Chapter 6: Environmental Law

John J. O'Brien
Michael R. Deland

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml
Part of the Environmental Law Commons

Recommended Citation
CHAPTER 6

Environmental Law

JOHN J. O'BRIEN* AND MICHAEL R. DELAND**

§6.1. Introduction. During the 1973 Survey year, a number of developments altered the tenor of several of the Commonwealth's environmental protection programs. One such major development was the enactment by the Legislature of four measures which, in the aggregate, constitute major revisions to the Massachusetts Clean Waters Act.¹ These revisions were necessary in order for the state to participate in the national water pollution control programs established by Congress through the Federal Water Pollution Control Act Amendments of 1972.² The details of these programs, and the Massachusetts role thereunder, are discussed in Part A of this chapter.

Pursuant to the mandate of the 1972 Massachusetts Environmental Policy Act,³ the Secretary of Environmental Affairs promulgated "Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports," which detail the procedures to be followed by state agencies preparing environmental impact reports. These regulations are discussed in Part B of this chapter.

A number of developments designed to refine further the national air pollution control program also occurred during the year. Because the precise manner in which and the extent to which these refinements are to be implemented is still an open question, the Massachusetts air implementation plan has not yet been completed and is undergoing constant revision. These refinements to the air program are discussed in Part C of this chapter.

Among other developments during the 1973 Survey year were the amendment of the emergency wetlands protection statute and the establishment of special trial list priority for certain actions taken to correct

* JOHN J. O'BRIEN is a member of the Massachusetts Bar.
** MICHAEL R. DELAND is Chief, Enforcement Branch, United States Environmental Protection Agency, Region I, and is a member of the Massachusetts Bar. The views expressed herein are those of the authors. They do not represent the views of the EPA or any other agency.

§6.1. ¹ G.L. c. 21, §§26-53.
or prevent environmental wrongs. These and other miscellaneous topics are discussed in Part D of this chapter.

A. WATER POLLUTION CONTROL

§6.2. Massachusetts and the Federal Water Pollution Control Act Amendments of 1972: Introduction. By the Federal Water Pollution Control Act Amendments of 1972 (the federal Act), Congress completely revised existing federal water pollution control law so as to create a national water pollution control program administered within each state pursuant to federally-promulgated standards. This new national program consists of three major elements: an intensified program of federal grants for the construction of publicly-owned waste treatment works, a comprehensive water pollution control planning program, and a national permit system regulating the discharge of pollutants from point sources.

§6.2. Massachusetts and the Federal Water Pollution Control Act Amendments of 1972: Introduction. By the Federal Water Pollution Control Act Amendments of 1972 (the federal Act), Congress completely revised existing federal water pollution control law so as to create a national water pollution control program administered within each state pursuant to federally-promulgated standards. This new national program consists of three major elements: an intensified program of federal grants for the construction of publicly-owned waste treatment works, a comprehensive water pollution control planning program, and a national permit system regulating the discharge of pollutants from point sources.


3 See 33 U.S.C. §§1281-1317 (Supp. II, 1972). As defined by the federal Act, a "point source" is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft,
It is chiefly through the interaction of these three measures$^4$ that the congressional intent of restoring and maintaining the "chemical, physical and biological integrity of the Nation's waters"$^5$ is to be effected. Although it is the declared policy of the federal Act that the states continue to exercise the primary role in the planning and implementing, but not the financing, of water pollution control programs,$^6$ the new federal Act grants the United States Environmental Protection Agency (EPA) broad powers to insure that state water pollution control programs achieve and maintain minimum federal standards.$^7$ During the 1973 Survey year, the Massachusetts Legislature enacted four amendments$^8$ to the Massachusetts Clear Waters Act (the state Act),$^9$ ostensibly designed to insure that the Commonwealth's water pollution program (which is administered by the Division of Water Pollution Control (DWPC)) comports with these minimum federal dictates. The following section will attempt to explore the extent to which the state and federal acts interact to achieve the congressional objectives.

§6.3. Water quality and the NPDES. The first section of the federal Act starkly states that "it is the national goal that the discharge of

---

$^4$ Other water pollution control measures are discussed at §6.7 infra.
$^7$ See, e.g., 33 U.S.C. §§1342(c), (d) (Supp. II, 1972), discussed at §6.3 infra.

Unlike the Massachusetts air pollution control program, which is implemented chiefly through a system of regulations for the several air pollution control districts, the Massachusetts water pollution control program is primarily of statutory orientation. The air pollution program is discussed at length in Miller, Environmental Law, 1972 Ann. Surv. Mass. Law. §§21.2-21.6. Recent revisions are discussed in §8.9 infra.

A number of provisions of the Clean Waters Act do, however, require that specific water pollution control objectives be implemented by rules and regulations promulgated by the Division of Water Pollution Control (DWPC). See, e.g., G.L. c. 21, §§27(12), 43(9), 45(6), 50, as amended by Acts of 1975, c. 546. At the close of the Survey year, regulations had not yet been promulgated under these provisions.
pollutants into the navigable waters be eliminated by 1985.\textsuperscript{1} Thereafter, that section establishes an interim goal to be achieved by 1983, that the water quality of the nation’s waters be such as to provide for “the protection and propagation of fish, shellfish, and wildlife” and for “recreation in and on the waters.” The mechanism set forth by the act to accomplish this “swimming water” goal is the National Pollutant Discharge Elimination System (NPDES). In substance, the NPDES is a permit system that regulates discharges consistent with the timetable limitations imposed by the federal Act.

The NPDES is based upon two distinct categories of discharge limitations: effluent limitations and water quality limitations. Effluent limitations are a measure of the amount of various pollutants that a particular type of effluent source may discharge. The federal Act uses effluent limitations to require as a minimum that publicly owned sewerage treatment works employ “secondary treatment” by mid-1977,\textsuperscript{2} and that other pollution sources treat their wastes to the level of the “best practicable control technology currently available” by the same date.\textsuperscript{3} The federal Act also uses effluent limitations to require the achievement of stricter standards: by July 1, 1983, publicly owned treatment works must employ “best practicable” technology,\textsuperscript{4} while all others must utilize “best available” means of treatment.\textsuperscript{5} As the statutory language implies, the limitations for point sources other than publicly owned treatment works are initially based on the feasibility of pollution control technology, including consideration of economic factors and, eventually, are founded upon the availability and development of pollution control technology. The effluent limitations are to be defined for individual categories of dischargers by sets of guidelines promulgated by the Administrator of the EPA.\textsuperscript{6}

In contrast, water quality limitations are predicated upon the quality of the receiving water into which a specific discharge is made and whether that discharge will violate the water quality standards of the particular receiving water.\textsuperscript{7} These standards are based upon a technical

\textsuperscript{7} The Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903, required the states to adopt water quality standards which generally included three parts: (1) the categorization of uses for particular bodies of water, or portions thereof, (2) a set of criteria applicable to each use, and (3) an implementation schedule establishing dates by which various dischargers were to achieve a certain level of treatment. By 1972 all states had adopted standards which, with the exception of a
determination as to the requirements necessary to sustain certain uses of water, such as for water supply, recreation in or on the water, or for the propagation of fish or shellfish. If it is determined that an effluent limited discharge, or a group of them, would violate water quality standards, then more stringent requirements may be imposed on the discharger or dischargers in order that the water quality standards be met.\footnote{3} A discharge limitation that is water quality limited is dependent upon a number of factors including the size and rate of flow of the receiving water, the use designated for the water, and the proximity and nature and volume of other discharges. On the other hand, effluent limited discharges are not related to the receiving water characteristics and therefore may be uniformly applied regardless of location. It is clear that the new federal Act, unlike its predecessor statutes, contemplates that effluent limitations, which are more susceptible to technical measurement and not dependent on the receiving water characteristics, are to be the primary regulatory base.\footnote{9}

At the heart of the federal Act's regulatory scheme is the NPDES.\footnote{10} The Act makes it unlawful for any point source to discharge any pollutant into navigable waters without a permit, and, in some circumstances, to discharge into publicly-owned treatment works.\footnote{11} The permit thus becomes the operative document for specifically delineating a discharger's obligations under the Act. It translates the effluent limitations and, if they need be applied, water quality limitations, into the

\footnote{8} \footnote{9} \footnote{10} \footnote{11}
particular requirements for a specific discharge. The effluent limitations refer to general categories of dischargers within which a particular plant may display various idiosyncrasies relating to such factors as the nature of a plant’s production process and the type of raw materials used. Further, it should be noted that the effluent and water quality limitations may not be the only basis for every permit issued. The Act provides that permits may be issued:

upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318 and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the [EPA] determines are necessary to carry out the provisions of this chapter. It is therefore explicitly recognized that permits will be issued prior to the promulgation of effluent and water quality limitations, and also implicitly suggested that there will be classes and categories for which guidelines may never be published.

12 Among the many parameters commonly limiting discharges are BOD (Biological-Chemical Oxygen Demand) which utilizes the DO (Dissolved Oxygen) content of a body of water, SS (Suspended Solids) metals, toxics and temperature. The parameters are normally limited both in terms of weight (e.g., pounds per day) and concentration (e.g., parts per million).


identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works). . . .


15 Despite this provision, the United States District Court for the District of Columbia recently held that the EPA must publish “as expeditiously as possible and no later than November 29, 1974 final . . . effluent limitation guidelines necessary to provide comprehensive coverage of all point source discharges.” (Emphasis added.) The court, in order to insure that the EPA meet the deadline, established a schedule by which various groups of guidelines be published. The list includes most of the nation’s major industrial groups. Natural Resources Defense Council v. Train, —F. Supp.—, 6 ERC 1033 (D.D.C. November 26, 1973).

It should also be noted that delays have been encountered in the application of water quality limitations. The federal Act requires the states to identify those waters for which the effluent limitations are not stringent enough to meet water quality standards applicable to such waters. 33 U.S.C. §1313(d) (Supp. II, 1972). The deadline
As well as specifying the precise effluent limitations required of each discharger, the permits contain an implementation schedule setting forth the terminal date by which the treatment level must be achieved and detailing specific interim dates by which various phases of the construction schedule must be completed. The permits also contain numerous other requirements including detailed monitoring requirements under which the permit holder is required to report specified data pertaining to its discharges. Most major industries are required to take samples on a daily basis and to report the results each month.

The permit process: State-EPA interaction. In conjunction with the NPDES permit system, the federal Act anticipates that the pollution control efforts of the federal government and of the states be coordinated. The administration of the permit system is an example of the degree of coordination required of federal and state agencies. While the Act provides for the take-over of the issuance of permits by the states, it retains in the federal government the power to veto the issuance of individual permits, and the option to withdraw the permit-issuing authority.

for the first submission of this information was six months after the enactment of the federal Act. 33 U.S.C. §1313(d)(2) (Supp. II, 1972). However, the Act provides no mechanism for such identification in the likely event that states fail to meet this deadline, unlike other Act provisions which authorize the EPA to act in the event of a state's failure to do so. See, e.g., 33 U.S.C. §1315(b) (Supp. II, 1972) (authorizing the EPA to establish water quality standards if a state fails to do so). Accordingly, the identification of waters for which effluent standards are not stringent enough to meet water quality standards is likely to be delayed.

The federal Act specifies that "not later than July 1, 1977" effluent limitations must be achieved, 33 U.S.C. §1311 (Supp. II, 1972), and thereby provides the EPA with flexibility to require earlier compliance dates. A typical implementation schedule contains dates for at least the following: (1) submission of preliminary plans, (2) letting of the construction contract, (3) commencement of construction, (4) completion of construction, and (5) attainment of operational level. Regulations adopted by the EPA require that no more than nine months elapse between such implementation stages. 40 C.F.R. §125.23(b) (1973).

The federal Act provides that permits are for fixed terms not to exceed five years. 33 U.S.C. §1342(b)(1)(B) (Supp. II, 1972).

The federal Act provides that the governor of each state desiring to administer its own permit program may submit a proposal to the EPA. If the EPA fails to disapprove the proposal within ninety days, the issuing authority is transferred to the state. 33 U.S.C. §1342(c) (Supp. II, 1972). A state's proposal must contain provisions which enable it to mirror EPA's permit issuing authority and process. See 33 U.S.C. §1342(b) (Supp. II, 1972). Included in these is a requirement that the maximum civil penalties and criminal fines be comparable to the amounts recoverable by the EPA. 33 U.S.C. §1342(b)(7) (Supp. II, 1972). Regulations promulgated by the EPA require penalties which in amount compare to fines recoverable by the EPA under the federal Act or "represent an actual and substantial economic deterrent to the actions for which they are assessed or levied." 40 C.F.R. §124.73(h) (1973). In Massachusetts, such penalties are imposed by G.L. c. 21, §42, as amended by Acts of 1973, c. 546, §8.

17 The federal Act provides that the governor of each state desiring to administer its own permit program may submit a proposal to the EPA. If the EPA fails to disapprove the proposal within ninety days, the issuing authority is transferred to the state. 33 U.S.C. §1342(c) (Supp. II, 1972). A state's proposal must contain provisions which enable it to mirror EPA's permit issuing authority and process. See 33 U.S.C. §1342(b) (Supp. II, 1972). Included in these is a requirement that the maximum civil penalties and criminal fines be comparable to the amounts recoverable by the EPA. 33 U.S.C. §1342(b)(7) (Supp. II, 1972). Regulations promulgated by the EPA require penalties which in amount compare to fines recoverable by the EPA under the federal Act or "represent an actual and substantial economic deterrent to the actions for which they are assessed or levied." 40 C.F.R. §124.73(h) (1973). In Massachusetts, such penalties are imposed by G.L. c. 21, §42, as amended by Acts of 1973, c. 546, §8.
authority from a state upon a showing at a public hearing that the state is not fulfilling the Act's requirements and has failed to take corrective action.19

Similarly, as long as the EPA retains the issuing authority, the states possess a form of veto power in the certification requirements of the federal Act. Before a permit can be finally issued by the EPA, the state in which the discharge originates must either certify that the proposed discharge meets applicable water quality and effluent limitations or waive its right of certification.20 If a state wishes to impose more stringent conditions that those in a permit proposed to be issued by the EPA, it may in some cases do so either by denying its certification, in which case no permit can be issued, or by imposing those conditions as requirements of its certification.21 The Act thus encourages national uniformity of pollution control standards, both by vesting the initial permit issuing authority in the EPA and by requiring the EPA to publish guidelines to serve as the basis for permits for classes and categories of industry. However, by giving individual states an option to impose more stringent controls as local conditions warrant, and to assume the authority to issue NPDES permits, the opportunity to maintain or develop local leadership in the pollution control field is preserved. At the same time, a minimum federal level of pollution control is insured for the entire country. By closely integrating the state and federal pollution control activities the Act further insures that the experience and expertise developed by many states over a long period of time can be utilized, thereby lessening the need for the huge federal bureaucracy which would otherwise be required.

