adequate political, structural, and financial legitimacy may not exist for a program using existing legislation.

SECTION II. FOOTNOTES

[1]John Armstrong, et. al., Coastal Zone Management: The Process of Program Development,(Washington, D.C.: Coastal Zone Management Institute, 1974), p. 1.

[2]The Coastal Zone Management Act of 1972, P.L. 92-583.

[3]Coastal Zone Management: Newsletter of Coastal Resource Exploitation, Conservation and Enhancement, (Washington, D.C.: Nautilus Press, October 1972), pp. 2-3.

[4]Zigurids L. Zile, "A Legislative-Political History of the Coastal Zone Management Act of 1972, " Coastal Zone Management Journal, Volume 3 (1974), p. 236.

[5]John Armstrong, op. cit., p. 4.

[6]Coastal Zone Management: Newsletter, op. cit., p. 3.

[7]The Coastal Zone Management Act of 1972, P.L. 92-583.

[8]Memorandum from Matthew Connally Jr., to Policy Steering Committee, March 14, 1975, proposed budget for FY 1975-76 (pages unnumbered).

[9]Ibid.

[10]Ibid.

[11]Ibid.

[12]Ibid.

[13]Ibid.

[14]Ibid.(Memorandum cover letter)

[15]Mark Kaufman, interview held October 31, 1975 and memorandum of March 14, 1975 (see footnote 8).

[16]See Sylvia Lewis, "Coastal Plan Runs Aground," American Society of Planning Organizations, November, 1975.

[17]Matthew Connally, interview held February 17, 1976.

[18]Ibid.

[19]Ibid.

[20]Ibid.

[21]Alan H. Kaufman, Draft: Existing Institutional Capacity for the Management of Resources and Growth in the Massachusetts Coastal Zone (Boston: Conservation Law Foundation, 1975) p. 104.

[22]Ibid., p. 56.

[23]Matthew Connolly interview, op. cit.

[24]Massachusetts Supreme Judicial Court, SJC-244, January 9, 1976, p. 3.

[25]McGibbon v. Board of Appeals of the Town of Duxbury, Brief for Defendant - Appealee, Appeals Court, No. 74-468, p. 4.

[26]Board of Appeals of Duxburg petition for rehearing of McGibbon v. Board of Appeals of Duxbury (SJC-244), January 19, 1976, p. 2.

[27]Jonathan Fuerbringer, "Dukakis Says Legislators Are Bent On Wrecking State Cabinet," The Boston Globe, December 5, 1975 p. 1., and Carol Surkin, "State Cabinet On Way Out?", The Boston Globe, December 2, 1975 editorial page.

[28]Matthew Connolly interview, op. cit., and Dan Calano interview, February 9, 1976.

[29]see Alan Kaufman, Existing Institutional Capacity for the Management of Resources and Growth in the Massachusetts Coastal Zone, op. cit.

SECTION III. CASE STUDIES

CASE STUDY # 1

WETLANDS PROTECTION ACT

The wetlands laws included in this case study are the Wetlands Protection Act of 1972 and its amendments (Chapter 131, Section 40 of the Massachusetts General Laws) and the wetlands restriction orders (Chapter 130, Section 105 of the Massachusetts General Laws). The case study inquires into the nature and outcomes of private sector/public sector interaction into the legislative and administrative aspects of the laws, draws conclusions concerning the effects of private sector/public sector outcomes and the factors associated with these effects, analyzes the problems of the law and reasons for private sector behavior and present recommendations which could potentially address these problems.

I. Legislation

This section presents an investigation of the nature and outcome of private sector/public sector interaction in legislative aspects of wetlands laws. The discussion contains: a brief accounting of the legislation which led up to the Wetlands Protection Act; a history of the development and passage of the Act itself, including a discussion of the role of the lobbyists; a history of the development and passage of the amendments, including a discussion of the role of the lobbyists; and finally, a more detailed discussion and analysis of the private sector lobbyists and the factors which are associated with their particular role.

A. HISTORY

The Wetlands Protection Act of 1972 was not the first law enacted to protect Massachusetts wetlands. Expression of legislative interest

in protecting wetlands dates back to the Jones Act of 1963, which required builders to obtain permits from the Department of Natural Resources before dredging, filling, or altering any coastal wetland. In 1965, the Hatch Act was passed, thereby including inland wetlands in the permitting requirement. Under both acts, the developer files a notice of intent with the Department of Natural Resources and the local Conservation Commission. After a hearing, the Department of Natural Resources issues an order of conditions, specifying what the builder must include in the project to protect the wetlands. According to one account of the history of the Hatch Act, the act passed in the House, but was delayed in the Senate because developers were uneasy, and because Hatch, a Republican in a Democratic legislature, could not rally enough support. However, pressure on Senate President Donahue, in the form of highly visible pressure from the press, and highly visible pressure from other interest groups - Forest & Parks Assoc., Audubon Society, League of Women Voters, and the farmers (after they had procured an agricultural exemption) resulted in passage of the bill.[1]

Two other acts to protect the wetlands were also passed: the Coastal Restriction Act in 1965, and the Inland Wetlands Restriction Act in 1968. These laws allowed for the restriction of development on wetlands before a developer had filed a notice of intent and optioned or bought the land. According to the law, the state could map the wetlands, and, after public hearings, restrict development.

The main problem with these laws, according to interviews carried out for this research as well as other inquiries into the effect of wetlands laws, is that they were never enforced adequately.[2,3,4] Understaffing and underfunding in both the restrictions and permitting divisions resulted in lengthy delays. The Department of Natural Resources often took months to issue orders of conditions for permit applications.[5]

B. WETLANDS PROTECTION ACT

1. Passage

In 1971, Representative Hatch introduced another bill, the Wetlands Protection Act, for the purpose of improving the permitting process. The bill was passed in 1972, and included some major changes:

- Coastal and inland wetlands were considered together instead of separately because the distinctions had been difficult to make in the past.
- A fine for violators was included. The fine was to have been $1,000., but actually came out in the law as $100.
- Power to issue permits was taken away from the Department of Natural Resources and given to the local Conservation Commissions. Developers, abutters, or any other citizen group could appeal a Conservation Commission's decision to the Department of Natural Resources.[6]

2. Role of Lobbyists

The Massachusetts Association of Conservation Commissions, the major lobby group to support actively Hatch's bill, felt strongly that the Department of Natural Resources was not administering the law promptly or properly.[7] The Department of Natural Resources did not oppose the bill.[8] Developers or developers' lawyers do not appear to have taken an active role in lobbying for or against this bill. The Home Builders Association, which represents developers and lobbies for them, did not hire a lobbyist until September, 1972, after the bill had already passed, and no individual developer seems to have taken a stand.[9] Reasons suggested for their lack of participation include:

- Lack of awareness of any obvious impact on them of this kind of administrative change.
- A belief that the environmental lobbyists had deceptively persuaded them that combining the Hatch and Jones Act into the Wetlands Protection Act would not expand the scope of the law.

- A placement of low priority on environmental actions of the Legislature.[10]

Without developer opposition, or any opposition that anybody remembers, and, in a time and mood when most people felt very strongly and emotionally about protecting the environment, the bill passed.

Strengthening the law's supporters (the local Conservation Commissions) by giving them direct power, and consolidating the fragmented constituency by placing fresh and saltwater wetlands together under the same law were important consequences of the new legislation.[11]

Included in the bill was an exemption of lands used for agriculture, an exemption which everybody, including the environmentalists, originally supported.[12]

C. AMENDMENTS

1. Passage

However, this new version of the law contained many problems. Conservation Commissions had little skill or expertise in defining wetlands and in issuing orders of conditions.[13] The Department of Natural Resources did not draft the rules and regulations immediately. Consequently, Conservation Commissions did not have a policy or uniform set of standards. Developers claimed that radical Conservation Commissions were calling any piece of land, wet or dry, with a blueberry bush a wetland.[14] In addition, many permits were still issued after a developer had filled the wetland.[15] Furthermore, the law had no clear statute of limitations, either for processing permit applications and issuing orders of conditions, or for prosecuting violators, and therefore the problem of long delays inherent in the original legislation was not resolved.[16]

A series of amendments were passed in 1973 and went into effect in 1974. These included:

- A very specific, detailed definition of a wetland, including a comprehensive list of the kind of plant life found in wetlands.

- A provision for the determination of applicability, which allows a developer to request a Conservation Commission to determine whether a particular piece of land comes under the jurisdiction of the law. If a Conservation Commission makes a positive finding, the determination is not appealable. If the finding is negative, the determination could be appealed to the Department of Natural Resources. A request for a determination is not limited to the developers' initiative, but also is extended to abutters.

- A statute of limitations, giving a Conservation Commission ten (10) days to act on a request for determination of applicability and a specific amount of time to act on an application, and giving the Department of Natural Resources a specific amount of time to act on an appeal.

- A change in the agricultural exemption, which originally read, "The provisions of this section shall not apply to the following: ... or work performed for agricultural purposes." The change reads, "The provisions of this section shall not appy to ... maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of lands for agricultural use."

- An alternation in the stipulation that other permits be acquired. The law originally read, "No such notice shall be sent before all permits, variances, and approvals required by local by-law with respect to the proposed activity have been obtained." The change reads, "No such notice shall be sent before all permits, variances, and approvals required by local law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained."

- An exemption of utility companies allowing them to maintain, repair, or replace gas, water, electric, telephone, and telegraph lines without applying for a permit.

- The fine for violation of the law was corrected to be $1,000 dollars, as it was originally written, instead of $100 as it was printed.[17]

In 1974, several more amendments were passed which went into effect in 1975. These included:

- A statute of limitations, giving groups a maximum of three years to sue a new owner of a wetland which was

illegally filled before the latest purchase. If after three years, no one has sued, the owner is not liable. Originally, the owner was liable for an indefinite period of time.

- Prohibition of the building of driveways across a wetlands if interrupted tidal flow would result.

- An adjustment of the agriculatural amendment from "to work performed for normal maintenance or improvement of lands for agricultural use" to "to work performed for normal maintenance or improvement of lands in agricultural use."

- The length of time given a Conservation Commission to grant a determination of applicability was extended from ten (10) days to twenty-one (21) days.

- A change in the emergency provision. The law originally stated: "An emergency project shall mean any project certified to be an emergency by the commissioner and the Conservation Commission." Under the amendment, the Conservation Commission reserves the right to declare an emergency. Only if the Conservation Commission fails to act within 24 hours may the commissioner certify a project as an emergency.[18]

2. Role of Lobbyists

There were several amendments which the Department of Public Works submitted to exempt itself. Environmentalists lobbied against these amendments which never passed.[19]

The Massachusetts Association of Conservation Commissions testified in support of all the amendments except the Department of Public Works exemptions. The Sierra Club and the Audubon Society testified less frequently than the Massachusetts Association of Conservation Commissions, but their testimony was in support of those amendments which passed.[20]

The Home Builders Association supported the amendment which defined a wetland, so that developers could operate under clear, definite guidelines.[21] The Home Builders opposed the appeals process under the determination of applicability but did not really fight it because if a developer had the right to appeal a positive determination, and if the developer exercised

that right, the appeals process would cause delays in the project, and developers tend to be in favor of a faster, rather than a slower process.[22] The Home Builders Association unsuccessfully opposed the extension of the Conservation Commission's deadline to make determinations of applicability from 10 to 21 days.[23] The amendment which requires developers to acquire all "obtainable" permits before going before the Conservation Commission also represents a defeat for the Home Builders, who wanted the law to specify (and thus limit) the permits to be obtained. The Forest and Parks Assoc. was against any loosening of the rules under which a developer could file a notice of intent, and neither the Conservation Commissions nor the Attorney General's office wanted the Conservation Commissions to be burdened with projects which in the end would not go through. The issue was settled with "obtainable" permits instead of "all" permits, a compromise whose meaning remains ambiguous.[24]

The tightening of the agricultural exemption did not really happen until the most recent of amendments. Although some groups wanted the agriculture exemption eliminated, certain legislators who had power in the Committee on Natural Resources delayed reporting out a strong amendment because of a commitment to Cumberland Farms.[25] When Cumberland Farms blatantly abused the agriculture exemption, pressure from the press and environmentalists produced the much tighter exemption.[26]

According to the informal record of hearings held by the Committee on Natural Resources, the Home Builders Association was the only business group to have participated in lobbying efforts in any major way concerning wetlands legislation.[27] The 1972 Act and its amendments have generally followed the goals and policies of the environmental groups.

Reasons for their success are hard to distinguish, but important factors seem to be the visibility of the issue and the pro-environmental

protection attitude expressed by the press. The chairmen on the Joint Committee of Natural Resources, whose jobs include reporting out environmental legislation must respond when the focus of the public is on them.[28]

D. LOBBYISTS

The environmental lobbyists seemed to be numerous and well informed, and had the backing of several sympathetic senators on the Natural Resources Committee.[29] The environmentalists submitted working drafts of amendments and testified at many hearings.

Individual developers, did not usually appear at hearings. Rather, they were represented by the Home Builders Association, an organization with about 1200 members consisting of developers and some construction and other suppliers. Most of the developers who join the Homebuilder's Association are small - about 10 to 20 building units per year - but the membership does range between some of Massachusetts' major developers to some of its very smallest ones. The Executive Vice-President is both chief lobbyist and administrator. He is one of the two lobbyists at the Home Builders Association, having worked for about two years. Generally, the developers are very competitive and therefore independent of the association.[30] The lobbyist meets regularly with the legislative committee and the board of the Association, and can not take public positions without consulting them since the different Association members are often in disagreement.

Since the membership is so diverse and broad, the members often act independently of the Association, thereby decreasing the credibility of the lobbyist in the eyes of certain legislators.[31] Also, the fact that the Association usually has opposed more bills than it has supported tends to decrease its credibility. [32]

II. Executive

This section presents an investigation of the nature and outcome of private sector/public sector interaction in the executive aspects of wetlands laws. The discussion includes a brief summary of the law, a description of the regulation writing process and the role lobby groups played in that process, and a description of the nature and outcomes of private sector/public sector interaction during the administration of the permitting and restriction laws. Administration on both the local and state levels is discussed.

A. BRIEF SUMMARY OF LAW

The Wetlands Protection Act, unlike the Massachusetts Environmental Policy Act, has teeth. The law itself has enforcement powers. The Conservation Commissions have the power to impose conditions on a developer when issuing permits for wetlands development. Conditions may be imposed to protect the public or private water supply and ground water supply, to control flooding, to prevent storm damage pollution, and to protect land containing shellfish or fisheries. A positive determination of applicability can be made if any work to be done will be significant to the areas just mentioned. Significant is defined very broadly in the regulations (Section 2.41) as any actual or potential contamination to the water supply or land containing shellfish, including the biological life necessary to support a wetland ecosystem and, as any action which results in any threat to the health, welfare, and safety of an individual or community.[33]

B. LOBBYING DURING THE PROCESS OF REGULATION WRITING

During the regulation writing process, environmental lobby groups made significant contributions while business and developer groups

remained outside the process.[34] The Massachusetts Association of Conservation Commissions drafted large portions of the regulations which were accepted by the commissioners of the Department of Natural Resources with little alteration.[35]

The regulations tend to strengthen the law. Some examples include:

- Allowing a Conservation Commission to prohibit, as well as regulate development (Section 2.8).
- Defining the border of a wetland as 100 feet horizontally landward from the bank of any beach, dune, wetland, etc., or 100 ft. horizontally landward from the water elevation of the 100-year storm; whichever is greater. (Section 2.6) The definition does not include a vertical border, so there can be no development on top of a cliff within 100 ft. of a wetland.
- Refusing to allow an appeal of a positive determination of applicability. (Section 3.5)[36]

Developers did not participate in the regulation writing for two reasons:

- Passivity on the part of the Home Builders Association early in the process and exclusion of the Association later on by the Department of Natural Resources.[37]
- Environmentalists not only expressed an interest in writing regulations, but also were invited to participate in the process.

C. ADMINISTRATION

Given that this law actually has some teeth, one must ask whether the law actually protects the wetlands, or whether development slowly nibbles wetlands away.

The Wetland Protection Act is implemented on both state and local levels. Major developers who are less competitive

repeal or amend the law, not only because such a move would be unpopular publicly, but also because characteristics of both the state and local components make rigorous enforcement of the law difficult.

1. Local Level Administration: Conservation Commissions

With the passage of the 1972 law, local Conservation Commissions were given the authority to make determinations of applicability and to issue orders of conditions on permit requests. Several conditions have made it difficult for local commissions to make decisions which maximize wetlands protection.

Most members of Conservation Commissions are voluntary. Thus, they do not have the same kind of financial incentives to do a job as engineers paid by developers.[38]

Most Conservation Commission members are part-time. They hold other full-time jobs and thus can not give their Conservation Commission jobs top priority.[39]

Most Conservation Commissioners are lay people. They often do not have the necessary engineering or legal expertise to evaluate the developer's and engineer's reports and findings. Knowing whether or not a development will have a detrimental affect on the water supply is often hard to ascertain for all parties, including the developer, but Conservation Commissions at least need to have the expertise to evaluate developer's reports and spot inadequacies, if not to make their own findings.[40]

Because Conservation Commissions often do not have their own lawyers or engineers, they end up using the city solicitor or city engineering when questions arise. City solicitors and city engineers do not always have unbiased opinions, especially when the Town Council or Town Planning Board is prodevelopment, and they do not always have time to provide assistance.[41]

Conservation Commissions themselves also may have members who have conflicts of interest. Appointments to the Conservation Commission may reflect these conflicts, which may work to the advantage or disadvantage of the Commission.

Environmental protectionist Town Councils appoint environment protection oriented Conservation Commissions who may use the law, not to regulate development, but to prohibit it, and pro-development Town Councils may appoint Conservation Commissions who ignore the law. While Conservation Commissions seem not to be concerned that appointments by Town Councils (rather than general election) may bias the Commissions, they do seem concerned about the lack of sufficient time or adequate professional expertise to do the job.[42]

Local Conservation Commissions also can be under pressure to respond to local sentiments in issuing orders of decisions. While local groups can be much more sensitive to local needs than state groups, at the same time, in a small community decisions could have social as well as legal aspects.[43]

Conservation Commissions do not always have the engineering expertise and adequate legal advice to make legal findings, and so a compromise, not always legal,[44] is usually worked out between the developer and the Conservation Commission. Fear on the part of Conservation Commissions of litigation by the developer, and fear on the part of the developer of costly delays serve to facilitate these compromises.[45]

In 92 percent of the cases, differences between the Conservation Commission and the developer are worked out without an appeal to the state, and most of the appeals are on inland, rather than coastal wetlands.[46] Very often much time and money are lost by the developer during this process, but the general feeling seems to be that compromising with the local Conservation Commission is still cheaper and faster than going to the Department of Environmental Quality Engineering with an appeal.[47]

Those compromises involved the developer deeding some of the land to the local town in return for a permit without "unreasonable" orders of

conditions, or the developer investing, in exchange for a permit, extra money for a row of trees so that the people who have delayed the permit are shielded from a view of the development.[48] Many participants in this process seem to feel Conservation Commissions impose illegal, unreasonable conditions as delay tactics to prohibit development.[49]

Such delay tactics on the part of Conservation Commissions, for whatever reason, sometimes do prohibit development. Sometimes a whole construction season is lost during the negotiation process.[50] Many developers, especially the smaller ones, are against the compromise process because they can not match compromises made by major developers and the ensuring delay forces smaller, competitive, but less financially solvent developers out of the market.[51] Thus delay, to a certain extent, protects wetlands by prohibiting development, but this is not necessarily a healthy process.

At the same time, however, compromises may not regulate development according to the law and may result in a nibbling away at the wetlands and inadequate protection of the ecology or water supply.

Another weak aspect of local implementation of the law is the dependence on local police power for enforcement.

Conservation Commissions can not take action on violations of the law unless somebody notices that a wetland is being dredged or altered, and reports the incident so it can be determined whether the individual has filed a notice of intent. Often, small activities go unnoticed.[52]

Furthermore, the $100 fine was little deterrent, and the $1,000 dollar fine seems to be little deterrent because few have the time or energy to prosecute violaters. Persons directly involved in the process claim that once a developer has succeeded in illegally filling a wetland, there is little action taken to force removal of the fill or impose the fine.[53]

No procedure exists for local conservation groups to do cumulative review, so that no way exists to estimate and predict the overall effect of incremental changes, i.e. all the development in the region, not just individual developments.

Local Conservation Commissions do not use uniform standards to evaluate permits, a situation which creates uncertainty for the developer and negotiable flexibility.

On the local level, then, enforcement of the law seems to work out to the developer's advantage. While delays weed out some of the competition, a developer who has the financial wherewithal can stay in the process, and procure the permit, sometimes with conditions which may protect the wetlands and sometimes without. Small developers or builders who do not bother to enter the process at all often are able to fill wetlands without a permit. Thus, there is no need for those developers who are able to work out compromises to spend time and money lobbying to amend the law or the regulations.

2. State Level

Department of Environmental Management: The Department of Environmental Management is responsible for wetlands restriction. Because the department is understaffed, restrictions proceed slowly.[54]

At the moment, two people are responsible for implementing the wetlands restriction law. This kind of understaffing leads to long delays in issuing restrictions, even though sources other than the State provide assistance by mapping wetlands. For example, Raytheon mapped Barnstable County in 1969, and now the Department of Environmental Management is restricting the wetlands in that county. Because the data is so old, much time and effort needs to be spent verifying the data.[55] Restriction also

may be slow because local tax pressures reduce the incentives for local communities to restrict development. With erosion of local tax bases, the incentive is to develop rather than restrict wetlands. Furthermore, the restrictions and permitting officers are in different administrative structures. Although their offices are in the same place, coordination and communication between the two groups is minimal.[56]

Department of Environmental Quality Engineering: The administration of the law on the state level by the Department of Environmental Quality Engineering is problematic also. Of the cases (8 percent) which go to the Department of Environmental Quality Engineering for appeals, 80 percent are appeals by the applicant, usually the developer. [57] The state encourages compromises so that no one will increase the delay by appealing the decision and going to the Commissioner of the Department of Environmental Quality Engineering requesting an adjudicatory hearing. The fact that these compromises tend to work in favor of the developer is indicated by the fact that most of the appeals made to the Commissioner for hearings are made by the Conservation Commissions.[58] Many participants in this process feel that the Department of Environmental Quality Engineering justly overturns outrageous and illegal conditions set by Conservation Commissions.[59] At the same time, many participants feel that the state tends to have a high pro-development bias in its decision making process, and that the state is undoing the work of Conservation Commissions during the appeals process.[60]

Several aspects of the appeals process work against the Conservation Commission and in favor of the developer. If the Conservation Commissions lack the expertise to make reasonable technical and legal decisions, they are therefore at a disadvantage. Since no fault insurance has been introduced in Massachusetts, many of the leading law firms are becoming

involved in environmental law, and volunteer lawyers for Conservation Commissions are little match for these lawyers. In the same vein, major developers employ top engineering firms whose findings the state seems reluctant to question.[61] Major developers, represented by leading law and engineering firms, are rarely questioned by the state about their information since in the past when findings were reviewed, state rarely found any oversights.[62] Some of the companies, though, have provided their computer services to the state free of charge, if anyone wanted to do a review,[63] a situation which may indirectly obligate the state to the developer. Even if there are no gratuities exchanged, strong, friendly informal relationships exist between major developers and the state, which allow developers to know exactly what they must do to procure a decision in their favor.[64] Open communication channels may be healthy. They can decrease the delays and provide certainty for the developer.

The state seems to direct its limited staff and time to checking on those small developers who cannot afford to conform with the law because of the delays and costs of compliance. The interviews indicate that the state does little about those builders who alter wetlands without filing a notice of intent.[65]

For developers who believe themselves to be in "compliance" with the law, the compromise and the appeals process, even though they may cause delays of up to two years, are still less expensive and faster than attempting to amend the law or go to court over the constitutionality of some of the regulations. At the time of this research, the state was urging developers and Conservation Commissions to reach compromises without resorting to adjudicatory hearings because, in the process of Massachusetts reorganization of cabinet offices, the hearings officer was eliminated from the budget.[66] The courts will not listen to cases unless there has

been a hearing on the grounds that all legal remedies have not been exhausted.

III. Analysis

A. PROBLEMS: NOT WITH THE LAW ITSELF, BUT WITH THE ADMINISTRATION

Generally, developers, environmentalists, and the state agree that the Wetlands Protection Act is basically a good law. Few disagree with the concept of wetlands protection. Few feel that the legal mechanism to protect wetlands is unreasonable or that the requirements are impossible to meet. Both environmentalists and developers feel that problems they perceive stem, not from the structure of the law, but from its administration. Developers who do receive permits however, whether or not the permits issued require protection of the wetlands, are not bound to criticize the intent of the law, and developers who do not have the financial means to comply will feel differently. The main problems with permitting are these: (1) Conservation Commissions are not in a good position to evaluate or challenge the findings of developers' engineers, thereby putting the developer at an advantage. (2) The strong, informal relationships between the state and the developers provide the developers with information which helps them comply with the law.[67] Open communication and information flow is certainly desirable. However, the existence of such relationships along with the state's bias toward development, and the general incapability of Conservation Commissions to match the expertise of developers, leads to a situation where developers tend to be pleased with the outcome of their interaction with the state.[68] If both the state and the Conservation Commissions had expertise comparable to that of the developer, and if both Conservation Commissions and developers, had a viable process of adjudication, the outcomes of private/public sector interaction might be very different.

The main problems with wetlands restrictions is that understaffing of the restrictions office results in slow restriction of wetlands. Why the office has been understaffed remains a mystery.

Lack of communication and coordination between restrictions and permit officers minimizes effective enforcement of the law.

Lack of wetlands policies and priorities (permit officers do case by case review) results in inefficient use of limited staff resources.

Underfunding and understaffing is a perceived problem in all the laws studied. While some state offices might perceive themselves to be underfunded and understaffed because they are not using existing personnel in an efficient way, in some cases understaffing is a real problem. (i.e. having two people to implement the wetlands restriction law) The possible causes of underfunding and understaffing are many. Some of these include:

- sluggish bureaucracy: People who control the various programs may leave vacancies in some programs unfilled in order to use the outage money for other projects.

- low appropriations: The Governor may be unsuccessful in procuring legislative approval of the budget. During the legislative review of the 1975-1976 budget, the Legislature directly undermined the cabinet system by cutting cabinet budgets.[69]

Furthermore, legislators who are not in favor of environmental protection, but who do not wish to make their positions public, may vote for particular bills, but help deprive them of funding. (The Scenic Rivers Act, for example, is a piece of environmental legislation which has never been funded.)

B. PRIVATE SECTOR BEHAVIOR

The fact that there was little or no effective business/industry involvement in the planning and passage of the wetlands legislation did not seem to have a detrimental effect on the law, i.e. the law and its

amendments were passed without the necessity of developer support, and the developers' apparent lack of awareness precluded their making public efforts to stop the bill or its amendments. The prevailing ideology of concern for the environment and the high visibility of the issue made it unnecessary to procure the support of developers before the bill went through. Furthermore, developers in 1972, had no lobbyist that anyone can remember, and the association, with its diverse and competing membership, had little credibility in the Legislature. The strategy, whether deliberate or not, of not involving the developers in the planning process of the law and its amendments, seems to have worked, in this particular case to provide a fairly strong law.

The intent of the law is to protect the wetlands by regulating development. The apparent mismatch in expertise between the local Conservation Commissions and the developers, and underfunding and understaffing in the state officers appears to result in inadequate enforcement of the law, so that developers can receive permits fairly easily. Developers have no prospect of loss in not participating in the legislative process, do not consider legislative activities in general particularly high priorities, and don't seem to care for public controversy, especially when their position runs counter to public emotions. A general characteristic of human behavior, both in the public and private sector, is to act on present concerns, not on anticipated future onces. Thus, it is understandable why developers did not perceive the law to be threat, and did not participate in the legislative planning process.

IV. Conclusions for Case Study #1

In the legislative and excutive arena, the following characteristics of the private sector, both business and environmentalist, seem to

associated with the following kinds of behavioral patterns and the following kinds of outcomes:

LEGISLATIVE ARENA

A. Passage of Law

Characteristics of Developer/Private Sector	Behavior Patterns	Outcome
1. Industry acts on the present circumstances, not potential future ones. • Legislative lobbying is a low priority, especially with regard to the initiation of a law. 2. Competitive developers are very independent of the lobby association, and do not often agree on positions. • Lobby association does not have much credibility with legislators. 3. Industry does not act unless it perceives something is at stake. Vague legislation does not indicate this. 4. Industry does not like public controversy.	1. Little lobbying effort	A strong, environmental law passed, in a form which reflected environmentalists' objectives.
Charateristics of Environmental Groups	**Behavior Patterns**	
1. Environmental groups were interested in the law, were well informed, willing to draft legislation, testify at hearings, and pressure legislators.	1. Intensive and Extensive lobbying effort.	
Charateristics of Issue*	**Behavior of Legislators**	
1. Vague, highly emotional, highly visible. Issue surfaced in an ideology supporting the environment.	1. Anti-environment leadership had to respond to pressure.	

