

CHAPTER 10

Environmental Law

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§ 10.1. **Hazardous Waste Facility Site Safety Council.** During the *Survey* year, the new Hazardous Waste Facility Site Safety Council (the "Council"), together with the Department of Environmental Management ("DEM"), adopted regulations¹ to implement and administer the Hazardous Waste Facility Siting Act, chapter 21D of the General Laws. The Siting Act was enacted in 1980² in response to the conspicuous absence of any modern hazardous waste facilities in the Commonwealth and the very urgent need for such facilities in this industrial state. The lack of new facilities is attributable in large part to often insurmountable institutional barriers to siting such a facility in any given community.³ It is almost axiomatic that while the public recognizes the need for safe and properly maintained hazardous waste facilities, no one wants one in his own backyard.⁴

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§ 10.1. ¹ "Regulations for the Administration of the Hazardous Waste Facility Siting Act, G.L. c. 21D," MASS. ADMIN. CODE tit. 990, §§ 1 *et seq* (effective April 29, 1982). Proposed regulations in the form of a public hearing draft were issued jointly by the Council and DEM in January 1982.

² G.L. c. 21D was added by Acts of 1980, c. 508, § 8 (effective July 15, 1980), and represents the culmination of an exhaustive investigation by the Special Committee on Hazardous Waste of legislative alternatives to deal with impediments (legal, economic and otherwise) to the siting process. *See* Acts of 1979, c. 704, § 4.

³ *See* Bacow and Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265 (1982).

⁴ *Id.* at 267-269. Bacow and Milkey analyze "local opposition to hazardous waste disposal facilities in terms of perceived long-term health and environmental risks and social and economic costs, such as noise, congestion, depression of real estate values, and the stigma of being known as the "region's dump."

Chapter 21D attempts to reconcile these conflicting statewide and local interests through an innovative process of promotion, negotiations and full disclosure. First, DEM is the "promoter," charged under the Siting Act with the responsibility for soliciting new facility proposals, identifying environmentally acceptable sites for development and acting as an information clearing-house on new technologies for the treatment, processing, and disposal of hazardous wastes.⁵ The Department of Environmental Quality Engineering ("DEQE") retains its traditional role as the principal licensing agency in the siting process. DEQE sets the substantive performance standards and financial responsibility criteria for site developers and facility operators.⁶

The Council was established to be the moderator of the entire siting process, and is specially charged under the Siting Act to facilitate a workable Siting Agreement between the developer and host communities. Indeed, the touchstone of the Siting Act is the fundamental premise and requirement that the developer and the host community can and must work together to mitigate anticipated adverse impacts caused by siting a new hazardous waste facility. The Act creates an incentive for both sides to resolve their differences. On the one hand, the statute restricts local authority to exclude facilities altogether, while on the other, it requires a developer to compensate a host community for the social and economic impacts associated with having a new facility. Specifically, the developer has the right under the statute to site a facility in an area zoned for industrial use if it completes a Siting Agreement, by negotiation or through arbitration, with the host community.⁷ In exchange, the host community is given technical assistance, through grants, to enable it to have more meaningful input in the siting process, and is provided a comprehensive compensation package from the developer, including, *inter alia*, direct monetary payments and other beneficial services.⁸

The regulations adopted during the *Survey* year implement the procedural steps established by chapter 21D for review of a siting proposal

⁵ G.L. c. 21D, § 3.

⁶ G.L. c. 21C, § 7, as amended by Acts of 1980, c. 508, §§ 2, 3. The 1980 amendments changed the standard by which DEQE may grant a license to construct, maintain and operate a hazardous waste facility, and further limited waste disposal by landfill to the alternative of last resort.