The permit process in Massachusetts. Shortly after the passage of the federal Act, Massachusetts applied for and was granted authority to issue permits on an interim, ninety-day, basis.22 During this period, which expired on March 19, 1973, the Commonwealth, through the DWPC, issued discharge permits.23 When the issuing authority reverted to the EPA, Massachusetts and the EPA signed an agreement detailing the process by which permits would be issued to Massachusetts industries and specifying that "the Commonwealth intends to apply for final approval of a permit program pursuant to section [1342(b)] of the Act as

19 33 U.S.C. §1342(c)(3) (Supp. II, 1972). This section specifies that the state corrective action must be taken within a "reasonable time, not to exceed ninety days."
22 Letter from William D. Ruckelshaus, EPA Administrator, to Thomas C. McMahon, Director, Division of Water Pollution Control, Jan. 10, 1973.
23 The Act provided for interim state permit programs, but carefully limited the life of such interim programs to ninety days. 33 U.S.C. §1342(a)(5) (Supp. II, 1972). With the EPA promulgation of regulations pertaining to permanent state permit programs on Dec. 22, 1972, 37 Fed. Reg. 28990, the limitation in §1342(a)(5) became operative, and interim state programs were required to terminate within 90 days.
soon as possible." On July 27, 1973, the Governor signed into law state legislation that prohibited discharges without state permits, and contained other provisions designed to satisfy the federal Act requirements for a state permit program. Nevertheless, by December 31, 1973, the Commonwealth had not made formal application to the EPA for final permit program approval. Thus, as of that date discharge permits were still issued in Massachusetts according to the provisions of the aforementioned agreement with the result that dischargers in the Commonwealth became subject to both state and federal sanctions. Under the terms of this agreement the EPA and the DWPC issue federal and state permits to a given point source in a single integrated document known as a “joint permit.” Priorities for issuing these permits are established by a technical committee comprised of representatives of the respective EPA and DWPC staffs.

According to the provisions of the agreement and practice as it has evolved, the permit issuing procedures are closely co-ordinated between the EPA and the state. A draft permit is initially prepared by EPA technical personnel and then forwarded to the state for review and comment. When agreement between the EPA and the DWPC is reached as to permit terms and conditions, it is then sent to the permit applicant with a “fourteen day letter.” This letter requires the applicant to reply within fourteen days if it wishes to present any factors which might justify revisions in the draft permit. If the industry or municipality does not respond within the fourteen-day period, the draft permit is then sent to public notice as required by EPA regulations and Massachusetts law. If the permit applicant does respond in writing within that period detailing technical objections to the terms and conditions of the permit, the EPA and the DWPC may provide an opportunity to meet to discuss the differences. These meetings enable the DWPC and the EPA to analyze changes in production or any other assumptions made in preparing the draft permit which would necessitate a revision in the draft

---

24 Agreement between John A.S. McGlennon, Regional Administrator, EPA Region I and Thomas McMahon, Director, Division of Water Pollution Control, March 18, 1973, on file at DWPC and EPA Region I offices [hereinafter referred to as “Agreement.”]


26 At the conclusion of the Survey year only three states (Oregon, California, and Connecticut) had applied for and received permit-issuing authority.

27 Agreement, supra note 24, at 1. The initially agreed upon priorities were: (a) industrial cooling water, (b) power plants, (c) remaining oil terminals, and (d) paper mills. Agreement, supra note 24, Exhibits A, B, C & D.


permit.\textsuperscript{80} After any necessary changes are made in the draft permit, public notice of its proposed issuance, or denial, is made.

The public notice regulations attempt to provide the maximum opportunity for citizens to learn of the proposed permit issuance and to comment upon it. Perhaps the most meaningful provision of the notice procedure under EPA regulations is the opportunity for any person or group of persons to be put on a mailing list for all notices within a particular state or specified geographical area.\textsuperscript{81} Under current EPA procedures, notice is usually mailed to local officials, to all environmental groups within the vicinity of the discharger, and to other federal and state agencies, such as fish and game departments, which could be reasonably expected to have an interest in the permit. It should be observed that the federal Act requires the EPA and the state, if it has permit-issuing authority, to issue such widespread public notice.\textsuperscript{82} EPA regulations provide that public notice contain at a minimum such information as a description of the discharge characteristics, a description of the receiving water, and a statement as to the EPA's tentative determination to issue or deny the permit.\textsuperscript{83} The notice must further specify that the EPA will provide a minimum of thirty days during which citizens may submit comments for consideration by the issuing agency or may request a public hearing.\textsuperscript{84} The EPA has the option to issue directly a notice of public hearing, which action insures that a hearing will be held and shortens the permit issuing process by thirty days.\textsuperscript{85} This option is exercised with respect to the issuance of permits to dischargers which the EPA has reason to believe, either by virtue of the size, characteristics, location, or other reasons, will stimulate significant public interest. The

\textsuperscript{80} Such meetings are often required in that the data upon which the EPA and state engineers drafted the permit conditions is frequently found to be outdated. Some data was submitted under the permit program established by prior law. The federal Act provides that "each application for a permit under . . . [33 U.S.C. §407 (1970)] pending on October 18, 1972, shall be deemed to be an application for a permit under this section." 33 U.S.C. §1342(a)(5) (Supp. II, 1972). The prior permit program under §407, which is popularly known as the "Refuse Act," never became operative. It was halted by a district court decision, Kalur v. Resor, 555 F. Supp. 1, 3 ERC 1458 (D.D.C. 1971). The decision was under appeal at the time of the passage of the 1972 federal Act, which mooted the issue by establishing the new NPDES permit program.

\textsuperscript{81} 40 C.F.R. §125.32(a)(3) (1973).


\textsuperscript{83} 40 C.F.R. §125.32(c) (1973).

\textsuperscript{84} Id.

\textsuperscript{85} 40 C.F.R. §125.34(b) (1973). Massachusetts law similarly provides that the director "may hold a public hearing if he deems such hearing to be in the public interest." G.L. c. 21, §§45(4), as amended by Acts of 1973, c. 546, §9. That section has a specific requirement not present in the federal Act that: "[i]f the applicant or permittee requests a hearing, the director shall hold a public hearing on the matter in a community within the affected area of the discharge, at least thirty days after giving notice thereof."
notice of a public hearing, whether it is based upon a citizen request or initial agency determination, must contain at a minimum such items as a concise description of the issues likely to be in question and the address and telephone number of the location at which interested persons may obtain further information, obtain a copy of the draft permit and fact sheet, if one has been prepared, and inspect and copy all related forms and documents.

Although the EPA has been given discretion in determining whether to hold hearings, every request in New England for a public hearing which has been founded upon technical considerations or reasonable questioning of the permit terms and conditions has been honored. There have been instances, however, in which request for public hearings have been withdrawn after informal discussions with the EPA and the state have satisfactorily explained the permit terms. Conversely, the EPA and the state have unilaterally initiated hearings on permits involving major or potentially controversial dischargers.

The Act mandates the giving of this opportunity for public participation, by stating in some very broad opening language:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] or any State under this chapter shall be provided for, encouraged, and assisted by the [EPA] and the States.

The Act further requires that the EPA publish regulations "specifying minimum guidelines for public participation." Locally, the EPA has attempted to encourage public participation in this permit process. Some believe, however, that the EPA is still susceptible to the charge that its efforts to encourage public participation are not extensive enough. It has been suggested, for instance, that the EPA allow environmentalists to participate in all meetings with industry and the state at

---

88 40 C.F.R. §§125.32(d), 125.33 (1973). The latter regulation provides that for every discharge which has on any day of the year a total volume in excess of 500,000 gallons, the Regional Administrator shall prepare and make available a detailed "fact sheet" describing with specificity the characteristics of the discharge.

87 A search of the EPA Region I Enforcement Division files has revealed no instances of a denied request for a public hearing.

88 See, e.g., Permit Application of Brown Paper Co., EPA file no. NH 0000655. The hearing was held March 15, 1973.


41 The EPA has developed comprehensive mailing lists of environmental groups throughout New England and had actively solicited the public's participation in the permit issuing process. The agency has either sponsored or participated in a number of citizen workshops throughout New England to help explain the federal Act.
which the draft permit is discussed. Such participation has been denied with the reasoning that these meetings are highly technical in nature, and may involve confidential information concerning trade secrets or processes. These meetings normally center on accurately establishing the industry's production figures; the presence of environmental groups might well inhibit the candor with which most industries are presently dealing with the EPA and the states. However, the EPA has recently agreed, on a trial basis, to permit a representative from a citizens' group to attend such meetings.\(^\text{42}\) However, no enduring solution to the question of public participation at draft permit meetings has yet been found.

Whether the public interest is ultimately reflected in the permit process is determined by the public hearing provisions and the manner in which they are administered.\(^\text{48}\) The public hearings are informal in nature, and are designed to maximize public participation. Following the public hearings the Regional Administrator may make such modifications in the draft permit as appear appropriate based upon information presented at the hearing and shall issue or deny the permit.\(^\text{44}\) Notice of such issuance or denial must be provided to all those who participated in the hearing and to others on the mailing list.\(^\text{45}\) A permit becomes effective thirty days following the issuance of such notice unless a request for an adjudicatory hearing is granted.\(^\text{46}\) Such request must fulfill certain procedural requirements\(^\text{47}\) and "[set] forth material issues relevant to the question whether a permit should be issued, and what conditions to such permit would be required to carry out the provisions of the Act . . . ."\(^\text{48}\) An adjudicatory hearing is a more formal process than the initial public hearing. Within twenty days of the completion of an adjudicatory hearing, the presiding officer certifies the record together with any proposed findings or conclusions submitted by the parties to the EPA Regional Administrator for discussion.\(^\text{49}\) The Regional Administrator, following a period of notice of a tentative decision and an opportunity for the submission of exceptions to that decision, issues his decision, which becomes the final decision of the Agency unless within thirty days any party appeals the decision to the EPA Administrator (as distinct from the Regional Administrator) or the EPA Administrator on his own motion stays the decision.\(^\text{50}\) An appeal to

\(^{42}\) An oral agreement was reached on January 6, 1974 between Rhode Island Ecology Action and EPA Region I Enforcement Division to permit that group's representation at draft permit discussions on a trial basis.

\(^{48}\) Regulations pertaining to public hearings on permit matters are codified at 40 C.F.R. §§125.31-.35 (1973).

\(^{44}\) Id. §125.34(b)(4) (1975).

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id. §§125.34(c)(2), (3) (1973).

\(^{48}\) Id. §125.34(f) (1975).

\(^{49}\) Id. §125.34(o)(1) (1973).

\(^{50}\) Id.
the Administrator is in the form of briefs citing specific deficiencies in the record, although discretion is available for oral argument to be heard.\(^{51}\) The proper forum for the appeal of a decision of the Administrator is the United States Court of Appeals.\(^{52}\)

The permit issuing mechanism has worked smoothly in Massachusetts, particularly insofar as industrial permits are concerned.\(^{53}\) Even though the EPA had, at the close of the Survey year, the authority to issue permits for discharges in Massachusetts,\(^{54}\) "joint permits" have been issued with the DWPC, after joint hearings.\(^{55}\) This process necessarily involves the staffs of both the federal and state agencies and should serve to smooth the transition when Massachusetts assumes the issuing authority, assuring that consistency in the permit terms and conditions will be maintained.

The permit process for municipal discharges in Massachusetts has been much slower in implementation,\(^{56}\) just as it has been throughout New England.\(^{57}\) It is apparent that the EPA and the DWPC will not be able to comply with the federal Act's requirement that municipal permits be issued by the end of 1974.\(^{58}\) This can be attributed, to a significant degree, to the infinitely more complex considerations involved in the drafting of municipal, as opposed to industrial, permits. Industrial permits can simply require specific discharge treatment within a stated

---

51 Id. §125.34(p) (1973).
53 As this article went to press, 71 joint EPA-Massachusetts permits had been issued and another 98 had been sent to public notice of issuance. While it appears unlikely that all the permits in Massachusetts will be issued by the December 31, 1974 deadline mandated by the federal Act, the permits to all the major or significant dischargers in the Commonwealth may well be issued by that date. Interview with Edward Conley, Chief, EPA Region I Permits Branch, in Boston, February 28, 1974. This process could be significantly slowed, however, if it is ultimately determined that each of the permits must be subject to an "environmental assessment" by the state under the Massachusetts Environmental Policy Act (MEPA) (G.L. c. 30, §§61, 62). See infra §6.8 for a discussion of the MEPA requirements. The federal Act specifically exempts all existing discharges from the requirement of an impact statement review under the National Environmental Policy Act. 33 U.S.C. §1371(c) (Supp. II, 1972).
54 See text at note 24 supra.
55 Groups of permits have been issued jointly by the EPA and the DWPC to both oil storage facilities and paper mills. See, e.g., Permit No. MA 0004375, issued on March 7, 1973 to Texaco, Inc.; Permit No. MA 0000621, issued on Dec. 18, 1973 to Erving Paper Mills.
56 As this article went to press, no municipal permits had been issued in Massachusetts, and draft permits for only one "major" and eight "minor" dischargers had been sent to public notice. A total of 55 permits have been drafted out of a total of 363 applications. See EPA Municipal Permit File—Massachusetts, March 1, 1974, on file in the EPA Region I office, John F. Kennedy Federal Building, Boston.
57 A search through the EPA Region I Municipal Permit File on March 1, 1974 revealed that a total of only 24 municipal permits have been issued in New England.
58 Interview with Edward Conley, Chief, EPA Region I Permits Branch, in Boston, March 1, 1974.
period in order to meet the timetable requirements of the federal Act. 69
On the other hand, municipalities may be unable to comply with NPDES permit requirements unless the construction grants program contained in the federal Act is fully initiated. 60 Two factors have prevented the construction grant program from achieving full success. First, of the eighteen billion dollars appropriated in the federal Act for construction grants, the President has failed to allocate nine billion dollars. 61 While a number of suits have been filed challenging this presidential action, and all to date have held that it is illegal, 62 it appears highly unlikely that a final court resolution will occur in time to free funds to aid in the construction of municipal facilities in order that a meaningful number, much less all, will achieve secondary treatment by the July 1, 1977 statutory deadline. Secondly, the complex requirements for municipalities to qualify for federal construction grants have prevented a significant portion of those funds which have been made available from being committed to specific construction projects. 68

It may be that the failure to issue municipal permits by the December 31, 1974 statutory deadline, and, more importantly, the failure of most municipalities to achieve secondary treatment by July 1, 1977, will so severely undermine the credibility of the NPDES as to render it impotent and necessitate its amendment. Such action, if necessary, could well undercut the effectiveness of the entire statute.

On balance, it appears that the NPDES permit program, by relying on easily measurable effluent limitations and by giving existing state agencies the opportunity to develop manpower and expertise until such time as they are able to assume official administration of the program, provides an efficient water pollution control mechanism. Whether it will be successful before 1983 is largely dependent upon whether sufficient construction grant funds are made available and upon how aggressively and effectively the Act's provisions are enforced.