* *By describing characteristics of the issue, legislative behavior can be better understood.*

LEGISLATIVE ARENA

B. Amendments

Characteristics of Developer/Private Sector	Behavior Patterns	Outcome
1. Had a specific interest in the lack of statute of limitations and in the lack of certainty over the definition of a wetland. Utility companies also had specific interests in certain exemptions. 2. The specific interests of developers were shared by the entire membership in the lobby association. 3. The Developers Association lobbyist didn't have extensive experience as a lobbyist. 4. Farmers still had a specific interest in exemption, but they had abused the exemption. Their abuse become a public issue. 5. Association lacked credibility	1. Association lobbyist participated in negotiations on content of some amendments. 2. Individual developers did not participate. 3. Utility companies did participate.	A series of amendments which met the needs of the developers for certainty, but which in no way weakened the law. Other executive departments attempts to exempt themselves failed.
Characteristics of the Environmental Groups	**Behavior Patterns**	
1. Environmental groups were interested in participating, were well informed, and willing to draft amendments. They agreed on need for statute of limitations and definition of wetland.	1. Wrote most amendments controlled the compromises.	
Characteristics of Issue	**Behavior of Legislators**	
1. Law highly emotional and symbolic, highly visible.	1. Responded to utility companies. Public pressure would not allow a favorable response to farmers.	

EXECUTIVE ARENA

Characteristics of Local Conservation Commissions	Behavior Patterns	Outcome
1. Consist of part-time volunteers. 2. Little engineering or legal expertise comparable to developers. 3. Potential conflicts of interests. 4. Easily intimidated by threats of litigation since often do not enforce law properly. 5. Few uniform standards or policies. 6. Little, if any, cumulative review. 7. Dependence on local police enforcement.	1. Often make unreasonable conditions outside scope of the law. 2. Often do not justify conditions. 3. Often can not adequately evaluate developers applications.	Wetlands get nibbled away. Questionable compromises are made between Conservation Commissions and developers, between the State and developers. Violators are not prosecuted most of the time. Excessive delays affect competition by putting some developers out of the market.
Characteristics of State	**Behavior Patterns**	
1. Underfunded, understaffed. 2. Older agency. 3. Lacks some technical expertise, comparable to developers. 4. Vague policy and plan. 5. Case by case review instead of cumulative review. 6. Pro-development bias.	1. Overturns some Conservation Commissions decisions. 2. Can not challenge expertise of developer. 3. Little prosecution of violators of the law.	
Characteristics of Developer/Private Sector	**Behavior Patterns**	
1. Something at stake - financial status. 2. Bigger firms have legal and engineering expertise and can afford to follow legal procedures. Have expertise to justify activities in terms of law. Occasional gratuities. 3. Smaller firms often cannot afford to comply and stay in business. 4. Industry does not like public controversy.	1. Use legal expertise to conform to law. 2. Use engineering expertise which Conservation Commissions unable to challenge. 3. Smaller developers often do not bother to file applications. 4. Developers negotiate individually with the state and the Conservation Commissions 5. Most information is controlled by developer.	

V. Recommendations

Because most of the perceived problems with the Wetlands Protection Act are not related to the structure of the law itself, but rather to its administration, most of the recommendations focus on the implementation aspects of the law. An environmental law as strong as the wetlands law contains a pro-developer bias which thwarts effective implementation because the burden of proof rests with the permit applicant (i.e. the developer much show that a project protects wetlands) and Conservation Commissions can lack the expertise to evaluate proof presented by developers.

A. EXECUTIVE LEVEL

Because the less than thorough enforcement of the wetlands law is due to problems in the administrative structure, the bulk of the recommendations deal with improved administrative procedures.

1. Local Level: Conservation Commissions

a. increased resources: To alter the imbalance in the interaction between public and private sector, Conservation Commissions need independent (of the local city or town) legal and technical sources. Potential sources of funding for this expertise need to be explored. Allowing Conservation Commissions to appoint associate members is another potential source of added resources, but the ability to appoint associate members does not necessarily compensate for the disadvantages of part-time, voluntary staff. Having the developer choose an engineer from a list proposed by the Conservation Commission is one suggested proposal.[70]

b. improved administration: Conservation Commissions need to develop uniform standards and policies for evaluating permit applications.

They need to develop mechanisms for cumulative (in addition to case by case) review. (The Lake Tahoe Regional Planning Commission has the mechanism for such a review.[71]) Conservation Commissions need to develop standards and policies for evaluating projects for regional impact. Conservation Commissions need to coordinate their efforts with other local groups which have responsibilities in environmental areas (such as local boards of health) or could have responsibilities (such as the police department)in identifying and prosecuting violators. Coordination could produce a more consistent enforcement of the law as well as a decrease in the delays for developers and sometimes conflicting standards they are expected to meet.

2. State Level

a. establishment of policies and priorities: The Department of Environmental Quality Engineering and the Department of Environmental Management need to have consistent policies concerning wetlands protection which would be used in the decision making process in addition to the evaluations presented by the engineers. Engineering solutions can predict only to a limited degree the impacts of development on the natural environment. To base a public policy on an uncertain and imperfect scientific base may be unwise.[72] Therefore, wetlands administrators should have a wetlands protection policy to use in the decision making process. Such a policy could include the identification of critical areas for preservation or restriction, and the development of criteria for permit application review, based on standards such as the size of the project and its proximity to important water supply areas.

In the absence of explicit public policy and guidelines, and in the absence of strong Conservation Commissions which have the expertise to

evaluate developer expertise, the strongest tool the environmentalists have is their power to cause long and costly delays for the developers. Using the strategy of delay as a way to protect wetlands is not fair to developers, especially if Conservation Commissions make illegal findings. Prohibiting development by delays is not necessarily the only way to protect wetlands.

b. improved coordination and communication. Restrictions and permitting officers should communicate and cooperate in implementing consistent wetlands policies, and wetland's officers should coordinate their activities with other permitting agencies within the Department of Environmental Management and Environmental Quality Engineering. Such coordination is made easier if there are explicit policies.

c. fairer regulations. Some of the wetlands regulations may need revision. (For example, the regulation which determines the boundaries of wetlands provides for a horizontal boundary but not a vertical one, thereby requiring developers to seek permits for developments on steep inclines near wetlands, i.e. Plymouth Cliffs.) The absence of a defined vertical boundary is not fair to developers, especially if there is a vertical distance beyond which it is not necessary to take special precautions to protect wetlands.

The kinds of processes which would increase administrative efficiency outlined above do not necessarily require participation from developers, who themselves may not be interested in becoming involved with issues until they become facts. (i.e. until a policy is established or a set of regulations issued.) At the same time, input from developers should be useful in any attempts to streamline or coordinate procedures, because the developers know where the specific snags and delays are. Efforts to address their problems could counter the strong anti-development image of some of the

Conservation Commissions and administrative offices.

Developers seem most interested in certainty, i.e. in knowing what the Conservation Commissions and the state require. Explicit guidelines and policies, on both a state and local level, should address these interest.

B. LEGISLATIVE LEVEL (LOCAL OR STATE)

Legislative activities concerning wetlands under consideration now probably would not affect the outcome of private sector/public sector interaction during the implementation process (it probably wouldn't matter to the developers whether Conservation Commissions are elected or appointed). Working with developers on legislation may result in compromises which weaken the law. No clear mismatch exists between the intent of the law and the structure for implementation (developers do not complain that the law is ridiculous or compliance impossible). Consequently, the recommendations do not emphasize developer private sector/public sector cooperation in most legislative planning processes which would concern wetlands. Even though the original assumption of this paper would have tended to support a recommendation of this nature, the case suggests that during the time period discussed, the private sector did not show interest in legislative planning.

However, the law is weak in some areas, and certain changes could result in better implementation.

1. Change the punishment for violators: Some people feel that prosecution of violators, i.e. people who do not comply with the law by altering wetlands without applying for a permit, would be made easier if the violation were a civil rather than a criminal offense.[73] Institution of dredging fees, which would be doubled for violators, might reduce the incentive to violate the law.[74] Regardless of whether the offense is

criminal or civil, somebody must identify the violation. Changing the nature of the offense may result in easier prosecution of identified violators, but does not improve the capacity of Conservation Commissions in identifying violators. The mechanism for identifying violators must be improved as well as the mechanism for prosecuting them if differential dredging fees are to provide any added incentive for compliance with the law.

2. Improve restriction incentives: The erosion of local tax bases creates incentives for the development, rather than the restriction of wetlands. Under an older version of the law, persons who objected to the restriction of their land could complain in writing to the Commissioner of Natural Resources and thereby cancel the restriction.[75] Now a person must go to court, thereby placing a financial burden on the owner and reducing the number of complaints. That owners could successfully petition the superior court with the claim that restriction orders constitute a "taking" and that the owner must receive compensation creates a disincentive for Conservation Commissions to restrict lands.[76] A careful investigation needs to be made of incentives which potentially could increase restriction of critical areas. These include more equitable tax exemptions and the designation of zones where development rights may be sold and exchanged or where taxes on development are redistributed to restricted areas.[77]

Whether or not developers would participate in these kinds of legislative processes depends on many factors, such as the strength of the environmental lobbies, the mood of the legislature (environmental protectionist or development), the strength of the developers' lobbies, and whether the amendment has any advantages for the developer. The incentive for a developer would be to oppose amendments which would increase the cost of the project, so that joint efforts of developers and environ-

mentalists may compromise the intent of the amendments. The case study indicates that environmentalists have not needed to compromise with developers to procure passage of their amendments. During the time period covered by the case study however, the mood of the legislature was pro-environmental protection and environmental issues were highly visible, the environmental protection lobbies were strong and the developers' lobby was weak. Consequently, developer cooperation was not necessary to insure passage of a bill and developer opposition was not sufficient to insure defeat of a bill.

However, although developer cooperation was not necessary during the passage of the wetlands laws and amendments during the time covered by the case study, this finding is not generalizable to other situations and cannot be used to predict what may happen to other pieces of environmental legislation which developers oppose. (See Case Study # 2.) Some of the factors which may have contributed to the success of environmentalists have changed.

1. weaker environmental lobby. The strength of the environmentalists was greatly enhanced by effective lobbying from the Massachusetts Forest and Parks Association, However, since some of the important positions in the Association are now vacant, active environmentalist lobbying either for or against bills, has decreased.[78]

2. lower visibility of environmental issues. Since issues of environmental protection receive much less public attention now, legislators are not under pressure to report out favorably environmental legislation and to vote for it.

3. more effective developer lobbying. The developers' lobbyist is becoming more successful in his lobbying efforts. Recently, the Home Builders Association pushed through the repeal of a bill

setting minimum limit on the number of feet which had to be between septic tanks and drainage systems. The repeal reduces the miminum number of feet potentially resulting in a greater number of developments near drainage systems and potential detrimental consequences for wetlands. The lobbyist is rapidly effectively counteracting the feeling that the Association has too diverse membership to have any credibility by having many individual members (200-300 at a time) write to legislators and to the Governor supporting the Association's position. In the future the group should be not ignored.[79]

4. Change in mood of the legislature. The recession has caused employment to replace the environment as a priority issue. Interest in bringing petroleum related industries to Massachusetts is the current manifestation of an effort to dispel Massachusetts' anti-business image. Creating this climate for investment may mean assuring business that strong environmental laws will not delay or increase the cost of development[80]

WETLANDS FOOTNOTES

[1]Margaret Reynolds, "A History and Evaluation of the Massachusetts Wetlands Protection Act," M.A. Thesis, Boston University School of Public Communications, 1975, pp. 12-16.

[2]Ibid., pp. 7, 16.

[3]Tiranth Gupta, "Economic Criteria for Decisions on Preservation And Alteration of Natural Resources with Special Reference to Freshwater Wetlands in Massachusetts," Study for the University of Massachusetts, August, 1973, pp. 61, 67, 189.

[4]Interviews, 4, 22, 40.

[5]Interviews, 1, 13, 17, 22.

[6]Chapter 131, Section 40 of the Massachusetts General Laws.

[7]Interviews 4, 40.

[8]Interviews 22, 40.

[9]Interviews 1, 9, 17, 29.

[10]Interviews 1, 9, 17, 29.

[11]Interview 4.

[12]Interviews 4, 40.

[13]Interviews 1, 17, 22, 40.

[14]Ibid.

[15]Interviews 22, 40.

[16]Interviews 17, 22, 40.

[17]Chapter 130, Section 40, History of the Massachusetts General Laws.

[18]Ibid.

[19]Interview 4.

[20]Informal records of testimony of the Joint Committee of Natural Resources at the Massachusetts Legislature.

[21]Inteviews 1, 17, 40.

[22]Interviews 1, 17, 40.

[23]Interviews, 1, 40.

[24]Interviews 1, 4, 40.

[25]Interview 28.

[26]Interviews 4, 40.

[27]Informal record in Joint Committee of Natural Resources, op. cit.

[28]Interview 30. That many environmental bills were reported out of the Joint Committee illustrates the successful effort of environment groups, particularly given the anti-environment voting record of some of the more powerful committee members (See Citizens for Participation in Political Action Newsletter Supplement, June, 1974).

[29]Interview 29.

[30]Interviews 1, 13, 17, 30.

[31]Interviews 1, 61, 17, 28, 30, 36.

[32]Ibid. The record of the Home Builders Association position at the Joint Committeee on Natural Resources tends to support the perceptions of those interviewed that the Association does not support as many bills as it opposes.

[33]Regulations under the Wetlands Protection Act, General Laws, Chapter 131, Section 40, filed November 11, 1974, published November 18, 1974, Section 2. 41.

[34]Interveiws 1, 22, 40.

[35]Ibid.

[36]Wetlands regulations, op. cit.

[37]Interviews 1, 22, 40.

[38]Interviews 1, 71, 22, 35, 40.

[39]Ibid.

[40]Interviews 1, 17, 22, 24, 35, 40.

[41]Interview 35.

[42]Interviews 35, 40.

[43]Interview 35.

[44]Interviews 1, 3, 13, 17, 22, 35.

[45]Ibid.

[46]Interviews 22, 40.

[47]Interviews 1, 3, 13, 17, 22, 35.

[48]Interviews 1, 13, 17, 22, 35.

[49]Interviews 1, 13, 17, 22.

[50]Ibid.

[51]Ibid.

[52]Interviews 22, 40.

[53]Ibid.

[54]Interviews 6, 20, 40.

[55]Ibid.

[56]Interviews 6, 20, 22.

[57]Figures available from Massachusetts Department of Environmental Quality Engineering

[58]Ibid.

[59]Interviews 1, 13, 17, 22.

[60]Interviews 1, 13, 17, 22, 30, 35, 40.

[61]Interviews 13, 22, 35. 40.

[62]Interviews 13, 22, 30.

[63]Interviews 13, 17, 22.

[64]Ibid.

[65]Interviews 22, 30. 40.

[66]Interviews 1, 22.

[67]Interviews 13, 17, 22.

[68]Interviews 17, 22, 40.

[69]Carol Surkin, Boston Globe, December 2, 1975, editorial page.

[70]Interview 40.

[71]Jens Sorenson, "Coastal Zone Management in California: Three Factors Influencing Future Direction," Institute of Urban Affairs and Regional Development, University of California, Berkeley, 1973.

[72]Richard Walker, "Wetlands Preservation and Management in Chesapeake Bay: The Role of Science in Natural Resource Policy," Coastal Zone Management Journal, Volume 1, Number 1, (Fall, 1973) pp. 75-101.

[73]Interview 40.

[74]Ibid.

[75]1968 version of Chapter 131, Section 40a of the Massachusetts General Laws.

[76]Interview 24.

[77]Sorenson, op. cit.

[78]Interview 35.

[79]Interviews 4, 28, 35.

[80]Interview 34.

CASE STUDY # 2

MASSACHUSETTS ENVIRONMENTAL POLICY ACT

This case study presents an inquiry into the nature and outcomes of private sector/public sector interaction during the passage and implementation of the Massachusetts Environmental Policy Act. A history of the role and effects of private sector participation in the legislative and executive processes is presented, followed by an analysis of private sector/public sector interaction. The analysis includes a discussion of those factors associated with specific outcomes of private sector/public sector interaction. Recommendations which address problems relating to private sector/public sector relationships and problems relating to the administration of the law are presented.

I. Legislation

A. HISTORY

Support for some kind of environmental protection law came from both the Governor's office and the Legislature. Massachusetts' concern for environmental protection dovetailed with a similar national mood. In 1969, when the "environmental movement" was at its height, Congress passed the National Environmental Protection Act, which the courts upheld.[1] In 1970, both Governor Sargent and Senate President Donahue submitted environmental legislation, most of which concerned water and air pollution. One bill, however, concerned general environmental quality. It called for the creation of an Environmental Quality Control Council and gave the Governor's office subpoena powers over violators. While this particular

bill did not pass, many of the water and air quality bills submitted by Governor Sargent and President Donahue did pass.[2]

In 1971, Governor Sargent filed a different version of an environmental protection act, which was similar to the National Environmental Policy Act, and which gave enforcing authority to the Executive Office of Environmental Affairs.[3] The bill was combined with a proposal by Attorney General Quinn providing for a division for environmental protection within the Attorney General's office.[4] The bill passed in the House, but failed in the Senate, under the leadership of Senate President Harrington.[5] However, a citizen's suit law (Chapter 732 of the Acts of 1971) allowing a group of ten citizens to sue for environmental damage was passed by the Legislature.

B. MASSACHUSETTS ENVIRONMENTAL POLICY ACT (MEPA)

1. Passage

In 1972, Governor Sargent refiled his bill (H5134) in the form of an executive order. On his blueprint for the Executive Office of Environmental Affairs,[6] issued February 4, 1972, Governor Sargent restated as one of his goals of 1972 the establishment of a Massachusetts Environmental Policy Act which would apply to all major state projects. In his executive order to the legislature, Governor Sargent asked that all state agencies and authorities consider the potential for environmental damage in all their actions and prepare reports demonstrating how they have minimized damage to the environment. All the cabinet secretaries were to identify those "projects and activities" which would require environmental impact statements.[7]

Speaker Bartley filed a similar bill and combined it with Attorney General Quinn's proposal to establish a division for environmental protection within the Attorney General's office.[8] A number of variations were dis-

cussed. These included: 1) exempting the Massachusetts Port Authority; 2) including municipal projects; and 3) giving the Office of Environmental Affairs varying degrees of administrative authority.[9] During the legislative debate, the original language which referred to "major projects" as the subject of the law was changed to "all projects."[10] President Harrington supported the bill, allegedly because Attorney General Quinn was adamantly for the second part of the bill[11] (the environmental protection division in the Attorney General's Office).

The bill was passed late in the legislative session at 3:30 or 4:00 in the morning when many legislators were absent and those present were weary.[12] The Senate Counsel did not approve the bill and deleted the Massachusetts Environmental Policy Act. It was too late to pass amendments. When the Counsel left the room for a break, one of Governor Sargent's environmental aids and Senator Saltonstall replaced the deleted section.[13] The bill was introduced and passed.

2. Role of Lobbyists

Even through the bill was passed hurriedly in the closing hours of the legislature, the issue of an environmental policy act was public, and received much notice from the press.[14] Environmentalists lobbied for the bill, and the Executive Offices lobbied for it, (Governor Sargent) and against it(in the form of exemption requests, both by the Port Authority and the Department of Public Works.) Private sector business interests remained silent. Most private business groups were aware of the bill, but unaware of its potential implications because the issue of whether or not private projects requiring state permits came under the law never came up.[15]

C. AMENDMENTS

1. Passage

The Massachusetts Environmental Policy Act is written in two sections. Section 61 went into effect in January, 1973 and Section 62 in July, 1973. No regulations were issued for Section 61 because the Office of Environmental Affairs considered it as a general philosophical statement.[16]

The absence of regulations between January and July produced uneasiness and uncertainty in the business community. People didn't know how a new law would be enforced. The business community, not knowing what would be required in an environmental impact statement, was afraid that banks would deny them loans without approved projects.[17] Such certainty was impossible without a clear definition of an environmental impact statement. Precedent suggested that private projects were subject to MEPA. In California, a court decision, (Mon vs. Mammoth Co.), determined that private projects were included under the law when they required state permits.[18]

The Greater Boston Chamber of Commerce, as well as other industry associations and individual construction companies, alarmed at the prospect of having to write environmental impact statements, approached Governor Sargent and requested that he press for a change in the regulations which would exempt private projects from the law.[19] Governor Sargent apparently did not want to antagonize the business community, yet he could not respond to them by submitting new legislation to weaken the law because he would risk losing the support of environmentalists, as well as the support of the Legislature.[20] He asked the Supreme Judicial Court for an opinion stating whether the regulations were outside the authority of the Office of Environmental Affairs.[21] The Court's opinion could not be construed as

precedent since the Court had no specific case before it. The number of briefs submitted to the Court indicate the wide range of opinion over whether the law included private projects.[22] The Supreme Judicial Court found that no solemn occasion existed requiring the justices to issue an opinion,[23] thus putting the decision back in the hands of the Governor and the Legislature.

Governor Sargent did not satisfy the need of the business community. They thus chose another strategy. Labor and industry found a common concern - fear that the uncertainty of the law's interpretation would cause a loss of jobs through denials of bank loans and costly delays.[24] Jobs for Massachusetts, (an association of business and labor groups, whose board includes the Speaker of the House, Senate President, and lieutenant Governor), became a forum for discussion of the uncertainty and ambiguities of MEPA.[26] One of the members of the Board, Senate President Harrington, introduced a bill to exempt private projects. The Boston Chamber of Commerce and Secretary Foster did not reach any compromises on the issue of private projects because the Secretary's office did not want to exempt them.[26] The Executive Office of Environmental Affairs and the legislature conducted hearings during which no concrete evidence of banks refusing to issue loans was presented.[27] The potential negative economic impact feared by the business community could not be demonstrated, and the projections of the potential number of job losses due to delays in obtaining approval for impact statements were never verified.[28] The Legislature, then, became the forum where a compromise between the Executive Office of the Governor and the business community had to be reached. The Office of Environmental Affairs did write and submit amendments, but these amendments did not exclude private projects, and the business community rejected them. Under pressure from the Lieutenant Governor, Secretary Foster's office was forced

to accept the amendment written by the Chamber of Commerce.[29] The Chamber, convinced that the Senate President Harrington's bill would not pass the House, wrote a less sweeping amendment. Harrington himself may not have wanted his bill passed, because he appeared to be using it as a threat to force a compromise.[30]

The amendment written by the Chamber of Commerce stated that any agency which issues a permit must write an impact statement for those projects which did not require Commonwealth funds, but which could cause damage to the environment. However, the impact statement had to be "limited in scope to the subject matter jurisdiction" of the agency. The Chamber of Commerce never defined "subject matter jurisdiction". The result was a questionable limitation of the scope of the law.[31] For example, if the only permit necessary to build a shopping center is a curb-cut, the agency giving the curb-cut permit must limit its environmental impact statement to the effect of the curb-cut on the environment, not the effect of the whole shopping center. At the same time, it is possible to interpret broadly "subject matter jurisdiction " to cover much more of a project. The Wetlands Protection Act for example, requires that the health, safety, and welfare of the community be protected before a permit is issued. The "subject matter jurisdiction" of these permits is therefore quite broad.

The Massachusetts Environmental Policy Act has been amended several more times. The most recent amendment extends the statute of limitations and specifies agency responsibilities regarding the promulogation of rules and regulations.[32] The amendments were discussed and drafted in a Commission created by the Legislature, were supported by the Secretary of Environmental Affairs, and were presented without much publicity.

2. Role of Lobbyists

The Legislature passed the amendment submitted by the Boston Chamber of Commerce. Several factors may have contributed to their success. The composition of the board of Jobs for Massachusetts guarantees that the leadership in the Legislature is aware of the business community's interests. For most legislators, however, the issues were vague. One of the chairmen of the Joint Committee on Natural Resources consistently confused the Environmental Policy Act with the Wetlands Protection Act.[33]

The environmental lobbyists felt they could not sustain adequate pressure to bring about defeat of the amendment, primarily because the amendment itself was so vague that there appeared to be little reason for legislators to vote against it. One important part of the amendment, however, called for the establishment of a commission to study the law and to be the forum for discussion of future amendments. The main reason private sector business groups entered the Legislative process was because they perceived a threat in the uncertainty of the law.[34] Different business groups participated in the process. Cooperation between usually disparate and competing groups occurred.[35]

The later amendments were supported by the Office of Environmental Affairs, and private sector business and industry groups seem to have played a passive role.

D. LOBBYISTS

1. Jobs for Massachusetts

Jobs for Massachusetts is not an "official" lobby group. It is an association of business and labor groups, which was started about three years ago, and whose board regularly meets to discuss issues. Often, the group has difficulty finding a issue over which everyone agrees because the business

and labor representatives often have extremely diverse opinions.[36] However, should the group reach any kind of consensus, the Board of Directors becomes very powerful. Its members include the heads of Boston's major banks, Massachusetts' major developers and heads of construction companies, as well as the Speaker of the House of Representatives, the President of the Senate, and the Lieutenant Governor. The private sector representatives on this board control much of the campaign money in Boston, and the board meetings provide a way for the private sector to express itself to the government, especially since the public officials on the Board attend almost very meeting.[37]

Dissatisfaction with the uncertainty over the meaning and requirements of the Massachusetts Environmental Policy Act was common to all the groups in Jobs for Massachusetts, because implicit in the uncertainty was a threat of a decrease in the number of jobs. After one of the board meetings for Jobs for Massachusetts, Senate President Harrington submitted his amendment which would exempt all private projects from the Massachusetts Environmental Policy Act, thereby weakening the Act significantly.

2. Chamber of Commerce

Jobs for Massachusetts, while not an offical lobby group, has a receptive ear in the House, the Senate, and the Governor's office, (through his Lieutenant Governor).[38]

Like Jobs for Massachusetts, the Chamber of Commerce has a diverse membership which includes small retail store owners, as well as major banks. In the past, the Chamber tended to listen to their more powerful members, such as the insurance companies, the banks, and the utilities. While the diversity of opinion normally tends to render the Chamber unable to take many public stands,in this case most Chamber members agreed that the Environ-

mental Policy Act was a problem.[39] As a consequence, the Chamber of Commerce as a whole tried to negotiate with Governor Sargeant.

The Chamber also coordinated its activities with Jobs for Massachusetts in pressuring the legislature for an amendment amenable to the Chamber.[40] One man at the Chamber and his lawyers wrote the amendment which was later adopted.[41]

It is generally agreed that the influence of Jobs for Massachusetts brought the Chamber amendment into the Legislature.[42] Even through the amendment may not have addressed the issues clearly or directly, its sponsorship guaranteed the support of the legislative leadership. According to environmentalists, the Chamber could have written a stronger, clearer amendment to better satisfy their needs, but didn't take advantage of the opportunity.[43] However, the Chamber was pleased with the success of the amendment and promoted the author of the legislation.[44]

Generally, the Legislature does not consider Chamber policies or requests threatening or credible.[45] Chamber lobbyists tend not to understand the multiplicity of concerns that legislators have. The profit margin and the job market seem to be primary concerns of Chamber lobbyists, while legislators must respond to a wide range of political and geographic constituencies.

Chamber lobbyists tend not to be credible because they often present untenable data to support their policies,[49] and because the Chamber's diverse membership does not always support positions taken by lobbyists.

3. Other Lobbyists

The Associated Industries of Massachusetts, an association of about 2,500 manufacturers, took little action on this issue other than testifying at legislative hearings. Although the Association has the resources to develop policy legislation and provide information to legislators, it de-

liberately played a more passive role in the controversy over the Massachusetts Environmental Policy Act. Business groups generally do not interfere with each other's lobbying,[46] and the Chamber of Commerce had taken the responsibility for lobbying efforts related to MEPA.

The Home Builders Association had wanted to work with the Chamber of Commerce, but the Chamber, certain of success, felt no need for additional allies.[47]

II. Executive

A. BRIEF SUMMARY OF LAW

The Massachusetts Environmental Policy Act is divided into two sections. Section 61 states that all agencies and authorities of the Commonwealth must determine the environmental impact of their activities and take all practicable means to minimize environmental damage. This section was to go into effect on January 1, 1973.

Section 62 states that authorities and agencies of the Commonwealth can not begin projects until they have published and circulated environmental impact reports. The reports must include a statement of the measures taken to minimize environmental damage, a statement of the environmental impacts of the project, and a discussion of project alternatives. Section 62 was to go into effect on July 1, 1973.

The bill was designed to address some of the inadequacies of the National Environmental Protection Act. These include:

- direct non-compliance or evasion by some groups,
- failure to circulate the draft impact statement to the pubic,
- the lack of authority on the part of reviewers to reject an impact statement,
- the lack of control of the Environmental Protection Agency over its sister agencies.[48]

B. LOBBYING DURING THE DEVELOPMENT OF REGULATIONS

Private sector groups did not participate in the regulation writing.[49] Secretary of Environment Foster and his counsel began in December, 1972, to prepare regulations to go into effect July 1, 1973. In the regulations, Secretary Foster determined that "project" meant "any work, project or activity of any agency which may have environmental impact, and which is (a) directly undertaken by the agency, or (b) which is supported by any form of financial assistance from an agency, or (c) which involves the issuance of a lease, permit, license, certificate, or any entitlement for use by agency."[50] Thus, the Secretary determined that private projects which have environmental impact and which require state permits (i.e. a curb cut) should come under the jurisdiction of the law. Whether this particular definition of "work, project, or activity" was within the scope of MEPA became a subject of much debate.[51] The business community was invited to participate in the regulation writing, and testified at the hearings, but their contribution was minimal.[52]

C. ADMINISTRATION

The Massachusetts Environmental Policy Act is less strong than the Wetlands Protection Act, since it can delay but not prohibit development.