⁷ Acts of 1980, c. 508, § 5 amended the Zoning Enabling Act, G.L., c. 40A, § 9, to permit construction of a hazardous waste facility, as of right, in any area zoned for industrial use provided that the developer obtains all necessary permits and licenses and successfully completes a Siting Agreement under G.L. c. 21D, §§ 12, 13. Once a developer files a Notice of Intent to construct a facility pursuant to the Siting Act, the host community may not adopt any zoning change to exclude the facility. This prohibition against exclusionary zoning, however, is lifted following final disapproval of the facility and expiration of all appeal periods under chapter 21D. *See* G.L. c. 21D, § 16.

⁸ G.L. c. 21D, §§ 11, 12.

and creation of a Siting Agreement. The first step in this process is the filing of a Notice of Intent, the purpose of which is to inform the public of a facility proposal and to provide the Council with preliminary information necessary for it to determine if the project is “feasible and deserving of state assistance,” and therefore warranting further state review.⁹ The regulations specify the contents of a Notice of Intent and require it to include a description of the proposed facility, the type of technology to be used, the developer’s prior experience and financial responsibility data, and identification of the selected site(s) for development.¹⁰ The developer, however, need not identify a particular site at the Notice of Intent stage, but he must indicate his willingness or unwillingness to utilize the site selection process provided in the statute.¹¹ Copies of the Notice of Intent must be sent to all host communities in which one or more sites are identified.

The Siting Act provides that the Council must determine whether the project is feasible and deserving within fifteen days of receipt of a completed Notice of Intent.¹² The very short review period indicates that this initial siting decision represents only a preliminary judgment on the merits of a facility proposal before permitting a project to proceed through the exhaustive impact analysis and licensing procedures set forth in chapter 21D. This review is intended to be a rough screening to eliminate projects which are clearly infeasible or developers who are financially insecure. While acknowledging the limited purpose of this feasible and deserving determination, the new regulations create a far more extensive review of a Notice of Intent than the fifteen day statutory review period by providing a forty-five day public comment period before a Notice of Intent is considered complete.¹³ The regulations thus provide an opportunity for public comment and input in the Council’s threshold determination on a project which was not expressly contemplated by the Siting Act.

While the Siting Act is silent as to the meaning of “feasible and deserving,” the regulations establish fairly stringent threshold criteria for

⁹ *Id.* at § 7; MASS. ADMIN. CODE tit. 990, § 4.00.

¹⁰ G.L. c. 21D, § 7; MASS. ADMIN. CODE tit. 990, § 4.02.

¹¹ G.L. c. 21D, § 9; MASS. ADMIN. CODE tit. 990, § 4.03. The site selection process, administered by DEM, is quite complex and involves solicitation of site suggestions from certain designated parties, public briefing sessions, a public comment period, and promulgation of a final list of acceptable sites. The Council then reduces this list to three candidate sites, including the developer’s preferred site, if any. *See* G.L. c. 21D, § 9; MASS. ADMIN. CODE tit. 990, § 7.00.

¹² G.L. c. 21D, § 7.

¹³ MASS. ADMIN. CODE tit. 990, §§ 4.05, 5.02. By creating a 45 day public comment period, the regulations assure that the host community will have formed its Local Assessment Committee (“LAC”) and have an opportunity to comment on a project proposal before the Council renders its feasible and deserving determination. *See* G.L. c. 21D, § 5 (LAC must be established within 30 days of receipt of Notice of Intent).

the Council's initial determination, focusing on the need for the facility, the financial resources and credibility of the developer, and significantly, certain site specific criteria which prohibit site development in environmentally sensitive or protected natural resource areas.¹⁴ If the developer has not named specific sites in its Notice of Intent, the Council may still issue a feasible and deserving determination on the non-site aspects of the Notice.¹⁵ If the developer utilizes the site selection process, the Council must defer its determination on the acceptability of specific sites until the conclusion of that review process.¹⁶

A favorable feasible and deserving determination by the Council triggers the more formal impact review process and negotiations between the developer and host and abutting communities. The host community's participation and representation in this process must be exclusively through its Local Assessment Committee ("LAC") which must be formed within thirty days from receipt of a Notice of Intent to build a