69 It should be noted that NPDES permits are issued subject to the condition that the permitted discharge will meet the timetable established by the federal Act. 33 U.S.C. §1342 (Supp. II, 1972).
60 For a discussion of the construction grants provisions of the federal Act, see §6.5 infra.
61 President Nixon cited "compelling national priorities for our limited federal resources" as the reason for his refusal to allocate the funds. Letter from President Richard M. Nixon to EPA Administrator Russell Train, January 10, 1974. See generally 4 Environmental Reporter Current Developments 1533 (January 11, 1974). For the original Congressional see 33 U.S.C. §1287 (Supp. II, 1972).
68 For a discussion of the requirements for federal construction grants see §6.5 infra.
§6.4. Enforcement. As noted above, discharges of pollutants are prohibited by both state and federal enactments. Correspondingly, both the Clean Waters Act and the federal Act establish comprehensive enforcement measures. While the Clean Waters Act provides for enforcement by the DWPC, the federal Act initially confers enforcement powers on the EPA, and, consistent with the Act’s policy declaration to “preserve . . . the primary responsibilities . . . of States to prevent, reduce, and eliminate pollution,” ultimately affords the potential that enforcement will be undertaken by the states with EPA supervision.

The specific enforcement provisions of both enactments will be examined in turn, followed by an explanation of discovery procedures provided in both acts, and enforcement program incentives offered by the federal Act.

**Enforcement under the federal Act.** In order to assure effective enforcement of the NPDES, the federal Act adopts a watchdog approach. Generally speaking, until a state permit program encompassing enforcement authority is adopted, the EPA has direct enforcement responsibilities. Throughout this period the Act affords a means by which either states or individuals can ensure vigorous EPA enforcement. With the approval of a state permit program, NPDES enforcement responsibilities shift to the state, subject to the scrutiny of both the EPA and private citizens.

More specifically, while permits are issued by the EPA the federal Act initially requires the EPA to act against discharges made without a permit or in violation of a permit: the EPA must either issue a compliance order to the suspected violator or bring a civil action against him. If a compliance order is issued, the EPA may allow a maximum of thirty days for compliance with the Act. Thereafter, to enforce such an order, the EPA may bring a civil suit in which a civil penalty may be assessed for each day of discharge in violation of the compliance order. Alternatively, the EPA may immediately bring a civil suit against a sus-
The EPA may bring a civil suit for compliance with the Act, it may obtain "appropriate relief," including a permanent or temporary injunction, and it may seek to have assessed a civil penalty for each day of the Act's violation. Further, the EPA has been given emergency powers to initiate litigation on behalf of the United States to immediately restrain any cause of pollution that endangers the health or livelihood of persons.

Throughout the period of EPA permit issuance and enforcement, both states and individuals can, to a limited extent, compel EPA enforcement. One section of the federal Act provides that any citizen, defined as "any person or persons having an interest which is or may be adversely affected," may bring an action against any alleged polluter for the violation of an effluent standard or water quality limitation or for the violation of an EPA compliance order. Further, that same section provides that any citizen can bring an action against the EPA to compel the performance of any nondiscretionary duty required of the EPA by the federal Act. This apparent congressional beneficence to private attorneys general is not without constraints; the Act limits the availability of such citizen suits. With limited exceptions, no citizen suit may be brought until the EPA has been given sixty days prior notification, and no citizen suit may be brought while the EPA is "diligently prosecuting a civil or criminal action," although a citizen may intervene in any such action "as a matter of right." Correspondingly, the EPA can intervene in any citizen suit. Further, citizen suits are limited in venue to the judicial district in which the pollution source is located. Notwithstanding the limitations imposed upon citizen suits, they comprise one method of insuring vigorous EPA enforcement of the federal Act.

Similarly, states may act to compel the EPA to enforce the federal Act. A state falls within the definition of a "person" contained in the citizen suit section and could, therefore, bring suit against either a suspected polluter or the EPA under that section. In addition, the federal Act specifies certain instances in which state governors may use the

---

citizen suit provision without regard to the restrictions imposed upon citizen suits.\textsuperscript{18} Hence, when a state governor alleges that the EPA has failed to enforce an effluent standard or water quality limitation, the violation of which occurs in another state and causes specified injury in his state, he may bring suit against either the EPA or the polluter, without regard to the citizen suit limitations that require giving the EPA sixty days notice and prohibit citizens from bringing suit if the EPA is "diligently prosecuting a civil or criminal action."\textsuperscript{19} In short, throughout the period of EPA-administered permit-issuance, both citizens and states can assure vigorous EPA enforcement of the federal Act. Since the EPA currently administers the federal Act permit program in Massachusetts,\textsuperscript{20} these provisions are particularly significant in the event that either private citizens or the Commonwealth believe that EPA enforcement is lax.\textsuperscript{21}

If and when Massachusetts receives EPA approval to administer the federal Act permit program, the Commonwealth will have direct enforcement responsibilities. Although the federal Act contains no provisions explicitly conferring enforcement powers on state agencies attempting to

\begin{itemize}
\item \textsuperscript{18} 33 U.S.C. §1365(h) (Supp. II, 1972).
\item \textsuperscript{19} 33 U.S.C. §1365(h) (Supp. II, 1972).
\item \textsuperscript{20} See text at §6.3, notes 24-26 supra.
\item \textsuperscript{21} To date only one notice of intent to file a citizen suit has been submitted in New England under the federal Act. Letter from Harold Ward, Vice President, Ecology Action for Rhode Island to John A.S. McGlennon, Regional Administrator, EPA Region I, January 8, 1974. This letter served notice of Ecology Action's intent to file suit against the City of Providence for failure to apply for an NPDES permit. Prior to the expiration of the 60 day period, EPA issued an order to the city requiring it to file a completed application within 30 days. It may thus be argued that Ecology Action's notification had the effect of prompting EPA to take enforcement action in a situation in which it might otherwise not have acted.

It should be noted that the EPA has adopted a formal policy of vigorous enforcement. See Memo from Alan G. Kirk II, Acting Assistant Administrator for Enforcement and General Counsel, U.S. EPA, to all Regional Administrators, July 23, 1973.

This memo states:
The credibility of the permit program and the Congressional goal to eliminate the discharge of pollutants into navigable waters by 1985 is in large part dependent upon the enforcement program undertaken by EPA and the states. A vigorous and thorough enforcement program in each Region is the best way to insure that these goals are met.

The Environmental Protection Agency has particular responsibility to enforce permits issued by EPA prior to approval of State permit programs. The thrust of the Region's enforcement program should be vigorously to enforce violations of all federally-issued permits and any state issued permits for which the State has not undertaken formal enforcement action . . . Section [1319] of the [federal] Act requires an appropriate enforcement action for every violation of the Act . . . Every violation of the Act should be pursued with an enforcement remedy.

(Emphasis added). Further, the EPA Region I office has taken enforcement action in each known instance of a permit violation in New England. EPA Quarterly Enforcement Report, Jan. 1, 1974, on file in the office of the Enforcement Branch, EPA Region I, Boston, Mass.
enforce an EPA-approved state permit program, the Act nevertheless indicates that such state agencies will have enforcement responsibilities, and contemplates that state enforcement powers will derive from state law. Both the EPA and private citizens may supervise state permit program enforcement activities. Without explicit federal Act authority to do so, the EPA has conditioned their approval of state permit programs in order to force a vigorous state enforcement posture. Further, the EPA is explicitly authorized by the federal Act to engage in state permit program enforcement supervision. If the EPA discovers a violation occurring in the course of operation of a state permit program, the federal Act authorizes the EPA to act directly against the suspected violator as it would if it were itself administering the permit program, or, otherwise, notify the state permit program administrators and the suspected violator and allow the state thirty days to commence enforcement action against the suspected violator before pursuing its compliance order or civil suit enforcement measures. If the EPA finds widespread violations and concludes that a state is failing to enforce its permit program effectively, the federal Act provides for a period of "federally assumed enforcement," which period begins only if the EPA finds continued state enforcement failures thirty days after it notifies the state permit program administrators of their enforcement laxity. During federally assumed enforcement, the EPA is required to exercise its enforcement powers. Federally assumed enforcement terminates

22 33 U.S.C. §1319(a)(l) (Supp. II, 1972). This section requires the EPA to notify state officials of state permit program violations and further requires the EPA to either issue a compliance order or bring suit if the state has not commenced enforcement action within thirty days of notification.

23 33 U.S.C. §1342(b)(7) (Supp. II, 1972). This provision mandates that state permit programs have adequate enforcement powers. For a discussion of the enforcement powers under the Massachusetts Clean Waters Act, see text following note 38 infra.

24 See, e.g., Agreement between Martin L. Johnson, Secretary of the Agency of Environmental Conservation, State of Vermont, and John A. S. McGlennon, Regional Administrator, Region I, U.S. Environmental Protection Agency, Feb. 29, 1974, on file in the Enforcement Branch, EPA Region I, Boston, Mass. For example, the agreement requires of Vermont that "one employee (the 'Reviewing Employee') of the [state] Agency shall be assigned full time to permit compliance review and reporting of permits issued by the Agency, including water discharge permits." The agreement further requires that Vermont "shall take action with respect to each permit violation known . . . ."

Authority for EPA conditioning its state permit program approval can be inferred from the Act. See, e.g., 33 U.S.C. §1342(b) (Supp. II, 1972) (providing that the EPA shall not approve a permit program unless the enabling state legislation is thought to be adequate).


28 Id. For a discussion of EPA enforcement powers while the EPA has direct enforcement responsibilities, see notes 4-10 and accompanying text, supra.
§6.4 ENVIRONMENTAL LAW

when the state convinces the EPA that it will enforce its permit program. Finally, the federal Act provides for EPA withdrawal of a state permit program if, after notice and hearing, a state continues to fail to properly administer its permit program. One possible ground for the conclusion of improper administration is the failure of a state to enforce its permit program. In short, the EPA can assure effective state permit program enforcement by conditioning its approval of a state permit program, directly supervising enforcement activities, assuming enforcement responsibilities and, ultimately, revoking a state permit program.

At the same time, private citizens can invoke the citizen suit provision to assure vigorous state enforcement activity. Citizen suits may be brought against the alleged polluter, upon notice to the intended defendant, to the state in which the alleged discharge occurs, and to the EPA. In addition, a private citizen might bring suit against the EPA to compel the EPA to take some enforcement action. Although it appears that the citizen could not seek specific EPA action, as, for example, the institution of a civil suit or the issuance of a compliance order, a citizen could apparently require the EPA to engage in enforcement activity required by the Act, i.e., the EPA could be forced to choose which enforcement measure it wished to pursue, and could then be forced to engage in that chosen enforcement activity. There appears to be no provision in the federal Act directly authorizing citizen suits against state permit program administrators, and, similarly, the federal Act does not explicitly establish, as a prerequisite to a state permit program, the requirement that a state law provide for citizen suits against state permit program administrators.

State enforcement under the Clean Waters Act. In order to enforce the prohibitions of the Clean Waters Act, that enactment affords the DWPC specific enforcement powers. The DWPC may order persons dis-
charging without a permit, contrary to a permit, or contrary to a state regulation, rule, or order promulgated under the Clean Waters Act, to apply for or renew a state permit.\textsuperscript{39} The DWPC may also order such a discharger to cease and desist such activity until such time as compliance with the DWPC regulatory program is fully achieved.\textsuperscript{40} Where it appears that a municipality is permitting incompatible wastes and slug loadings to be introduced into its treatment works without adequate pretreatment, is failing to monitor and prevent excessive loading of its collection and treatment systems, or is otherwise operating in a manner that will lead to the violation of the terms of its permit, the DWPC may impose a "sewer ban" by ordering the municipality "to prohibit all additional connections to such [treatment] works from any source not already connected."\textsuperscript{41} Until such time as the municipality ceases violating the terms of its permit and takes the corrective action specified in the DWPC "sewer ban" order, no further connections to the municipal sewage system may be made.\textsuperscript{42} The DWPC may order industrial users of publicly-owned treatment works to pay the user charges allocable to their use of the treatment works.\textsuperscript{43} If it determines that a discharger has violated any term or condition of its permit, has obtained a permit by misrepresentations, has failed to disclose fully all relevant facts or apprise the DWPC of any changed circumstances which would warrant a reduction in, or discontinuance of, the authorized discharge, or has committed any other serious breach of its privilege to discharge, the DWPC may modify, suspend or revoke any outstanding permit.\textsuperscript{44}

The issuance of such orders is subject to administrative and judicial review. Proposed permit suspensions or revocations and cease and desist orders must include notice that the party to whom the order has been issued may, within thirty days, request an administrative hearing pursu-

\textsuperscript{39} G.L. c. 21, §44(1), as amended by Acts of 1973, c. 546, §10. Although this provision gives the DWPC authority to order dischargers to apply for permits and to issue cease and desist orders, see n.40 infra, this section does not explicitly authorize the DWPC to specify what precise corrective measures must be taken to achieve water quality objectives. The DWPC is powerless to order the sewerage of an unsewered area, to order the connection of any particular waste source to a sewer line, or to order the connection of one municipal system to another (where a regional or intermunicipal sewage disposal system would be the most viable means of attaining water quality objectives).

\textsuperscript{40} G.L. c. 21, §44(1), as amended by Acts of 1973, c. 546, §10. Issuance of either an order to apply for a permit or a cease and desist order does not preclude the DWPC from undertaking criminal or civil enforcement activities. G.L. c. 21, §44(1), as amended by Acts of 1973, c. 546, §10.

\textsuperscript{41} G.L. c. 21, §44(2), as amended by Acts of 1973, c. 546, §10.

\textsuperscript{42} G.L. c. 21, §44(2), as amended by Acts of 1973, c. 546, §10.

\textsuperscript{43} G.L. c. 21, §44(3), as amended by Acts of 1973, c. 546, §10. For a discussion of user charges see §6.5 infra.

\textsuperscript{44} G.L. c. 21, §45(10), as amended by Acts of 1973, c. 546, §9.
§6.4 ENVIRONMENTAL LAW

ant to the provisions of the state Administrative Procedure Act. Failure to make a timely request is deemed to constitute consent to the terms of these orders. Any person may obtain judicial review of any order, permit determination, or other DWPC action, other than those actions to which the party seeking review has consented. Subject to various procedural requirements, the DWPC’s water pollution control enforcement authority may also be invoked by private citizens.