The intent of the MEPA law is to motivate public and private sector groups to consider the environmental impact of their activities. In other words, the law expects that agencies incorporate the concern to minimize environmental damage in their project planning. However, the mechanism of implementation may lack the incentives to induce agencies and groups to internalize environmental concerns.

1. State Level: Office of Environmental Affairs

Three full-time staff in the Office of the Secretary of Environmental Affairs review impact statements. Since private sector groups tend not to

submit impact statement until late in their planning process,[53] the impact statement reviews do not necessarily provide incentives for agencies or private sector groups to internalize a concern for environmental protection. Thus, by the time an impact statement is submitted, the opportunity to consider seriously alternatives to the proposed project is reduced.

The staff in the Office of Environmental Affairs reviews impact statements and circulates them for other agencies or groups to review and comment. For example, the coastal review center in the coastal zone management office reviews impact statements concerning projects in the coastal zone. A publication called the Environmental Monitor, lists the impact statements available for review, thus allowing review and comment by any interested party. An agency's use of them is voluntary, not obligatory, thus limiting the law's effectiveness. However, the comments are not legally binding.

The staff cannot directly provide incentives for agencies or private sector groups to consider the importance of environmental protection in their planning. Their main function seems to be to require the full disclosure of environmental impact in the impact statement. Other agencies planning projects or evaluating permit applications can use the comments of the people from the Office of Environmental Affairs in the decision making process. However, while the Office of Environmental Affairs can reject impact statements for incomplete disclosure or improper determination of environmental impact, agencies can issue permits. An agency head is not required to defer to the Office of Environmental Affairs.[54] Review and comment by the Office of Environmental Affairs becomes valuable to those agencies concerned with environmental impact.

However, the low appropriations in the Office of Environmental Affairs makes comprehensive review of impact statements or project difficult.

Underfunding has several consequences. Because of limited funding, the Secretary of Environmental Affairs is placed in a position of having to bargain for survival. Since the Office lacks support from both the Governor and the Legislature, the Secretary is in a vulnerable position and can do little but compromise the role of the Department in order to obtain funding.[55]

Because the full time staff is so small, the Office has depended on student reviews. Students specializing in environmental management at the University of Massachusetts have reviewed many impact statements. Private sector groups have complained that students have little knowledge or expertise.[56] Although students are not trained professionals, the limited funding buys more services from students than professionals.[57]

Furthermore, with such few staff many impact statements have been rubber stamped and approved without thorough review.[58] It is difficult to determine whether the group or agency proposing a project considered less environmentally damaging alternatives. Considerations of alternatives to a particular project are required in an impact statement, but they are not necessarily included in the planning process.[59]

Problems also result from an agency's limited jurisdiction in environmental impact assessment. Increased staffing would allow the Office of Environmental Affairs to interpret the jurisdiction of the permitting agency in a very broad way. By interpreting the "subject matter jurisdiction" of the permitting agency very narrowly, the Office may approve some projects which have not minimized environmental damage. For example, a curb-cut for a shopping center may not hurt the environment, but the shopping center itself may.

Another important consequence of limited funding is the staff's inability to gather independent data, and consequent reliance on those

agencies or private sector groups interested in receiving project approval. Environmental impact statements are not always written by disinterested, neutral parties, but by the private sector interests who will be doing work for the State or who are requesting permits. Typically, an agency receives an impact statement, replaces the cover page written by the private sector group with its own, and forwards the report to the Office of Environmental Affairs. Environmental impact statements thus can become justifications of projects already planned rather than the product of a planning process which includes environmental protection.

The lack of clear cut policies and priorities for environmental management may limit further the effectiveness of the implementation.[61] Although MEPA reviews may be computerized so that trends will be discernible, at the moment projects are reviewed on a case by case basis with no systematic mechanism for cumulative review,so that incremental impacts may go unnoticed.

If the Office of Environmental Affairs wishes to halt a project for improper determination of environmental impact, the Secretary of Environmental Affairs must go to court, an action with potentially damaging political consequences for the Secretary.

As a result, private sector industry interaction with those with MEPA review functions is quite different from private sector interaction with the wetlands administrators. Since the law is not prohibitive, there is generally little incentive to have to think about negotiating.[62] If any agency granting a permit has a good relationship with the Office of Environmental Affairs, and the agency seriously considers the Offices's comments, there is incentive for private sector groups to discuss impact statements with the staff in the Office of Environmental Affairs. However, some groups do not bother because they do not perceive the EOEA to be

reasonable. (For example, the impact statement for the Pilgrim II Power Plant was reviewed by someone who had a reputation for intensely disliking power plants, and therefore was bound to find fault with the statement no matter what it said.[63]) This kind of situtation gives the Office of Environmental Affairs the reputation of being unfair, and calls a great deal of public attention to the Office which is very disruptive and not very constructive. On the other hand, had the Secretary assigned the impact report to someone more open-minded about power plants, the environmentalists probably would have been antagonized.

Groups can make efforts to avoid involvement in the MEPA. If the curb-cut permit is the only permit required by the State, a developer could save the time and expense of filing an environmental impact statement by putting the curb-cut on a city road. This choice may not make good planning sense for the developer or the city, but it will save time.

2. Local Implementation

The circulation of environmental impact statements and the passage of the citizen suit law are supposed to increase the opportunity for citizen participation (See page 62) in decisions made by the State concerning environmental protection. Little litigation has occurred under the citizen suit law,[65] possibly because the publishing of impact statements does not necessarily provide a mechanism for citizen participation.

Under the Wetlands Protection Act, it is assumed that developers do not necessarily internalize environmental concerns. Rather, the Conservation Commissions act as checks on developers. They have legal authority to protect the wetlands. No similar organization has been found under MEPA. While environmental impact statements must be circulated among interested parties for comment, no specific local or regional groups, like

Conservation Commissions have the responsibility and authority to evaluate determinations of environmental impacts. Consequently, there are few court cases involving MEPA, and little opportunity for citizens to participate early in the planning process when an agency or group can choose among project alternatives.

Complete dependence on the State to evaluate impact statements may be unheathly. The Conservation Commissions were given the authority to issue wetlands permits because there was general agreement that the State was not doing an adequate job.[66] Furthermore, a characteristic of older regulatory systems and bureaucracies is that as they become more familiar with those they regulate, they carry out less effectively their mandate to regulate.[67] Regulatory systems and bureaucracies are no exception to the general pattern of human behavior which links friendship to familiarity. The first case study in this report suggests that the older wetlands office fits into this pattern. Should MEPA reviewers come to identify more with those they regulate than with the law, there are no formal local or regional groups to act as an effective check.

III. Analysis

A. WEAKNESS OF ENVIRONMENTAL LOBBIES

The Massachusetts Environmental Policy Act (MEPA) was passed without the active participation of private business and industry groups. However, since both public and private environmental lobbying efforts had not been successful in previous attempts at similar legislation, one could conclude that the MEPA become law because of quite another factor. Speaker Bartley, an advocate of an environmental policy act, combined the MEPA Bill with Attorney General Quinn's bill to establish a Division of Environmental

Protection in his office. Quinn received President Harrington's support for his legislation and so the MEPA "rode in on its coattails".

Environmental lobbies had little influence in the development of the Chamber of Commerce amendment. They were not strong enough to oppose a bill which received much publicity, which was supported by legislative leadership, and which was ambiguously worded. However, they were successful in securing passage of a later amendment strengthening MEPA when the business community was no longer lobbying against MEPA.

B. PROBLEMS IN THE STRUCTURE OF THE LAW

1. Scope of the Law

The broad, sweeping term, "natural environment" used in Sections 61 and 62 of MEPA created many uncertainties for those who had to comply with them. The wide scope of the law was a target of criticism by those who could not understand the terms of compliance. The regulations for Section 62, published six months after Section 61 went into effect, helped clarify the ambiguity and uncertainty.

2. Ambiguity in the Law

The meaning of MEPA has been ambiguous. One possible reading is that MEPA is intended to protect the environment. Section 61 supports this view, "... all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment." Interpreting Section 61 as a strong legal vehicle could give the Department of Environmental Affairs much control over the way laws within the Department are administered.

However, the more popular reading of MEPA sees Section 61 as a general philosophical statement, not a strong legal tool. In this reading, Section 62 of MEPA becomes a planning tool intended to insure full, public disclosure of the effects projects may have on the environment, but not intended as the

means to prohibit projects which may have adverse environmental impacts. Under Section 62 of MEPA, the publishing of a disclosure of environmental impact does not guarantee that the project will be undertaken in a manner which minimizes environmental impact.

3. Limited Enforcement Power

Acceptance of the second reading results in a law with limited enforcement power either as a planning tool or as a means of direct environmental protection. Section 62 is not a sufficient means to enforce either purpose. A requirement of full disclosure has not been an incentive for state agencies or private groups to incorporate a concern for protecting the natural environment in their planning.

Furthermore the powers of the Office of Environmental Affairs to demand full disclosure of environmental impact are limited because state agencies continue to retain their legal authority to issue ordinary permits regardless of determination by the Department of Environmental Affairs after a specific time period. The Secretary of Environmental Affairs cannot enforce an uneeded request for more complete or accurate disclosure without going to court.

The informal enforcement power of MEPA depends on the relationship the Secretary of Environmental Affairs has with the other cabinet offices and with the Governor, (i.e., whether cabinet officers would be willing to delay projects or permits until the Secretary of Environment Affairs was satisfied that all practicable means had been taken to minimize damage to the environment, and whether the Governor is willing to support positions taken by the Department of Environmental Affairs.)

C. PROBLEMS IN ADMINISTRATION

Because Section 61 has been interpreted as a planning guide or a

philosophical statement, those implementating MEPA have not been directing the major portion of their energies toward insuring that all laws are administered to prevent environmental damage.

They are instead reviewing impact statements to insure that they contain full disclosure of environmental impacts. The Office of Environmental Affairs has but one legal path, a lawsuit, to prevent an agency from granting a permit for a project whose planners have not minimized or disclosed environmental impacts. Therefore, the work of the staff is used more effectively when the Secretary of Environmental Affairs has:

- strong, informal relationships with other agenices;
- the support of the Governor
- the backing of citizens who are informed and organized enough to go to Court.

An additional alternative, but not a politically safe one is for the Secretary of Environmental Affairs to sue an agency or group.

Several other factors limit the usefulness of reviewing environmental impact statements. Because private sector groups interact with the State after a project is planned, environmental impact states become justifications of projects, rather than planning tools.[68] Late in the process, consideration of less environmentally damaging alternatives is not usually an option.

Inadequate funding has also made enforcement of full disclosure a problem.[69] The State must usually depend on private sector data, must narrow its interpretation of "subject matter jurisdiction", and must rubber stamp many impact statements.

Case by case review rather than selective review based on clear policies and priorities may also limit the effectiveness of impact reviews, especially with limited staff.

The State did not begin the implementation of MEPA with a good relationship with the private sector. By allowing Section 61 to hang in limbo for six months without any regulations the State did not consider industry's needs for certainty and clarity.

D. PRIVATE SECTOR BEHAVIOR

The private business and industry sector was apparently uninvolved in the passage of MEPA because their lobbyists assumed the law referred only to state sponsored projects and therefore had no implication for them.

The Chamber of Commerce's amendment, written by the business community, reflects the strength and power of private sector business and industry groups.

The primary reason for business and industry participation in the amendment process was that the absence of regulations created a substantial amount of uncertainty, and compelled the business community to seek clarity in an amendment. Had regulations been issued earlier (January, 1973), an amendment may not have been necessary, although groups still would have objected to the law because of their fears of delays, financial burdens, and litigation.[70]

Now that MEPA has been in effect for several years, private sector groups are less threatened because there has been little litigation and because the law has been used to prohibit projects. Impact statements are often regarded by private sector groups as justifications for already-planned projects, not as planning tools. They are often considered unnecessary red tape which usually will be rubber stamped, not reviewed. The impact statement requirement does not seem to act as an incentive for private sector groups to incorporate environmental protection into the planning process, but rather as a process to be avoided when possible.

IV. Conclusions for Case Study #2

In the legislative and executive arena, the following characteristics of the private sector, both business and environmentalists, seem to be associated with the following kinds of behavior patterns and the following kind of outcome:

LEGISLATIVE ARENA

A. Passage of Law

Characteristics of Business/Private Sector	Behavior Patterns	Outcome
1. Industry acts on present circumstances, not future ones. • Legislative lobbying is a low priority especially with regard to initiation of a law. 2. The diversity of membership within business associations prevents the association from taking positions with which most members agree. • Lobbying positions by some business associations are not credible with legislators. 3. Industry and business do not act unless something is at stake. Vague legislation does not present specific, concrete issues. 4. Industry does not like public controversy.	1. Little lobbying efforts, little awarness of potential implications of bill.	An environmental bill, which reflected the concerns of environmentalists, was finally passed after the opposition was persuaded to vote for the bill to make legal not MEPA itself, but the section portion of the bill - the establishment of an EPA division in the attorney general's office. (In other words, had MEPA not been attached to the EPA bill, it might not have passed.)
Characteristics of Environmental Groups	**Behavior Patterns**	
1. Environmental groups were well-informed and interested in lobbying.	1. Lobbying effort for the bill.	
Characteristics of Government	**Behavior Patterns**	
1. The Governor's Office was interested in promoting the bill and wrote the legislation.	1. Lobbying for the bill.	
Characteristics of the Issue	**Behavior of Legislators**	
1. Vague, surfaced during the time of an ideology supporting the environment; issue not so emotional or symbolic as wetlands.	1. Anti MEPA legislators were powerful enough to stop bill for two years.	

LEGISLATIVE ARENA

B. Amendments

Characteristics of Business/Private Sector	Behavior Patterns	Outcome
1. Business interests felt a specific threat to them which stemmed from the uncertainties of the law, i.e., the uncertainty of the requirements of an impact statement and from the opportunity for litigation. 2. The specific threat was shared by many business interests which do not normally agree. 3. The official lobbyists had not much influence, and had little concrete evidence to support their claims. 4. The unofficial lobbyists had direct and powerful influence. 5. Private sector dislikes public controversy but needed to change. 6. The private sector believed it was quicker to amend a new law than try to comply.	1. Business groups had the powerful negotiating position, even though they did not understand the issue clearly, and presented shaky evidence to support their cause. 2. Dislike of public controversy led the groups to negotiate with the Governor before going to the Legislature. 3. Business influence, based on sympathy from legislative leadership, produced an amendment which if passed, would virtually repeal the law.	An amendment was passed which was written by the business groups and reflected their interests. Other executive offices' attempts to exempt themselves from the law i.e., Massport and the Department of Public Works, failed.
Characteristics of Environmental Groups	**Behavior Patterns**	
1. Both the Department of Environmental Affairs and the lobbyists were willing to put time and energy into drafting amendments. 2. The state office was slow in writing regulations, thereby causing uncertainty among business groups.	1. Wrote amendments and lobbied, but did not have an audience, since the negotiation process was controlled by business.	
Characteristics of Issue	**Behavior of Legislators**	
1. Recession increased the concern for jobs and decreased concern for the environment. Governor Sargeant did not want to antagonize either group. Vague, confusion with Wetlands. 2. While the idea of exemption for private projects may have been clear, what constituted a compromise was vague.	1. Senate President responded to business concerns by introducing an amendment which would virtually repeal the law. 2. Became the forum of discussing the issue after the Executive office refused to respond.	

EXECUTIVE ARENA

Characteristics of State	Behavior Patterns	Outcome
1. Underfunded, understaffed 2. New agency - not yet identified with those it regulates. 3. Dependent on business data - no time to do independent research, especially on data and on alternatives. 4. No apparent overall policy, plan or priorities. 5. No cumulative review. 6. No prohibitive power.	1. Does very little in house research on impact statements. 2. Delays projects, but ultimately approves them.	Violators are not prosecuted. Delays do not prohibit projects. Except where state agencies have environmental concerns as a priority, the law may not be very effective.
Characteristics of Other Actors - 10 Taxpayer Groups and Other Agencies	**Behavior Patterns**	
1. Very few resources for citizen's group with which to contest draft impact statements and claim improper determinations. 2. Enthusiasm of agency depends on priorities of secretary. 3. Very few organized groups to monitor EIS's.	1. Very little litigation 2. Some agencies enforce the law (i.e., Department of Transportation) while other disregard it.	
Characteristics of Industry	**Behavior Patterns**	
1. Something at stake - <u>time</u> and <u>money</u> 2. Controls the data. 3. Has no incentive to consider seriously potential damage to the environment of their actions.	1. Little internalization of intent of the law. 2. Impact statements turn into red tape procedures to justify projects whose plans have already been decided.	

V. Recommendations

A. EXECUTIVE LEVEL

1. Provide Clarity and Certainty for Private Sector Groups

Any changes in what the State Office of Environmental Affairs expects of other state agencies or the private sector (i.e., changes in the regulations) should be clear to those groups.

The Department of Environmental Affairs may need to include private sector business groups in the development of policies or of new regulations. Private sector participation may provide certainty for business and industry and may provide the occasion for the Department of Environmental Affairs to build a working relationship with the private sector. Such participation may sometimes require compromise on the part of the Department of Environmental Affairs and may dilute new policies or regulations. However, lack of support from the Legislature and the Governor forces the Secretary of Environmental Affairs into this compromise situation with business and industry. One might conclude that an acceptable compromise which can be implemented is preferable to an empty victory which has limited enforceability.

2. Match MEPA's Implementation Mechanism with its Intent

The Department of Environmental Affairs should rectify the mismatch between the intent of the law and the mechanism for implementation. If the Department chooses to read Section 61 as a statement of MEPA's intent, than it is possible that requiring impact statements may not be the only means to implement the law. The Department needs to take additional steps to insure that all laws are administered to minimize environmental damage, such as replacing individuals in key positions, who are lax in carrying out the law or initiating lawsuits.

If the Department of Environmental Affairs assumes that the requirement under MEPA for full disclosure of environmental impacts and project alternatives means that MEPA is a planning tool, the Department needs to take steps to insure that agencies and private sector groups use it as such. Giving the Department the authority to delay projects until all means have been taken to minimize environmental damage might provide the incentive for agencies and private sector groups to take seriously environmental impact statements. Interaction between the Department of Environmental Affairs and other agencies or private sector groups early in the planning process before decisions are cast in concrete would allow the agency or group to choose less environmentally damaging projects without as much time loss. Fear of increased delays if impact statements lacked approval might motivate agencies and private sector groups to incorporate concern for environmental protection in their project planning.

3. Set Clear Policies and Priorities

The tremendous number of agency projects and private projects requiring permits and environmental impact statements results in a large amount of work. To decrease the pressure and to develop a mechanism (other than a political one) for dealing with important projects and insuring that they receive a thorough review, the Office of Environmental Affairs should establish more specific and consistent criteria for determining the importance of a project. Emphasizing state projects over private projects would not be an effective way to establish priorities, since there are many substantial and potentially damaging private projects. Some useful criteria for establishing priorities could include consideration of the cost, size, and type of project, as well as its nearness to some natural resources, i.e., rivers, coast, ecologically critical areas.[71]

Furthermore, the Department of Environmental Affairs should determine whether and when MEPA review duplicates review of environmental impacts under other state or federal laws, and if there are important benefits from the duplication. (i.e., whether when NEPA is required MEPA should nonetheless apply because local review is more thorough than federal). The Department should determine whether more coordinated review is possible. (i.e., a group which needs two permits could submit one impact statement rather than two).

Lastly, the authorship of environmental impact statements should be public. The name of the group which does the impact statement should appear on the cover.

3. Increased Funding

Since the Department of Environmental Affairs has limited authority under Section 62 of MEPA to prohibit projects which would have adverse environmental impact, increased funding for implementation may not be necessary. If, however, the Department of Environmental Affairs chose to emphasize Section 61 of MEPA, or had legal authority to delay projects until impact statements were approved, the underfunded and understaffed office could use higher appropriations. With increased funding, the Department could employ more professional staff to review impact statements. Staff would not need to be so dependent on industry data, and on industry support. Staff would be able to interact with other agencies or groups early in the project planning process when there would be more flexibility in decision making.

The Department of Environmental Affairs may be able to procure additional appropriations from three sources: 1) from the State Legislature in annual budget appropriations; 2) from the establishment of a

the review of impact statements to private sector groups which write them, and 3) from matching funds from federal programs which have relevance to the proposal.

4. Strengthen the Role of Environmental Advocates on the Local Level

At the present time, the State is the primary advocate for environmental preservation during the assessment of impact statements, a situation which may not insure protection of the environment as the relevant state agency becomes older. There is no equivalent of a Conservation Commission to check the accuracy of determinations found in an environmental impact statement. Such a group would provide an incentive for the private sector to think about environmental protection. Groups writing environmental impact statements would take their work more seriously knowing that an organized group could sue them and cause greater delays. Groups writing environmental impact statements might interact with local citizens early in the process knowing that local approval would be necessary to avoid a law suit. Citizens, who normally would lack a vehicle for participation, would have access to the decision-making process.

Three possibilities for local participation exist: local growth policy commissions, Conservation Commissions, or a group formed specifically to read environmental impact statements. Forming a new group may not be a good idea because finding the necessary appropriations and building the necessary structure will be time consuming, costly, and will further fragment the process of environmental decision-making. Because local growth policy commissions probably will be oriented toward developing growth policies, there would be a potential conflict of interest if their responsibilities included review of environmental impact statements. The local group to assume the responsibility for either assisting the enforcement

of Section 61 or of approving impact statements would be the Conservation Commissions, if the other recommendations are implemented, since they are established environmental advocates. Giving the Conservation Commissions added responsibility without the necessary authority (i.e., to delay a project) would not be an effective mechanism for local participation, because there may be few benefits to Conservation Commission members reviewing statements without any enforcement powers.

B. LEGISLATIVE LEVEL

Some of these recommendations will require amendments to the law. If the Department of Environmental Affairs decides to submit legislation, the strategy the staff chooses should not underestimate the power of the business community to influence legislative activity.

MASSACHUSETTS ENVIRONMENTAL POLICY ACT

FOOTNOTES

[1]Interview 34

[2]Ibid.

[3]Ibid., H. 5859, 1971.

[4]Interview 34, H.3086, 1971, H.6284, 1971.

[5]Interview 34.

[6]Governor Sargent's blueprint for Executive Office of Environmental Affairs, 1972, Issued February 4, 1972.

[7]H. 5134, submitted February 10, 1972 as an executive order.

[8]H. 3000, 1972.

[9]Interview 34.

[10]Interview 16.

[11]Interview 28, 34.

[12]Interviews 9, 16, 28, 34.

[13]Interviews 16, 28.

[14]Interviews 26, 34.

[15]Interviews 16, 18, 26, 29, 34.

[16]Interviews 26, 34.

[17]Interviews 9, 11, 26, 29. Boston Globe articles: February 19, 1973, July 8, 1973, July 15, 1973, July 19, 1973, and letter from the Ad Hoc Business Coalition, circulated to the State offices in the Spring of 1973.

[18]Interview 29, and, Friends of Mammoth v. Board of Supervisors of Mono County, 8 Cal. 3rd,247 (1972).

[19]Interviews 29, 34, and Boston Globe, July 6, 1973, July 7, 1973.

[20]Interview 34, and Boston Globe, March 14, 1973, page 6.

[21]Interviews 16, 29, 34, and Governor Francis Sargent, Letter to the Justices, July 27, 1973.

[22]See Briefs filed under 1973 Mass. Adv. 1253, 302 N.E. 2nd 565.

[23]Answer to the Justices to the Governor, 1973, Mass. Adv. 1253, 302 N.E. 2nd 565, October, 1973.

[24]Interview 34.

[25]Interviews 11, 26, 29.

[26]Interviews 26, 29.

[27]Interviews 16, 26, 29. Testimony of Vincent Vappi, President, Great Boston Chamber of Commerce, March 20, 1974 at a hearing on MEPA held by the Massachusetts Joint Committee of Natural Resources. Testimony at same hearing by respresentatives from the Home Builders Association and Cabot, Cabot, and Forbes., Christian Science Monitor, April 29, 1974, p. 4A.

[28]Interviews 16, 26, 29.

[29]Interviews 16, 26, 29, 34.

[30]Interview 26 and Boston Globe, February 12, 1974, p. 34.

[31]Interviews 18, 26, 29.

[32]H 6199, 1975.

[33]Interviews 26, 34.

[34]Interviews 9, 11, 29.

[35]Interviews 9, 11, 16, 29.

[36]Interview 11.

[37]Interviews 11, 26, 33.

[38]Interviews 16, 26.

[39]Interviews 16, 29, 30.

[40]Interviews 9, 16, 26, 29.

[41]Interviews 26, 29.

[42]Ibid.

[43]Interview 26.

[44]Interview 29.

[45]Interviews 16, 30.

[46]Interviews 9, 11, 29.

[47]Interview 29.

[48]Interviews 16, 24.

[49]Interviews 26, 29.

[50]Executive Office of Environmental Affairs, Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports, June 29, 1973, Section 2.4.

[51]See briefs filed under Mass. Adv. 1253, 302 N.E. 2nd 565, 1973.

[52]Interview 26.

[53]Interview 18, 26.

[54]MEPA regulations, op. cit. Section 3.1.

[55]A recent article in the Boston Globe (June 16, 1976, p. 4) quotes Senate President Harrington as saying that Massachusetts most throw off its environmental laws. The House Ways and Means budget cuts for the Department of Environmental Quality Engineering (Boston Globe, May 28, 1976) also demonstrate a lack of legislative support for the Department of Environmental Affairs.

[56]Interviews 3, 9. 11.

[57]Interviews 3, 9, 26.

[58]Interviews 9, 24.

[59]Interviews 18, 30, 35.

[60]Interviews 16, 18, 26. 35.

[61]Interviews 3, 26, 33.

[62]Interview 3.

[63]Interviews 3, 34.

[64]Interviews 17, 18. One of those interviewed described an actual case where this kind of planning took place.

[65]Interview 18.

[66]Interviews 30, 35, 40.

[67]M. Berstein, Regulating Business by Independent Commission, Princeton: Princeton University Press, 1955.

[68]J. Landis, The Administrative Process, New Haven: Yale University Press, 1938, introduction.

J. Q. Wilson, "The Dead Hand of Regulation," Public Interest, 1971.

Intervie 15.

[69]Interviews 18, 26.

[70]Interviews 18, 24, 36.

[71]Interviews 9, 11, 16, 18, 26, 29.

[72]Interviews 24, 26, 33.

CASE STUDY # 3

ENERGY FACILITIES SITING ACT

The format for the discussion of the development and administration of the Energy Facilities Siting Act varies slightly from the format used in the first two cases. Because the Energy Facilities Siting Act is the product of extensive interaction and cooperation between private and public sector groups, the discussion of the development and passage of the law is combined with the discussion of the role the lobbyists played.

Since, at the time this report was written, the Energy Facilities Siting Council had promulgated regulations but had not heard any cases or approved any forecasts the discussion of public sector/private sector interaction in the implementation stages of the law is brief. We have included a section which projects private sector/public sector interaction during implementation which is based on the interviews of those persons from both sectors who will be most affected by the activities of the Council and on a reading and interpretation of the implications of the law.