¹⁴ Compare G.L. c. 21D, § 7 with MASS. ADMIN. CODE tit 990, § 5.00. The regulations exclude from site development, *inter alia*, any area protected by the Wetlands Protection Act, G.L. c. 131, § 40 and the regulations promulgated thereunder, MASS. ADMIN. CODE tit. 310, §§ 9.00-10.00; scenic rivers; Areas of Critical Environmental Concern; national and state parks; watersheds of Class A surface waters; and drinking water supplies or aquifers. MASS. ADMIN. CODE tit. 990, § 5.04(1)-(9). There is some question whether the Council has the statutory authority to impose such substantive criteria on site selection, a function which appears is otherwise delegated to DEQE under G.L. c. 21C, § 7. The Siting Act, however, does authorize the Council to reject proposals which it finds to be unacceptable for the siting process "after appropriate consultation with [DEQE]." G.L. c. 21D, § 4(8). It would therefore appear that the Council's threshold siting criteria would be valid, at least to the extent said criteria are not inconsistent with DEQE's substantive siting criteria.

¹⁵ MASS. ADMIN. CODE tit. 990, § 5.03.

¹⁶ *Id.* at § 5.04. A developer may move for reconsideration of a negative feasible and deserving determination at any time. *Id.* at § 5.06(1). Alternatively, a developer may seek judicial review of such determination pursuant to G.L. c. 30A, § 14 as the Council's determination is a final agency decision and Chapter 21D does not expressly preclude such review. See G.L. c. 30A, § 7. In contrast, other interested persons may seek reconsideration of a favorable feasible and deserving determination only where the developer has utilized the site selection process. MASS. ADMIN. CODE tit. 990, § 5.06(2). Such persons, however, may not seek immediate judicial review of a favorable determination, since such a decision is just the first in a number of administrative steps before a final decision on a site location will be made under chapter 21D. See *Boston Edison v. Brookline Realty & Investment Corp.*, 10 Mass. App. Ct. 63, 405 N.E.2d 995 (1980); *East Chop Tennis Club v. Mass. Comm'r Against Discrimination*, 364 Mass. 444, 305 N.E.2d 507 (1973). Early judicial review of a feasible and deserving determination is one of the key issues to be decided by the Supreme Judicial Court in the pending matter of *Warren v. Hazardous Waste Facility Site Safety Council, et al.*, No. 3221 (S.J.C.). In *Warren*, the superior court found that it lacked jurisdiction over the town's appeal of the Council's favorable initial determination because the town "failed to exhaust its administrative remedies as it [had] only proceeded through the initial stage of the site proposal process required by G.L. c. 21D." *Warren v. Hazardous Waste Facility Site Safety Council*, No. 82-21740, slip op. at 5 (Worcester Sup. Ct., January 11, 1983).

facility in a named city or town, or from notification by DEM that the city or town is a host community of a site appearing on the final list of suggested sites.¹⁷ The LAC is responsible under the statute for representing the host community in all negotiations with the developer regarding the terms and conditions of the Siting Agreement and for appointing two local residents to participate as voting members of the Council with respect to the facility proposal.¹⁸ Once formed, the LAC is eligible to receive technical assistance grants from the Council¹⁹ including the costs of staff, consultants, engineers, lawyers and other expenses.²⁰

Full public disclosure about the details of a facility proposal is mandated by the Siting Act. Within thirty days of the Council's determination that a proposal is feasible and deserving, or the publication of a final suggested site list, DEM must conduct at least one briefing session in the host community or in each host community on the final list.²¹ All decisions of the Council and filings by the developer must be published in the *Environmental Monitor* or by other appropriate means.²²

Upon selection of one or more sites by the developer or the Council through the site selection process, the developer must prepare a preliminary and final impact report for each site under consideration.²³ The impact review process under the Siting Act tracks almost identically the review procedures under the Massachusetts Environmental Policy Act