Owing to the fact that the state Act was revised to bring it into conformance with the federal Act, the enforcement provisions of the state Act in large part mirror those found in the federal Act. The former prescribes civil forfeitures and criminal penalties consisting of fines and/or imprisonment for: (1) discharges without a permit or in violation of a permit’s terms; (2) violation of DWPC orders or regulations; (3) the submission in a permit application of information known by the applicant to be false; or (4) the tampering with or rendering inaccurate of any monitoring device required as a condition of any permit. Such enforcement actions may be undertaken notwithstanding the fact that the DWPC may have previously sought to abate the source of pollution through the issuance of a cease and desist order. The superior court in equity has jurisdiction to enforce permits, orders, regulations, determinations and other actions of the DWPC undertaken pursuant to the state Act. In exceptional cases, where it appears that “a discharge or combination of discharges presents an imminent and substantial threat to the health, welfare or livelihood of any persons,” the DWPC may, without the necessity of proceeding through a formal order or permit issuing procedure, undertake to have the discharge enjoined or remedied by other appropriate action.


47 G.L. c. 21, §46A, as amended by Acts of 1973, c. 546, §13. Such applications for judicial review must be filed in superior court within thirty days of receipt of notice of the DWPC’s final decision. Id.


49 G.L. c. 21, §42, as amended by Acts of 1973, c. 546, §8. Civil forfeitures up to $10,000, or criminal penalties consisting of fines ranging from $2500 to $25,000 and/or up to one year of imprisonment, may be assessed for each day of violation. Id.


52 Id. Another enactment passed during the Survey year permits preferential trial disposition of environmental enforcement actions. See Acts of 1973, c. 283, discussed infra §6.10.
In its regulation and control of municipal sources of water pollution, the DWPC, by virtue of the recently-enacted "mandatory district" statute, has been vested with a unique means of securing compliance with municipal water pollution control objectives. In the past, the Commonwealth has, on occasion, found it difficult to compel municipalities to undertake affirmative programs deemed necessary for the protection of the public health. Under the state Act, the DWPC may propose that any one or more municipalities, or portions thereof, unite to form a district to provide integrated wastewater management services on a multi-municipal basis. Municipalities have the option either of forming such a district voluntarily or of having it formed for them pursuant to this "mandatory district" statute. Whereas the district commission of a "voluntarily-formed" district is comprised of members appointed by the constituent municipalities, the commission of a "mandatorily-formed" district is composed of members appointed by the DWPC. Inasmuch as the financial obligations of the water pollution abatement district are authorized, not by vote of the constituent communities, but by vote of the district commission, the "mandatory formation" of a water pollution abatement district can result in a municipality virtually losing control over its financial obligations for water pollution abatement projects. A district's local share of construction costs can only be financed from municipal appropriations or by general obligation bonds backed by the credit of the individual municipality. Operating costs are similarly borne by the member municipalities. The district commission establishes the cost apportionment formulae; the towns pay their apportioned shares either through property tax assessments or through user charges.

Enforcement discovery procedures. Both the federal and state acts provide a number of means whereby enforcement may be facilitated. Sources may be required by the terms of their permits to acquire, record and furnish evidence of their compliance with permit conditions.

54 For a discussion of this problem as applied to DWPC enforcement activities, see Comment, Inaction of town government in correcting source of water pollution: McMahon v. Town of Grafton, 1971 Ann. Surv. Mass. Law §8.10; Comment, Sovereignty and the Control of Water Pollution, 2 Env. Affairs 421 (1972).
58 G.L. c. 21, §§30(7), 35.
60 Id.
61 Id.
Although the state Act limits the use of data thus obtained to civil enforcement actions, no such restriction limits the use of such data in either criminal or civil enforcement actions brought under the federal Act. Further, both the EPA and the DWPC are granted a right of entry to premises to inspect and copy records required to be maintained as a condition of a permit, to inspect monitoring equipment, and to sample effluents. Persons who refuse to permit entry or refuse to provide information, or who knowingly furnish or cause to be furnished to the DWPC or to the EPA inaccurate information are subject, under the federal Act, to criminal penalties and, under the state Act, to both civil and criminal penalties.

**Federal Act enforcement incentives.** It should be noted that the federal Act encourages the development of state enforcement programs through its grants for state programs directed towards the prevention, reduction, and elimination of pollution. These grants are predicated upon the states fulfilling certain requirements including a condition that a grant cannot be made if the EPA has seen fit to assume enforcement responsibilities. The regulations promulgated for the disbursement of funds to state enforcement programs are far more specific in requiring that an adequate state pollution control program be a condition of the receipt of any federal funds. Further portions of the grant money may be allocated on an “incentive” basis, so that a state will fulfill specific enforcement requirements. Thus opportunity exists for EPA to so carefully condition the pollution control program grants so as to virtually insure that an acceptable state enforcement program be developed.

**§6.5. Grants for the construction of publicly-owned treatment works.** To ameliorate the expense of constructing publicly-owned treatment facilities, both the federal Act and the state Act provide for the expenditure of public funds to subsidize the costs of constructing publicly-

---

63 G.L. c. 21, §42, as amended by Acts of 1973, c. 546, §8. Such data may, however, be used in a criminal prosecution for inaccurate data submissions. Id.

64 For a discussion of the Fifth Amendment issues involved in EPA actions based on data thus acquired, see Comment, The Federal Water Pollution Control Act Amendments of 1972, 14 B.C. Ind. & Com. L. Rev. 672, 701-02 n.206 (1973).


66 Refusal to permit entry is subject to the federal criminal penalties. 33 U.S.C. §1319(c)(1) (Supp. II, 1972). The supplying of inaccurate information is punishable by a fine of up to $10,000, or by up to six months imprisonment, or by both. 33 U.S.C. §1319(c)(2) (Supp. II, 1972).


70 40 C.F.R. §§35.557(a) (1973).

71 See 40 C.F.R. §§35.554(a), 35.559(b) (1973).

86 1 “Construction,” as defined in the federal Act, encompasses both planning and physical construction expenses, including
preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items.

The federal aid in support of pollution abatement facility construction authorized by the federal Act is directed almost exclusively to publicly-owned facilities; the federal Act provides no similar grant program to assist non-public polluters in bearing the burden of installing waste treatment technology. The federal Act does, however, amend the Small Business Act to establish a limited program providing loans to small business concerns suffering "substantial economic injury" in meeting water pollution control requirements. 15 U.S.C. §§633(c), 636(g) (Supp. II, 1972). In 1970 the Massachusetts Legislature attempted to effect a similar business aid program, Acts of 1970, c. 746. This enactment was declared to violate the Massachusetts Constitution by the Supreme Judicial Court. Opinion of the Justices, 1971 Mass. Adv. Sh. 419, 268 N.E.2d 149. The intent of providing marginal industries with public assistance in meeting the requirements of the NPDES could be achieved, to a certain extent, by the provisions of G.L. c. 40D, which provides that, subject to certain conditions, municipalities may form "industrial development pollution abatement authorities" empowered to lease pollution abatement services to industries.

The definition of "treatment works" eligible for federal construction grants found in the federal Act encompasses the widest variety of water pollution abatement facilities, including traditional water-oriented, as well as land disposal, treatment methods. 33 U.S.C. §§1292(2)(A) and (B) (Supp. II, 1972).


The "Massachusetts share" amounts to an additional 15%, G.L. c. 21, §33, as amended by Acts of 1973, c. 546, §6. The state Act also provides that when a publicly-owned facility is ready for construction in any fiscal year in which federal construction grants are not available, the "Massachusetts share" may be raised to 90% of the costs of construction, provided that the total project construction costs do not exceed $5,000,000 or any lesser amount set by the division. Id.

Both the federal Act, 33 U.S.C. §1286 (Supp. II, 1972), and Massachusetts law, Acts of 1975, c. 546, §14, provide that, in certain cases, waste treatment facilities already constructed without the benefit of a full "federal" or "Massachusetts" share shall be eligible for reimbursement by the EPA or the DWPC to insure that the combined state-federal funding totals 90% of the costs of construction. Federal reimburse-

http://lawdigitalcommons.bc.edu/asml/vol1973/iss1/9
grant programs can furnish ninety percent of the costs of constructing qualifying6 publicly-owned waste treatment facilities. Unlike previous federal programs, which required an annual congressional appropriation for each year in which a project was to receive a federal grant, construction grant commitments made pursuant to the new federal Act constitute contractual obligations of the federal government.7

The most innovative feature of the federal construction grants program is the requirement that grant recipients generate revenue through user charges and industrial cost recovery fees.8 The federal Act

---

6 The Massachusetts program to provide state grants and facilitate the acquisition of federal grants for the construction of publicly-owned waste treatment facilities is effected by the interaction of two separate sections of chapter 21. One section enables the DWPC to authorize cities, towns, special districts, the Metropolitan District Commission, and other existing governmental units to apply for state financial assistance. G.L. c. 21, §30A, as amended by Acts of 1973, c. 546, §4. Another provision details the procedures by which water pollution abatement districts may obtain federal and state construction grants. G.L. c. 21, §33, as amended by Acts of 1973, c. 546, §6.

6 Federal construction grants will be made to publicly-owned projects in Massachusetts by the EPA if it is satisfied that the proposed works: (1) provide for the application of the best practicable waste treatment technology over the life of the works, 33 U.S.C. §1281(g)(2)(A) (Supp. II, 1972); (2) can be technologically upgraded in the future to a level permitting the total elimination of discharges, 33 U.S.C. §1281(g)(2)(B) (Supp. II, 1972); (3) are not fed by sewer collection systems that are subject to excessive infiltration, 33 U.S.C. §1281(g)(3) (Supp. II, 1972); (4) are included in any applicable areawide plan, 33 U.S.C. §1284(a)(1) (Supp. II, 1972); (5) conform to any applicable state plan, 33 U.S.C. §1284(a)(2) (Supp. II, 1972); (6) have been certified for priority by the DWPC, 33 U.S.C. §1284(a)(3) (Supp. II, 1972); (7) will be operated and maintained in accordance with a DWPC-approved plan of operation, 33 U.S.C. §1284(a)(4) (Supp. II, 1972); (8) have sufficient size and capacity, including reserve capacity, to meet the planned or anticipated use of such works, 33 U.S.C. §1284(a)(5) (Supp. II, 1972); (9) are to be operated by an agency that has, or will have, in effect a system of charges by which all users will pay their proportionate share of operation and maintenance costs, 33 U.S.C. §1284(b)(1)(A) (Supp. II, 1972); (10) are to be operated by an agency that has, or will have, in effect a system of charges by which industrial users will pay a sum amounting to the Federal construction cost subsidy attributable to their use of the facility, 33 U.S.C. §1284(b)(1)(B) (Supp. II, 1972); and (11) are to be operated by an agency that has statutory and administrative capacity to insure adequate construction, operation and maintenance of the works, 33 U.S.C. §1284(b)(1)(C) (Supp. II, 1972).


requires that recipients of federal construction grants adopt a system of user charges by which all users of waste treatment services pay their proportionate share of the costs of operating and maintaining the federally-financed facility.\(^9\) Interpreting the federal Act's requirements, the EPA has determined that domestic, industrial, non-industrial, and governmental users are subject to this requirement.\(^10\) Further, the EPA maintains that large volume users may not be given quantity discounts\(^11\) and that the operating and maintenance cost fees imposed upon all users must reflect the strength, volume, flow characteristics and other factors of a discharger's wastes that influence the cost of treatment.\(^12\) However, the EPA has taken the position that meter reading, billing, and other service costs not related to the extent of use of the facility may be charged equally to all users irrespective of the nature and extent of their waste output.\(^13\) Moreover, in addition to user charges and other service charges that are to be imposed, the EPA allows users to be assessed for local debt service payments for previous construction, as well as for debt service costs for the remaining ten percent "local share" of new construction costs.\(^14\)

The federal Act imposes an additional financial obligation upon industries discharging to publicly-owned treatment works. Federal grant recipients must obtain from industrial users\(^15\) that portion of the total federal construction grant attributable to the facility's treatment of their wastes through the imposition of a cost recovery fee.\(^16\) The industrial cost recovery requirement does not apply to industries that discharge primarily segregated domestic wastes or wastes from sanitary conveniences.\(^17\) Both user charges and industrial cost recovery fee systems are

\(^12\) Id., adding 40 C.F.R. Part 35, Appendix B(f)(1).
\(^16\) 33 U.S.C. §1284(b)(1)(B) (Supp. II, 1972). The purpose of this requirement is twofold. First, by requiring industries to pay their share of the waste treatment facility's federally subsidized capital costs, the federal Act insures that public funds—at least federal funds—are not used to subsidize capital expenses that should be rightfully borne by the industrial user. Secondly, the imposition of capital outlay recovery fees is designed to minimize the economic disparity between the capital outlay expenditures incurred by those industries that are required to provide their own treatment equipment and those industries that are able to discharge to publicly-owned facilities. Note that industrial cost recovery fees are imposed in addition to pretreatment requirements. See §6.3, n. 11 supra.
subject to EPA approval. These requirements, when coupled with the provisions of the federal Act allowing grantees to retain up to fifty percent of industrial cost recovery fee revenues for future reconstruction and expansion, reflect the congressional intent that the federal construction grant program ultimately produce publicly-owned water pollution abatement systems that are financially self-sufficient.

§6.6 Water pollution control planning. Of the three major programs of the new federal Act—the NPDES, the construction grants, and the planning programs—it is the last that could have the potential to be most environmentally-significant from a long-term point of view. While the permit program provides the mechanism for implementing the immediate water quality strategy and the construction grants program provides financial incentives vital to the construction of municipal water pollution abatement facilities, the planning programs are designed to insure that virtually every natural resource issue that may be affected by the implementation of a water pollution control system is incorporated within the planning of that system. Decisions regarding the construction and location of such systems are crucial not only because immediate pressing water problems cannot be cured without them but,
more importantly, because such decisions have far-reaching ramifications regarding future land use and development trends within the area to be served by a planned pollution abatement system.1 In recognition of the significance of these factors, the federal Act establishes three levels of water pollution control planning processes, ranging from the planning of individual municipal facilities by local governmental units, to water quality planning by the States, to "areawide" waste management planning by regional planning agencies. Supervising these planning processes is the EPA, which, while itself devoid of any direct planning responsibility, must promulgate and enforce regulations coordinating the structuring and content of these subordinate planning processes. Ideally, these planning programs are to be integrated with the NPDES, the construction grants program, and with each other in order to achieve a systematic and comprehensive plan of action for improving and maintaining water quality. To a large extent the federal Act prescribes similar objectives for all three planning programs, the primary distinctions between the three being the geographic application, the particular planning focus, and the implementation dates of each planning scheme. Presently, the requirements of two of these federal planning processes, municipal facilities planning and state-prepared water quality planning, are applicable to Massachusetts water pollution control activities. Because of its technical complexities and political sensitivity, it is uncertain whether any effort will be made to implement any federal Act "areawide" planning programs in Massachusetts.