I. Legislation

A. HISTORY

Massachusetts' interest and experience with energy facility siting laws is of recent origin. The Legislature failed to pass the first siting bill which was written by Governor Sargent's counsel and his environmental aide in 1971. Instead, the Legislature accepted House Report #5349, (Chapter 78 of the resolves of 1971) which set up a legislative Commission consisting of two Senators, five Representatives,the Commissioner of Public Works, Commissioner of Public Health, Commissioner of Natural Resources, or their designees, and

six appointees of the Governor. The report mandated the Commission to study the electric industry and electric energy policy in Massachusetts.[2] Chapter 110 of the resolves of 1973 increased the number of the Governor's appointees by five, and expanded the scope of the study to include the total energy picture, including municipal electricity and the gas and petroleum industry.[3] In 1973, the Commission issued House Report #6190 which, with some modifications by the Governor and Attorney General, became Chapter 164 S.69-0 of the General Laws, or the Energy Facilities Siting Act.[4]

B. ROLE OF PRIVATE SECTOR GROUPS IN THE PASSAGE OF THE ENERGY FACILITIES SITING ACT

One Senator, with an interest in the environment, and one Representative, with a reputation for having a strong interest in the utilities, officially co-chaired the Commission.[5] However, in actuality, the Representative took the initiative in directing the work.[6] Both Senators had an interest in the environment, but all five Representatives were good friends who tended to vote together and who were oriented toward the utilities companies.[7] It is generally well known that the co-chairman from the House of Representatives has frequent contact, both socially and professionally, with utility company representatives.[8] The designees of the various State agencies tended either to be neutral, or to favor positions expressed by the utility companies.[9] The Governor's original appointees consisted of three members of environmental interest groups, (one from the Sierra Club, and two from the Conservation Law Foundation), and two representatives of the utility companies (key decision-makers in the New England Electric Company and Boston Edison) and the Chairman of the Department of Public Utilities.[10] Since both environmental and industry representatives have claimed to be in the minority position, the balance varied with meeting attendance and participation. However, the total balance tended to favor industry interests.[11] The industry representatives were not always in agreement,

however. The municipal power representative often disagreed with the other industry representatives.[12]

The Commission did not work as a whole group. A subcommittee was formed to write the siting bill. Its members included representatives from Boston Edison, the Department of Public Health, the Conservation Law Foundation, and the Commission co-chairman from the House of Representatives. The chairman set the agenda and provided the drafts of the bill on which the discussions were based. For some reason, this inhibited the negotiating position of the other interests and increased the advantage of the industry groups.[13]

The subcommittee and the Commission worked by consensus, a method which tends to dilute opposing positions. The Chairman rarely called for a vote, and, if all the problems or disagreements were worked out in the subcommittee, the whole Commission tended not to make major changes.[14]

When the first bill was reported out in 1973 (as House #6190), environmental interests not represented on the subcommittee vigorously opposed the law on the grounds that it was blatantly pro-industry.[15] The Massachusetts Forest and Parks Association persuaded the Attorney General and Governor Sargent to testify against the bill which was then sent back to the Commission for revision.[16]

Industry and environmental interests made this compromise: industry agreed to allow its demand forecasts to be subject to a public hearing and to the approval of the Siting Council. Industry representatives also agreed to the goal of "necessary" energy (as opposed to abundant energy).[17] The utility companies procured the right to initiate an appeals process to the Siting Council if they were burdened in specific ways by the permitting procedures in the State agencies or by delays on the local level. They also procured the right to eminent domain.[18] The compromises were not completely worked out or agreed upon, and the vague sections in the law reflect this.[19]

Many legislators did not understand the implications of the bill they passed.[20] The long, complicated bill came up for a vote late in the session. The implications of the bill bypassed legislators under the time pressure. Furthermore, because the bill had the support of the Commission; many legislators did not examine it thoroughly. The homerule sentiment in Massachusetts is so strong, that had the General Court been aware of the Siting Council's power to overrule local decisions, there would have been much debate.[21] Furthermore, several legislators said that the issues were vague, and that the motion was worded so that it was unclear whether a vote of yes meant a vote for or against the bill.[22]

C. ROLE OF PRIVATE SECTOR GROUPS DURING THE PASSAGE OF AMENDMENTS

Several amendments to change the date of the bill's implementation were passed in 1974. These bills, which delayed implementation of the law, were pushed through by legislators who responded to the lobbying efforts of some utility companies who remained opposed to the bill,[23] as well as the Siting Council's need for more time to write regulations.

House #6297, passed in 1974, expanded the scope of the law to include gas facilities.[24] House #5755, the petroleum amendment, was passed in the fall of 1975 without much debate or controversy.[25] This amendment expanded the scope of the law to include oil facility siting. The Siting Council must approve notices of intent to construct petroleum facilities which are filed by petroleum companies (Section 69I). Petroleum companies may make appeals to the Siting Council under the same conditions as electric and gas companies. However, oil companies can not exercise powers of eminent domain and can not appeal to override local zoning laws. Oil companies were denied these powers because several senators succeeded in deleting the homerule override from the amendment.[26]

D. ROLE OF PRIVATE SECTOR PUBLIC DURING THE APPROPRIATIONS PROCESS

During the first reporting of the budget, the Siting Council received no appropriations. Lobbying efforts by the utility companies and by the active chairman of the Siting Commission resulted in appropriations.[27]

E. LOBBYISTS

Private sector industry groups participated and contributed much to this piece of legislation, although the level and effectiveness of participation varied.[28] Most environmental interests agree that the Energy Facilities Siting Act is a highly technical law and that industry representatives contributed much useful and necessary expertise and information.[29]

- Electric Companies: The Senior Vice-President of two electric companies sat on the legislative Commssions, and one sat on the subcommittee which wrote the siting bill. They participated because they perceived something at stake - an overly stringent law if they did not participate and a potentially large financial savings if they did. Informal ties between the utility companies and the active participants on the Commission may have contributed to the industry's willingness to participate. These ties also guaranteed open communication channels. One electric company representative participated in all actions relating to the bill. These included sitting on the Commission, developing compromises when the Governor and Attorney General sent the bill back into the Commission for reconsideration, and assisting in the development of regulations.[30]

The interests of one electric company are not necessarily the interests of all electric companies. Although one utility company representative had contributed substantially to the development of the bill, another utility company opposed the bill when it was introduced in the Legislature.[31] This company representative felt that a long delay process diluted the power of eminent domain, and that the Siting Council required too much information for forecast approval.[32] The company registered its protests with the President

of the Senate who pushed through some delay in the implementation of the law.[33]

Both electric companies employ several lobby groups, one of which is the Massachusetts Electric and Gas Association. The lawyer for the Association feels he has the ear of the House and Senate leadership. He has represented the utility companies for thirty years, and claims to stop 300 bills a year.[34] He did not lobby actively for the Energy Facilities Siting Act, probably because his clients were divided.[35] Even without his direct influence, supporters of the bill were strong enough to insure its passage.

- Gas Companies: The gas companies do not have as many full time lobbyists as the electric companies, and therefore do not have the same degree of influence. However, they did participate in the development of the Siting Act. The top management (senior vice-presidents) sat on the Commission. One of the major accomplishments achieved by the gas company representatives was the reduction (from 10 to 5) in the number of years required to be covered in the demand forecast for gas.[36]

- Oil Companies: One oil company representative was on the subcommittee to write the oil amendments. The oil company representatives did not actively participate, primarily because they thought the anti-business attitude in Massachusetts would mean that the oil industry would never come here.[37] Since the oil industry is not based in Massachusetts, oil companies have no immediate stake in participating in the development of a siting law for Massachusetts.

II. Executive

A. BRIEF SUMMARY OF MASSACHUSETTS ENERGY FACILITY SITING ACT

Chapter 164 S.69-O of the Massachusetts General Laws sets up an Energy Facilities Siting Council. The Council can accept, reject, or modify

forecasts of future needs from the gas and electric companies. Electric companies must provide a ten year forecast and gas companies a five year forecast.[38] The forecast must include a determination of the demand for energy, the needs the company has in meeting the demand, the facilities and plans which would meet those needs, and alternative plans. Before accepting, rejecting, or modifying the demand forecast, the Siting Council must hold a public hearing both on a state and local level.

The Siting Council also has the ability to hear and to rule on appeals initiated by the utility companies. When a utility company makes an appeal to the Siting Council, it applies for a "certificate of environmental impact and public need".[39] A utility company can initiate an appeal if it can not meet the standards set by an agency issuing a permit using equipment commerically available, if the agency delays in issuing the permit, if there are inconsistencies in the conditions set by the various agencies issuing permits, if the conditions imposed are non-regulatory in nature, or if local delays and denials become burdensome. The certificate issued is a composite of all the permits. During the appeals process the approved forecast can be presented to the Siting Council as proof of the need for a facility,[40] thereby linking forecast approval with facility approval.

The Siting Council can not overturn State agency decisions to deny or issue permits, but it can change the conditions of permit approvals. The Council can not override federal water pollution and air pollution control laws.

B. PRIVATE SECTOR LOBBYING DURING THE PROCESS OF REGULATION WRITING

Both the gas and the electric companies submitted regulations, testified at hearings and worked with the staff of the Siting Council, although the electric companies were more involved in the process and participated from the

beginning. Both power companies testified at hearings and helped draft regulations.[41]

The gas company did not participate in the development of regulations until the end of the process, when the regulations were almost complete. Its representatives have expressed considerable dissatisfaction with what they feel is a rigid position taken by the Siting Council member who is knowledgeable about gas companies.[42] As a result, they may search for legal means to avoid interacting with the Siting Council.[43]

Representatives from large oil companies were willing to leave regulation writing to the electric companies, although representatives from smaller firms did participate in the regulation writing process.[44] After the regulations were issued, oil company representatives, sensing that the anti-business climate they perceived in Massachusetts might be changing, and disliking the precedent set in the Energy Facilities Siting Act of regulating private enterprise, complained that the regulations did not take into consideration their needs as a competitive industry.[45]

Oil company representatives, however, did not specify in writing changes in the regulations which would meet their needs, although the Siting Council staff and oil company representatives did meet to discuss the issues.[46] The Siting Council then made minor changes in the regulations and received the approval of major oil company representatives.[47]

Oil company representatives, like utility company representatives, do not always agree, particularly the smaller independents and large majors. One oil company representative who participated in the regulation writing process, cooperated with the Siting Council staff because he felt that the major oil companies, not the government, were his greatest cause for concern, although his colleagues seem to have felt the regulations were too stringent and pressured to have them rewritten.[48]

C. LOBBYING DURING THE SELECTION OF THE SITING COUNCIL MEMBERS

The Siting Council consists of: 1) a person experienced in the conservation and protection of the environment, 2) a professional engineer, 3) a person experienced in matters relating to the electric power industry (who votes only on matters directly related to that industry), 4) a person experienced in matters relating to the gas industry (who has a similar vote), and 5) a person experienced in matters relating to the oil industry (who has a similar vote). All are appointed by the Governor. The Council members with industry experience have cumulatively one vote. Additional members include the secretaries of Administration and Finance, Consumer Affairs, Environmental Affairs, and Manpower Affairs, or their designees.

Governor Sargent left the choice of all but one appointee up to his aide who apparently was not subjected to industry lobbying during the selection process.[49] Industry apparently saw no need to lobby for their choice of representatives, and participation in this process was not a high priority.[50] Governor Sargent chose the former head of the Department of Public Utilities as the person experienced in matters relating to the electric power industry. The man was appointed with the support of one utility company and the opposition of another.[51]

The gas company submitted a slate of candidates, all of whom would have had a conflict of interest had they been chosen, according to the Governor's aid who reviewed the list.[52] Although they were aware that their candidates were subject to conflict of interest, the gas company representatives did not submit any other names of people who would qualify.[53] The person eventually appointed is knowledgeable about the gas industry, but does not represent its interests according to gas company representatives.[54] At the time of this report, oil companies had not submitted a slate for the Siting Council member knowledgeable about the petroleum industry.

III. Analysis

A. VALUE OF COMPROMISE

Industry involvement with the government concerning the Energy Facilities Siting Act has been very different from what it was in the other two cases.

The Energy Facilities Siting Act, unlike the other two laws, is technical and complex and requires the contribution of technical experts, who for the most part can only be found in industry.

The co-chairman of the Commission which drafted the Energy Facilities Siting Act stressed consensus and compromise as the means of developing the legislation. Consequently industry and environmental interests needed to cooperate and compromise with each other throughout the entire process. The theoretical advantage of industry and environmentalists working together to develop joint proposals is that both groups will be willing to support the laws they have written. However, the ultimate outcome may not be where both positions are balanced, particularly if the negotiation strategies of the opposing interests are not equally strong or sophisticated. In the case of the Energy Facilities Siting Act, industry does not consider concessions made to the environmentalists important concessions. (The major compromise of the Act, discussed earlier, was that the environmentalists procured a forecast approval process and the industry procured an appeals process). Industry groups do not regard the forecast approval process as a concession to the environmentalists because they do not trust the accuracy of long term forecasting.[55] Furthermore, while environmental interests regard inclusion of the goal "necessary energy" (as opposed to abundant energy) as a concession from industry, industry representatives disagree on the grounds that New England can never have abundant energy.[56]

The other problem with using a compromise/consensus model to develop legislation is that the groups on the Commission who were to represent industry and environmental interests did not have the support of all the industry and environmental interests concerned with this issue. Compromises accepted by environmentalists on the Commission were not accepted by the Massachusetts Forest and Parks Association, which successfully lobbied to have the bill returned to the Commission for revision. Compromises accepted by one electric company were vigorougly opposed by another, which successfully lobbied to delay implementation of the law.

B. BEHAVIOR OF PRIVATE SECTOR GROUPS

1. Actual

The electric and gas companies which do most of their business in Massachusetts were willing to give the priority of top level management to the development of the Energy Facilities Siting Act and to the regulations. They perceived a potentially large financial gain from appeals made to the Siting Council. (For example, they felt that the Siting Council, with its broader perspective on both economic and environmental issues, would allow the utilities to use less expensive cooling systems than those required by the Office of Environmental Affairs. The utilities felt that the Council would agree that the added environmental protection from a more expensive cooling system was not worth the extra cost.) These kinds of issues are tangible and concrete, and the potential benefits are specific and substantial, thereby providing incentives for industry to participate.

The oil companies, on the other hand, are not based in Massachusetts. As long as the oil companies perceived an anti-business attitude in Massachusetts they had no reason to participate in the development of a siting law. After direct actions were taken by the current administration to dispell the feeling of anti-business climate, they become involved.

2. Anticipated

At the present time, the degree to which industry groups will actually use the Siting Council is questionable. The law itself, by setting minimum facility sizes, precludes projects relating to Outer Continental Shelf development from reaching the Council.

The gas company, which feels the Act is too strict may seek the means to avoid using the Siting Council. The electric companies, who for the most part are pleased with the bill and who see their interests represented in the legislaton, will also seek the means to avoid using the Siting Council in order to avoid the delays.

Originally, industry groups felt that the Siting Council, with its broader perspective on economic and environmental issues, would have less stringent pollution control standards. Some environmentalists agreed and believed that in acting on appeals the Siting Council would only overturn stringent conditions on permits.[57] (Belief that the appeals process is biased toward industry may be substantiated partly by the fact that only industry can appeal.) However, the length of time required to go through the appeals process may result in industry's choosing not to antagonize state agencies and public interest groups by using their right to appeal. Some industry groups are now saying that they would rather compromise with state agencies on major issues (such as cooling systems) and avoid the antagonism and controversy implicit in the long appeals process, where the gain might not be worth the time and money spent to procure it.[58] Such actions would allay the fears of those who feel that the Siting Council is so biased toward development that it would consistently favor industry on any appeal. The utility companies have great political power as it is, and some people are not enthusiastic about creating another place for them to exercise leverage.[59] In any case, since the Siting Council has not yet approved, rejected, or modified any forecasts, or heard

any appeals, one can not with any degree of certainty discuss the effect of the law.

IV. Conclusions for Case Study #3

In the legislative and executive arena, the following characteristics of the private sector, both business and environmentalist, seem to be associated with the following kinds of behavior patterns and the following kinds of outcomes.

LEGISLATIVE ARENA

A. Passage of the Law and Amendments

Characteristics of Business/Private Sector	Behavior Patterns	Outcome
1. The diversity of interests, even within an industry, makes it difficult to find positions with which everyone agrees. . . Consensus is hard to achieve 2. Industry does not act unless something is at stake. Specific legislation with specific tradeoffs emphasized concrete issues. 3. Industry groups possess organization, technical expertise, manpower, and capital.	1. Active interest, participation, and lobbying by top level management in industry.	1. A bill was passed with controversy over whose interests are reflected. 2. The bill was a compromise favoring industry
Characteristics of Environmental Groups	**Behavior Patterns**	
1. No clear leadership among environmental groups. 2. No clear environmental ideology was represented.	1. Lobbying unsuccessful relative to industry groups.	
Characteristics of Legislature	**Behavior Patterns**	
1. Legislative leadership appeared to reflect a pro-industry bias. 2. The legislators on the Commission concerned with the environment gave this bill low priority.	1. The weight of the Commission's support for the plan and the timing of introduction resulted in quick passage of legislation.	
Characteristics of Issue		
1. concrete, specific, complicated		

EXECUTIVE ARENA

B. Regulation Writing

Characteristics of State	Behavior Patterns	Outcome
1. Had time and expertise to spend on regulations. 2. Staff more lenient than Council on matters relating to gas companies.	1. Supplied first drafts of regulations, and negotiated with industry.	Electric companies consider regulations stringent, but fair. Appealing to the Siting Council will be so time consuming they may not make appeals. Gas companies consider the regulations stringent and may avoid the Council also. Petroleum companies originally believed the regulations did not take into consideration the competitive nature of the industry. After more negotiations and revisions, they were satisfied.
Characteristics of Public Interest Groups	**Behavior Patterns**	
1. Uninterested for the most part in writing regulations, but did testify at hearings.	1. Did not participate significantly.	
Characteristics of Industry	**Behavior Patterns**	
1. Industry had much necessary information and expertise unavailable from other resources. 2. Electric companies interested and willing to contribute expertise. Generally satisfied with their influence. 3. Gas companies involved late in the process and had less influence. 4. Major oil companies uninterested and involved late. Oil companies generally satisfied with their influence. • Industry fragmented. Not all groups share common policies. • Industry does not like to get involved until it perceives a potential gain or loss.	1. Electric companies had successful input into the regulations. 2. Gas companies did not receive concessions they wanted, because they left most of the work to the electric companies who did not represent their interests. 3. Oil company representatives from smaller firms participated early in the process. Larger firms participated later when they perceived a change in the Massachusetts business climate.	

ENERGY FACILITIES SITING ACT

FOOTNOTES

[1]Interview 16.

[2]Massachusetts House of Representatives Report #5349, Chapter 78 of the Resolves of 1971, and Interview 32.

[3]Chapter 110 of the Resolves of 1973, and Interview 32.

[4]Massachusetts House of Representatives Report #6190, 1973, and Interview 32.

[5]Interviews 4, 7, 8,

[6]Interviews 7, 8, 36.

[7]Interviews 8, 32.

[8]Interviews 7, 8, 32.

[9]Interviews 8, 32.

[10]Interview 32.

[11]Ibid.

[12]Interview 7, 32.

[13]Interviews 7, 8, 32.

[14]Ibid.

[15]Interviews 4, 8, 32.

[16]Interviews 4, 8, 21.

[17]Interviews 3, 4, 7, 32.

[18]Ibid.

[19]For example, the description of the appeals process in Section 69K

[20]Interviews 8, 28, 36.

[21]Ibid.

[22]Interviews 28, 36.

[23]Interviews 8, 21.

[24]Chapter 852 of 1974 of the Massachusetts Laws, Interview 32.

[25]Interviews 8, 32.

[26]Interviews 7, 28, 32, 36.

[27]Interviews 3, 19, 32.

[28]Interviews 3, 4, 7, 8, 21, 32.

[29]Interviews 7, 8.

[30]Interviews 3, 7, 21, 32.

[31]Interviews 3, 7, 21.

[32]Interview 21.

[33]Interviews 8, 21.

[34]Interview with Tom Joyce, lawyer in the Massachusetts Electric and Gas Association.

[35]Interviews 7, 8.

[36]Interview 37.

[37]Interviews 5, 8.

[38]See Section 69I of the Energy Facilities Siting Act.

[39]See Section 69K of the Energy Facilities Siting Act.

[40]See Section 69L of the Energy Facilities Siting Act.

[41]Interview 7, 8, 21.

[42]Interview 8, 37.

[43]Interview 37.

[44]Interviews 8, 10, 37.

[45]Interviews 5, 8, 10.

[46]Interview 10.

[47]Ibid.

[48]Interviews 5, 8.

[49]Interviews 7, 16.

[50]Interviews 3, 16, 21.

[51]Interviews 3, 16, 21.

[52]Interview 16.

[53]Interviews 16, 37.

[54]Interview 37.

[55]Interview 3.

[56]Interviews 3, 21.

[57]Interviews 3, 4, 7.

[58]Interviews 3, 21.

[59]Interviews 4, 35.

SUMMARY OF CASE STUDIES

Summary of Private Sector/Public Sector Interaction in Case Study #1

Briefly, the history of private (business) sector interaction with the government for the Wetlands Protection Act is as follows:

Little private sector/government interaction took place in the legislative branch of the government during the passage of the law or its amendments, although the developers' lobbyists did occasionally testify at the hearings. Any interaction that may have taken place, or any input that business had is not reflected in the law with the exception of the exemption granted the farm lobbyists, (which eventually was virtually repealed) and the exemption granted the utility companies. Preferences of the environmentalists are clearly reflected.

Funding for the implementation of the Wetlands Protection Act, both the permitting and restriction sections, has been limited, although apparently not because of lobby efforts on the part of the business community to prevent appropriations, since such activities appear to be low priority.

The Wetlands Protection Act has considerable emotional appeal and is considered an important symbol of Massachusetts' concern for the environment, thus putting developers who oppose the bill in the position of standing against popular ideology. In addition, the developers' lobby with its diverse membership was not as credible in the eyes of legislators as it might have been.

In the executive branch of the government, private sector/government interaction has been somewhat different. Developers were not involved in regulation writing in the early stages because of their passivity and the later stages because the Commissioner excluded them.

Developer groups did express successfully their self-interest in the permitting process. Understaffed, underfunded Conservation Commissions have tended to be little match for developers with expert lawyers and expert engineers.

In most cases, negotiations between the government agent (either the state or the Conservation Commission) benefit the developer. The building industry, however, is very competitive and most of the negotiations are carried on by individual developers (usually either the lawyer or the engineering firms), not by the Home Builders Association, whose members are very independent and competitive.

Summary of Private Sector/Public Sector Interaction in Case Study #2

The following paragraphs describe the nature of private sector/public sector interaction concerning the Massachusetts Environmental Policy Act.

- Little private sector/government interaction took place during the passage of the first version of MEPA. Business and industry groups seemed unaware of the potential implications of the law. Strong lobbying activities were undertaken by the Executive Office of the Governor and the results of their efforts are reflected in the law.

- The uncertainty created by the new law, and the initial opposition of the private sector to writing impact statements, resulted in a major lobbying effort by private business to exempt private projects from the new law. Most of their lobbying efforts were successful. Although Governor Sargent did not satisfy the demands of the business community, the Senate President filed a bill to exempt all private projects from the law. The compromise bill that eventually passed reflected the preferences of the business community. Concern for certainty in the law united private sector groups in a way which seems to occur infrequently.

- Although business lobby groups presented ambiguous and confusing information to legislators concerning the potential job losses resulting from MEPA, these groups had the power to force a change in the law primarily because of their influential position. An alliance between the politically powerful Jobs for Massachusetts and the Chamber of Commerce resulted in an unusual sucess for them. While the Chamber of Commerce does not have strong credibility among some legislators, the board of Jobs for Massachusetts constitutes a strong link between the business community and the Legislature.

- Business and industry groups did not participate in the initial development of regulations, although they may be included in the creation of future regulations.

- Although appropriations for the administration of MEPA have been low, underfunding has not been traced to industry lobbying, but rather to the Legislature's interest in the business sector, as well as political motivations of key committee members.[1] However, some business and industry groups express a great deal of interest in having the funding reduced completely and consequently nullifying the Act.[2]

- Understaffing and dependence on industry data in the impact statement review process tend to work to the advantage of the project proponents. When agency heads are concerned with environmental protection, this advantage is reduced. Interaction during MEPA review between the Department of Environmental Affairs and those who submit impact statements occurs relatively late in the planning process for these groups, so that real consideration of project alternatives does not always take place. The impact statement becomes a justification for a project, not a planning tool.

SUMMARY FOOTNOTES
MEPA

[1] Surkin, Carol, Boston Globe, December 2, 1975.

Interviews 2, 3, 34.

[2] Interviews 9, 11, 29.

Summary of Private Sector/Public Sector Interaction in Case Study #3

The following section summarizes briefly the history of private (business)sector interaction with the government during the development of the Energy Facilities Siting Act.

- Top management from industry participated in the development of the Energy Facilities Siting Act. The interests of the private sector were expressed through representation of individual companies on the legislative Commission. They received additional support from powerful and sympathetic legislators.

- Believing that the Siting Council could have some power in affecting the activities of their organizations, private industry felt it was in their interests to participate on the Commission.

- Environmentalists disagree about the success of their own lobbying efforts. Some feel that in the compromise process, they were unable to procure meaningful concessions, while others were satisfied. Industry groups do not appear threatened or worried that the bill will affect their plans in any substantial way. When questioned about possible concessions made to environmentalists, they appeared unconcerned.

- When the electric and oil companies perceived a threat, they participated in the regulations and feel they have been effective. The gas company feels its participation in the regulation writing process has been ineffective.

SECTION IV. ANALYSIS AND CLARIFICATION OF ASSUMPTION

The cases demonstrate the difficulties and complexities involved in deriving generalizations about the nature of industry interaction in the development and enforcement of three Massachusetts laws. It is impossible to find distinct causal links between particular private institutions' characteristics and outcomes of private industry/public interaction which occur later in time. Generalizations and prediction are made difficult for several reasons. In analyzing the political processes, it may be impossible to identify all the variables. The number of informal relationships among the various actors and the degree of their importance can never be known definitively. In addition, a particular political process rarely exists in isolation. For example, an amendment which favors the environment may have been the result of the particular industry involved conceding to environmental forces in return for their support on another bill not under the purview of this study. Furthermore, the composition and priorities of the different private sector groups vary widely.

The following chart (#1) illustrates the heterogeneity of the groups examined in the study.

On the basis of the cases, generalizations about the importance of many of the industry variables cited in the introduction (size of industry, competitiveness, technical expertise) are difficult to make.

For example, the size of the industry lobbying groups has not been a consistent indicator of their lobbying success. Of the registered lobbyists, the Associated Industries of Massachusetts has the biggest budget.[1] However, this group chose not to participate actively in any of the cases covered by this study becasue other groups were doing it for them.[2] The Chamber of Commerce,

not considered a heavy spender on lobbying, successfully secured passage of its version of an amendment to the Massachusetts Environmental Policy Act. Major developers in Massachusetts, who can afford to comply with the Wetlands Protection Act, or who have solid relationships with its administrators, tend not to lobby for changes, while smaller firms who do not have the resources to compromise or comply are more active lobbyists. However, this does not necessarily lead to the conclusion that the more competitive businesses are more active. The regulated electric utilities industry, for example, participated much more actively in the Energy Facilities Siting Act than the more competitive petroleum companies. In this latter example, geographic location played a crucial role. Lastly, the cases do not allow generalization about the importance of technical expertise as a determinant of private industry interaction with the public sector. While technical expertise appears to be an invaluable resource for the utility companies in their lobbying efforts, the Chamber of Commerce, with far less technical expertise, was able to accomplish its goals during the process of amending the Massachusetts Environmental Policy Act.

Even these comparisons are complicated by the following qualifications: 1) that the time frames are different for each case; 2) that few of the industry characteristics are constant throughout changing economic conditions; and 3) that the strength of the State agencies or public interest groups to which the industry must respond varies.

Despite these limitations, the cases do suggest and identify a large number of factors which shape the relationships between state and local government and private business. Two factors consistently influenced the evolution of the three laws addressed in the cases. The first is that informal contacts between private sector business representatives and government will invariably have impact on the frequency and nature of communication between the two groups.

In addition, an industry group that perceives a threat of loss, whether it be in income or time, tends to initiate interaction with the government. Consequently, the strength of the formal and informal communication channels between the government and the private business sector is a crucial factor which determines government/business behavior. Other factors influence the development of public policy relating to these laws, but in a less consistent fashion, (i.e., the nature of the issue, the priorities of the legislature, the strength of other public interest groups and of the agencies administering the law).

Rather than make facile generalizations on the public/private interactive process, the charts below have been developed to identify the industry interaction within the three sectors of government - legislative, executive, and judicial.

The Energy Facilities Siting Act has not been in effect long enough to draw conclusions about the implementation process. However, certain characteristics of the law itself and of those involved are used to project those outcomes (Chart #5).

The description of judicial outcomes relating to the Massachusetts Environmental Policy Act and to the Wetlands Act (Chart #6) is an attempt to link political/legal structures with enforcement of the law in the judicial process. It should be noted, however, that the relationship between the variables and outcomes identified is far less certain because the scope of this research did not include a detailed analysis of the judicial process. This study is not a legal analysis of judicial decisions and interpretation of the law. Rather, it is an analysis of the evaluation, implementation, and enforcement of the three laws with an attempt to relate their status to the relationships between government and business.

All the descriptive work in the charts relates to the political process. Another process is implicit in this analysis, the planning process. Planning,

though a function of regulatory agencies is not treated separately in these charts because its effects on public/private interaction are not easily distinguishable when planning is interwoven with the political process.