¹⁷ G.L. c. 21D, § 5; MASS. ADMIN. CODE tit. 990, § 8.01. The chief executive officer of a community must appoint the members of the LAC, which by statute must include the chief executive officer who serves as chairman, the chairman of the board of health, the chairman of the planning board, the chairman of the conservation commission, the fire chief, and four local residents nominated by the chief executive officer and approved by the local governing body. MASS. ADMIN. CODE tit. 990, § 8.02. In the event that the chief executive officer fails to form a LAC, the Council must appoint the members of the committee itself. G.L. c. 21C, § 5; MASS. ADMIN. CODE tit. 990, § 8.03.

¹⁸ G.L. c. 21D, §§ 4, 5(2); MASS. ADMIN. CODE tit. 990, § 8.06. The LAC is also subject to the requirements of the Open Meeting Law, G.L. c. 39, §§ 23A-23D, although the purposes for which the LAC may hold executive sessions are expanded to include strategy discussions and negotiations with respect to the Siting Agreement.

¹⁹ G.L. c. 21D, § 11; MASS. ADMIN. CODE tit. 990, § 9.00. Abutting communities as well as the LAC are eligible for grant assistance. While the statute appears to condition the award of such grants upon the scoping of the environmental impact part of the preliminary project impact report, the regulations make it clear that advance funding of up to \$5,000 may be awarded to eligible communities before that time. Compare G.L. c. 21D, § 11 with MASS. ADMIN. CODE tit. 990, §§ 9.01, 9.04(2).

²⁰ MASS. ADMIN. CODE tit. 990, § 9.04. The Council may grant up to a maximum of \$15,000 per grant, although recipient communities may request additional grants. *Id.* at 9.06.

²¹ G.L. c. 21D, § 8; MASS. ADMIN. CODE tit. 990, § 6.03.

²² MASS. ADMIN. CODE tit. 990, §§ 4.05, 5.05, 6.03, 7.04, 7.05, 10.01(3), 10.02(4), 10.03(3), and 15.02.

²³ G.L. c. 21D, § 10; MASS. ADMIN. CODE tit. 990, § 10.00.

("MEPA") and the MEPA regulations.²⁴ The one significant addition under chapter 21D is that the developer must prepare a detailed socio-economic analysis, called the Socio-Economic Appendix ("SEA"), addressing the positive and negative impacts of the proposed project and feasible measures to minimize any adverse socio-economic impacts.²⁵ The developer must also prepare the traditional environmental impact report which continues to be reviewed by the Secretary of Environmental Affairs, in tandem with the Council's review of the SEA.²⁶ The Final Project Impact Report is prepared only after execution of the Siting Agreement, and must include information, comments and facility redesign data resulting from negotiation of the agreement.²⁷ The Council and the Secretary then determine the adequacy of the Final Project Impact Report.²⁸

The Siting Agreement, of course, is the culminating feature of the entire siting process. No facility may be constructed without a Siting Agreement established between the developer and the LAC, and until the agreement has been declared by the Council to be operative and in full force and effect.²⁹ Upon such Council approval, the Siting Agreement becomes a nonassignable contract binding the developer and the host community, and is enforceable against either party in court.³⁰ The elements of a Siting Agreement, as specified in the Siting Act and repeated in the new regulations, include, *inter alia*, procedures for facility construction, operation and maintenance; monitoring practices; compensation; services and special benefits to the host community; services and benefits to be provided by the Commonwealth; tax provisions, including prepayments or payments in lieu of taxes; renegotiation provisions; and compensation for abutting communities.³¹ The statute also provides for certain optional

²⁴ G.L. c. 30, §§ 62-62H; MASS. ADMIN. CODE tit. 301, § 10.00. The Council's regulations, like the MEPA regulations, require the developer to first file a Project Notification Form ("PNF"), which is then "scoped" and the contents of the impact report determined, followed by preparation and review of preliminary and final Project Impact Reports. MASS. ADMIN. CODE tit. 990, §§ 10.01-10.03. Public comment periods are provided at each review stage of the report. *Id.*

²⁵ G.L. c. 21D, § 10; MASS. ADMIN. CODE tit. 990, § 10.01(5). The SEA serves as a key document in the negotiation of a Siting Agreement by the developer and host community.