Local treatment facility planning. In Massachusetts, the planning of public wastewater treatment facilities has been a function traditionally exercised on the local government level, and, as a result, decisions on their planning and construction have largely reflected the immediate parochial interests of the involved local government unit.2 As growing general interest in improved water quality was reflected in progressively stronger state and federal pollution control statutes,3 the exercise of the

---

2 Subject to the approval of the DWPC, municipalities have broad powers to plan the development of sewerage systems, (G.L. c. 83, §1) and sewage disposal facilities (G.L. c. 83, §6). As part of its duty to protect inland waters and public water supplies, the Department of Public Health must also approve the siting of surface and subsurface waste disposal facilities. See G.L. c. 83, §§1, 6; G.L. c. 111, §§17, 159, 160. The planning of individual water pollution abatement facilities may also be done by water pollution abatement districts, by industrial pollution control authorities, and by specially-created water pollution abatement districts. See G.L. c. 21, §30, 30A, as amended by Acts of 1973, c. 546, §4.
3 The history of federal water pollution control legislation is traced supra. §6.2, n.2. The history of Massachusetts water pollution control legislation is traced supra, §6.2, n.8.
pollution control function by municipalities became increasingly subject to more pervasive water quality policies established by state and federal mandate. Nevertheless, with the exception of satisfying minimal engineering design criteria as a condition to receipt of federal and state planning grants, local facilities planning was, until recently, still conducted with local concerns as the dominant planning factor.  

The new federal Act could, however, change the perspective of local facilities planning. In addition to prescribing minimal engineering criteria as a condition to receipt of federal construction grants, the federal Act suggests that future federal funding will encourage the development of public waste treatment facilities designed to accommodate a number of advanced technical objectives including waste recycling, wastewater reclamation, confined waste disposal, environmentally-safe sludge disposal practices, nonpoint pollution source controls, and the integration of sewage disposal with the disposal of solid waste, waste heat, thermal discharges and other environmentally-destructive discharges. The federal Act, moreover, specifies a diverse array of factors beyond the pale of ordinary engineering practice, the consideration of which the EPA should encourage in the planning of municipal facilities. Specifically, it suggests that facilities be planned to com-

---

4 Federal grants to assist in the construction of public waste disposal systems under the new federal Act and its predecessor, as well as other federal aid programs (see §6.5, n.2 supra) must pass muster under the Project Notification and Review System. See note 43 infra for discussion of this system.  
6 The minimal engineering criteria required by the federal Act can be found in §3 U.S.C. §§1281, 1284 (Supp. II, 1972). For a listing of the conditions that must be met prior to federal funding of a local facility, see §6.5, n.6 supra.  
13 It is a matter of considerable debate, both within and without the EPA, as to when and to what degree non-technical factors (described in notes 7-12 supra and accompanying text) are to be incorporated into municipal facilities planning. This debate reflects tension between the minimal planning prerequisites of local facilities planning and the more visionary planning perspectives of areawide planning programs (discussed in notes 50-45 infra and accompanying text) which are also set forth, to some extent, in non-mandatory provisions of the local facilities planning section, §3 U.S.C. §1281 (Supp. II, 1972). By contrast, the more sophisticated planning process described in the areawide planning program (§3 U.S.C. §1288 (Supp. II, 1972)) requires that the plans prepared by areawide organizations "be applicable to all wastes generated within the area involved" (§3 U.S.C. §1288(h)(1) (Supp. II, 1972)) (emphasis added)—a planning objective that might also be achieved if the scope of design
prehend areawide pollution problems,\textsuperscript{14} to include open space and recreational considerations,\textsuperscript{15} and to be revenue producing.\textsuperscript{16}

Because it is a direct outgrowth of prior funding programs and because its continuation is assured by the well-organized profession of consulting engineers, local facilities planning is the planning program most likely to be fully implemented in Massachusetts. However, the impact that the local facilities planning process will have on future water pollution control in Massachusetts is limited by a number of factors. First, because it comes into play only when public facilities are planned to qualify for federal funding, it will not influence pollution control activities of those areas that either already have federally-funded pollution abatement facilities or have no need for such facilities. A second limitation stems from the fact that local facilities planning applies only to publicly-owned projects seeking federal construction grants; by definition, this planning process will be inapplicable to pollution sources that do not discharge to publicly-owned facilities.\textsuperscript{17} Planning for treatment of industrial wastes prior to separate discharge must still be conducted or contracted out by industries entirely at their own expense.

\textit{State water quality planning.} As it became apparent that the solution to water quality problems required broad-based assessments of the need for and effectiveness of water pollution control projects, states began to define their overall control objectives in terms of water quality standards.\textsuperscript{18} Prior federal water pollution control strategies encouraged the

\begin{itemize}
  \item objectives specified in both the express and precatory provisions of the local facilities program were fully implemented. Either way, it appears to be the congressional intent that successive phases of federally-financed facilities planning programs are to include incremental increases of these non-technical factors.
  \item The extent to which such factors are included in waste treatment facility planning will, of course, affect the nature and timing of that planning. As the planning entailed in satisfying federal eligibility requirements thus increases to encompass these factors, the engineering community will be forced to share its now exclusive control over pollution abatement planning with planners of more diverse backgrounds. Because of the complexities presented by such innovative planning concepts, and because of the influence still exerted by those who regard the engineering factors as the paramount planning determinant, it does not appear likely that the present round of facilities planning will incorporate these non-technical factors.
  \item \textsuperscript{14} \S 1281(c) (Supp. II, 1972).
  \item \textsuperscript{15} \textsuperscript{1281(f) (Supp. II, 1972).
  \item \textsuperscript{16} \textsuperscript{1281(d) (Supp. II, 1972).
  \item \textsuperscript{17} Pollution sources that discharge to publicly-owned facilities are subject to pre-treatment standards. See \S 6.3, note 11 supra. Pollution sources which do not discharge to publicly-owned facilities will be directly subject to the NPDES. Unlike the areawide and state basin planning processes, the local facilities planning program encompasses only the wastes that are to be processed through the system under consideration. Thus, control over sources not discharging to publicly-owned facilities is exerted pursuant to areawide, state and federal, \textit{but not local}, planning programs.
  \item \textsuperscript{18} When the Massachusetts Division of Water Pollution Control was created in

\textsuperscript{17} pollution control program. See \S 6.6, note 11 supra. Pollution sources which do not discharge to publicly-owned facilities will be directly subject to the NPDES. Unlike the areawide and state basin planning processes, the local facilities planning program encompasses only the wastes that are to be processed through the system under consideration. Thus, control over sources not discharging to publicly-owned facilities is exerted pursuant to areawide, state and federal, \textit{but not local}, planning programs.

\textsuperscript{18} When the Massachusetts Division of Water Pollution Control was created in

http://lawdigitalcommons.bc.edu/asml/vol1973/iss1/9
use of such standards in the formulation of state control strategies. However, reliance on water quality standards as the dominant operative norm in state programs did not prove to be an effective means of improving water quality, largely because the translation of instream objectives into abatement requirements for pollution sources proved extremely difficult. It was this experience that prompted Congress in the national water pollution control program to rely primarily upon the use of standardized effluent limitations to attain the high water quality standards which remain the goal of the new national program. The new federal Act requires that water quality standards be established for all waters to achieve the ultimate goal of restoring their natural biological and physical integrity. Further, the states must maintain a continuing planning process to co-ordinate the NPDES and construction grants programs in order to attain instream standards along a given waterway. The plans so produced must assess the need for constructing publicly-owned treatment works, inventory and characterize significant pollution sources, and list the compliance schedules and effluent limitations that will be prescribed for every source. In these plans the states must also identify the more severely-polluted segments of rivers. If, because of an extremely severe pollution problem, water quality standards cannot be attained through the application of “standard” NPDES effluent limitations to the pollution sources on a given waterway segment, the plan must provide that special measures will be taken to attain water quality standards. Specifically, water quality plans must allocate maximum daily loads of pollutant and thermal discharges into such segments, prescribe effluent limitations sufficiently stringent to achieve water quality standards, and take whatever other measures, including control of


19 See §6.5 n.7, supra.
20 53 U.S.C. §§1313(a)-(c) (Supp. II, 1972). The new national water pollution control program seeks to achieve water quality objectives through a combination of water quality standards and effluent limitations for point sources. The latter limitations are the basic regulatory norm except in those instances where water quality standards cannot be achieved without more rigorous measures. See §6.3, supra.
27 53 U.S.C. §1312(a) (Supp. II, 1972). As a condition to state administration of
non-point pollution sources, necessary to attain those standards in such waterway segments.

Areawide planning. In recognition of the fact that, even with thorough implementation of the NPDES and construction grants programs, the pollution problems of certain highly-polluted areas are not likely to be completely solved on a traditional small-scale basis, Congress included in the federal Act provisions for the development and implementation of waste management programs to deal with water pollution problems on a long-range, regional scale. Pursuant to EPA guidelines, the Governor of each state is required to identify those areas where high-density urban-industrial concentrations have caused "substantial water quality control problems," and designate therefor a "single representative organization . . . capable of developing effective areawide waste treatment management plans for [that] area." Because high-density urban-industrial concentrations often give rise to ancillary pollution sources not susceptible to standard effluent controls, the elimination of water pol-

the NPDES permit program, the state program must be capable of issuing permits that prescribe effluent limitations more stringent than "standard" NPDES effluent limitations if it appears that the application of "standard" effluent limitations will be incapable of achieving water quality standards. 33 U.S.C. §1342(b)(1)(A) (Supp. II, 1972).

28 The state plans must include controls over the disposition of residual wastes from wastewater treatment, 33 U.S.C. §1313(e)(3)(G) (Supp. II, 1972), and a process to co-ordinate land use and other natural resource planning with water quality planning and management. 40 C.F.R. §130.10(d) (1975).


31 In its regulations published on September 14, 1973, the EPA indicated that "urban-industrial concentrations" will be defined in terms of those portions of Standard Metropolitan Statistical Areas and areas contiguous thereto that have "substantial concentrations of population and manufacturing production or other factors which result in substantial water quality control problems." 38 Fed. Reg. 25681, 82 (1973), adding 40 C.F.R. §126.10(a).

32 EPA regulations promulgated on September 14, 1973 indicated that, to qualify for an areawide planning designation, the area in question must have a "substantial water quality problem," as evidenced either by its classification as a water quality-limited segment, by a substantial groundwater pollution problem, or by reliance on groundwater resources to the extent that protection from pollution necessitates the comprehensive pollution control activity encompassed within areawide regulatory activity. 38 Fed. Reg. 25681-82 (1973), adding 40 C.F.R. §126.10(b).

33 33 U.S.C. §1288(a)(2)(B) (Supp. II, 1972). The EPA promulgated regulations under this section on September 14, 1973. 38 Fed. Reg. 25681-83. Those regulations provide the governor of a state with three options regarding designation of areawide agencies. He may: (1) formally "designate" such agencies; (2) formally "non-designate" such regions; or (3) "remain silent." 38 Fed. Reg. 25681-82, adding 40 C.F.R. §§126.13, 126.14 and Note following §126.14. Where a governor elects to follow option (3), the local political entities in an area otherwise eligible for areawide designation may, by their own initiative, themselves, obtain areawide designation from the EPA. 33 U.S.C. §1288(a)(4) (Supp. II, 1972). Governors or local political units may by cooperative action obtain interstate areawide designation. Id.
lation in such areas will require the application of more advanced non-point pollution control strategies. Accordingly, the areawide waste management program requires the development and implementation of a strategy for regulating and abating virtually every present and potential point and non-point water pollution source, including construction, mining, agricultural and silvicultural, and other activities.

The most controversial aspect of the areawide regulatory program may lie in the fact that it also requires a strategy to "regulate the location, modification, and construction of any facilities within such areas which may result in any discharge in such area." Such controls would certainly mandate preconstruction siting review and approval of any proposed location of industrial or municipal pollution sources in designated high-density areas. Areawide waste management planning thus envisions the imposition of water-oriented land-use controls.

A second significant facet of the areawide program may be its choice of regional wastewater management agencies that can achieve operating economies-of-scale and regionwide coordination of control strategy in the more severely polluted areas of the nation.

Nevertheless, at this juncture the extent to which areawide planning will be implemented in Massachusetts is unclear. As this chapter was going to press, Massachusetts had failed to submit proposed areawide designations to the EPA by the prescribed deadline date. Consequently, it appears that such water pollution control strategies will not soon be implemented in the Commonwealth. Because they have had extensive experience in studying substantive issues relating to the water quality

---

85 Unlike the NPDES, which is limited to the control of point source pollution (see 33 U.S.C. §§1112(a), 1342(a), 1362(12) (Supp. II, 1972)), the scope of regulatory activities to be exercised by areawide waste management agencies encompasses both point and nonpoint sources of pollution. Some typical nonpoint sources are mentioned in text at notes 36-39 and at note 39 infra.
89 Areawide waste management processes must be capable of (1) regulating irrigation, channel obstruction, ground water extraction, stream diversion and other inland activities likely to reduce fresh water flow to the extent that rivers, lakes, estuaries and other fresh water area are subject to salt water intrusion; (2) controlling residual waste disposal; and (3) insuring that land or subsurface disposal of pollutants will not affect either ground or sub-surface water quality. 33 U.S.C. §§1288(b)(2)(I)-(K) (Supp. II, 1972).
91 Such controls, when coupled with the indirect source preconstruction review requirements of the air pollution control program (discussed in §6.8 infra), indicate that the more heavily-polluted areas of the nation are, or will shortly be, regulated by EPA-supervised air- and water-orientated land use controls.
92 The EPA specified March 14, 1973 as the deadline for the initial submission of areawide regions. 58 Fed. Reg. 25681-83 (1973), adding 40 C.F.R. §126.15.
management needs of their respective regions, it would appear that the regional planning agencies established pursuant to G.L. c. 40B are the Massachusetts regional entities most likely to be designated to perform areawide planning tasks. Until such time as federal Act regional planning agencies are designated in the Commonwealth, the state itself must perform the necessary "areawide" planning.

§6.7. Other provisions. Although the NPDES, the construction grants, and the planning programs will dominate water pollution control activities, several other aspects of new national program are significant.

Oil and hazardous substances pollution. The new federal Act increases the scope of the existing oil spill program to include hazardous wastes.

---

48 There are presently twelve regional planning agencies (RPAs) in Massachusetts. Much of their expertise in dealing with local planning matters has been developed as a result of regional land use, transportation, open space and recreation, water supply, and wastewater management studies, which they have done under various federal and state programs. This regional experience has been reinforced as a result of their roles in the federal Project Notification and Review System (PNRS) implemented by U.S. Office of Management and Budget Circular A-95, as revised. The "A-95" review program requires that all requests for federal financial aid, and all federal projects, be reviewed, through the PNRS, by appropriate state and regional "clearinghouses." For a discussion of the A-95 process see Sikorsky, Local Control Over Federally Funded Projects, 19 N.Y.L.F. 113 (1973), and Berlin, Federal Aids for Pollution Control (BNA Environment Rep. Monograph No. 16, 1973).

The RPAs also review the environmental impacts of proposed state and federal projects under MEPA and NEPA. See §6.8 infra.