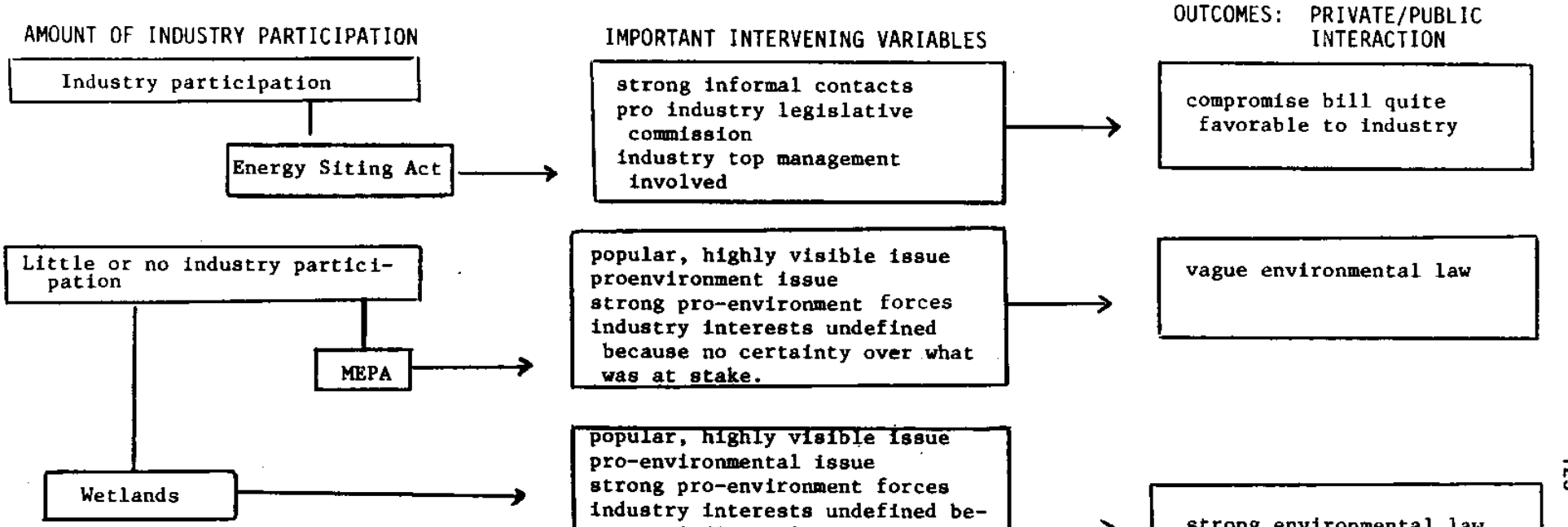
#1

CHARACTERISTICS OF BUSINESS/INDUSTRY GROUPS
THROUGHOUT THESE THREE CASES

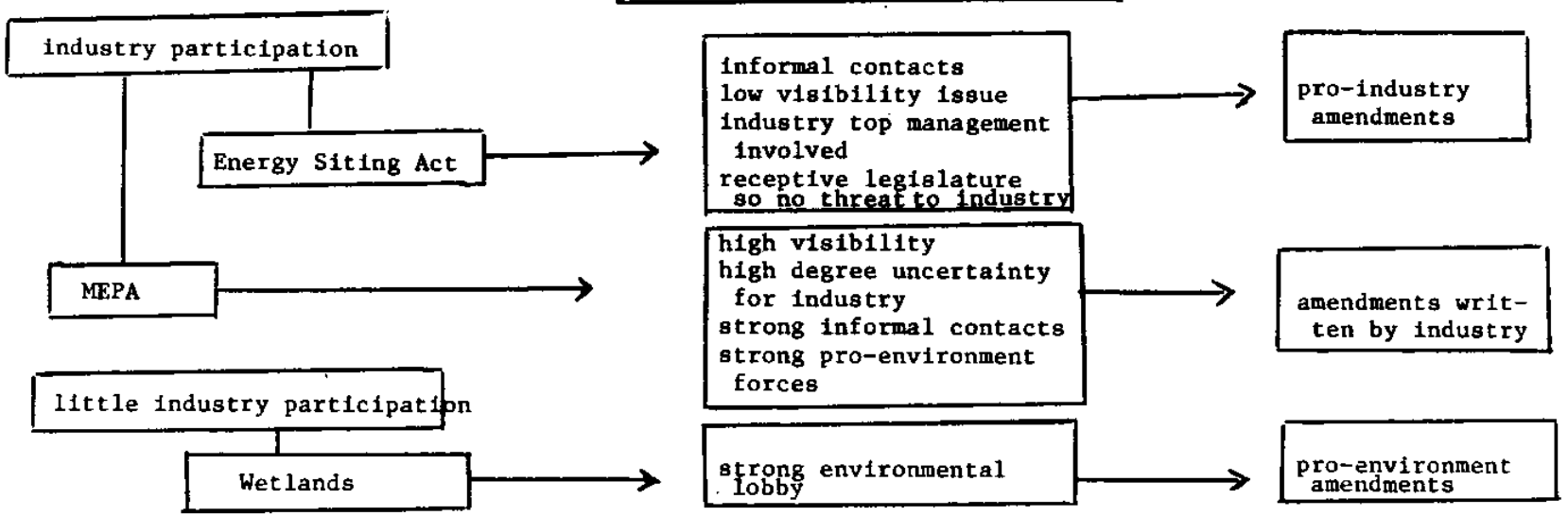
Builders, Developers	Utility Companies	Associations	Utility Associations
1. Little time or expertise for legislative lobbying. 2. Competitive, fragmented	1. Electric companies are successful lobbyists. Their resources include professional expertise and informal contacts. Gas companies have fewer lobbyists than electric companies and a less spectacular record. 2. Lobbyists are professional, credible, honest, sociable, reliable, full-time, well paid, have personal friends in legislature. 3. Utility companies fragmented often disagree on policies.	(Home Builders, Chamber of Commerce, Jobs for Mass, AIM) 1. Too broad, too diverse to have unified positions most of the time positions lack credibility when they are unified they have influence. 2. Perceived as less professional. Less sophisticated. Data often unreliable. Positions tend to be negative. 3. Little influence except for Jobs for Massachusetts.	1. Scope limited enough so that positions are possible which all members support. Positions taken are credible. although occasionally members do not agree (electric co.) 2. Lobbyists are honest, professional, credible reliable, full-time well paid, have personal friends in legislature. 3. Considerable influence especially at stopping legislation (electric companies) (gas companies not so much influence- no association

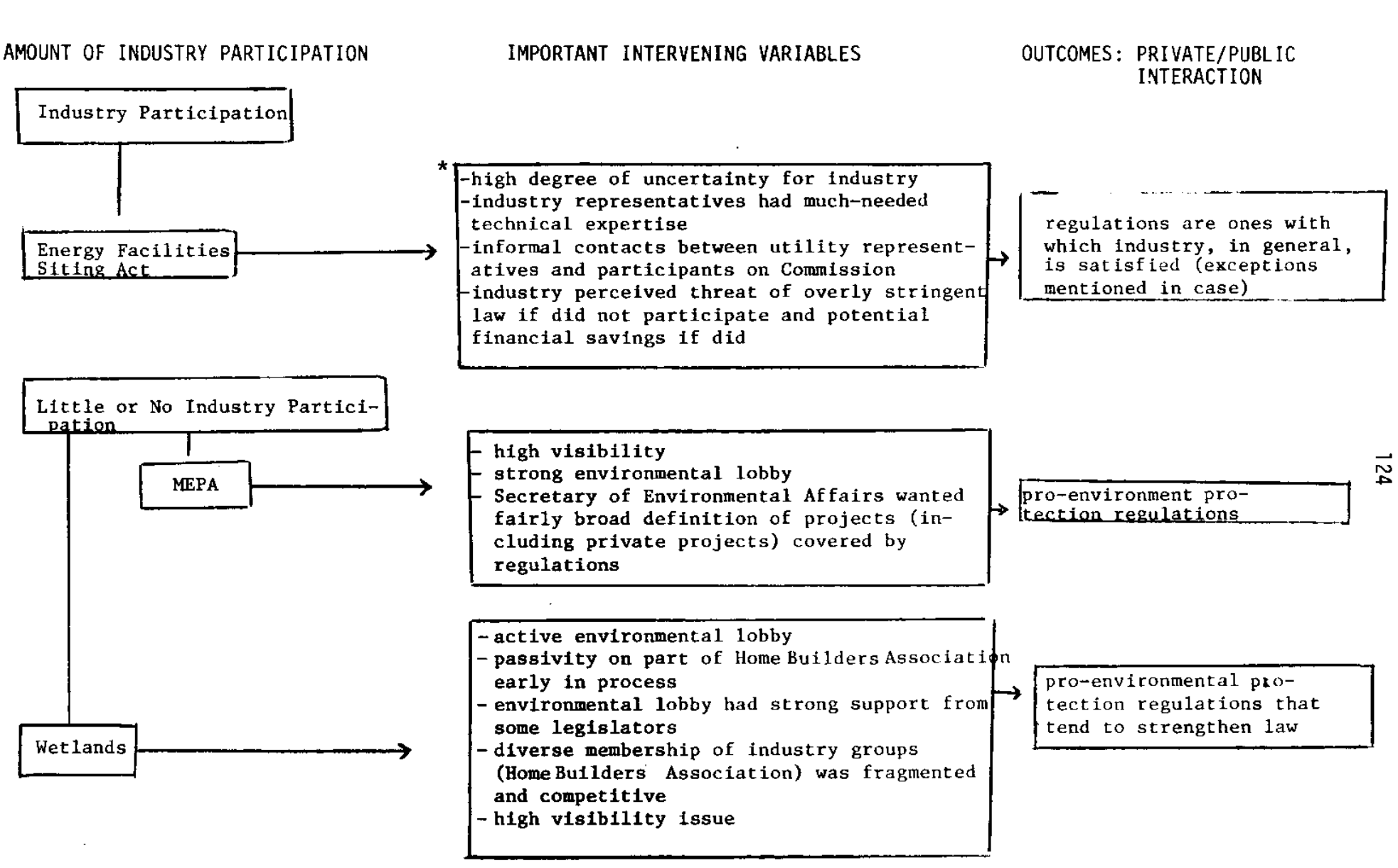
LEGISLATIVE #2

1. Bill Writing



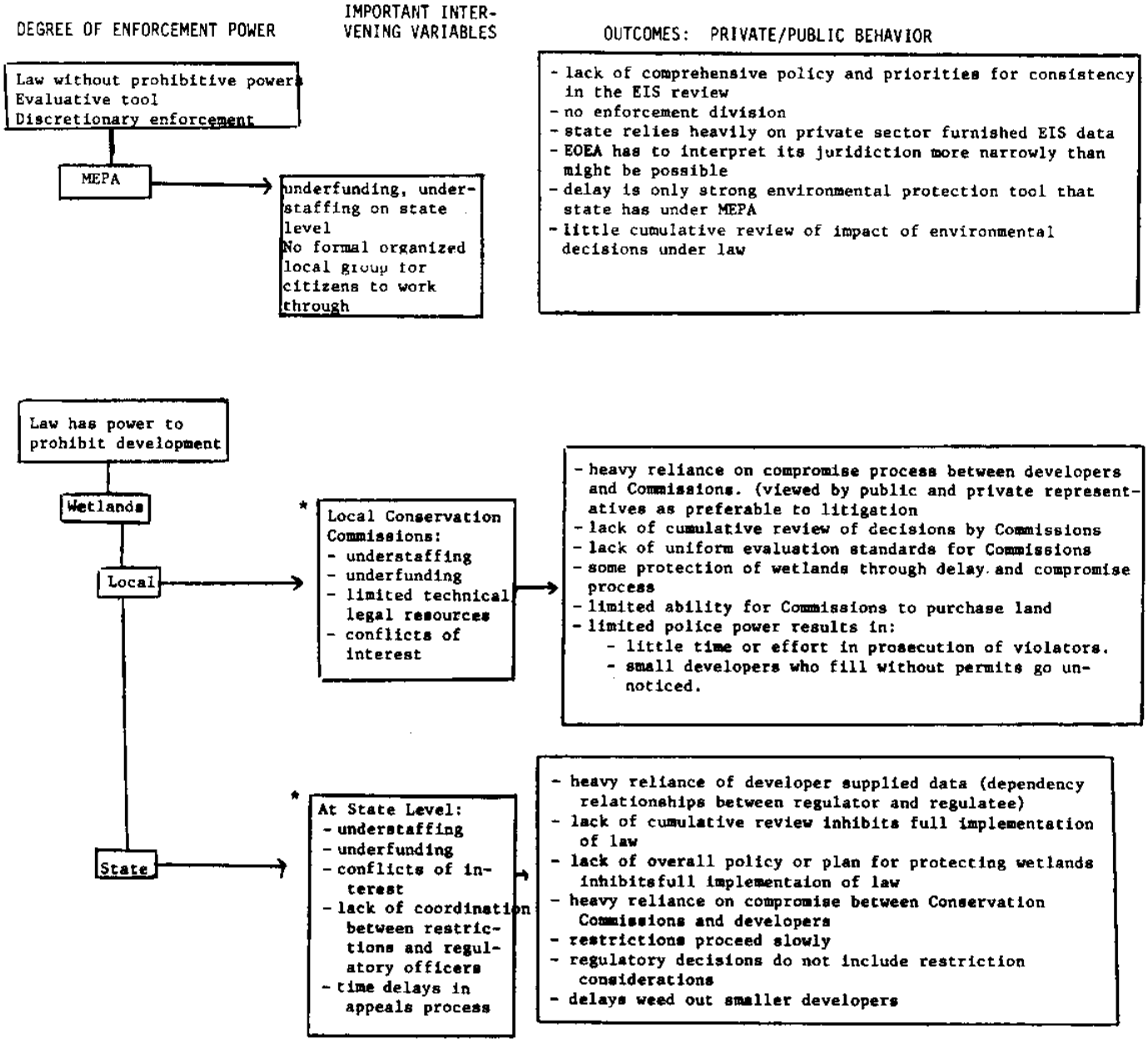
2. Amendments





* *Electric Company strong participation,*
Gas Company moderate participation, and
Oil Company negligible until perceived threat.

IMPLEMENTATION OF LAW #4**

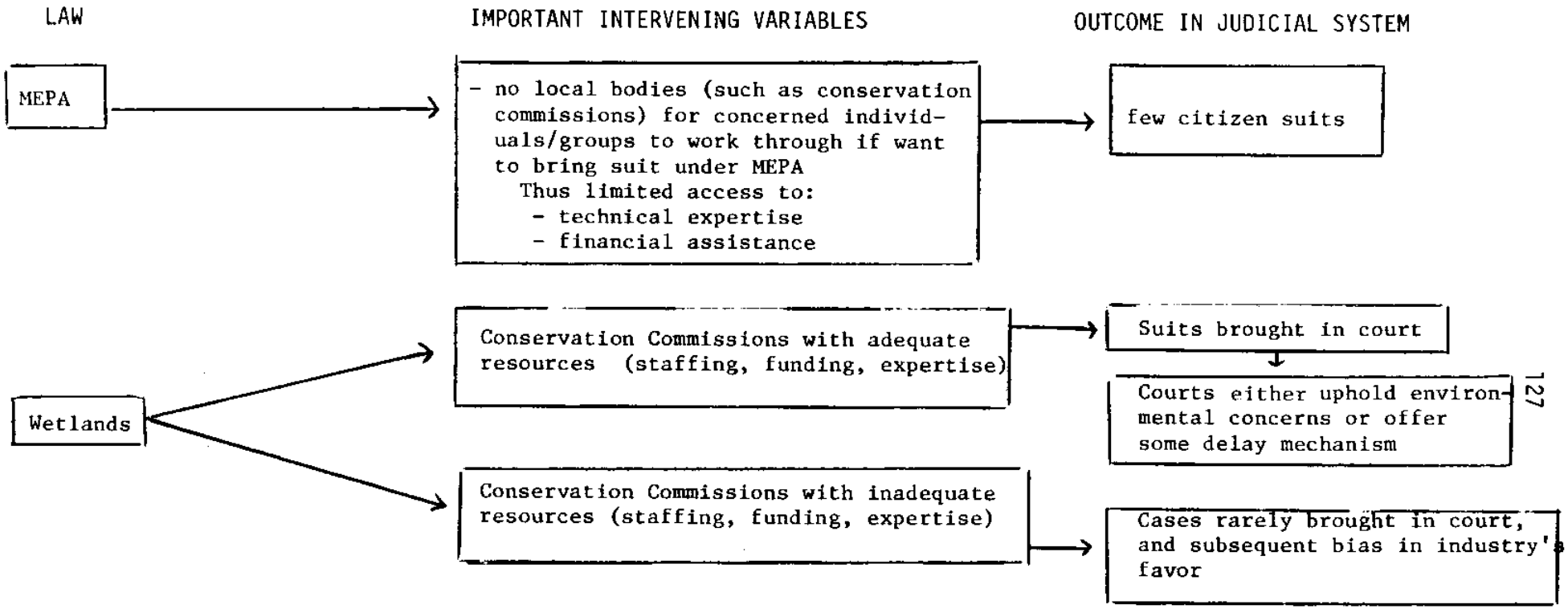


* *Some are adequately staffed and therefore effective.*
** *Energy Facilities Siting Act discussed separately.*

IMPLEMENTATION OF ENERGY FACILITIES SITING ACT #5

Characteristics of Law	Important Intervening Variables	Projected Outcome: Private/Public
Law precludes appeals to Siting Council on projects whose size is smaller than a specified amount. *law precludes use of council for development involved with exploratory oil operations. Appeals can only be made by industry. * See Section 69G of Energy Facilities Siting Act	- complex and highly technical law; industry expertise invaluable - visibility of energy issue high, but awareness of existence of Siting relatively low. - Siting Council in sensitive position of not wanting to offend too many state agencies by overturning their permit conditions. - environmentalists or other non-industry groups may be at a disadvantage since they can not appeal to the Council.	- high level of industry awareness on status of bill and its amendments - disincentives for active environmentalist participation - number of large, controversial issues may be worked out at the state level to avoid the delay in the appeals process - council dependent on industry information - public hearing process that might be as heavily reliant on industry data as the Commission

JUDICIAL #6


LAW
IMPORTANT INTERVENING VARIABLES
OUTCOME IN JUDICIAL SYSTEM
MEPA
- no local bodies (such as conservation commissions) for concerned individuals/groups to work through if want to bring suit under MEPA
Thus limited access to:
- technical expertise
- financial assistance
few citizen suits
Wetlands
Conservation Commissions with adequate resources (staffing, funding, expertise)
Suits brought in court
Courts either uphold environmental concerns or offer some delay mechanism
Conservation Commissions with inadequate resources (staffing, funding, expertise)
Cases rarely brought in court, and subsequent bias in industry's favor

SECTION IV

FOOTNOTES

[1]Michael Kenney, Boston Evening Globe, February 12, 1976, page 5.

[2]Interview 9.

SECTION V. CONCLUSIONS

I. Introduction

The original assumption of the study was that the development and implementation of the environmental legislation would be enhanced if appropriate state public agencies made a concerted effort to communicate with those private business groups potentially affected by their actions. The case studies provide historical clarification of the tradeoffs and compromises implicit in the private industry/public interactions. They suggest the difficulty of using specific industry characteristics as the means to identify and predict private sector industry behavior towards the government. Many other variables, including the strength of the state agencies, the strength of environmental lobbies, and the personalities involved, make it difficult to isolate the characteristics of private industry groups as independent variables. However, the role of other variables as they affect government/industry relationships can be identified and used in a predictive way. Generally some of these variables include the nature of bureaucracy, the nature of the issue as it relates to the visibility and popularity of other trends and the nature of the communication channels used by Massachusetts industry groups.

This analysis therefore has value as a tool for evaluating public and private needs in the environmental area, the tradeoffs that inevitably flow from an information sharing and/or compromise process and the implicit tradeoffs that occur in the absence of significant communication between the two groups.

The large value questions involved for public officials as they consider how much or how little they want to institutionalize communication channels with private industry can not be generally or theoretically resolved here. However, a perspective that seeks to clarify such tradeoffs should serve to make public decisions more informed value decisions.

The conclusions that follow are divided into (1) general conclusions about interaction between the private industry and public sectors with regard to environmental programs, and (2) specific conclusions which can be applied to the development and implementation of the Massachusetts Coastal Zone Management program.

A. GENERAL CONCLUSIONS

1. The Private Sector has need for certainty.

Private industry and its representative associations seek certainty and clarity in environmental legislation and public policy making. Their interactions with public agencies on environmental issues have been reactive in nature. When legislation and/or regulations are pending, or existing laws are either vague or open to conflicting interpretations, industry will tend to seek clarity in order to provide a more certain operating environment for itself. In the past, industry has had varied success in seeking certainty from the public sector.

The cases amply demonstrate this point. Private industry groups at most played only a small role in the development of the Massachusetts Environmental Policy Act and of the Wetlands legislation. However, they responded to vagueness in the legislation by seeking clarifying amendments, i.e., a clearer definition of a wetland and of the scope of the Massachusetts Environmental Policy Act. The highly technical nature of the Energy Facilities Siting Act demanded more cooperation between public and private groups, and industry participated in the development of the legislation. Industry perceived potential financial gain, a receptive Commission, and had the valuable industry data necessary to the Commission. This pattern of interaction distinguishes the Energy Facilities Siting Act from the other two laws. However, in all cases certainty has been sought.

2. Private industry and its representative associations are heterogeneous.

Variables of size, competitiveness, resources, and formal/informal ties do not necessarily predict the nature and outcomes of private industry/public interaction. In Massachusetts, private sector interests are by no means homongeneous or monolithic (see Chart #1 in Section IV). The resources that private groups can bring to bear on environmental issues vary from group to group. Subsequently, outcomes vary to a large extent with the sophistication and interest in lobbying of the various private industry groups.

For example, as the Energy Facilities Siting case demonstrates, the Massachusetts' utilities had dramatically different degrees of control over the shape of the law and its regulations. Though the utility companies are comparable in many ways, they perceived their roles as lobbyists quite differently. When companies do decide to lobby, size and expertise are not necessarily determinants of lobbying outcomes. The Chamber of Commerce, an organization with far fewer lobbying resources or sophistication than others described in the cases, (i.e., Massachusetts Electric and Gas Association) managed to procure the passage of its own amendment to the Massachusetts Environmental Policy Act.

Private group lobbying positions are not uniform, adding a further degree of complexity. For example, the electric companies (both members of the same industry association) differed widely in their attitudes and lobbying tactics on the Energy Facilities Siting Act. Likewise, smaller developers in the Home Builders Association have very different attitudes from the larger developers represented by the same group and this affects the Association's ability to be effective as a lobbying force. In addition, the fact that private sector groups sometimes agree to divide lobbying responsibilities for a broad set of issues among themselves makes it harder to anticipate the role particular groups will play.

3. The strength of public agencies and environmental groups is a determinant in the final outcome of public/private interactions.

The conclusion that private sector groups are reactive with regard to environmental legislation makes it important to consider the strength and behavior of other private and public interest groups. The perspective on the Executive Office of Environmental Affairs that the cases provide suggests that the effectiveness of a particular agency in interacting with private industry is related to the level of agency funding, level of staffing, its sense of mission, leadership, links with the Legislature, links with private industry, links with the Governor and with other agencies.

For example, budget cuts by the Legislature have decreased the enforcement power of the Wetlands law. At the time the cases were written, understaffing in the Wetlands division had resulted in lengthy delays in completing restrictions and in hearing appeals. This created incentives for the private sector to avoid the whole process and increased their antagonism towards the Executive Office of Environmental Affairs. Similarly, understaffing has made the Massachusetts Environmental Policy Act review process more superficial than desirable and industry has both exploited this and at the same time resented this misuse of their time and resources.

An agency's relationship with the Executive and other agencies also determines its effectiveness in implementing its laws and therefore can affect the communication process with private groups. At present the Secretary of Environmental Affairs cannot legally prohibit an agency from issuing a permit on the basis of a Massachusetts Environmental Policy Act impact statement review. Consideration of a Massachusetts Environmental Policy Act review by other agencies is voluntary and there has been little apparent executive impetus to change this.

Not only is the condition of the public agency important, but so is the strength of environmental lobbying groups and their constituencies. For example, when the Massachusetts Forest and Parks Association had an actively committed lobbyist, the Home Builders Association was not particularly successful in opposing their positions. This pattern changed when the Massachusetts Forest and Parks Association lost their lobbyist.

4. The nature of bureacracy has implications for patterns of communication between public and private groups.

There is little incentive for change in bureacracies, and, when change does occur, it occurs slowly. When a pattern develops in a bureacracy, it persists, and this has been the case in public/private industry interaction in the environmental area.

Characteristics of a bureacracy that are going to determine the strength and nature of communication links with private groups are, for example, the age of the agency, strength of the Secretary's position within the Legislative and Executive branches, and the tendency of the agency to implement the laws on a case by case basis.

In the three cases covered by this study, the older agency (Wetlands Office) identified more closely with the developers than the newer Massachusetts Environmental Policy Act review office. As mentioned earlier, the perceived power of the Secretary of Environmental Affairs affects the functioning of the Executive Office of Environmental Affairs and the way the private sector reacts to it. Futhermore, the short terms of office dictated by the political structure, makes it more difficult to bring about long term changes and make it necessary to regulate on a fairly adhoc case by case basis. Public agencies can not respond and change their makeup as quickly as their private counterparts, and recommendations for improving communication between the private and public sectors must take this into consideration.

5. The visibility and public enthusiasm for environmental issues during any time period will affect the quality of private/public interaction.

Current economic problems in Massachusetts as well as in the nation have displaced the Commonwealth's environmental concern of the early 1970's with economic concern. Promotion of development does not necessarily preclude concern for conservation of the environment. However, in fact, the effectiveness of environmental protection lobbies and their constituencies appears to have diminshed in the last few years. The cases demonstrate that a decrease in the strength of environmental lobbies, has resulted in a relative increase in the strength of industry lobbies.

6. Massachusetts private sector industries and their associations will seek to avoid public controversy on environmental issues.

Private industry groups are naturally sensitive about their public image. To maintain low visibility and avoid public controversy, industry will often use whatever formal and informal channels it can to express its interests. Rather than taking a public, controversial anti-wetlands legislation stance, in the early 1970's, (a period of high environmental concern) industry chose to negotiate informal compromises for permits on the administrative level. The Massachusetts Environmental Policy Act presents a second example. Private industry groups were quite willing to approach Governor Sargent and the Secretary of Environmental Affairs to propose changes in the regulations of the Massachusetts Environmental Policy Act. The same groups were later forced to use the Legislature as a last resort when the less visible channels of influence failed.

7. The value of communication, cooperation, and compromise between private industry and the public sector varies.

The cases demonstrate the crucial distinction between information exchange and joint policy development. On the whole, public decision-makers can benefit from understanding the channels industry groups use to communicate

and the circumstances that make private groups responsive or unresponsive in the public policy process. Obviously, the amount of time and energy public decision-makers can devote to this varies, but the cases indicate that, at the least, some familiarity with industry's needs and past behavior can help public agencies shape more sensitive environmental programs and legislation. For example, some of the controversy that surrounded the implementation of the Massachusetts Environmental Policy Act could have been avoided if public officials had taken into consideration industry's need for certainty.

The cases qualify the value of formal compromise or cooperative policy development. The compromise process ncessarily involves tradeoffs, and the cases clarify these. The compromise process during the development of the Energy Facilities Siting Act diluted environmental interests. The key concession demanded from industry (i.e., forecasting approval) was not really a significant one. In addition, it is not clear, since the Siting Council is so new, that industry will not try to circumvent the Council. There has not been enough time to see the Council in operation, but its efficacy in the next few years may shed light on just how equitable and generally workable the compromise process was.

Another case of formal compromise, very different from the case of the Energy Facilities Siting Act, is the Chamber of Commerce amendment to the Massachusetts Environmental Policy Act, which represented a compromise between the Senate President (who tended to take the role of private business interests) and the Secretary of Environmental Affairs. This compromise process was almost completely dominated by private sector business interests, but did not substantially weaken the law.

The necessity and value of compromise in the development of legislation and regulations might increase as the concern for environmental protection in Massachusetts continues to decrease. Implicit in this is the need for environ-

mental agencies to maintain their political position and their sense of their goals.

8. The scientific and technical aspects of environmental policy making increasethe necessity for adequate communication channels between the public and private sectors.

While information is sometimes available from other resources (i.e., universities and public interest groups) industry expertise is often the most comprehensive expertise available. Use of private industry expertise can lead to a dependency role for the public agency which could have inherent conflicts of interest. Nevertheless, scientific and technical expertise could be used with some care.

9. Administrative delays in environmental agencies are a successful, but not always healthy mechanism of environmental protection.

Lengthy and costly delays tend to discourage appeals and to deter development. Underfunding and understaffing in the Executive Office of Environmental Affairs have made the delay process a fairly important regulatory tool. The Wetlands case is the appropriate one to cite here. It demonstrates that the delay process does not uniformly protect the environment. First, delay works against smaller, less competitive developers, and it can be argued that some economic development is lost and that one group is being discriminated against. Furthermore, long and costly delays increase the incentives for informal compromise, thus increasing the advantage for those with informal channels of communication. It also increases the possibility for corruption within the system.

Reliance on delay mechanisms does not benefit anyone consistently. On the one hand, when delays are internalized in the system, the agency's ability to shape policy can be diminished and the initiative can pass from the agency to the private sector. On the other hand, delays can aid conservation when all other means fail by providing time for the agency to

gather information to support its case and by discouraging developers from a costly undertaking.

10. Planning without regulatory authority can not be relied on as a vehicle for involving private interest groups in government processes.

Planning provides the mechanisms through which agencies can clarify their own goals and alternative strategies as well as educate themselves. As such, there is little reason for industry to become involved in the process or feel threatened by it. Since industry for the most part reacts to policy formulation and implementation, planning for Wetlands legislation and for the Massachusetts Environmental Policy Act did not stimulate industry interests or participation . Their interests in certainty makes their lack of participation understandable.

This perception of the planning process has implications for communication between the public and private sector. Industry participation in the kind of planning which involves policy development and clarification may not be desirable or feasible since industry shows a tendency to become interested at a later stage, when policy is linked to implementation strategies.