²⁶ MASS. ADMIN. CODE tit. 990, §§ 10.01-10.03.

²⁷ *Id.* at § 10.03(2).

²⁸ *Id.* at § 10.03; MASS. ADMIN. CODE tit. 301, § 10.07(4). This determination is a precondition of the Council's final declaration that the siting agreement is operative and to be given full force and effect. G.L. c. 21D, § 12; MASS. ADMIN. CODE tit. 990, § 14.03.

²⁹ G.L. c. 21D, § 12; MASS. ADMIN. CODE tit. 990, §§ 14.02, 14.03.

³⁰ See *supra* note 29.

³¹ G.L. c. 21D, § 12, cl. 2(1)-(10); MASS. ADMIN. CODE tit. 990, § 14.01(1). The level of compensation to be provided by the developer to abutting communities must be established by the Council. G.L. c. 21D, § 14. Abutting communities, unlike the host community, are entitled

elements of an agreement, including direct monetary payments for “demonstrable adverse impacts.”³²

Negotiations of the Siting Agreement can commence at any time after the Council determines a project is feasible and deserving of state assistance, or after a site is identified through the site selection process.³³ The parties may voluntarily accept the services of a mediator, or the Council in its discretion may require the parties to utilize a mediator if there is not sufficient progress in the negotiations.³⁴ If no agreement is reached after the Council’s approval of the draft SEA, the Council may declare an impasse and require the parties to submit to final and binding arbitration.³⁵ Once appointed, the arbitrator, or arbitration panel as the case may be, must determine, after a hearing, the terms and conditions of the Siting Agreement within forty-five days.³⁶ The Siting Act and, in turn, the new regulations, provide that the arbitration proceedings are governed by the procedures and standards for judicial review established by the Uniform Arbitration Act for Commercial Disputes.³⁷ While the Siting Act provides that the arbitration will be final and binding, the regulations provide that the arbitrator may only submit a final draft agreement to the Council, leaving it to the Council to determine whether the agreement complies with the procedural and substantive requirements of chapter 21D.³⁸

to compensation only for “demonstrably adverse impacts.” *Id.* The procedures for establishing such compensations are set forth in the regulations at section 12.00. The Council’s determination is final unless the developer or abutting community files a request for arbitration. MASS. ADMIN. CODE tit. 990, § 12.06.

³² G.L. c. 21D, § 14, cl. 3(1); MASS. ADMIN. CODE tit. 990, § 14.01(2).

³³ MASS. ADMIN. CODE tit. 990, § 11.01. Formal negotiations must begin at least upon the Council’s determination that the draft SEA is adequate. *Id.* at 11.01(2).

³⁴ *Id.* at 11.02. If there is little progress in negotiations 45 days after Council approval of the draft SEA, it may require the parties to utilize a mediator selected by the Council. *Id.* at 11.02(2).

³⁵ G.L. c. 21D, § 15, cl. 1. If the parties fail to execute an agreement within 60 days after Council approval of the draft SEA, they must submit a Negotiation Status Report identifying the unresolved issues and indicating whether an impasse has been reached. MASS. ADMIN. CODE tit. 990, § 11.03. The Council may then declare an impasse or extend the period of negotiations another 30 days. *Id.* at 11.04(2).