Before the RPAs are designated to perform areawide planning functions under the federal Act, a number of criticisms that have been directed against them up to this point will have to be overcome. Since, in most cases, these criticisms arise as a result of limitations within chapter 40B itself, the significant changes must eventually be effected by the Legislature. Three principal criticisms have been made concerning the RPAs. First, it has been stated that the statutory requirement that each member community appoint an equal number of commissioners has created a political unit that is often not representative of the area's actual political composition. Secondly, these agencies have not yet been granted power to insure compliance with their regional plans, their roles being defined in the statute as "advisory only." Thirdly, these agencies do not have adequate resources to carry out areawide planning functions. Thus, in order to adequately perform the areawide planning functions contemplated by the federal Act, it will be necessary to revise chapter 40B to correct these deficiencies.


The regulatory scheme thus constituted requires the EPA to identify those substances determined to be “hazardous,” and to define what levels of oil and hazardous discharges will be deemed “harmful” for purposes of triggering the punitive and remedial aspects of the oil and hazardous substances liability program.

Marine sanitation. The federal Act also provides for a joint EPA-Coast Guard program to abate water pollution caused by sewage discharges from watercraft. After the dates prescribed for installation of marine sanitation devices in new and existing watercraft, no vessel may operate on waterways, or be sold, unless the toilet devices thereon have been certified by the Coast Guard as conforming to EPA-established standards of performance. Except in those instances in which the EPA, upon the request of a state, designates certain waters as areas in which no discharges should occur, the marine sanitation device standards will, upon their effective date, completely preempt existing state law.

Discharges of dredged or fill material. A separate permit system governs the disposal of dredged or filled material. This particular permit system is administered by the Army Corps of Engineers, subject to EPA-promulgated guidelines and EPA authority to veto the selection of disposal sites. The federal approach to discharges of dredged or fill material is

---

10 The liability of owners and operators of sources of oil and hazardous substances pollution is defined in 33 U.S.C. §1321(f) (Supp. II, 1972).
11 The standards are to be effective within two years for new, and five years for existing, vessels.
13 33 U.S.C. §1322(c)(l) (Supp. II, 1972). The standards are to be effective within two years for new, and five years for existing, vessels.
17 This activity is exempted from the purview of the NPDES by 33 U.S.C. §1342 (Supp. II, 1972).
implemented as a result of the interaction of the federal Act\(^\text{18}\) and the Marine Protection, Research, and Sanctuaries Act of 1972.\(^\text{14}\)

**Environmental impact obligations.** Certain activities of the EPA and the DWPC are exempted from the requirements of their respective environmental policy acts. With the exception of awards of municipal construction grants and its issuance of new source discharge permits, many EPA regulatory activities are exempted from the *procedural* requirements of NEPA.\(^\text{15}\) In comparison, under MEPA,\(^\text{16}\) the DWPC need prepare or file environmental impact reports neither for its permit determinations, nor for its funding and regulatory activities related to publicly-owned treatment or collection systems, nor for a project or portion thereof for which an environmental impact statement is required under NEPA.\(^\text{17}\) The DWPC must prepare impact reports for all its other activities.

### B. ENVIRONMENTAL IMPACT REVIEW

§6.8. MEPA environmental impact report procedures. In 1972, by the enactment of the Massachusetts Environmental Policy Act (MEPA),\(^\text{1}\) the Legislature created an environmental review process designed to inject environmental awareness into Massachusetts state agency decision-making. MEPA requires, first, that state agencies consider the environmental impact of their programs,\(^\text{2}\) and, second, that, before undertaking any project which may cause damage to the environment, the agencies prepare a formal document, termed an “environmental impact report,” defining the environmental impacts that will result from that project.\(^\text{3}\) Although


\(^{16}\) G.L. c. 30, §§61 and 62. See §6.8 infra.

\(^{17}\) Acts of 1973, c. 546, §16.


2 G.L. c. 30, §61. In addition to requiring state agencies to ascertain the environmental impact of their “works, projects or activities,” MEPA requires that state agencies “use all practicable means and measures to minimize damage to the environment,” and that any Massachusetts state agency “determination” shall include a finding describing the project’s environmental impacts as well as a finding that “all feasible measures have been taken to avoid or minimize said [environmental] impact.” MEPA further requires that, absent a contrary intent, “all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment.”

3 These reports must be prepared by all agencies, departments, boards, commissions
it articulates a governmental policy and prescribes an administrative requirement, MEPA does not provide any explicit guidance as to how that policy and that requirement are to be applied to the diverse Massachusetts state agencies. During the 1973 Survey year, a number of judicial, legislative, and administrative attempts were made to supply such guidance.

and authorities of the Commonwealth as well as by authorities of political subdivisions of the Commonwealth. G.L. c. 90, §62.

The comparable document in the federal NEPA environmental review system is termed an "environmental impact statement."

The "works, projects and activities" for which Massachusetts state agencies must prepare such impact reports have been defined by the Secretary of Environmental Affairs as

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 an agency.

MEPA Regulations §2.4. This definition has not been uniformly accepted. See text at notes 68-69 infra.

During the 1973 Survey year, two cases bearing upon MEPA were presented to the Supreme Judicial Court. In the first, the Governor propounded to the court two questions concerning the scope of activities that are subject to MEPA. In the second the City of Boston utilized a MEPA claim as part of its attempt to enjoin construction activity at Logan Airport. As this chapter was going to press the Supreme Judicial Court made its rulings in both cases.

In Answer of the Justices to the Governor, 1973 Mass. Adv. Sh. 1253, 302 N.E.2d 565, the court declined to define the scope of review authority vested in the Secretary of Environmental Affairs by MEPA, stating that the Governor's questions were propounded to it in an inopportune manner.

In City of Boston v. Massachusetts Port Authority, 1974 Mass. Adv. Sh. 187, 308 N.E.2d 488, 6 ERC 1337, the court held, inter alia, that the city could not rely on MEPA section 61 alone to obtain independent judicial review of the Port Authority's compliance with MEPA, since the exclusive section 62 "enforcement device," i.e. the environmental impact report requirement, was not effective until six months after section 61 and did not apply to the Authority's decision in the contested case. The court's decision in this case is significant from two other perspectives. First, the court held that G.L. c. 214, §10A, the so-called "Private Right of Action" statute, authorizes the enforcement of procedural, as well as regulatory, aspects of the Commonwealth's environmental protection programs. For discussions of the "Private Right of Action" statute see, generally, the law review commentary cited in note 7 infra. Secondly, the court held that, notwithstanding language in its special enabling legislation specifically exempting it from supervision and/or regulation by any entity of the Commonwealth, the defendant Port Authority was subject to the air pollution control programs administered by the Department of Public Health. In so holding, the court expressly rejected a ruling by the attorney general and a superior court decree that the Port Authority's enabling legislation exempted it from the state air pollution control program. On the basis of the attorney general's ruling and the lower court decree, the EPA, on September 1, 1973, had terminated air pollution control program grants to the Commonwealth. Program funding was, however, later restored. See, generally, the discussion of developments in the Massachusetts air pollution control program in §6.9 infra.
Although it does provide a comprehensive catalogue of those impacts that constitute "damage to the environment," MEPA neither describes what impacts are to be considered significant for purposes of triggering the MEPA report requirement, nor describes how such reports are to be prepared. The "Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports" (MEPA Regulations) promulgated by the Secretary of Environmental Affairs formulate a two-step administrative procedure for implementing MEPA. Since MEPA requires that the preparation of impact reports be commenced during a project's initial planning and design phase, it is essential that it be determined at

5 Acts of 1973, c. 546, §16 exempts the Division of Water Pollution Control from the MEPA environmental impact report requirements in activities relating to the construction of publicly-owned treatment works or to projects for which an environmental impact report is required under federal law. See §6.7 supra.

6 See, e.g., the MEPA Regulations which are the principal element of this article as well as the other MEPA Regulations discussed in note 9 infra.

7 As defined in MEPA, "damage to the environment" means: 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, 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.

8 Although it does outline some general requirements as to the timing, format and content of impact reports, MEPA provides no guidance as to how these requirements may be satisfied.

9 The MEPA Regulations promulgated by the Secretary of Environmental Affairs were fully effective on July 6, 1973, and were amended on October 31, 1973. G.L. c. 30, §62 requires that each executive office "promulgate rules and regulations approved by the secretary of environmental affairs to carry out the [MEPA environmental impact report procedure]." The Secretary's MEPA Regulations serve both as models for the MEPA regulations to be promulgated by each state agency and as interim MEPA procedures to be used by the several secretariats and their subordinate state agencies until such time as they adopt their own MEPA regulations. MEPA Regulations §1.2. Although the MEPA mandate that regulations be promulgated omits independent state agencies, it can be inferred that the report preparation procedures outlined by the Secretary's Regulations will also extend to the MEPA activities of these independent agencies, inasmuch as these independent agencies are otherwise subject to the MEPA impact report requirement. See G.L. c. 30, §61.

10 The two-step process involves an initial environmental assessment, and, where the assessment indicates that the project will produce a significant environmental impact, an environmental impact report. See notes 11-18 infra and accompanying text.
an early point what projects will cause significant environmental damage and thus necessitate the preparation of a report. Accordingly, the first step in the administrative procedure outlined by the MEPA Regulations is an assessment by the agency of the magnitude of the environmental impact likely to result from a proposed activity. The MEPA Regulations require that state agencies prepare a document termed an “environmental assessment form,” with which will be evidenced the agency’s evaluation of the project’s short- and long-term environmental impacts upon a wide variety of environmental assets.  

It is on the basis of these assessments that it will be determined which projects require preparation of reports. If the assessment indicates that the proposed project will impact environmental assets in a significant manner, the statutory measure of significant damage is automatically met and the agency is required to immediately commence preparation of a report. If, on the other hand, it appears from the assessment that the proposed project will not cause significant environmental damage overall, the project may be undertaken without a report. However, irrespective of whether or not the assessment

11 The proposed activity must be assessed in terms of its impacts upon: (1) the use of recreationally- or aesthetically-valuable areas; (2) unique natural or man-made features; (3) historical or archeological structures or sites; (4) the potential use, extraction or conservation of scarce natural resources; (5) the habitats, food sources, or other areas vital to rare or endangered wildlife or fish species; (6) fish, wildlife, or plant life; (7) rare or endangered plant species; (8) existing fresh or salt waters or wetlands; (9) beaches; (10) agricultural land; (11) environmentally-protective statutory or regulatory programs; (12) flood plains; (13) noise, dust, and smoke levels; (14) air and water resources; or (15) scenic areas. See MEPA Regulations, Appendix A, “Environmental Assessment Form,” Part II (Assessment of Environmental Damage).

12 Although an indication of a significant impact on any of the assessment categories specified in note 11, supra, will generally require the preparation of an environmental impact report, the administrative procedure prescribed by the Secretary’s MEPA Regulations does hold out the possibility that an agency may be able to proceed without preparing a report, despite an indication of impact in one or more of the assessment categories. See MEPA Regulations Appendix A, “Environmental Assessment Form,” Part III. See also MEPA Regulations §2.6.

13 MEPA Regulations §§3.1(d). Environmental impact reports are prepared on one of two levels of detail: “Standard Reports,” which, depending upon the project, would ordinarily require no more than six professional man-months of effort, and “Extensive Reports,” which would require considerably more effort. Whether or not a report will be “standard” or “extensive” is to be determined on the basis of “(1) the magnitude of the potential environmental impact caused by the project; (2) the availability of reasonable alternatives that warrant careful analysis; and (3) the extent to which more in-depth analysis would help to resolve uncertainties about possible environmental impacts of the proposed project or its alternatives.” MEPA Regulations §3.1(f).

Agencies must indicate on their environmental assessment forms whether an extensive or a standard report will be prepared. The Secretary may require that an extensive report be prepared for a particular project. MEPA Regulations §3.1(f).

14 MEPA Regulations §3.2. Such assessments of “no significant environmental damage” are termed “Negative Assessments.” Unless the Secretary finds that the Negative Assessment does not comport with MEPA (MEPA Regulations §3.2(c)), or un-
indicates that a report will be required for a particular project, no project may proceed until the assessment has been submitted to the Secretary for approval, and the public for comment. On the basis of his own review, and on the basis of public comments received by him during this period, the Secretary will indicate whether, in his judgment, an agency's decision not to write a report, or the extent of detail that it plans to put into a report, comports with MEPA.

less subsequent changes in the project render the initial Negative Assessment inaccurate (MEPA Regulations §3.1(b)), an agency filing a Negative Assessment will be relieved from all further "paperwork obligations" under MEPA. MEPA Regulations §3.1(d).

16 MEPA requires that environmental impact reports "be so prepared and disseminated as to inform the originating agency, reviewing agencies, the appropriate regional planning commission [and] the attorney general . . . of the environmental consequences of state actions and the alternatives thereto prior to any commitment of state funds and prior to the commencement of any work, project, or activity." G.L. c. 30, §62. A list of the designated "reviewing agencies" is compiled in Appendix B of the Secretary's Regulations. These agencies are to receive not only assessments (MEPA Regulations §3.2(a)), but also draft and final impact reports. See MEPA Regulations §§7.2, 7.7.

17 MEPA also requires that the public be included in the environmental review process (G.L. c. 30, §62). Accordingly, the Secretary's Regulations provide that the public be notified of "important phases of agency action," such as the submission of assessments, and the availability of draft or final impact reports. MEPA Regulations §§3.2(b), 7.3, 7.7. To facilitate public participation in the environmental review process, the MEPA Regulations provide that the notice of all "important phases of agency action" is to be made by way of a publication distributed at 15 day intervals to interested members of the public. MEPA Regulations §9A. The final deadline for comment on assessment forms and final reports by the Secretary (MEPA Regulations §§3.2(c), 7.9) and comment on assessment forms, and draft and final reports by the public (MEPA Regulations §§3.2(c), 7.3, 7.7), as well as comments on assessments and final reports by reviewing agencies (MEPA Regulations §§3.2(c), 7.7), is measured from the date of publication. The Secretary of Environmental Affairs currently publishes this notice in a bulletin entitled the "Section 62 Monitor."

18 MEPA requires that the environmental review process be completed before state funds are committed, and before activity is commenced, a state "work, project, or activity." The environmental review procedure outlined by the MEPA Regulations mandates a number of time periods during which further progress on the project must await the receipt of comments by reviewing agencies, the public, and the Secretary of Environmental Affairs.

Soon after assessments are submitted to the Secretary (as required by MEPA Regulations §3.1(a)), public notice of such submission is made in the "Section 62 Monitor". MEPA Regulations §§3.2(b), 9A. Reviewing agencies and the general public may submit comments on assessments within 15 days following publication of this notice in the Monitor. The Secretary has an additional 5 days (i.e., 20 days from the date of publication) to indicate whether, in his opinion, the originating agency's determination to write no report, or to write either a Standard or an Extensive report, comports with MEPA. If, at the end of that 20 day period, the Secretary has failed to comment on the agency's assessment, he is deemed to have approved it. MEPA Regulations §3.2(c).