B. APPLICATION OF CONCLUSIONS TO THE ACTIVITIES OF THE MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT

The general conclusions can be considered more specifically in the context of the Massachusetts Coastal Zone Management Office.*

Historically, public regulatory agencies have been criticized for the way that they establish balanced rapport with the private groups affected by their actions. On the one hand, the regulator must understand the position and interests of the regulatee and coordinate with it. On the other hand, any regulatory agency can lose its objectivity through familiarity with the interests it must regulate.

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* *Brief background on that agency can be found in Section II.*

While it is difficult to gauge the "success" of any public/private interaction. Some preliminary conclusions on current private industry/public liaisons in coastal zone planning and the outlook for public/private industry interactions in this area follow.

Currently, the primary formal instruments of contact with private groups used by the Coastal Zone Management Office are the Task Force, public participation program, and planning activities.[1] While informal channels of communication with the private sector may exist, their effects on activities of the Coastal Zone Management Office are not known and neither are the more indirect effects of the Legislative liaison in the Coastal Zone Management Office, or the regular meetings of the Secretary of Environmental Affairs with an economic advisory board of broad representation. However, the nature of the planning activities of the Coastal Zone Management Office has implications for the shape and effectiveness of relationships between the Coastal Zone Management Office and private industry.

The strong emphasis on planning activities of the Coastal Zone Management Office has reflected the Commonwealth's decision to fit its program planning to the federal legislation rather than fit the legislation to program plans. The literal interpretation of the law has limited the opportunity for the Coastal Zone Management Office to relate to Massachusetts' business interests. The cases amply demonstrate industry's preoccupation with present circumstances over potential future ones. Consequently, long range planning and data collection provide little incentive for industry to participate in the process, a situation which continues to undermine the credibility of the Executive Office of Environmental Affairs.

The planning functions of the Coastal Zone Management Office do not offer any of the stimuli to which industry responds. The most obvious is agency authority (i.e., definite program goals, implementation of plans, specific

legislation, regulatory authority). The shape of an industry group's relationship with a public agency depends on many factors (informal contacts, etc.) but at this point there is little cause for private industry to take note of and respond to a hypothetical coastal zone management plan.

Four omissions in the current activities of the Coastal Zone Management Office stand out as probable causes of industry disinterest in the program.

Absence of concrete policy guidelines debate on crucial issues and constituency for coastal zone management.

The apparent extent of private industry liaisons with the Office of Coastal Zone Management is limited to private industry representation at Task Force and Committee meetings. This limited attendance may be a direct result of their having been given little to react to. On the rare occasions when a controversial issue with policy making implications has been on the agenda, the attendance of private industry representatives has improved significantly. For example, the Vice-President of Northeast Petroleum made a rare appearance at a Task Force Committee meeting when decisions were going to be made regarding the negative nomination of tracts in the leasing process. While there is danger inherent in establishing specific policy guidelines, the Coastal Zone Management Office has not yet issued specific enough policy and implementation guidelines to evoke the interests of most private industry groups. While coastal zone management involves a multitude of interests, most of which have conflicting goals, the full scope of the potential constituency for a coastal zone management program will not be known until some concrete positions are taken. The lack of realism and legal authority in the "use" papers may not produce the quality of debate and identification of constituency anticipated by the Coastal Zone Management Office. The legal and political importance of identifying and building a strong constituency fora coastal zone management program is fundamental. The three cases give numerous examples of well-organized industry and environ-

mental constituencies and the effect they have on the public policy process.

- An ostensible lack of legal or administrative authority to implement a comprehensive coastal zone management plan.

One industry group who regularly attends Task Force meetings consistently expresses the thought that potential plans have little relevance for industry because they lack enforcement power. Without a clear understanding of how a plan will be implemented, industry can not determine its own interests in a plan.

- An absence of clear management priorities which integrate the planning documents for the various uses in the coastal zone.

For example, the fishing and maritime use papers do not mention offshore oil development, even though there will be a separate use paper on offshore oil.

- Absence of short term planning.

The concentration of the Office of Coastal Zone Management on long term planning has further isolated it from short term environmental resource management decisions which may have immediate consequences for coastal development and which may alter the shape of any long term plan. Short terms of public office may reduce the value of long term planning, and therefore the likelihood of industry interest in the process. Based on the cases, industry is far more likely to respond to short term plans which have immediate consequences.

The more specific discussion that follows on alternative coastal zone management strategies elaborates on this general application of the conclusions to the coastal zone program.

1. Alternative Strategies

The development of a coastal zone management plan in Massachusetts has only begun to involve implementation strategies, although several strategies

have been discussed at the Task Force and ancillary meetings. The choice of an implementation plan will affect the nature of the communication process between the public and private industry sectors which in turn will to some extent affect the shape of a coastal zone management policy.

The cases provide insight into the implementation process, both legislative and administrative, and into the way private industry/public interaction affects that process. While the cases do not suggest the means to predict private sector response to different coastal zone management implementation plans, they do indicate the kinds of questions an agency should consider and the reactions an agency might anticipate from the private industry groups. Two alternative strategies and their possible consequences for private industry/public communication are: (1) using the existing legal structure to enforce a coastal zone management plan and drafting legislation to accomplish this, and (2) drafting comprehensive legislation that might involve a reorganization of the power structure.

1. Using the existing legal structure

a. Disadvantages

Accepting the current legal structure as the basis for a coastal zone management plan suggests that the functions of the coastal zone management office should not differ significantly in the next year from their present functions, although more effort would be spent on drafting a plan for Federal approval. This draft plan would be fairly predictable. Its legal base and degree of specificity as a public policy will be as strong as the laws upon which it is based. A plan based on current legislation can only be very limited, (i.e., to water use) and most probably will affect only a few of the business interests who would have been affected by a more comprehensive program. Consequently, one might not expect the nature of the communication and interaction with the private sector to change dramatically in the near future. Because industry does not perceive the coastal zone management planning process

as threatening or as influencing the way current legislation is enforced, their limited participation in the planning process can not be considered as an official point of view or as representative of industry interests and needs. The heavy emphasis on planning in the 1972 Federal legislation, and the paucity of guidelines for implementation reflect the current priorities of the Coastal Zone Management Office, and therefore have constrained their activities somewhat. It is questionable, however, whether the necessary groundwork is being established for effective implementation of a plan or whether more substantial and meaningful communication with the private industry groups who have interests in the coastal zone is being established.

Earlier in this report, an examination of the nature of the bureaucracies, particularly the Executive Office of Environmental Affairs, led to the conclusion that bureaucracies with regulatory functions may identify more with those they regulate as they grow older, and that bureaucracies, by their very nature, can not change their structure very easily or quickly. The cases support both these concepts. Unfortunately, using the existing legal structure supports this static model by not providing the incentive and direction necessary for an agency to alter its priorities and behavior. Speaking more broadly, this research has uncovered a potential weakness of the new "federalism" wherein funding is provided on a decentralized basis and the discretion for innovation is left up to the state or local funded body. Often the state or local government has no incentive to introduce innovation. The federal legislation,with its intent to bring states into federal programs, provides few guidelines for those at the State and local levels who favor innovations but who do not have the strong Federal support sometimes necessary for imagination and innovation at the State and local levels.

Massachusetts may need additional legislation to implement a successful coastal zone management plan. The current legal basis for a coastal zone

management plan may not be sufficient. Legal analysis of this question has produced directly opposing legal viewpoints.[2] Even if the existing legal structure is considered sufficient to implement a management plan, the cases indicate that the administration of three specific laws which will provide a substantial part of a management plan is not sufficient, and that much administrative innovation may be needed.[3] Thus, neither the Federal legislation nor the existing bureaucratic process provide the necessary incentives for administrative change.

The increased funding that would result from Federal approval of Massachusetts' state coastal zone management plan may not be the panacea for all administrative problems. As the cases demonstrate, underfunding is not the only obstacle to effective law enforcement. The lack of policy and direction, lack of coordination within the agency, and in the case of the Massachusetts Environmental Policy Act, the lack of legal authority, are problems which may require more far reaching solutions. Furthermore, the implementation of an effective coastal zone management plan requires increased coordination among the different state agencies. Such coordination may be difficult to achieve without added legislation and without strong support from the Governor and the rest of the cabinet. Under the current legal structure, one might expect the private industry/public sector interaction to continue as it presently does with a large number of informal negotiations and compromises which can undermine the intent of the legislation.

b. Advantages

Using the existing legal structure as a basis for a coastal zone management plan has several advantages. At the moment, there does not appear to be a constituency for dramatic legal changes regarding coastal zone management in either the Governor's office or in the Legislature, and consequently, the position of the Secretary of Environmental Affairs may be more tenable

if no new major legislation is introduced. Furthermore during this period of economic concern, many legislators do not give the Executive Office of Environmental Affairs top priority. The introduction of new legislation may be dismissed as an unnecessary addition to the already cumbersome layers of bureaucracy.

At this point in the planning process, there may not be enough time to write and introduce new legislation. Because the Coastal Zone Management Office did not consider the development of new legislation and the building of a constituency for that legislation as a high priority early in the planning process, there may not be adquate time or staff to build the necessary constituency for new legislation now, but they must prepare now for legislation which will make the program more meaningful to those groups whose activities are in the broad band of coastal zone management and to those agencies who will have authority to implement a plan.

The current emphasis on economic development in the Commonwealth, the weakness of environmental public interest groups and the increasing effectiveness of industry lobbying efforts may put the Coastal Zone Management Office at a disadvantage if new legislation is introduced. While the Secretary of the Executive Office of Environmental Affairs may be able to exercise a certain degree of control over administrative activities and policy within the agency, the Secretary has less control over the outcomes of lobbying activities of industry groups. Therefore, time might better be spent on those activities whose outcome is more certain (i.e., addressing current difficulties in the administration of existing laws.)

A final advantage of using existing legislation is that Massachusetts would receive its management funds sooner than if legislation were passed before the submission of a proposal to the Federal Government.

2. Writing Comprehensive Coastal Zone Management Legislation

a. Disadvantages

As discussed earlier, it may be too late in the planning process for the Coastal Zone Management Office to have the necessary time and staff to build a constituency for new legislation and to write effective legislation. The case of the Massachusetts Environmental Policy Act suggests that major legislation which affects private industry/public sector relationships must be specific and clear so that the possibilities for public controversy afterward are decreased since public controversy can undermine a law. (However it should be noted that debate and controversy may be desirable during the process of drafting legislation to identify the necessary areas of compromise in the legislation.)

The concern for economic development in Massachusetts and the political constraints caused by the nature of the relationship between the Cabinet and the Legislature may increase substantially the difficulty of introducing new legislation.

The political and economic constraints as well as the absence of a strong, well organized constituency for coastal zone management may make it difficult for the Executive Office of Environmental Affairs to find sponsorship from Legislative leadership for coastal zone management legislation. While private industry groups may successfully defeat coastal zone management legislation, the New England tradition of homerule cannot be overlooked as an equally strong opponent.

Drafting new legislation would probably delay the receipt of federal funds which are badly needed to strengthen those environmental programs already on the books.

b. Advantages

Although the risks discussed above may be very high, the introduction of comprehensive coastal zone management legislation may help increase the strength of a coastal zone management plan and may improve the nature of the communication and interaction between the public and the private sectors. The introduction of legislation which contains a clear, concrete implementation plan may result in a clearer identification of those private sector coastal zone interests who have not previously participated substantially in the political process. Identification of coastal zone interests and identification of a constituency for coastal zone management may be possible when groups can respond to new legislation and when they perceive a gain or a loss in using their resources to respond. The introduction of new legislation may provide the Coastal Zone Management Office with the response from industry they have thus far been unable to evoke. Explicit and concrete feedback from private industry may provide a broader perspective on alternative management possibilities. Furthermore, the possible bandwagon effect of the enthusiasm generated by initiating something new should not be underestimated.

Since coastal zone management is part of land use planning, and since it involves a balancing of economic and environmental interests, many agencies and jurisdictions would become involved if a management plan were to be implemented under the current legal structure. Many of the existing laws, however, were written with application to inland areas, not to the coastal zone.[5] Furthermore, many of the existing laws have been outdated by modern technologies,[6] and some agencies that have operating responsibilities under these laws are no longer performing viable functions.[7] An advantage of clearly written, comprehensive legislation is that it would provide the legal backbone necessary to improve agency coordination and resolve jurisdictional disputes. Some of the possibilities for comprehensive legislation include mandatory zoning, a strong regional structure (similar to the Martha's Vineyard Planning and

Development Commission), and a plan similar to the coastal zone management plan in California.

The examination of two alternative strategies to implement a coastal zone management plan has been presented with attention paid to both the advantages and disadvantages of each strategy as it relates to evoking the interest and participation of private industry groups. Regardless of which strategy the Executive Office of Environmental Affairs chooses to pursue, the agency leadership must consider several crucial factors which may determine the effectiveness of an implementation strategy.

- Constituency

Identification of the groups who have an interest in coastal zone management is necessary whether or not new legislation is introduced. While identification of private industry interests is the first step in developing a sensitive coastal zone management plan, the interest and participation of these groups is essential to the program. It is important that the views of those with well-defined and substantial financial interests in the coastal zone be discussed and addressed in the final management scheme. There are few short run gains to be made in neglecting this part of the constituency, for ultimately the strength of the program may depend on it.

- Extent of Compromise

In developing a strategy to implement a coastal zone management plan and in creating the constituency necessary to support the plan, the Coastal Zone Management Office needs to be prepared to consider and to accommodate both economic and environmental interests while maintaing a clear sense of its priorities.

- Planning

The Coastal Zone Management Office needs to consider and select an appropriate balance between short and long term planning activities, and approach

the private business sectors with its short term policy and implementation plans. It is also necessary to strike a better balance between developing a plan and building the basis for effective implementation. Planning which occurs without strong links to implementation may be ineffectual.

SECTION V

FOOTNOTES

[1]Primarily the planning staff's "use" papers. (See Section II of this report for a more detailed discussion).

[2]Kaufman, A., of the Conservation Law Foundation of New England. Report to the Office of Coastal Zone Management, Executive Office of Environmental Affairs, "Existing Institutional Capacity for the Management of Resources and Growth in the Massachusetts Coastal Zone," July, 1975,

Rice, D., Executive Office of Environmental Affairs, "A Proposed Management System for the Massachusetts Coastal Zone Program," Preliminary Report, March, 1976.

[3]Another law which would be part of the coastal zone management plan, according to M. Connolly, of the Office of Coastal Zone Management is the Ocean Sanctuaries Act.

A surface inquiry into this law has indicated that its administration is as problematic as the administration of the laws studied in detail, Interview 12.

[4]Kaufman, op. cit.

[5]Interview with M. Connolly.

[6]Ibid.

[7]Interview with A. Kaufman.

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Energy Facilities Siting Act, Chapter 164, Section 690 and following.

INTERVIEWS

1. L. Allen, Senator Bulger's Office, Massachusetts Senate
2. J. Battles, Executive Director, Massachusetts Petroleum Council
3. J. Bonsall, Representative MacLean's Office, Massachusetts House of Representatives
4. G. Bresnick, Executive Vice President of Home Builders Association of Massachusetts
5. J. Buckley, Vice President, Northeast Petroleum Corporation
6. D. Calano, Executive Office of Environmental Affairs, Office of Coastal Zone Management
7. M. Connolly, Executive Office of Environmental Affairs, Office of Coastal Zone Management
8. D. Connors, lawyer, Tyler, Reynolds and Craig
9. J. Daniels, Executive Office of Environmental Affairs, Department of Environmental Management, Wetlands Restrictions
10. S. Ells, Assistant for Congressional and Intergovenmental Relations, Region I Office of the Environmental Protection Agency, former counsel to Governor Sargent
11. D. Gifford, Vice President of Urban Affairs, Cabot, Cabot and Forbes
12. Representative Gilette, Massachusetts House of Representatives
13. E. Grahme, Assistant Professor of Management, Sloan School of Management, Massachusetts Institute of Technology
14. D. Grice, Executive Office of Environmental Affairs, Department of Environmental Management Wetlands Restrictions
15. W. Hicks, Executive Office of Environmental Affairs, Office of the Secretary
16. G. Jefferson, Executive Office of Administration and Finance, Deputy Director, Office of State Planning
17. T. Joyce, lawyer, Massachusetts Electric and Gas Association
18. A. Kaufman, lawyer, Conservation Law Foundation
19. M. Kaufman, Executive Office of Environmental Affairs, Office of Coastal Zone Management
20. Representative Kendall, Massachusetts House of Representatives

21. E. Klein, Wetlands Project, Massachusetts Aubudon Society

22. H. Laing, Attorney Advisor, Region I Office of the Environmental Protection Agency, former Counsel to the Secretary of Envrionmental Affairs

23. J. Lawless, Speaker McGee's Office, Massachusetts House of Representatives

24. F. Lee, Environmental Affairs, Boston Edison Company

25. H. Lee, Director, Massachusetts Energy Policy Office, former environmental aid to Governor Sargent

26. J. Lewis, Executive Office of Environmental Afairs, Office of Coastal Zone Management

27. J. Matera, Executive Office of Environmental Affairs, Department of Environmental Quality Engineering, Wetlands

28. W. McCarthy, Associate Counsel, Associated Industries of Massachusetts

29. K. McKlintock, lawyer, Conservation Law Foundation

30. H. Muehlman, Vice President, Jobs for Massachusetts

31. E. Murphy, Secretary of Environmental Affairs

32. J. Neely, lawyer, Energy Facilities Siting Council

33. N. Nickerson, President, Massachusetts Association of Conservation Commissions

34. A. Patterson, Executive Office of Environmental Affairs, Department of Environmental Quality Engineering

35. R. Ruddock, Director of Metropolitan Affairs, Greater Boston Chamber of Commerce

36. B. Saivetz, President, Bradford Saivetz and Associates, Inc.

37. Senator W. Saltonstall, Massachusetts Senate

38. M. St. Claire, counsel, Boston Gas Company

39. J. Stevens, Vice President, Massachusetts Electric, New England Power Service Co, New England Power Co., and Director of Consumer and Information Services, New England Electric Co.

40. C. Sullivan, Secretary of Consumer Affairs, former Acting Director Energy Facilities Siting Council

41. T. Tillotson, lawyer, Sherburne, Powers, and Needham

42. M. Ventresca, Executive Office of Environmental Affairs, Office of Coastal Zone Management, former lobbyist for Massachusetts Forest and Parks Association

APPENDIX A

Coastal Zone Management Act
Wetlands Protection Act
Wetlands Restriction Orders
Massachusetts Environmental Policy Act
Energy Facilities Siting Act

Public Law 92-583
92nd Congress, S. 3507
October 27, 1972

An Act

To establish a national policy and develop a national program for the management, beneficial use, protection, and development of the land and water resources of the Nation's coastal zones, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for a comprehensive, long-range, and coordinated national program in marine science, to establish a National Council on Marine Resources and Engineering Development, and a Commission on Marine Science, Engineering and Resources, and for other purposes", approved June 17, 1966 (80 Stat. 203), as amended (33 U.S.C. 1101–1124), is further amended by adding at the end thereof the following new title:

Marine Resources and Engineering Development Act of 1966, amendment.

80 Stat. 998; 84 Stat. 865.

TITLE III—MANAGEMENT OF THE COASTAL ZONE

SHORT TITLE

SEC. 301. This title may be cited as the "Coastal Zone Management Act of 1972".

CONGRESSIONAL FINDINGS

SEC. 302. The Congress finds that—

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone;

(b) The coastal zone is rich in a variety of natural, commercial, recreational, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation;

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion;

(d) The coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations;

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost;

(f) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values;

(g) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate; and

(h) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

DECLARATION OF POLICY

SEC. 303. The Congress finds and declares that it is the national policy (a) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this title, and (d) to encourage the participation of the public, of Federal, state, and local governments and of regional agencies in the development of coastal zone management programs. With respect to implementation of such management programs, it is the national policy to encourage cooperation among the various state and regional agencies including establishment of interstate and regional agreements, cooperative procedures, and joint action particularly regarding environmental problems.

DEFINITIONS

SEC. 304. For the purposes of this title—

(a) "Coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

(b) "Coastal waters" means (1) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadsteads, and estuary-type areas such as bays, shallows, and marshes and (2) in other areas, those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries.

(c) "Coastal state" means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this title, the term also includes Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(d) "Estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term includes estuary-type areas of the Great Lakes.

(e) "Estuarine sanctuary" means a research area which may include any part or all of an estuary, adjoining transitional areas, and adjacent uplands, constituting to the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over a period of time the ecological relationships within the area.

(f) "Secretary" means the Secretary of Commerce.

(g) "Management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this title, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

(h) "Water use" means activities which are conducted in or on the water; but does not mean or include the establishment of any water quality standard or criteria or the regulation of the discharge or runoff of water pollutants except the standards, criteria, or regulations which are incorporated in any program as required by the provisions of section 307(f).

(i) "Land use" means activities which are conducted in or on the shorelands within the coastal zone, subject to the requirements outlined in section 307(g).

MANAGEMENT PROGRAM DEVELOPMENT GRANTS

SEC. 305. (a) The Secretary is authorized to make annual grants to any coastal state for the purpose of assisting in the development of a management program for the land and water resources of its coastal zone.

(b) Such management program shall include:

(1) an identification of the boundaries of the coastal zone subject to the management program;

(2) a definition of what shall constitute permissible land and water uses within the coastal zone which have a direct and significant impact on the coastal waters;

(3) an inventory and designation of areas of particular concern within the coastal zone;

(4) an identification of the means by which the state proposes to exert control over the land and water uses referred to in paragraph (2) of this subsection, including a listing of relevant constitutional provisions, legislative enactments, regulations, and judicial decisions;

(5) broad guidelines on priority of uses in particular areas, including specifically those uses of lowest priority;

(6) a description of the organizational structure proposed to implement the management program, including the responsibilities and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.

(c) The grants shall not exceed 66⅔ per centum of the costs of the program in any one year and no state shall be eligible to receive more than three annual grants pursuant to this section. Federal funds received from other sources shall not be used to match such grants. In order to qualify for grants under this section, the state must reasonably demonstrate to the satisfaction of the Secretary that such grants will be used to develop a management program consistent with the requirements set forth in section 306 of this title. After making the initial grant to a coastal state, no subsequent grant shall be made under this section unless the Secretary finds that the state is satisfactorily developing such management program. Limitation.

(d) Upon completion of the development of the state's management program, the state shall submit such program to the Secretary for

review and approval pursuant to the provisions of section 306 of this title, or such other action as he deems necessary. On final approval of such program by the Secretary, the state's eligibility for further grants under this section shall terminate, and the state shall be eligible for grants under section 306 of this title.

Grants, allocation.

(e) Grants under this section shall be allocated to the states based on rules and regulations promulgated by the Secretary: *Provided, however*, That no management program development grant under this section shall be made in excess of 10 per centum nor less than 1 per centum of the total amount appropriated to carry out the purposes of this section.

(f) Grants or portions thereof not obligated by a state during the fiscal year for which they were first authorized to be obligated by the state, or during the fiscal year immediately following, shall revert to the Secretary, and shall be added by him to the funds available for grants under this section.

(g) With the approval of the Secretary, the state may allocate to a local government, to an areawide agency designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, to a regional agency, or to an interstate agency, a portion of the grant under this section, for the purpose of carrying out the provisions of this section.

80 Stat. 1262; 82 Stat. 208. 42 USC 3334.

Expiration date.

(h) The authority to make grants under this section shall expire on June 30, 1977.

ADMINISTRATIVE GRANTS

Limitation.

SEC. 306. (a) The Secretary is authorized to make annual grants to any coastal state for not more than 66⅔ per centum of the costs of administering the state's management program, if he approves such program in accordance with subsection (c) hereof. Federal funds received from other sources shall not be used to pay the state's share of costs.

Allocation.

(b) Such grants shall be allocated to the states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the plan, population of the area, and other relevant factors: *Provided, however*, That no annual administrative grant under this section shall be made in excess of 10 per centum nor less than 1 per centum of the total amount appropriated to carry out the purposes of this section.

Program requirements.

(c) Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that:

(1) The state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303 of this title.

(2) The state has:

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the state's management program is submitted to the Secretary, which plans have been developed by a local government, an areawide agency designated pursuant to regulations established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, a regional agency, or an interstate agency; and

80 Stat. 1262; 82 Stat. 208. 42 USC 3334.

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (5) of this subsection and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of such local governments and agencies in carrying out the purposes of this title.

(3) The state has held public hearings in the development of the management program.

(4) The management program and any changes thereto have been reviewed and approved by the Governor.

(5) The Governor of the state has designated a single agency to receive and administer the grants for implementing the management program required under paragraph (1) of this subsection.

(6) The state is organized to implement the management program required under paragraph (1) of this subsection.

(7) The state has the authorities necessary to implement the program, including the authority required under subsection (d) of this section.

(8) The management program provides for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature.

(9) The management program makes provision for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or esthetic values.

(d) Prior to granting approval of the management program, the Secretary shall find that the state, acting through its chosen agency or agencies, including local governments, areawide agencies designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, regional agencies, or interstate agencies, has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power—

(1) to administer land and water use regulations, control development in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(2) to acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(e) Prior to granting approval, the Secretary shall also find that the program provides:

(1) for any one or a combination of the following general techniques for control of land and water uses within the coastal zone;

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(B) Direct state land and water use planning and regulation; or

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(2) for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

(f) With the approval of the Secretary, a state may allocate to a local government, an areawide agency designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, a regional agency, or an interstate agency, a portion of the grant under this section for the purpose of carrying out the provisions of this section: *Provided*, That such allocation shall not relieve the state of the responsibility for ensuring that any funds so allocated are applied in furtherance of such state's approved management program.

80 Stat. 1262; 82 Stat. 208. 42 USC 3334.

Program modification.

(g) The state shall be authorized to amend the management program. The modification shall be in accordance with the procedures required under subsection (c) of this section. Any amendment or modification of the program must be approved by the Secretary before additional administrative grants are made to the state under the program as amended.

Segmental development.

(h) At the discretion of the state and with the approval of the Secretary, a management program may be developed and adopted in segments so that immediate attention may be devoted to those areas within the coastal zone which most urgently need management programs: *Provided*, That the state adequately provides for the ultimate coordination of the various segments of the management program into a single unified program and that the unified program will be completed as soon as is reasonably practicable.

INTERAGENCY COORDINATION AND COOPERATION

SEC. 307. (a) In carrying out his functions and responsibilities under this title, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) The Secretary shall not approve the management program submitted by a state pursuant to section 306 unless the views of Federal agencies principally affected by such program have been adequately considered. In case of serious disagreement between any Federal agency and the state in the development of the program the Secretary, in cooperation with the Executive Office of the President, shall seek to mediate the differences.

(c)(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

Certification.

(3) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such

certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

Notification.

(d) State and local governments submitting applications for Federal assistance under other Federal programs affecting the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of title IV of the Intergovernmental Coordination Act of 1968 (82 Stat. 1098). Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this title or necessary in the interest of national security.

42 USC 4231.

(e) Nothing in this title shall be construed—

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

(f) Notwithstanding any other provision of this title, nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this title and shall be the water pollution control and air pollution control requirements applicable to such program.

Ante, p. 816. 81 Stat. 485; 84 Stat. 1676, 42 USC 1857 note.

(g) When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 306 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use program which may be hereafter enacted, the Secretary, prior to approving such pro-

gram, shall obtain the concurrence of the Secretary of the Interior, or such other Federal official as may be designated to administer the national land use program, with respect to that portion of the coastal zone management program affecting such inland areas.

PUBLIC HEARINGS

SEC. 308. All public hearings required under this title must be announced at least thirty days prior to the hearing date. At the time of the announcement, all agency materials pertinent to the hearings, including documents, studies, and other data, must be made available to the public for review and study. As similar materials are subsequently developed, they shall be made available to the public as they become available to the agency.

REVIEW OF PERFORMANCE

SEC. 309. (a) The Secretary shall conduct a continuing review of the management programs of the coastal states and of the performance of each state.

Financial assistance, termination.

(b) The Secretary shall have the authority to terminate any financial assistance extended under section 306 and to withdraw any unexpended portion of such assistance if (1) he determines that the state is failing to adhere to and is not justified in deviating from the program approved by the Secretary; and (2) the state has been given notice of the proposed termination and withdrawal and given an opportunity to present evidence of adherence or justification for altering its program.

RECORDS

SEC. 310. (a) Each recipient of a grant under this title shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition of the funds received under the grant, the total cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

Audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipient of the grant that are pertinent to the determination that funds granted are used in accordance with this title.

ADVISORY COMMITTEE

Coastal Zone Management Advisory Committee, establishment; membership.

SEC. 311. (a) The Secretary is authorized and directed to establish a Coastal Zone Management Advisory Committee to advise, consult with, and make recommendations to the Secretary on matters of policy concerning the coastal zone. Such committee shall be composed of not more than fifteen persons designated by the Secretary and shall perform such functions and operate in such a manner as the Secretary may direct. The Secretary shall insure that the committee membership as a group possesses a broad range of experience and knowledge relating to problems involving management, use, conservation, protection, and development of coastal zone resources.

Compensation, travel expenses.

(b) Members of the committee who are not regular full-time employees of the United States, while serving on the business of the committee, including traveltime, may receive compensation at rates not exceeding $100 per diem; and while so serving away from their

homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for individuals in the Government service employed intermittently. 80 Stat. 499; 83 Stat. 190.

ESTUARINE SANCTUARIES

Grants.

SEC. 312. The Secretary, in accordance with rules and regulations promulgated by him, is authorized to make available to a coastal state grants of up to 50 per centum of the costs of acquisition, development, and operation of estuarine sanctuaries for the purpose of creating natural field laboratories to gather data and make studies of the natural and human processes occurring within the estuaries of the coastal zone. The Federal share of the cost for each such sanctuary shall not exceed $2,000,000. No Federal funds received pursuant to section 305 or section 306 shall be used for the purpose of this section.

Federal share.

ANNUAL REPORT

SEC. 313. (a) The Secretary shall prepare and submit to the President for transmittal to the Congress not later than November 1 of each year a report on the administration of this title for the preceding fiscal year. The report shall include but not be restricted to (1) an identification of the state programs approved pursuant to this title during the preceding Federal fiscal year and a description of those programs; (2) a listing of the states participating in the provisions of this title and a description of the status of each state's programs and its accomplishments during the preceding Federal fiscal year; (3) an itemization of the allocation of funds to the various coastal states and a breakdown of the major projects and areas on which these funds were expended; (4) an identification of any state programs which have been reviewed and disapproved or with respect to which grants have been terminated under this title, and a statement of the reasons for such action; (5) a listing of all activities and projects which, pursuant to the provisions of subsection (c) or subsection (d) of section 307, are not consistent with an applicable approved state management program; (6) a summary of the regulations issued by the Secretary or in effect during the preceding Federal fiscal year; (7) a summary of a coordinated national strategy and program for the Nation's coastal zone including identification and discussion of Federal, regional, state, and local responsibilities and functions therein; (8) a summary of outstanding problems arising in the administration of this title in order of priority; and (9) such other information as may be appropriate.

(b) The report required by subsection (a) shall contain such recommendations for additional legislation as the Secretary deems necessary to achieve the objectives of this title and enhance its effective operation.

RULES AND REGULATIONS

SEC. 314. The Secretary shall develop and promulgate, pursuant to section 553 of title 5, United States Code, after notice and opportunity for full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, both public and private, such rules and regulations as may be necessary to carry out the provisions of this title. 80 Stat. 383.

AUTHORIZATION OF APPROPRIATIONS

SEC. 315. (a) There are authorized to be appropriated—

(1) the sum of $9,000,000 for the fiscal year ending June 30, 1973, and for each of the fiscal years 1974 through 1977 for grants under section 305, to remain available until expended;

(2) such sums, not to exceed $30,000,000, for the fiscal year ending June 30, 1974, and for each of the fiscal years 1975 through 1977, as may be necessary, for grants under section 306 to remain available until expended; and

(3) such sums, not to exceed $6,000,000 for the fiscal year ending June 30, 1974, as may be necessary, for grants under section 312, to remain available until expended.

(b) There are also authorized to be appropriated such sums, not to exceed $3,000,000, for fiscal year 1973 and for each of the four succeeding fiscal years, as may be necessary for administrative expenses incident to the administration of this title.

Approved October 27, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 92-1049 accompanying H.R. 14146 (Comm. on Merchant Marine and Fisheries) and No. 92-1544 (Comm. of Conference).
SENATE REPORT No. 92-753 (Comm. on Commerce).
CONGRESSIONAL RECORD, Vol. 118 (1972):
Apr. 25, considered and passed Senate.
Aug. 2, considered and passed House, amended, in lieu of H.R. 14146.
Oct. 12, House and Senate agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 8, No. 44:
Oct. 28, Presidential statement.

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two of chapter one hundred and sixty-six, or to the construction or maintenance of any electric distribution facilities required to serve a building or structure whose construction has been approved by the local conservation commission.

Added by St.1974, c. 842, § 1.

Historical Note

St.1974, c. 842, § 1, an emergency act, was approved Aug. 14, 1974, and by section 5 made effective upon its passage.

Sections 2 to 4 provided:

"Section 2. The provisions of section thirty-nine A of chapter one hundred and thirty-one of the General Laws, inserted by section one of this act, which require a notice of and a public hearing and approval of certain activities in mountain regions in the county of Berkshire, shall not become effective until a map or text delineating the boundaries of the mountain regions has been filed with the city or town clerk and has been recorded in the registry of deeds for the county or district in which the city or town is located and the hearing authority has after notice and public hearing, adopted rules and regulations consistent with the provisions of this section which have been approved by the commissioner of natural resources.

"Section 3. The provisions of section thirty-nine A of chapter one hundred and thirty-one of the General Laws, inserted by section one of this act, shall not apply to existing buildings or structures in existence on the effective date of this act, nor to the use of land to the extent to which it is used on said effective date. The provisions of said section thirty-nine A, as so inserted, shall not apply to any activity for which application for permits, variances and approvals required by bylaw or ordinance have been filed before the effective date of this act nor to a lot in a subdivision if such subdivision has been approved pursuant to sections eighty-one K to eighty-one GG, inclusive, of chapter forty-one prior to said effective date.

"Section 4. If any provision of section thirty-nine A of chapter one hundred and thirty-one of the General Laws, inserted by section one of this act, or the application of such provision to any person or circumstances shall be invalid, the remainder of said section or application of that provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

§ 40. Removal, fill, dredging or altering of land bordering waters; definitions; procedures; enforcement; exceptions; penalties

No person shall remove, fill, dredge or alter any bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other telecommunication services, without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment and without receiving and

complying with an order of conditions and provided all appeal periods have elapsed. Said notice shall be sent by certified mail to the conservation commission or, if none to the board of selectmen in a town or the mayor of a city in which the land upon which such activity is proposed is located. Each such notice shall be accompanied by a filing fee of twenty-five dollars payable to the city or town. Copies of such notice shall be sent at the same time by certified mail to the department of natural resources and the department of public works. No such notice shall be sent before all permits, variances and approvals required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained. Upon receipt of any notice hereunder the department of natural resources shall designate a file number for such notice and shall send a notification of such number to the person giving notice to the conservation commission, selectmen or mayor to whom the notice was given, and to the department of public works. Said notification shall state the name of the owner of the land upon which the proposed work is to be done and the location of said land.

Upon written request of any person, the conservation commission shall within ten days make a written determination as to whether this section is applicable to any land or work thereon. Where such person is other than the owner, notice of any such determination shall be sent to the owner.

The term "applicant" as used in this section shall mean the person giving notice of intention to remove, fill, dredge or alter.

The term "person" as used in this section shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof, administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representative, agents or assigns.

The term "bogs" as used in this section shall mean areas where standing or slowly running water is near or at the surface during a normal growing season and where a vegetational community has a significant portion of the ground or water surface covered with sphagnum moss (*Sphagnum*) and where the vegetational community is made up of a significant portion of one or more of, but not limited to nor necessarily including all, of the following plants or groups of plants: aster (*Aster nemoralis*), azaleas (*Rhododendron canadense* and *R. viscosum*), black spruce (*picea mariana*), bog cotton (*Eriophorum*), cranberry (*Vaccinium macrocarpon*), high-bush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), laurels (*Kalmia angustifolia* and *K. polifolia*), leatherleaf (*Chamaedaphne calyculata*), orchids (*Are-*

thusa, Calopogon, Pogonia), pitcher plants (*Sarracenia purpurea*), sedges (*Cyperaceae*), sundews (*Droseraccae*), sweet gale (*Myrica gale*), white cedar (*Chamaecyparis thyoides*).

The term "coastal wetlands", as used in this section, shall mean any bank, marsh, swamp, meadow, flat or other lowland subject to tidal action or coastal storm flowage.

The term "freshwater wetlands", as used in this section, shall mean wet meadows, marshes, swamps, bogs, areas where groundwater, flowing or standing surface water or ice provide a significant part of the supporting substrate for a plant community for at least five months of the year; emergent and submergent plant communities in inland waters; that portion of any bank which touches any inland waters.

The term "swamps", as used in this section, shall mean areas where ground water is at or near the surface of the ground for a significant part of the growing season or where runoff water from surface drainage frequently collects above the soil surface, and where a significant part of the vegetational community is made up of, but not limited to nor necessarily include all of the following plants or groups of plants: alders (*Alnus*), ashes (*Fraxinus*), azaleas (*Rhododendron canadense* and *R. viscosum*), black alder (*Ilex verticillata*), black spruce (*Picea mariana*), button bush (*Cephalanthus occidentalis*), American or white elm (*Ulmus americana*), white Hellebore (*Veratrum viride*), hemlock (*Tsuga canadensis*), highbush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), cowslip (*Caltha palustris*), poison sumac (*Toxicodendron vernix*), red maple (*Acer rubrum*), skunk cabbage (*Symplocarpus foetidus*), sphagnum mosses (*Sphagnum*), spicebush (*Lindera benzoin*), black gum tupelo (*Nyssa sylvatica*), sweet pepper bush (*Clethra alnifolia*), white cedar (*Chamaecyparis thyoides*), willow (*Salicaceae*).

The term "wet meadows", as used in this section where ground water is at the surface for a significant part of the growing season and near the surface throughout the year and where a significant part of the vegetational community is composed of various grasses, sedges and rushes; made up of, but not limited to nor necessarily including all, of the following plants or groups of plants: blue flag (*Iris*), vervain (*Verbena*), thoroughwort (*Eupatorium*), dock (*Rumex*), false loosestrife (*Ludwigia*), hydrophilic grasses (*Gramincae*), loosestrife (*Lythrum*), marsh fern (*Dryopteris thelypteris*), rushes (*Juncaceae*), sedges (*Cyperaceae*), sensitive fern (*Onoclea sensibilis*), smartweed (*Polygonum*).

The term "marshes", as used in this section, shall mean areas where a vegetational community exists in standing or running water during the growing season and where a significant part of the vege-

tational community is composed of, but not limited to nor necessarily including all, of the following plants or groups of plants: arums (*Araceae*), bladder worts (*Utricularia*), bur reeds (*Sparganiaceae*), button bush (*Cephalanthus occidentalis*), cattails (*Typha*), duck weeds (*Lemnaceae*), eelgrass (*Vallisneria*), frog bits (*Hydrocharitaceae*), horsetails (*Equisetaceae*), hydrophilic grasses (*Gramineae*), leatherleaf (*Chamaedaphne calyculata*), pickerel weeds (*Pontederiaceae*), pipeworts (*Eriocaulon*), pond weeds (*Potamogeton*), rushes (*Juncaceae*), sedges (*Cyperaceae*), smartweeds (*Polygonum*), sweet gale (*Myrica gale*) water milfoil (*Halcragaceae*), water lilies (*Nymphaeaceae*), water starworts (*Callitrichaceae*), water willow (*Decodon verticillatus*).

The conservation commission, selectmen or mayor receiving notice under this section shall hold a public hearing on the proposed activity within twenty-one days of the receipt of said notice. Notice of the time and place of said hearing shall be given by the hearing authority at the expense of the applicant, not less than five days prior to such hearing, by publication in a newspaper of general circulation in the city or town where the activity is proposed and by mailing a notice to the applicant and to the board of health and the planning board of said city or town and to the department of natural resources and the department of public works. The conservation commissior and its agents, officers and employees and the commissioner of natura. resources and his agents and employees, may enter upon privately owned land for the purpose of performing their duties under this section.

If after said hearing the conservation commission, selectmen or mayor, as the case may be, determine that the area on which the proposed work is to be done is significant to public or private water supply, to the ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, or to the protection of fisheries, such conservation commission, board of selectmen or mayor shall by written order within twenty-one days of such hearing impose such conditions as will contribute to the protection of the interests described herejn, and all work shall be done in accordance therewith. If the conservation commission, selectmen or mayor, as the case may be, make a determination that the proposed activity does not require the imposition of such conditions, the applicant shall be notified of such determination within twenty-one days after said hearing. Such order or notification shall be signed by the mayor or a majority of the conservation commission or board of selectmen, as the case may be, and a copy thereof shall be sent forthwith to the applicant and to the department of natural resources and the department of public works.

If a conservation commission has failed to hold a hearing within the twenty-one day period as required, or if a commission, after holding such hearing, has failed within twenty-one days therefrom to issue an order, or if a commission, upon a written request by any person to determine whether this section is applicable to any work, fails within ten days to make said determination, or where an order does issue from said commission, the applicant, any person aggrieved by said commission's order or failure to act, or any owner of land abutting the land upon which the proposed work is to be done, or any ten residents of the city or town in which such land is located, may, by certified mail and within ten days from said commission's order or failure to act, request the department of natural resources to determine whether the area on which the proposed work is to be done is significant to public or private water supply, to the ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish or to the protection of fisheries. The commissioner of natural resources also may request such a determination within said ten days. The party making any such request shall at the same time send a copy thereof by certified mail to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder. If such party is other than the applicant, a copy of such request shall also be sent at the same time by certified mail to the applicant. Upon receipt of such request the department of natural resources shall make the determination requested and shall by written order issue within seventy days of receipt of such request, signed by the commissioner of natural resources, impose such conditions as will contribute to the protection of the interests described herein; provided, however, that said department shall notify the applicant within thirty days of the receipt of such request if his application or request is not in proper form or is lacking information or documentation necessary to make the determination. Such order shall supersede the prior order of the conservation commission, board of selectmen or mayor, and all work shall be done in accordance therewith, but in no event shall any work commence until ten days have elapsed following the issuance of said order. At any time prior to a final order of determination by the department, any party requesting a determination may in writing withdraw the request, and such withdrawal shall be effective upon receipt by the department. Notwithstanding the withdrawal, the commissioner may continue the determination if he notifies all parties within ten days of receipt of the withdrawal. A copy of such order shall be sent to the applicant, to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder, and to the department of public works.

No work proposed in any notice of intention shall be undertaken until the final order, determination or notification with respect to such work has been recorded in the registry of deeds for the district in which the land is located.

Any site where work is being done which is subject to this section shall display a sign of not less than two square feet or more than three square feet bearing the words, "Massachusetts Department of Natural Resources File Number . . .", and the sign shall display the file number assigned to the project.

If the department of public works finds that any proposed work would violate the provisions of chapter ninety-one, it shall proceed immediately to enforce the provisions of said chapter.

The provisions of this section shall not apply to any mosquito control work done under the provisions of clause (36) of section five of chapter forty, of chapter two hundred and fifty-two or of any special act; to maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of lands for agricultural use; or to any project authorized by special act prior to January first, nineteen hundred and seventy-three.

The notice of intention required in the first paragraph of this section shall not apply to emergency projects necessary for the protection of the health or safety of the commonwealth which are to be performed or which are ordered to be performed by an agency of the commonwealth or a political subdivision thereof. *An emergency project shall mean any project certified to be an emergency by the commissioner and the conservation commission of the city or town in which the project would be undertaken, or if none, by the mayor of said city or the selectmen of said town.* In no case shall any removal, filling, dredging, or alteration authorized by such certification extend beyond the time necessary to abate the emergency.

Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation. Any court having equity jurisdiction may restrain a violation of this section and enter such orders as it deems necessary to remedy such violation, upon the petition of the attorney general, the commissioner of natural resources, a city or town, an owner or occupant of property which may be affected by said removal, filling, dredging or altering, or ten residents of the commonwealth under the provisions of section ten A of chapter two hundred and fourteen.

Rules and regulations shall be promulgated by the commissioner to effectuate the purposes of this section. However, failure by the commissioner to promulgate rules and regulations shall not act to suspend or invalidate the effect of this section.

Whoever violates any provision of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than six months or both. Each day or portion thereof of continuing violation shall constitute a separate offense. This section may be enforced by natural resources officers, deputy natural resources officers, and any officer having police powers.

Added by St.1967, c. 802, § 1. Amended by St.1968, c. 444, § 2; St.1971, c. 1020; St.1972, c. 784, § 1; St.1973, c. 163; St.1973, c. 769; St.1974, c. 818, § 1.

Historical Note

As added in 1967, this section read: "A person shall not remove, fill or dredge any bank, flat, marsh, meadow or swamp bordering on any inland waters without filing written notice of his intention to so remove, fill or dredge, including such plans as may be necessary to describe such proposed activity, with the board of selectmen in a town or the mayor of a city, and with the state departments of public works and natural resources. Such notice shall be sent by registered mail at least thirty days prior to any such removing, filling or dredging. The selectmen or mayor, as the case may be, shall hold a public hearing on said proposal within fourteen days of the receipt of said notice, and shall notify by mail the person intending to do such removing, filling or dredging, and the said state departments of the time and place of said hearing. The selectmen or mayor may recommend such protective measures as may protect the public interest. The selectmen or mayor, within seven days thereafter, shall transmit such recommendations to the commissioner of natural resources, but the failure to do so shall not delay the issuance of an order by the commissioner. The department of public works shall determine whether the proposed activity would violate any provisions of chapter ninety-one and shall take such action as may be necessary to enforce such provisions. If the area on which the proposed work is to be done is determined by the department of natural resources to be essential to public or private water supply or to proper flood control, the department shall by written order signed by the commissioner impose such conditions as may be necessary to protect the interests described herein, and the work shall be done in accordance therewith. The provisions of this section shall not apply to areas established by the water resources commission as flood plain zones. Land used for agricultural purposes shall be exempt from the provisions of this section. The provisions of this section shall not apply to any work done under the provisions of clause (36) of section five of chapter forty, chapter two hundred and fifty-two, or any special act. The commissioner may, by rule or regulation, exempt from this section such other use as he may deem not inconsistent with the purposes of this section. The superior court shall have jurisdiction in equity to restrain a continuing violation of this section."

St.1968, c. 444, § 2, approved June 26, 1968, inserted, in the provisions of this section as appearing in 1967, a former antepenultimate sentence deleted in 1971, which read: "The provisions of this section shall not apply to inland wetlands which are subject to an order adopted under section forty A, nor to inland wetlands immediately contiguous to thereto unless such contiguous wetlands had been subject to such an order which was thereafter revoked by reason of the objection of the owner."

Section 3 of St.1968, c. 444, provided: "No order adopted under section forty A of chapter one hundred and thirty-one of the General Laws, inserted by section one of this act, shall be deemed to invalidate any order imposed prior thereto by the commissioner of natural resources under section forty of said chapter one hundred and thirty-one, as originally appearing in chapter two hundred and twenty of the acts of nineteen hundred and sixty-five, and said order shall remain in full force and effect until expressly amended or repealed by the commissioner of natural resources."

St.1971, c. 1020, approved Nov. 9, 1971, in the provisions of this section as appearing in 1967, inserted the words "with the conservation commission or if none" following the word "activity" in the first sentence, inserted the words "conservation commission or if none the" following the word "The" at the beginning of the third, fourth, and fifth sentences, and deleted the sentence inserted in 1968.

St.1972, c. 784, § 1, approved July 18, 1972, rewrote the section to read as hereinafter appearing as amended in 1973.

Sections 3 and 4 of St.1972, c. 784, provided:

"Section 3. All orders issued under the authority of section twenty-seven A of chapter one hundred and thirty of the General Laws prior to the effective date of this act shall remain in full force and effect until amended or repealed by the commissioner of natural resources.

"Section 4. The department of natural resources is hereby authorized and directed to map the commonwealth so as to make available to municipalities the delineation of wetlands within their boundaries."

St.1973, c. 163, approved April 9, 1973, added the third sentence of the fourth paragraph, in the provisions of this section as appearing in 1972.

St.1973, c. 769, an emergency act, approved Sept. 17, 1973, inserted the twelfth paragraph, in the provisions of this section as appearing in 1972.

As so amended in 1973, this section read:

"No person shall remove, fill, dredge or alter any bank, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding without filing written notice of his intention to so remove, fill, dredge or alter, including such plans as may be necessary to describe such proposed activity and its effect on the environment, at least sixty days prior to any such removing, filling, dredging or altering. Said notice shall be sent by certified mail to the conservation commission or, if none to the board of selectmen in a town or the mayor of a city in which the land upon which such activity is proposed is located. Each such notice shall be accompanied by a filing fee of twenty-five dollars payable to the city or town. Copies of such notice shall be sent at the same time by certified mail to the state departments of natural resources and public works. No such notice shall be sent before all permits, variances and approvals required by local by-law with respect to the proposed activity have been obtained. Upon receipt of any notice hereunder the department of natural resources shall designate a file number for such notice and shall send a notification of such number to the person giving notice, to the conversation commission, selectmen or mayor to whom the notice was given, and to the department of public works. Said notification shall state the name of the owner of the land upon which the proposed work is to be done and the location of said land.

"The term 'person' as used in this section shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or political subdivision thereof, administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representative, agents or assigns.

"The term 'applicant' as used in this section shall mean the person giving notice of intention to remove, fill, dredge or alter.

"The conservation commission, selectmen or mayor receiving notice under this section shall hold a public hearing on the proposed activity within twenty-one days of the receipt of said notice. Notice of the time and place of said hearing shall be given by the hearing authority at the expense of the applicant, not less than five days prior to such hearing, by publication in a newspaper of general circulation in the city or town where the activity is proposed and by mailing a notice to the applicant and to the board of health and the planning board of said city or town and to the state departments of natural resources and public works. The conservation commission, its agents, officers, and employees, may, for the purpose of performing its duties under this section, enter upon the land upon which the proposed work is to be done and make or cause to be made such examination or survey as is deemed necessary.

"If after said hearing the conservation commission, selectmen or mayor, as the case may be, determine that the area on which the proposed work is to be done is significant to public or private water supply, to the ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish, or to the protection of fisheries, such conservation commission, board of selectmen or mayor shall by written order within twenty-one days of such hearing impose such conditions as will contribute to the protection of the interests described herein, and all work shall be done in accordance therewith. Such order shall be signed by the mayor or a majority of the conservation commission or board of selectmen, as the case may be, and a copy thereof shall be sent forthwith to the applicant and to the department of natural resources and the department of public works. Notwithstanding such order, no work shall be done until sixty days after the filing of the notice of intention required by this section.

"Not more than twenty-eight days after a hearing under the provisions of this section, any person aggrieved by an order issued after such hearing, or any owner of land abutting the land upon which the proposed work is to be done, or any ten residents of the city or town where such land is located may by certified mail request the department of natural resources to determine whether the area on which the proposed work is to be done is significant to public or private water supply, to the ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to protection of land containing shellfish or to the protection of fisheries. The commissioner of natural resources also may request such a determination within said twenty-eight days. The party making any such request shall at the same time send a copy thereof by certified mail to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder. If such party is other than the applicant, a copy of such request shall also be sent at the same time by certified mail to the applicant. Upon receipt of such request the department of natural resources shall make the determination requested and shall by written order, signed by the commissioner of natural resources, impose such conditions as will contribute to the protection of the interests described herein. Such order shall supercede the prior order of the conservation commission, board of selectmen or mayor, and all work shall be done in accordance therewith. A copy of such order shall be sent to the applicant, to the conservation commission, board of selectmen or mayor which conducted the hearing hereunder, and to the department of public works.

"Any person aggrieved by an order of the department of natural resources issued under the provisions of this section may appeal under the provisions of chapter thirty A. Such right of appeal shall be exclusive.

"No work proposed in any notice of intention shall be undertaken until the final order with respect to such work has been recorded in the registry of deeds for the district in which the land is located.

"Any site where work is being done which is subject to this section shall display a sign of not less than two square feet or more than three square feet bearing the words: 'Massachusetts Department of Natural Resources File

Number .....', and the sign shall display the file number assigned to the project.

"If the department of public works finds that any proposed work would violate the provisions of chapter ninety-one, it shall proceed immediately to enforce the provisions of said chapter.

"The provisions of this section shall not apply to the following: any mosquito control work done under the provisions of clause (36) of section five of chapter forty, chapter two hundred and fifty-two, or under the provisions of a special act; (or work performed for agricultural purposes) The commissioner may adopt rules and regulations consistent with the purpose of this section.

"The notice of intention required in the first paragraph of this section shall not apply to emergency projects necessary for the protection of the health or safety of the commonwealth which are to be performed or which are ordered to be performed by an agency of the commonwealth or a political subdivision thereof. An emergency project shall mean any project certified to be an emergency by the commissioner and the conservation commission of the city or town in which the project would be undertaken, or if none, by the mayor of said city or the selectmen of said town. In no case shall any removal, filling, dredging or alteration authorized by such an emergency certification extend beyond the time necessary to abate the emergency.

"Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this section or in violation of any order issued under this section shall forthwith comply with any such order or restore such real estate to its condition prior to any such violation. Any court having equity jurisdiction may restrain a violation of this section and enter such orders as it deems necessary to remedy such violation, upon the petition of the attorney general, the commissioner of natural resources, a city or town, an owner or occupant of property which may be affected by said removal, filling, dredging or altering, or ten residents of the commonwealth under the provisions of section ten A of chapter two hundred and fourteen.

"Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months or both. This section may be enforced by natural resource officers."

St.1974, c. 818, § 1, an emergency act, approved Aug. 13, 1974, rewrote the section.

Section 3 of St.1974, c. 818, provided:

"Within ninety days of the effective date of this act the commissioner of natural resources shall promulgate the regulations required by section forty of chapter one hundred and thirty-one of the General Laws, as amended by section one of this act. Said regulations shall concern, but shall not be limited to, defining the terms in said section forty and establishing standard application forms setting forth the minimum information which is required for issuance of an order pursuant to said section forty."

Prior Laws:

G.L. c. 130, § 27A, as added by St. 1963, c. 426.
G.L. c. 131, § 117C, as added by St. 1965, c. 220.
St.1965, c. 375.
St.1966, c. 276.
St.1969, c. 406, §§ 1, 2.
St.1972, c. 510.

Cross References

Damages for violation of this section, see section 42 of this chapter.
Protective orders concerning scenic and recreational rivers and streams, effect upon prior orders imposed pursuant to this section, see c. 21, § 17B.
Regulation of certain activities to protect mountain regions of Berkshire county, activity subject to this section excepted, see section 39A of this chapter.

appropriate to their major academic interests. The employment of such students in positions classified under section forty-five shall be approved by the personnel administrator. The employment of such students in said positions shall, upon certification to the said administrator by a representative of such a college, university or institution that such student is enrolled therein under a "co-operative plan" of education, not be subject to the provisions of chapter thirty-one: provided that employment by the commonwealth of a student under such plan is for a stated and limited time.

Added by St.1968, c. 203. Amended by St.1974, c. 835, § 49.

Deferred 1974 Amendment

St.1974, c. 835, § 49, approved August 13, 1974, and by section 185 made effective July 1, 1975, amended this section to conform to the establishment of a division of personnel administration in the executive office for administration and finance. For amendment, see the note hereunder.

1968 Enactment. St.1968, c. 203, was approved April 30, 1968.

1974 Amendment. St.1974, c. 835, § 49, approved Aug. 13, 1974, and by section 185 made effective July 1, 1975, substituted "personnel administrator" for "director of the bureau of personnel in the first and second sentences, and substituted "said administrator" for "director of civil service" in the third sentence.

St.1974, c. 835, amended this section in conformity with establishment by the act of a division of personnel administration in the executive office for administration and finance. See G.L. c. 7, § 4A, and the note thereunder.

Library references
States ⇐53.
C.J.S. States §§ 49, 53, 55, 56, 70, 77, 79.

ENVIRONMENTAL IMPACT OF PROJECTS, ETC. CONDUCTED BY AGENCIES [NEW]

Caption editorially supplied.

§ 61. Determination of impact by agencies; damage to environment; prevention or minimizing; definition applicable to this section and section 62

All agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means and measures to minimize damage to the environment. Unless a clear contrary intent is manifested, all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment. Any determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact.

As used in this section and section sixty-two, "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth and shall include but not be limited to air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other surface or subsurface water resources; destruction of seashores, dunes, marine resources, underwater archaeological resources, wetlands, open spaces, natural areas, parks, or historic districts or sites. Damage to the environment shall not be construed to include any insignificant damage to or impairment of such resources.

Added by St.1972, c. 781, § 2. Amended by St.1973, c. 989, § 4.

1972 Enactment. St.1972, c. 781, § 2, was approved July 18, 1972, and by section 3 made effective Dec. 31, 1972.

1973 Amendment. St.1973, c. 989, § 4, approved Nov. 2, 1973, inserted "underwater archaeological resources" in the first sentence of the second paragraph.

Cross References

Air pollution, see c. 111, § 142E.

Department of natural resources, division of water pollution control, see c. 21, § 26 et seq.

Department of the attorney general, division of environmental protection, see c. 12, § 11D.

Metropolitan air pollution control district, see c. 111, § 142B.

Remedies,

Cease and desist orders, commissioner of public health, see c. 111, § 2c.

Injunction, see c. 214, § 10A.

Intervention in adjudicatory proceedings involving damage to environment, see c. 30A, § 10A.

Solid waste disposal, department of public works, see c. 16, § 18 et seq.

Waste water treatment facilities,

Board of certification of operators, see c. 13, § 56A.

Certification of operators, see c. 112, §§ 87AAAA, 87BBBB.

Water pollution, see c. 21, § 43 et seq.