Thus, the first phase in the environmental review process, the environmental
There are a number of instances in which the Secretary's MEPA Regulations permit deviations from strict MEPA procedures. Where it appears that an "imminent threat to public health or safety, or a serious and immediate threat to the natural resources" requires "immediate emergency action" by a state agency, that agency may undertake such emergency action before preparing an environmental assessment form or impact report.\(^9\) A state agency action that involves the use or repair, replacement or reconstruction, and construction of small facilities may be "categorically exempted" from environmental assessment and impact report obligations.\(^{23}\) Similar categorical exemptions may obtain to relieve assessment, necessarily requires that a 20 day period elapse prior to any work on the project (in the case of a negative assessment). Since an agency's determination to write an impact report can be affected only by the Secretary's statement that the report should be either Extensive or Standard, this time period will, as a practical matter, not appreciably affect those projects.

Once it has been determined that the magnitude of a project's environmental impact is such that a report will be needed, the state agency must face further waiting periods. When a proposing agency has completed its draft impact report, that report must be submitted to the Secretary and the designated reviewing agencies, and public notice of such submission must be made in the Monitor. MEPA Regulations §§7.2, 7.3, 9A. Depending upon the MEPA environmental review procedure established by the particular state agency involved (see note 9 supra), reviewing agencies and the public may comment on the draft report within a minimum of 30 days from the date of receipt of the draft by the "State Clearinghouse" (within the Office of State Planning and Management), or from the date of publication of the Monitor. This period may be extended for an additional 15 days. MEPA Regulations §7.4. After the period for public and reviewing agency comment on the draft report has passed, the Secretary then has an additional 14 days in which to issue a written statement indicating whether or not he feels that the draft report adequately and properly complies with MEPA. The Secretary's failure to comment during this time period will be deemed an approval of the draft report. MEPA Regulations §7.9.

The final waiting period in the MEPA process arises when the agency has completed its final impact report. Once completed, final reports must be circulated among reviewing agencies. MEPA Regulations §§7.2, 7.7. Further, notice of such final reports must be made in the Monitor. MEPA Regulations §§7.3, 7.7, 9A. The preparing agency may not proceed with its project until 60 days have elapsed from the publication of a final impact report. MEPA Regulations §7.10. During the first 30 days of this 60 day period the Secretary may issue a written statement commenting on the extent to which the report complies or fails to comply with MEPA. MEPA Regulations §7.9. If the Secretary fails to comment during this thirty day period, he will be deemed to have approved the final report. MEPA Regulations §7.9.

\(^9\) MEPA Regulations §3.1(e). An assessment form must be filed within sixty days of the institution of the emergency action.

\(^{20}\) MEPA Regulations §8.1, Class 1.

\(^{21}\) MEPA Regulations §8.1, Class 2.

\(^{22}\) MEPA Regulations §8.1, Class 3.

\(^{23}\) Such "categorical exemptions" are to be incorporated within the MEPA regulations promulgated by each agency. See note 9 supra. Where an agency either does not promulgate its own MEPA rules and regulations within such regulations, it must obtain categorical exemption status by way of an appropriate assessment form filing for each project. MEPA Regulations §8.0.
state agencies from MEPA filing requirements that pertain to information collection,\textsuperscript{24} inspections,\textsuperscript{25} ministerial projects\textsuperscript{26} and activities involving minor alterations to land, water or vegetation.\textsuperscript{27} Each state agency may, by rule or regulation approved by the Secretary, set further categorical exemptions defining standardized norms, or "threshold exemptions," for determining which activities within a particular class of activities will produce or fail to produce "significant environmental damage."\textsuperscript{28} None of these categorical exemptions will apply to release a state agency from its MEPA obligations if a particular project to which these exemptions would apply is sited in an "environmentally sensitive" area\textsuperscript{29} or if it is part of a series of projects which, in the aggregate, will produce a significant environmental impact.\textsuperscript{30}

Once it appears from an assessment that a particular project will produce significant environmental damage, the MEPA Regulations require that the proposing agency move to the second step of the MEPA administrative procedure, the preparation and filing of an environmental impact report. It is through the preparation of these reports that state agencies are to satisfy their MEPA obligations to document the environmental impacts caused by their activities\textsuperscript{31} and to "review, evaluate, and determine the impact on the natural environment of [their] works, projects and activities [and] . . . use all practicable means and measures to minimize damage to the environment."\textsuperscript{32} The MEPA Regulations require that these impact reports be prepared in two phases, draft and final,\textsuperscript{33} and at two levels of detail, either Standard or Extensive.\textsuperscript{34} Impact reports must describe the proposed project,\textsuperscript{35} the initial assessment of its impacts,\textsuperscript{36} and the characteristics of its site.\textsuperscript{37} They must also sum-

\textsuperscript{24} MEPA Regulations §8.1, Class 5.
\textsuperscript{25} MEPA Regulations §8.1, Class 6.
\textsuperscript{26} MEPA Regulations §8.1, Class 7.
\textsuperscript{27} MEPA Regulations §8.1, Class 4.
\textsuperscript{28} MEPA Regulations §8.1, Class 8.
\textsuperscript{29} "An "environmentally sensitive" area is one in which "an otherwise insignificant impact could become significant." MEPA Regulations §8.2.
\textsuperscript{30} MEPA Regulations §8.3.
\textsuperscript{31} See G.L. c. 30, §62.
\textsuperscript{32} G.L. c. 30, §61.
\textsuperscript{33} Prior to its submission to the Secretary and its dissemination for commentary by reviewing agencies and the public, the impact report is considered incomplete and is termed a draft report. After all commentary has been received and incorporated into the impact report documentation, the report is considered final. Ideally, the agency decision to abandon or proceed with a particular project is to be made on the basis of this final report. The sequence by which draft reports evolve into final reports is discussed in note 18 supra.
\textsuperscript{34} See note 13 supra.
\textsuperscript{35} MEPA Regulations §6.1, Part III.
\textsuperscript{36} MEPA Regulations §6.1, Part I.
\textsuperscript{37} MEPA Regulations §6.1, Part IV. This section of the report must include a discussion of the economic, physical, social, environmental, and otherwise unique
marize the major costs and benefits of the project and its alternatives, project the probable environmental impact of the project and its alternatives, and describe all measures being utilized to minimize environmental damage. Impact reports must also contain the comments received from reviewing agencies, the public and the Secretary, and must indicate "what action if any the [preparing] agency has taken in response to" these comments.

To the greatest extent possible, agencies are to utilize their own full-time staff in the preparation of environmental impact reports. However, when, because of a lack of technical expertise or manpower, an agency determines that it is unable to prepare an adequate impact report, the agency may, subject to the Secretary's approval, engage qualified outside consultants to prepare such reports.

In order to minimize the administrative burden imposed upon state agencies by these requirements, the MEPA Regulations provide three means by which state agencies may minimize their report preparation efforts and yet satisfy their MEPA obligations. First, where a particular project causing significant environmental damage involves two or more agencies, these agencies may satisfy their MEPA obligation with respect to that project by preparing and filing a "joint" environmental impact report. A second such MEPA procedure permits an agency to discuss, in one impact report, the cumulative environmental impact of a number of projects which are "substantially similar in their environmental impact and are undertaken repeatedly." The MEPA Regulations also seek to expedite the environmental review process by permitting impact statements prepared under the federal National Environmental Policy Act to be circulated and reviewed for purposes of satisfying MEPA environmental review requirements.

The most salient aspect of the environmental review procedure created by the MEPA Regulations is the extent to which they implement the statutory mandate that the public, the Secretary of Environmental Affairs, and, indeed, the entire state government be involved in agency decisions having potentially adverse effects on the environment. Consistent with characteristics of the area in question as well as any environmentally-protective regulatory program applicable to that area.

38 MEPA Regulations §6.1, Part II.
39 MEPA Regulations §6.1, Part V.
40 MEPA Regulations §6.1, Part VI.
41 MEPA Regulations §6.1, Part VII.
42 MEPA Regulations §6.1, Part VIII, and MEPA Regulations §7.6.
43 MEPA Regulations §11.
44 MEPA Regulations §7.1.
45 MEPA Regulations §5.1.
46 MEPA Regulations §4.1. Such reports are termed "combined" reports.
47 See note 1 supra.
48 NEP A Regulations §9.
recent legislation expanding the role of the public in the protection of the environment, the MEPA Regulations require that the public be notified of each "important phase of agency action." To the greatest extent possible, state agencies are to hold public hearings as part of their environmental review procedures. All assessments and impact reports, both draft and final, generated as part of the environmental review process are to be public documents, copies of which may be purchased from the originating agency or examined at the offices of the originating agency, reviewing agencies and "appropriate institutions" situated in the area of the proposed project. The MEPA Regulations also give the Secretary a prominent role in determining how statute agencies are to satisfy their MEPA obligations. All executive office MEPA procedures, all categorical exemptions, all requests to prepare combined reports and all MEPA contracts with outside consultants must be approved by the Secretary. More importantly, the Secretary is responsible for determining whether assessments and draft and final reports comply with MEPA. Towards this end, for any particular project he may reject assessments and determine the scope of detail to be devoted to the preparation of an impact statement. Moreover, subject to procedural limitations, the Secretary may require that an assessment form be revised or redone if it appears to him that the project was fraudulently or inaccurately described in the original documentation, or if the project has been substantially changed. The third aspect of the MEPA regulatory procedure—the extent to which the entire range of state administrative agencies may be involved in the environmental review of decision-making.

49 Public participation in environmental protection activities has been enhanced as a result of a number of recent enactments. The most significant opportunity for public participation in environmental protection activities in the Commonwealth is found in the "Private Right of Action" (G.L. c. 214, §10A) and the "Statutory Right of Intervention" (G.L. c. 30A, §10A) statutes. See Johnson & Miller, Environmental Law, 1971 Ann. Surv. Mass. Law §8.6, and the law review commentary cited in note 7 supra. Other provisions for public notice and public participation can be found in the Massachusetts water pollution control program. See, generally, §§6.2-6.7 supra. See G.L. c. 21, §§27(7), 45(4), as amended by Acts of 1973, c. 546, §§3, 9.

50 MEPA Regulations §9A. See also note 17 supra.
51 MEPA Regulations §7.5.
52 MEPA Regulations §7.8.
53 MEPA Regulations §§3.2(b), 7.3.
54 MEPA Regulations §7.3.
55 G.L. c. 30, §62. See also MEPA Regulations §1.2.
56 MEPA Regulations §8.0.
57 MEPA Regulations §4.1.
58 MEPA Regulations §11.
59 MEPA Regulations §2(c).
60 MEPA Regulations §7.9.
61 MEPA Regulations §§3.2(c).
62 MEPA Regulations §8.1(f).
63 MEPA Regulations §14.
—may prove to be the most troublesome from an administrative standpoint. MEPA imposes upon reviewing agencies an affirmative burden to append their written comments to the impact reports they review. Ideally, this requirement has great potential, not only to achieve the environmental awareness which is the immediate objective of MEPA, but also to imbue Massachusetts administrative procedure with an element of cohesion in its decision-making processes. As a practical matter, however, due to the enormity of the bureaucratic burden imposed on some state agencies by this requirement and the intransigence of many agencies to open up their decision-making processes to public scrutiny, it is likely that it will be some time before the MEPA review procedure becomes an accepted part of Massachusetts state government.

There are, moreover, a number of circumstances which may complicate implementation of the MEPA review process. First, the review procedures outlined by MEPA and the MEPA Regulations may be incompatible with substantive and procedural review formats prescribed by other statutes. For example, the Department of Community Affairs is required to make a number of substantive findings about an urban renewal plan prior to approving it. It is unclear how this requirement is to be co-ordinated with the MEPA requirement that state agency projects be evaluated in terms of their environmental impact and be tailored to minimize that impact. A second dimension to the problem of co-ordinating MEPA with other statutory requirements arises by way of the procedural guidelines required of certain state activities. The wetlands protection statute requires that persons planning to undertake projects in wetlands obtain all necessary permits, variances and approvals prior to filing notice with the municipal conservation commission. Since the acquisition of such clearances obviously limits the range of alternatives for a given project to the scope of the clearances obtained, compliance with the MEPA mandate that a wide range of alternatives be considered is apparently precluded. It would therefore appear that the prior requirements of the wetlands statute should be amended so as to permit full consideration of development alternatives.

A second source of difficulty concerning the precise level of state agency action to be subject to MEPA arose shortly after the MEPA Regulations were promulgated. As a result of an intra-cabinet dispute concerning whether the statutory phrase “works, projects or activities” authorizes

---

64 MEPA explicitly states that:
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 [in a particular project] shall affix their written comments to the final impact report.

G.L c. 30, §62. (Emphasis added.)

65 G.L. c. 121B, §48.

66 G.L. c. 131, §40.
the Secretary to require MEPA documentation for all state agency actions involving "the issuance of a lease, permit, license, certificate, or any entitlement for use by an agency," the Governor propounded to the Supreme Judicial Court two questions concerning the scope of review authority vested in the Secretary by MEPA. The court's response appeared as this chapter was going to press. Stating that the issues to be resolved were not properly placed before it, the court declined to interpret the scope of the operative statutory phrase. The question of how broad an interpretation should be accorded the phrase has thus not been judicially determined. From a practical standpoint, however, the absence of such a definitive judicial resolution may not prove to be a significant problem. As Massachusetts state agencies adapt the broad procedural elements of the Secretary's MEPA Regulations to fit their own administrative needs, the problem of defining what "works, projects or activities" will require full environmental review will hopefully be obviated.

The major difficulty presented by the MEPA environmental review process appears to lie in ascertaining how state agencies are to utilize environmental impact reports to satisfy their MEPA obligations. Ideally, final agency decisions regarding activities that have a significant environmental impact will be made on the basis of the data produced in the report. However, "[i]ndications of adverse environmental impact appearing in an environmental impact report do not in themselves require that a proposed activity be halted." If, based upon an evaluation of the various equities involved in a particular project, an agency concludes that, on balance, the merits of the project outweigh its negative features, the agency is free to proceed with the project.

Thus it can be seen that the Secretary's MEPA Regulations eliminate much of the uncertainty concerning the procedural framework for implementing MEPA. How successful these regulations will be in determining the enforceability of the substantive requirements of that statute is still an open question, the answer to which may depend not only upon the regulations promulgated by each state agency, but also upon the interpretations accorded the substantive elements of MEPA by the judiciary.

C. AIR POLLUTION CONTROL

§6.9. Air pollution control. The Massachusetts air pollution control program has been altered by rulings in three federal court actions, by

67 MEPA Regulations §2.4(c).
69 MEPA Regulations §1.3(b).
70 MEPA Regulations §1.4.

amendments to the state air pollution control regulations, and by a ruling of the state attorney general. These changes variously affect the commonwealth's ability to plan and regulate factors affecting future air quality conditions, to review and control the construction or modification of complex sources, to control transportation-related sources of air pollution, and to regulate air pollution-causing activities of independent state authorities. Other changes deal with the level of particulate emissions permitted from incinerators, hydrocarbon emission controls, and the use of residual fuel oil in the Metropolitan Boston Air Pollution Control District.

**Nondegradation.** As a result of the decree in *Sierra Club v. Ruckelshaus*, the United States Environmental Protection Agency (EPA) was directed to disapprove the air pollution control programs of all states, including Massachusetts, which did not provide for the prevention of "significant deterioration" of air quality levels in those areas in which air quality is presently better than the standards established for the area. Although the EPA maintains that, because the lower court decisions in that action were affirmed, without opinion, by an equally-divided Supreme Court, there has been "no definitive judicial resolution" of this "nondegradation" issue, it has, nonetheless, taken steps to implement the original District Court directive. Accordingly, in November, 1972 the EPA disapproved all state air pollution control programs, including that of Massachusetts insofar as they failed to provide for and enforce nondegradation controls. The development of a nondegradation strategy by the EPA is, however, complicated by two factors: defining degradation and developing a strategy to implement the nondegradation strategy. First, inasmuch as the nondegradation issue will arise only in those undeveloped areas in which aesthetic, scenic, recreational and other "clean air" values still abound, the development of a strategy to prevent further significant air quality deterioration requires that such degradation be defined without direct reference to a minimal level of desired air quality. Whereas the administration of air pollution control strategies in degraded areas is directed at reducing existing pollutant emissions to attain a desired level of air quality, the orientation of a nondegradation strategy is directed, not at reducing present emission levels, but, rather, at controlling the increase of future air pollution-causing activity so as to insure that air quality standards will never be violated. Once such a definition has been formulated, devising strategy to implement such a definition encounters diffi-

---


5 Improved pollution control technology will, of course, be an essential part of nondegradation schemes.
cularies. Because nondegradation strategies will be applicable only to relatively undeveloped areas, the implementation of a strategy to control future air deteriorations will, necessarily, confront sensitive policy issues regarding growth patterns, land use, and other social, economic and political factors. Owing to the complexities inherent in preventing "significant air quality deterioration," the EPA has not yet promulgated a nondegradation plan for Massachusetts or any other state but has proposed alternative schemes for defining and preventing significant deterioration.6

Transportation and land use controls. In its initial approval of the Massachusetts air implementation plan, the EPA had granted a two-year extension of the deadline for submitting the transportation and land use strategies required to attain carbon monoxide and photochemical oxidant standards in the Boston and Springfield regions.7 On January 31, 1973, the United States Court of Appeals for the District of Columbia, in Natural Resources Defense Council, Inc. v. Environmental Protection Agency (NRDC I),8 held that the transportation plan extensions granted to Massachusetts and other states were not authorized by the Clean Air Act,9 and, accordingly, must be withdrawn. Acting pursuant to this decree, the EPA, on March 20, 1973, rescinded these extensions and ordered that Massachusetts submit by April 15, 1973, a transportation strategy for these two regions.10 Because Massachusetts failed to submit a plan by this deadline,11 the EPA, on July 2, 1973, proposed transportation control strategies for Boston and Springfield.12 However, because several features

6 The EPA, on July 16, 1973, proposed four major alternate nondegradation control plans: (1) an "air quality increment" plan, which would prescribe a single definition of deterioration to be applied uniformly in all nondegraded areas of the country; (2) an "emission limitation" plan, which would establish a fixed percentage in the amount of emissions that would be allowed in any nondegraded area; (3) a "local definition" plan, whereby an integrated EPA-state-local decision-making process would determine, on a case-by-case basis, what, where and how much, air quality deterioration—within air quality standards—would be permitted in a given nondegraded area; and (4) an "area classification" plan wherein states would establish long-range growth goals for nondegraded areas and coordinate these growth patterns with nondegradation objectives. These nondegradation schemes are described in detail in 38 Fed. Reg. 18986-19000 (1973).
8 475 F.2d 968, 4 ERC 1945 (D.C. Cir. 1973). The court decree also dealt with the review and control of complex sources.
of these plans were later determined to be unsuitable, the Governor, in September 1973, announced, and the EPA, in November 1973, published, revised plans for these regions. As of this writing there are presently six suits pending in the First Circuit Court of Appeals challenging the Massachusetts transportation control plans. Implementation of a number of the features of the transportation strategies, as revised, has been delayed pending the outcome of these suits.

**Complex Sources.** One other aspect of the Massachusetts air program has been affected by the ruling in *NRDC I*. In that ruling the court also ordered the EPA to disapprove state plans insofar as they lacked adequate authority to review and regulate the construction or modification of parking lots and garages, roads and highways, airports, shopping centers, and other "complex" facilities which may cause a violation of air quality standards, not directly as a result of their own pollutant emissions, but indirectly as a result of the emissions of mobile sources associated with the use of those facilities. Pursuant to this court order, the EPA disapproved the state plans, including the Massachusetts plan, insofar as they relate to complex sources and ordered that the states submit by August 15, 1973 plans for reviewing and regulating the construction or modification of complex sources. Since Massachusetts failed to submit a


14 The first case, *South Terminal Corporation v. EPA* (1st Cir., No. 73-1366), challenges EPA authority to impose an egress toll, a parking surcharge, or a construction freeze at Logan Airport. The second action, *Sears, Roebuck & Co. v. EPA* (1st Cir., No. 73-1383) requests review of the entire Boston plan, particularly the parking restrictions, light- and medium-duty-retrofit requirements, construction freeze, as well as the gasoline storage and dispensing controls. The remaining four actions, *Fitz-Inn Auto Parks, Inc. v. EPA* (1st Cir., No. 73-1386); *Pilgrim Parking, Inc. v. EPA* (1st Cir., No. 73-1387); *Meyers v. EPA* (1st Cir., No. 73-1388); and *Associated Dry Goods Corp. v. EPA* (1st Cir., No. 73-1389) request a general review of the entire Boston transportation control plan.

15 Experience has indicated that certain types and sizes of facilities have considerable potential for impacting air quality adversely. Whether or not the activity associated with a given complex source will, in fact, cause air quality standards to be violated will depend upon the size and type of the proposed facility and upon existing local conditions. Accordingly, the criteria that will determine which sources will be subject to indirect source review will be framed in terms of the type, size and site of a given complex source. Such criteria were proposed by the EPA on October 30, 1973, 38 Fed. Reg. 29893-96 (1973), to revise 40 C.F.R. §52.22.


complex source scheme by this deadline, the EPA, on October 30, 1973, proposed complex source regulations for Massachusetts.\textsuperscript{18}

\textit{Metropolitan Boston Air Pollution Control District.} On July 1, 1973, amendments to the hydrocarbon emission, particulate emission, and residual fuel oil use regulations applicable to the Metropolitan Boston Air Pollution Control District became effective.\textsuperscript{19} The hydrocarbon emission revisions expand the range of storage facilities subject to vapor emission control regulation\textsuperscript{20} and prescribe more precise requirements for the vapor discharge control devices that must be installed on new and existing petroleum product storage tanks.\textsuperscript{21} The status of these Massachusetts regulations has, however, been made somewhat uncertain as a result of hydrocarbon emission control regulations proposed by the EPA on July 2, 1973.\textsuperscript{22} The EPA regulations conflict with the Massachusetts regulations as to the deadline for the installation of vapor balance systems on service station tanks: whereas the Massachusetts amendments do not require that such system be installed on tanks with capacities of 250 gallons or less and do not require that such systems be installed on existing tanks in excess of 250 gallons until such time as these tanks are replaced or modified,\textsuperscript{23} the proposed EPA regulations would require that \textit{all} tanks be equipped with such devices.\textsuperscript{24}

The 1973 amendments prohibit the discharge from incinerators of

\textsuperscript{18} 38 Fed. Reg. 29893-6 (1973), revising 40 C.F.R. \textsuperscript{52.22}. These proposed regulations would set thresholds for determining what complex facilities within and without highly-polluted areas would require pre-construction or pre-modification review and approval by the EPA or the appropriate state agency.

\textsuperscript{19} The original "Regulations for the Control of Air Pollution in the Metropolitan Boston Air Pollution Control District" became effective June 1, 1972. The 1973 amendments also postponed by one year the effective date of the residual fuel oil use prohibition, and inserted a new regulation proscribing the emission from incinerators of particulate matter in excess of 100 microns. Regulations 5.2.2, 8.1.7.

\textsuperscript{20} The original regulations applied to storage facilities with capacities ranging from 5,000 to 40,000 gallons. The regulations, as amended, now cover such facilities capable of storing between 250 and 40,000 gallons. Regulation 2.5.4.4.

\textsuperscript{21} Service stations with a tank capacity in excess of 250 gallons must, at a minimum, have before January 1, 1974, drop tube fill lines capable of conversion to vapor recovery systems. Regulation 2.5.4(a). Service station tanks with capacities in excess of 250 gallons that are constructed (Regulation 2.5.4.4(b)), or replaced or modified (Regulation 2.5.4.4(c)), after July 1, 1973, must be equipped with drop tube fill lines as well as vapor balance lines (or an equally effective vapor discharge control system) at the time of construction, replacement or modification.

\textsuperscript{22} 38 Fed. Reg. 17689-91, 17695 (1973). In addition to proposing regulations for controlling evaporative emissions from retail gasoline outlets, these proposed EPA regulations would prescribe restrictions on the use of organic solvents, as well as paints and architectural coatings containing photochemically-reactive solvents, in the Metropolitan Boston area. 38 Fed. Reg. 17689-91, 17695-6 (1973).

\textsuperscript{23} See note 21 supra.

\textsuperscript{24} 38 Fed. Reg. 17695 (1973), proposing 40 C.F.R. \textsuperscript{52.1128(e)(4)}. 
particulate matter of a dimension greater than 100 microns, and postpone for one year the effective date of the residual fuel use ban. 25

Variance and new source reporting procedures. In the third federal action, the First Circuit Court of Appeals, in Natural Resources Defense Council v. Environmental Protection Agency (NRDC II) 28 on May 2, 1973, held that the EPA approval of variance 27 and new source reporting procedures 28 in the Massachusetts air implementation plan would result in unauthorized postponements of the deadlines for attaining standards prescribed by the Clean Air Act. 29

Public authorities and the Massachusetts Air Pollution Control Program. As a result of the apparent inability of the Department of Public Health to impose its air pollution control regulations upon the Massachusetts Port Authority, the status of the entire state air pollution control program was cast into considerable doubt. The attorney general had advised, 30 and the superior court had ruled, 31 that the exemption from state agency "supervision or regulation" found in the special legislation creating the Massachusetts Port Authority also exempted it from the air pollution control jurisdiction of the Massachusetts Department of Public Health. On the basis of these determinations, the EPA, on September 1, 1973, had terminated federal grants to fund the Massachusetts air pollution control program. 32 As this chapter was going to press, the attorney general's opinion and the superior court decree were reversed by the Supreme Judicial Court. 33

D. MISCELLANEOUS DEVELOPMENTS


---

25 Regulations 8.1.7, 5.2.2.
27 Regulations 50.1 and 2.4.
28 Regulation 14, as modified by G.L. c. 111, §§2B, 142B and 142D. See 478 F.2d at 891-93, 5 ERC at 1889-90.
32 EPA funding is authorized by 42 U.S.C. §1857c (Supp. II, 1972), and may be reduced or terminated if the EPA determines that the state program is not effecting a viable pollution control strategy. 42 U.S.C. §1857c(c) (Supp. II, 1972).
33 See note 30 supra.
to obtain preferential trial disposition of environmental enforcement actions brought by him upon a showing that any delay in obtaining a trial on the merits "would prevent the attainment of a full and complete remedy to the alleged damage to the environment."

Acts of 1978, c. 162 provides that the failure of a state agency to notify the attorney general of an administrative proceeding or public hearing in which environmental damage may be an issue, as required by G.L. c. 12, §11D, will not invalidate such a proceeding or hearing.

Wetlands protection. Two measures passed during the 1978 Survey year amend the provisions of the wetlands protection statute. Acts of 1978, c. 769 exempts from the notice requirements of the wetlands statute state agencies, or political subdivisions, or their designees, who are required to undertake in wetlands "emergency projects necessary for the protection of the health and safety of the commonwealth." In order to qualify for this exemption, the municipal authority must first certify that the project is an emergency project requiring such expeditious action. Exemptions thus authorized only extend for such time as is necessary to abate the emergency.

Acts of 1978, c. 163 authorizes municipal conservation commissions and their designees to enter and inspect the sites of proposed projects for which a wetlands permit is sought.

Sewage disposal system siting. G.L. c. 111, § 127M, added by Acts of 1978, c. 848, now establishes a series of statutory restrictions upon the siting of sewage disposal systems near water supply sources, watercourses, and dwellings. Sewage disposal systems may not be constructed or maintained within one hundred feet of any known water supply source or tributary thereto. Approval by the Department of Public Health must be obtained prior to the construction of any such system within one hundred feet of any watercourse. Similar approval must be obtained prior to the construction of any such system within seventy-five feet of a single, or one hundred feet of a multiple, dwelling. This enactment supersedes several existing Department of Public Health regulations.

Farmland assessment. G.L. c. 61A, as added by Acts of 1978, c. 1118, provides that owners of certain qualifying lands used for agricultural and/or horticultural purposes may have such lands assessed at their "actual use," rather than their "highest potential use," values for real


2 Department of Public Health regulations governing subsurface sewage disposal may be found in the State Sanitary Code, Art. XI, Minimum Requirements for the Disposal of Sanitary Sewage in Unsewered Areas (1966). Some pre-empted regulations contained therein include Regulation 2.9 (proscribing unauthorized discharges of sanitary sewage and other wastes into watercourses); and Regulations 3.1 and 3.2 (governing the location of sewage disposal systems).
estate tax purposes. This statute is designed to implement Article XCIX of the Articles of Amendment to the Constitution of the Commonwealth.

_Tidewater displacement._ As a result of Acts of 1973, c. 870, the compensation required for filling tidelands has been increased from thirty-five cents to two dollars per cubic yard of water displaced.

_Oil pollution control._ The basic Massachusetts oil pollution prevention and control provisions found in G.L. c. 21, §§27(14),8 50-58, were refined by a number of developments during the 1973 Survey year. Acts of 1973, c. 437 increased the technical requirements on, and the penalties imposed for violations of, the oil spill-containing boom requirements of G.L. c. 21, §50A.

G.L. c. 21, §52A, added by Acts of 1973, c. 1162, now requires that retail automobile lubricating oil outlets must install, and arrange to have emptied, facilities into which their customers may discharge excess waste oil.

---

8 The provisions of G.L. c. 21, §27(14), formerly found at G.L. c. 21, §27(10), were recodified at their present location by Acts of 1973, c. 546, §3.