Law Review Commentaries

Judicial review of a (NEPA) negative statement. (1973) 53 Boston U.L.Rev. 879.

Supplementary Index to Notes

Enforcement procedures 2

1. In general

Where construction of project by Port Authority and suit arising out of same were commenced at least two months before effective date of c. 30, § 62, requiring every agency, department, etc., to publish an environmental impact report prior to commencement of any project, resolution by authority paraphrasing requirements of this section with earlier effective date was sufficient to comply with statutory requirements. City of Boston v. Massachusetts Port Authority (1974) 308 N.E.2d 485, 1974 Mass.Adv.Sh. 187.

Where § 62 of this chapter required that secretary of every executive office promulgate regulations approved by the Secretary of Environmental Affairs, the Secretary issued regulations outlining substance which environmental regulations had to contain to be approved and Secretary of Commerce who objected that regulations exceeded scope of § 62 of this chapter had not submitted any regulations for approval, no actual conflict existed and Governor was under no present duty to act on the question whether such regulations were beyond the authority granted to Environmental Affairs Secretary by Environmental Policy Act; thus, no solemn occasion existed requiring Supreme Judicial Court to issue an advisory opinion answering such question. Answer of Justices to Governor (1973) 302 N.E.2d 565, 1973 Mass. Adv.Sh. 1253.

2. Enforcement procedures

Procedures in c. 30, § 62, for compliance with and for enforcement of requirements of this section that all authorities review, evaluate and determine impact on natural environment of their activities and use all practicable means and measures to minimize damage of environment constitute alternative to judicial review and should be exhausted before judicial review becomes appropriate. City of Boston v. Massachusetts Port Authority (1974) 308 N.E.2d 483, 1974 Mass.Adv.Sh. 187.

Bill in suit under environmental protection statute (c. 214, § 10A) was adequate though air pollution complained of was not alleged to constitute violation of statute but rather procedural failures were alleged to be violative. Id.

§ 62. Environmental impact reports; scope of requirement; preparation and contents; publication; effect upon commencement of projects, etc., by agencies; submittal to reviewing agencies; rules and regulations; funds; actions or proceedings, limitations

No agency, department, board, commission, or authority of the commonwealth or any authority of any political subdivision thereof shall commence any work, project, or activity which may cause damage to the environment until sixty days after it has published a final environmental impact report in accordance with the provision of this section or until sixty days after a public hearing on said report, provided that research, planning, design and other preliminary work necessary to describe and evaluate such project for the purposes of this section may be undertaken.

Any such agency, department, board, commission, authority or any authority of any political subdivision which grants permit determinations, orders or other actions

shall prepare an environmental impact report for any work, project or activity of any private person, firm or corporation which may cause damage to the environment and for which no funds of the commonwealth are to be expended, provided that such report shall be limited in scope to the subject matter jurisdiction of such agency, department, board, commission, authority or authority of a political subdivision by which said report is prepared. No action shall be brought to compel any such agency, department, board, commission, authority or authority of a political subdivision or any such private person, firm or corporation to make, cause to be made or have made on its behalf any environmental impact report other than the report required by this section.

Environmental impact reports for any work, project or activity of private persons, firms or corporations shall be submitted to the secretary of environmental affairs for comment, and such comment, if any, shall be submitted to the agency, department, board, commission, authority or authority of any political subdivision by which said report is prepared within thirty days from its receipt. The approval or disapproval of said secretary of any such report shall not be required.

An environmental impact report shall contain detailed statements describing the nature and extent of the proposed work and its environmental impact; all measures being utilized to minimize environmental damage, any adverse short-term and long-term environmental consequences which cannot be avoided should the work be performed; and alternatives to the proposed action and their environmental consequences. The preparation of said report shall be commenced during the initial planning and design phase of any work, project, or activity subject to this section and the report shall be so prepared and disseminated as to inform the originating agency, reviewing agencies, the appropriate regional planning commission, the attorney general and the public of the environmental consequences of state actions and the alternatives thereto prior to any commitment of state funds and prior to the commencement of the work, project, or activity. All reviewing agencies, and any state agency, department, board, commission, division or authority which has jurisdiction by law or special expertise with respect to any environmental impact involved shall affix their written comments to the final impact report. In order to insure an interdisciplinary review, the secretary of environmental affairs shall in conjunction with any agency involved jointly approve the selection of any consultant engaged to prepare the draft or final impact report.

The secretaries of the executive offices shall each promulgate rules and regulations approved by the secretary of environmental affairs to carry out the purposes of this section which shall be applicable to all agencies, departments, boards, commissions, authorities or instrumentalities within each of such executive offices and which shall conform with the requirements of the National Environmental Policy Act Pub.Law 91-190, and amendments thereto.[1] Any draft report, final report, and all written comments required by said regulations shall be public documents. Said reports shall be submitted to the secretary of environmental affairs who shall issue a written statement indicating whether or not in his judgment said reports adequately and properly comply with the provisions of this section.

For the purposes of carrying out the provisions of this section, funds made available for the purpose of design of or planning or performing said work, project, or activity shall be available and may be expended for the research, preparation, and publication of the reports required by this section and expenses incidental thereto, and said funds may be transferred or otherwise may be made available to other state departments and resource agencies designated by the secretary of environmental affairs for the purpose of meeting the expenses incurred in evaluating the draft or final impact report.

Any action or proceeding alleging that an agency, department, board, commission, authority or authority of any political subdivision has improperly determined whether a work, project or activity may cause significant damage to the environment shall be commenced not later than sixty days after the date upon which the secretary of environmental affairs shall issue his comment, if any, on the environmental impact

report prepared by such agency, department, board, commission, authority or authority of any political subdivision in connection with such work, project or activity, or not later than ninety days after the date upon which such agency, department, board, commission, authority or authority of any political subdivision shall have transmitted such report to said secretary, whichever date occurs first. Any action or proceeding alleging that an environmental impact report fails to comply with the provisions of this section shall be commenced no later than thirty days after the date upon which the final environmental impact report has been transmitted by an agency, department, board, commission, authority or authority of any political subdivision to the secretary of environmental affairs. In the event that the comments of the secretary of environmental affairs indicate his detailed reasons for his finding that such final environmental impact report fails to comply with the provisions of this section, the time during which any action may be commenced alleging that such report fails to comply with said section shall be extended for an additional period of thirty days.

Added by St.1972, c. 781, § 2. Amended by St.1974, c. 257, §§ 1, 2.

[1] 42 U.S.C.A. § 4321 et seq.

1972 Enactment. St.1972, c. 781, § 2, was approved July 18, 1972, and by section 3 made effective July 1, 1973.

1974 Amendment. St.1974, c. 257, §§ 1, 2, an emergency act, approved May 28, 1974, and by section 4 made effective July 1, 1974, inserted the second and third paragraphs, and added the last paragraph, respectively.

Section 3 provided: "Any application for any permit determinations, orders or other actions filed with any agency, department, board, commission, authority or authority of any political subdivision on the effective date of this act may be reviewed, evaluated and considered in accordance with the provisions of section sixty-two of chapter thirty of the General Laws, as amended by sections one and two of this act; provided, however, that if so reviewed, evaluated or considered, final approval on such permit determinations, orders or other actions shall not be granted until after July first, nineteen hundred and seventy-four."

1974 Related Laws. St.1974, c. 819, §§ 1, 2, an emergency act, approved Aug. 13, 1974, provided:

"Section 1. The Emergency Finance Board, established by section 1 of chapter 49 of the acts of 1933, when acting upon any of its statutory requirements, shall not be subject to the provisions of section sixty-two of chapter thirty of the general laws, pertaining to environmental impact, provided that there has been previous compliance with said section by another agency, department, board, commission or authority of the commonwealth or an autority of a political subdivision thereof with respect to the work, project or activity which is the subject matter of the request for statutory approval of said Emergency Finance Board. The Emergency Finance Board shall promulgate, with the approval of the secretary of environmental affiars, rules and regulations to carry out its obligations under said section sixty-two, which rules and regulations may establish categories of exempt approvals and may require applicants for approvals to supply data and information on environmental impact to said Emergency Finance Board.

"Section 2. The membership of the special commission established by chapter fifty of the resolves of nineteen hundred and seventy-four to make an investigation and study relative to the implementation and effects of environmental impact laws in the commonwealth, is hereby increased by three members to be appointed by the governor, one of whom shall be representative of environmental interests and two of whom shall be selected from a list to be submitted by the associated industries of Massachusetts to represent industry and by the secretary of manpower affairs or his designee. Said special commission shall in the course of its investigation and study consider the subject matter of current house document numbered 2884 and chapter two hundred and fifty-seven of the acts of nineteen hundred and seventy-four."

Cross References

Environmental affairs,
Executive office, see c. 6A, § 15.
Secretary, see c. 6A, § 3.

Law Review Commentaries

Judicial review of a (NEPA) negative statement. (1973) 53 Boston U.L.Rev. 879.

Supplementary Index to Notes

Enforcement procedures 2

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1. In general

Where construction of project by Port Authority and suit arising out of same were

commenced at least two months before effective date of this section requiring every agency, department, etc., to publish an environmental impact report prior to commencement of any project, resolution by authority paraphrasing requirements of c. 30, § 61, with earlier effective date was sufficient to comply with statutory requirements. City of Boston v. Massachusetts Port Authority (1974) 308 N.E.2d 488, 1974 Mass.Adv.Sh. 187.

Where this section required that secretary of every executive office promulgate regulations approved by the Secretary of Environmental Affairs, the Secretary issued regulations outlining substance which environmental regulations had to contain to be approved and Secretary of Commerce who objected that regulations exceeded scope of this section had not submitted any regulations for approval, no actual conflict existed and Governor was under no present duty to act on the question whether such regulations were beyond the authority granted to Environmental Affairs Secretary by Environmental Policy Act; thus, no solemn occasion existed requiring Supreme Judicial Court to issue an advisory opinion answering such question. Answer of Justices to Governor (1973) 302 N.E.2d 565, 1973 Mass.Adv.Sh. 1253.

2. Enforcement procedures

Procedures in this section for compliance with and for enforcement of requirements of c. 30, § 61, that all authorities review, evaluate and determine impact on natural environment of their activities and use all practicable means and measures to minimize damage of environment constitute alternative to judicial review and should be exhausted before judicial review becomes appropriate. City of Boston v. Massachusetts Port Authority (1974) 308 N.E.2d 488, 1974 Mass.Adv.Sh. 187.

or in the waters of an adjoining county lying within three miles of the county in which such city or town is situated. 5 Op.Atty.Gen.1918, p. 181.

2. Rules and regulations

The rule-making power delegated to the director of marine fisheries by c. 130, § 17A, authorizes the director to adopt and enforce regulations with respect to subjects specifically enumerated in the former section which conflict with and thereby supersede previously existing special acts of the legislature, construed in the light of this section so providing. Op.Atty.Gen. Dec. 5, 1969, p. 74.

§ 105. Protection of coastal wetlands

The commissioner, with the approval of the board of natural resources, may from time to time, for the purpose of promoting the public safety, health and welfare, and protecting public and private property, wildlife and marine fisheries, adopt, amend, modify or repeal orders regulating, restricting or prohibiting dedging, filling, removing or otherwise altering, or polluting, coastal wetlands. In this section the term "coastal wetlands" shall mean any bank, marsh, swamp, meadow, flat or other low land subject to tidal action or coastal storm flowage and such contiguous land as the commissioner reasonably deems necessary to affect by any such order in carrying out the purposes of this section.

The commissioner shall, before adopting, amending, modifying or repealing any such order, hold a public hearing thereon in the municipality in which the coastal wetlands to be affected are located, giving notice thereof to the state reclamation board, the department of public works and each assessed owner of such wetlands by mail at least twenty-one days prior thereto.

Upon the adoption of any such order or any order amending, modifying or repealing the same, the commissioner shall cause a copy thereof, together with a plan of the lands affected and a list of the assessed owners of such lands, to be recorded in the proper registry of deeds or, if such lands are registered, in the registry district of the land court, and shall mail a copy of such order and plan to each assessed owner of such lands affected thereby. Such orders shall not be subject to the provisions of chapter one hundred and eighty-four. Any person who violates any such order shall be punished by a fine of not less than ten nor more than fifty dollars, or by imprisonment for not more than one month, or by both such fine and imprisonment.

The superior court shall have jurisdiction in equity to restrain violations of such orders.

Any person having a recorded interest in land affected by any such order, may, within ninety days after receiving notice thereof, petition the superior court to determine whether such order so re-

stricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation. If the court finds the order to be an unreasonable exercise of the police power, as aforesaid, the court shall enter a finding that such order shall not apply to the land of the petitioner; provided, however, that such finding shall not affect any other land than that of the petitioner. The commissioner shall cause a copy of such finding to be recorded forthwith in the proper registry of deeds or, if the land is registered, in the registry district of the land court. The method provided in this paragraph for the determination of the issue of whether any such order constitutes a taking without compensation shall be exclusive, and such issue shall not be determined in any other proceeding, nor shall any person have a right to petition for the assessment of damages under chapter seventy-nine by reason of the adoption of any such order.

The department may, after a finding has been entered that such order shall not apply to certain land as provided in the preceding paragraph, take the fee or any lesser interest in such land in the name of the commonwealth by eminent domain under the provisions of chapter seventy-nine and hold the same for the purposes set forth in this section.

No action by the commissioner or the department under this section shall prohibit, restrict or impair the exercise or performance of the powers and duties conferred or imposed by law on the department of public works, the state reclamation board or any mosquito control or other project operating under or authorized by chapter two hundred and fifty-two.

No order adopted hereunder shall apply to any area under the control of the metropolitan district commission.

Added by St.1965, c. 768, § 1.

Historical Note

St.1965, c. 768, § 1, an emergency act, was approved Nov. 23, 1965.

Sections 3 and 4, as amended by St. 1970, c. 691, provided:

"Section 3. The consent of the commonwealth is hereby given to the acquisition by the United States, by condemnation, purchase, gift, devise, or lease, of the area, hereinafter described, of land or water, or of land and water, in the commonwealth, for the establishment of a national wildlife refuge in accordance with the Migratory Bird Conservation Act (16 USC 715–715d, 715e, 715f to 715k, 715l to 715r [§§ 715l, 715m, repealed]) and amendments thereof or thereto, reserving, however, to the commonwealth full and complete jurisdiction and authority over all such areas not incompatible with the administration, maintenance, protection and control thereof by the United States under the terms of said act; provided that the commonwealth reserves to itself through the state reclamation board and the Plymouth County Mosquito Control Project, and the South Shore Mosquito

Control Project, and their successors, the right to provide for control of mosquitoes and greenhead flies in such lands and the right to construct and maintain such ditches, culverts, dams and any other installation on the lands so acquired as may be necessary for the proper control of mosquitoes and greenhead flies. Said area, located in Plymouth county, is bounded and described as follows: Being approximately 2,300 acres of tidal and fresh marsh, together with included water and contiguous uplands bordering on the North river in the towns of Hanover, Marshfield, Norwell, Pembroke and Scituate, and in general extending from West Elm street, Barker street, and state Route 53 in Pembroke down stream along the said North river to its mouth between Third Cliff and Fourth Cliff in the town of Scituate.

"Section 4. Awards of damages, expenses of acquisition of land and water, and expenses incidental thereto and to the preparation of maps and plans of lands to be affected by orders or to be acquired, to the holding of hearings, and to the adoption and recording of orders as provided in section one hundred and five of chapter one hundred and thirty of the General Laws, may be paid out of funds heretofore or hereafter made available for the purpose of section three of chapter one hundred and thirty two A of the General Laws."

St.1970, c. 691, was approved Aug. 18, 1970. Emergency declaration by the Governor was filed the same date.

Cross References

Property tax, assessment of real estate permanently restricted under this section as a separate parcel of real estate, see c. 59, § 11.

Law Review Commentaries

Coastal wetlands in New England, (1972) 52 Boston U.L.Rev. 724.

Conservation, open space and recreation. Julian J. D'Agostine and Richard G. Huber, 13 Annual Survey of Mass. Law, Boston College, p. 230 (1966).

Inland wetlands. Richard G. Huber and David A. Mills, 15 Annual Survey of Mass.Law, Boston College, p. 352 (1968).

Powers and functions of state government. Joseph F. Courtney, 12 Annual Survey of Mass.Law, Boston College, p. 285 (1965).

Library References

Navigable Waters ⇐36(3).

C.J.S. Navigable Waters §§ 92, 93.

or 'graduate on the job training' for purposes of workmen's compensation laws; provided, however, that the 'graduate on the job training' period of any cadet engineer who, following his 'graduate on the job training', continues in the employ of the contracting city or town as a permanent full-time employee, shall be considered as 'creditable service' for purposes of retirement laws, pension laws, and other laws pertaining to municipal employees."

1974 Amendments. St.1974, c. 745, approved Aug. 7, 1974, in the third paragraph, substituted the first sentence in lieu of the former first and second sentences as appearing in St.1964, c. 94, containing identical provisions except that the word "not" was inserted to exempt cadet engineers from civil service law.

St.1974, c. 836, § 158, approved Aug. 13, 1974, and by section 185 made effective July 1, 1975, substituted "personnel administration in such form as the personnel administrator" for "civil service in such form as the director of civil service" in the first paragraph.

St.1974, c. 835, amended this section in conformity with establishment by the act of a division of personnel administration in the executive office for administration and finance. See G.L. c. 7, § 4A, and the note thereunder.

Library references

Municipal Corporations ⟨⟹135, 206, 213, 216(1), 220(9).

C.J.S. Municipal Corporations §§ 469, 518, 626–636, 679 et seq., 711 et seq., 727.

§ 69F. Expenses

All expenses, obligations or commitments for the payment of money incurred by the contracting city or town, pursuant to the provisions of sections sixty-nine B to sixty-nine E, inclusive, shall be considered as part of the annual expense of the plant for the year in which they are incurred, and shall be paid from the income of the plant in accordance with the provisions of this chapter. Added St.1958, c. 311, as amended St.1958, c. 564, §§ 4, 5.

1958 Amendment. Section was enacted by St.1958, c. 311 as section 69E. Renumbered as section 69F by St.1958, c. 564, § 5.

St.1958, c. 564, § 4, changed the reference "sixty-nine A to sixty-nine D" to "sixty-nine B to sixty-nine E".

Library references

Municipal Corporations ⟨⟹206, 213, 258.

C.J.S. Municipal Corporations §§ 626–636, 679 et seq., 1028 et seq.

ELECTRIC POWER FACILITIES—ENERGY NEEDS—ENVIRONMENTAL PROTECTION [NEW]

Caption editorially supplied.

§ 69G. Definitions

As used in section sixty-nine H to sixty-nine R, inclusive, the following words and terms shall have the following meanings:—

"Applicant", a person or persons who submit a long-range plan or notice of intention to construct an oil facility to the council, or applies to the council for a certificate of environmental impact and public need.

"Certificate", a certificate of environmental impact and public need, as provided for in section sixty-nine K.

"Construction", any placement, assembly, or installation of facilities or equipment, which in the case of an oil facility must be valued in excess of five million dollars, including contractual obligations to purchase such facilities or equipment, at the premises where such equipment will be used, including preparation work at such premises.

"Council", the Energy Facilities Siting Council established under the provisions of section sixty-nine H.

"Department", the department of public utilities as established under the provisions of section two of chapter twenty-five.

"Electric company", (1) an electric company as defined in section one; (2) a corporation organized under the laws of the commonwealth empowered to generate,

transmit, distribute or sell electricity for ultimate use by fifty or more persons; (3) a foreign corporation empowered under the laws of its state of incorporation to generate, transmit, distribute or sell electricity for ultimate use by fifty or more persons and qualified to do business in the commonwealth; and (4) a municipal corporation empowered to operate a municipal lighting plant under the provisions of section thirty-five or section thirty-six.

"Facility", (1) any bulk electric generating unit, including associated buildings and structures, designed for, or capable of operating at a gross capacity of one hundred megawatts or more; (2) any new electric transmission line having a design rating of sixty-nine kilovolts or more and which is one mile or more in length except reconductoring or rebuilding of existing transmission lines at the same voltage; (3) any ancillary structure including fuel storage facilities which is an integrated part of the operation of any electric generating unit or transmission line which is a facility; (4) any unit, including associated buildings and structures, designed for, or capable of, the manufacture or storage of gas; and (5) any new pipeline for the transmission of gas having a normal operating pressure in excess of one hundred pounds per square inch gauge which is greater than one mile in length except restructuring, rebuilding, or relaying of existing transmission lines of the same capacity.

"Gas", a term which shall include natural gas, propane air, synthetic natural gas, and liquefied natural gas.

"Gas company", (1) a gas company as defined in section one; (2) a corporation organized under the laws of the commonwealth empowered to manufacture or store gas for resale or distribution to a gas company as defined in section one; (3) a foreign corporation empowered under the laws of its state of incorporation to manufacture or store gas for resale or distribution to a gas company as defined in section one, and qualified to do business in the commonwealth; (4) a natural gas pipeline company as defined in section twenty-five B; and (5) a municipal corporation empowered to operate a municipal gas plant under the provisions of section thirty-five or section thirty-six.

"Liquefied natural gas", a natural gas that has been changed into a liquid by cooling the temperature at atmospheric pressure to approximately —260° F.

"Local Government", any political subdivision of the commonwealth, including any county, city, town, district agency or regional agency.

"Long Range Forecast", a plan filed with the council under the provisions of sections sixty-nine I and sixty-nine J, inclusive.

"National pollutant discharge elimination system permit", a permit issued in conformance with the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251, et seq.1

"Natural gas", a type of gas which originates in the ground and is predominantly methane.

"Notice of intention", a notice of intention to construct an oil facility which shall be filed with the council under the provisions of sections sixty-nine I and sixty-nine J.

"Oil company", (1) any person, authority or corporation organized under the laws of the commonwealth empowered or intending to construct or operate an oil facility; (2) a foreign corporation or person empowered under the laws of its state of incorporation to, or intending to construct or operate an oil facility, and qualified to do business in the commonwealth.

"Oil facility", any new unit, including associated buildings and structures, designed for, or capable of, the refining, storage of more than five hundred thousand barrels or transshipment of oil or refined oil products and any new pipeline for the transportation of oil or refined oil products which is greater than one mile in length except restructuring, rebuilding, or relaying of existing pipelines of the same capacity: provided, however, that this oil facility shall not include any facility covered by a long-range forecast or supplement thereto under section sixty-nine I.

"Propane air", a type of gas produced by those facilities which add commercial grade propane to air for mixture with natural gas.

"Significant portion of his income", ten per cent of gross personal income for a calendar year, except that it shall mean fifty per cent of gross personal income for a calendar year if the recipient is over sixty years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement. Income includes retirement benefits, consultants fees, and stock dividends. Income is not received directly or indirectly from permit holders or applicants for a permit where it is derived from mutual fund payments or from other diversified investments over which the recipient does not know the identity of the primary sources of income.

"Synthetic natural gas", a type of gas which is made by a facility which produces a gaseous fuel from the manufacture, conversion or reforming of liquid or solid hydrocarbons.

Added by St.1973, c. 1232, § 1. Amended by St.1974, c. 852, §§ 1, 2; St.1975, c. 617, § 1.

[1] 33 U.S.C.A. § 1251 et seq.

1973 Enactment. St.1973, c. 1232, § 1, adding this section and sections 69H to 69R of this chapter, was approved Dec. 12, 1973, and by section 7 made effective Dec. 31, 1974.

Section 6 of the 1973 act, as amended by St.1974, c. 852, § 21, provided: "The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions. This act shall not apply to any matter over which any agency, department, or instrumentality of the federal government has exclusive jurisdiction."

1974 Amendment. St.1974, c. 852, § 1, approved Aug. 14, 1974, substituted "impact" for "compatability" in the definition of "Applicant", substituted "Energy" for "Electric Power" in the definition of "Council", and inserted clauses (4) and (5) in the definition of "Facility".

Section 2 added the definitions of "Gas", "Gas company", "Liquefied natural gas", "Natural gas", "Propane air" and "Synthetic natural gas".

1975 Amendment. St.1975, c. 617, § 1, an emergency act, approved Sept. 24, 1975, inserted "and terms" in the introductory clause; inserted "or notice of intention to construct an oil facility" in the definition of "Applicant"; inserted "which in the case of an oil facility must be valued in excess of five million dollars" in the definition of "Construction"; inserted "including fuel storage facilities" in cl. (3) of the definition of "Facility"; and inserted the definitions of "Notice of intention", "Oil company", and "Oil facility".

Cross References

Regulation of certain activities to protect mountain regions of Berkshire county, activities conducted in connection with any "facility" as defined in this section excepted, see c. 131, § 69G.

Water pollution control, generally, see c. 21, § 26 et seq.

Library references

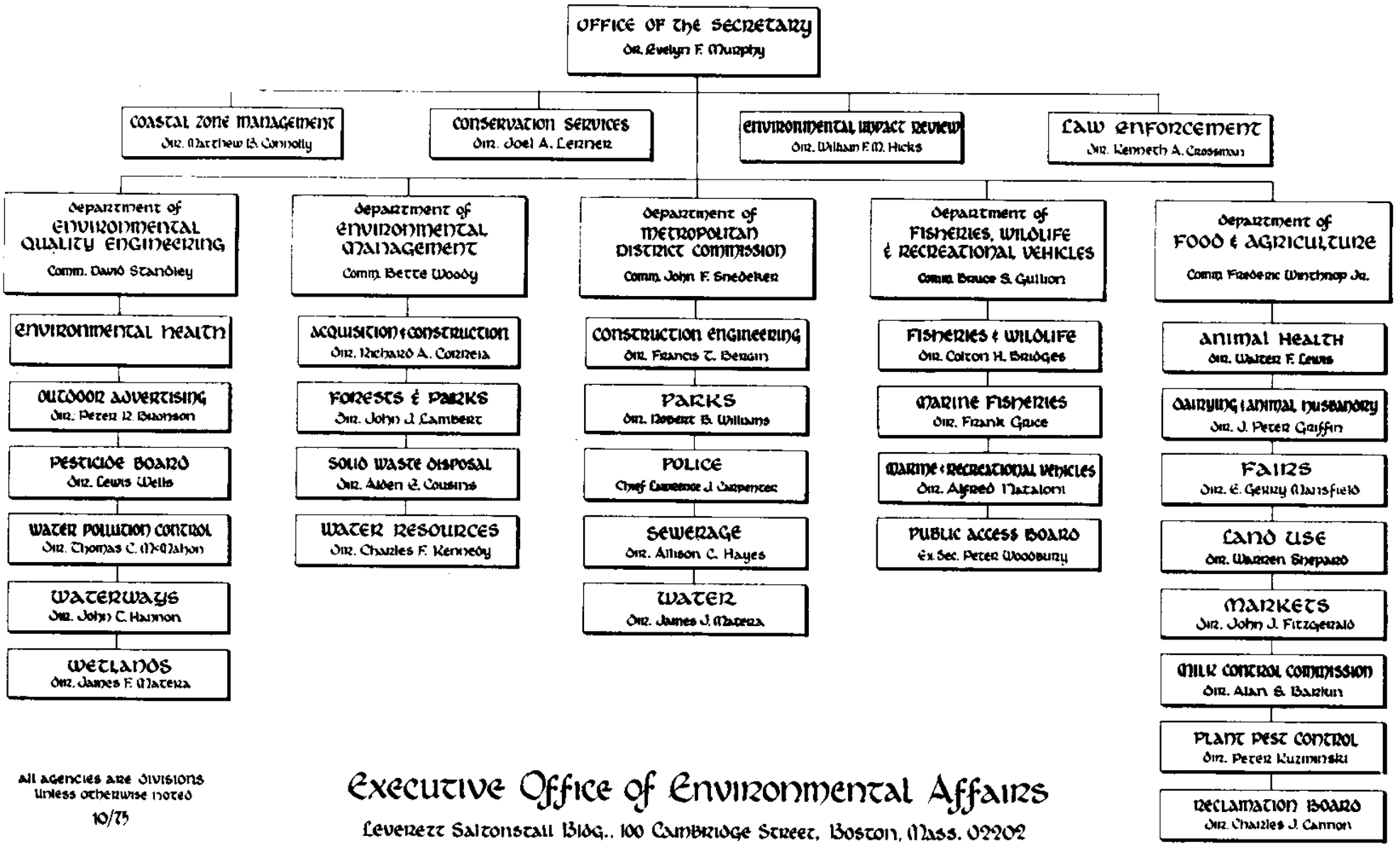
Electricity ⊂=1.

C.J.S. Electricity § 1 et seq.

§ 69H. Energy facilities siting council

There is hereby established the Energy Facilities Siting Council which shall be responsible for implementing the energy policies contained in sections sixty-nine H to sixty-nine R, inclusive, to provide a necessary energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.

Said council shall be composed of the secretary of administration and finance, the secretary of consumer affairs, the secretary of environmental affairs, and the secretary of manpower affairs, or their respective designees, and five persons to be appointed by the governor for terms of three years, one of whom shall be experienced in the conservation and protection of the environment, one of whom shall be a professional engineer registered under the provisions of chapter one hundred and twelve, one of whom shall be experienced in matters relating to the electric power industry and who shall vote only on those matters directly related to such



All agencies are divisions unless otherwise noted

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