³⁶ G.L. c. 21D, § 15, cl. 4; MASS. ADMIN. CODE tit. 990, § 13.01(2). The 45 day time limitation for arbitration may be extended by the Council at the request of the arbitrator. In addition, the parties may agree upon a Siting Agreement at any time during the arbitration proceedings. MASS. ADMIN. CODE tit. 990, § 13.01(3).

³⁷ G.L. c. 21D, § 15, cl. 6, incorporating by reference G.L. c. 251; MASS. ADMIN. CODE tit. 990, §§ 13.04-13.05.

³⁸ Compare G.L. c. 21D, § 15, cl. 5 with MASS. ADMIN. CODE tit. 990, § 14.02. The Siting Act does not expressly authorize the Council to pass on the sufficiency of a Siting Agreement, but rather empowers it only to declare the agreement to be operative. G.L. c. 21D, § 12, cl. 1; see also G.L. c. 21D, § 4. The regulations, however, presume that the Council has the power not only to approve but also to reject an agreement, authorizing it to return an agreement, with a statement of reasons, to the arbitrator or to the parties for further negotiations. MASS. ADMIN. CODE tit. 990, § 14.02(3).

Although the siting process under chapter 21D is essentially completed upon the Council's declaration of an operative Siting Agreement, the developer has at least two more siting hurdles to overcome before commencing construction of its facility. First, the developer must obtain a site assignment from the local board of health of the host community.³⁹ The ability of a community to abuse this permitting authority is severely limited by the statutory standard governing site assignments. A site assignment must be granted, after public hearing, if the "proposed facility imposes no significantly greater danger . . . than dangers that currently exist in the conduct and operations of other industrial and commercial enterprises in the Commonwealth not engaged in the treatment, processing or disposal of hazardous waste, but using processes that are comparable."⁴⁰ The host community is further prohibited under the Siting Act from imposing any new license or permit requirements after the effective date of the statute, and any validly required license or permits must be granted within sixty days after application by the developer, or twenty-one days after a Siting Agreement is established, whichever is later.⁴¹ Second, the developer must obtain from DEQE a license to construct, operate, and maintain a hazardous waste facility pursuant to chapter 21C of the General Laws.⁴² Unlike the standard for issuance of a local site assignment, DEQE's discretion to grant or deny a chapter 21C license is much broader.⁴³ Regulations governing license requirements and procedures under chapter 21C were adopted during the *Survey* year, and provide for both informal and, under certain circumstances, formal adjudicatory hearings on facility license applications.⁴⁴

³⁹ G.L. c. 111, § 150B, as amended by Acts of 1980, c. 508, § 4.

⁴⁰ *Id.* A negative determination by the Board of Health is immediately appealable to the superior court. A decision granting a site assignment may be appealed by any aggrieved persons to DEQE. *Id.*

⁴¹ G.L. c. 21D, § 16 (effective July 15, 1980); *see supra* note 7 regarding the prohibition against exclusionary zoning under G.L. c. 40A, § 9, as amended by Acts of 1980, c. 508, § 5. While curtailing local veto power, the Siting Act falls short of granting the Commonwealth unlimited authority to designate new sites for development. A developer who has successfully completed the siting process, has a Siting Agreement and all necessary licenses and permits, but who cannot in good faith acquire the site, may petition DEM to take the selected site by eminent domain. G.L. c. 21D, § 17; MASS. ADMIN. CODE tit. 990, § 15.00. DEM's authority to exercise this power, however, is subject to approval by a majority of the governing body of the host community.

⁴² *See supra* note 6.

⁴³ DEQE must issue a license if it determines that construction, maintenance and operation of a facility on a particular site "does not constitute a significant danger to public health, public safety, or the environment, does not seriously threaten injury to the inhabitants of the area or damage to their property, and does not result in the creation of noisome or unwholesome odors." G.L. c. 21C, § 7.

⁴⁴ MASS. ADMIN. CODE tit. 310, § 30.800 (effective July 1, 1982). An informal public hearing must be conducted on all facility license applications. An aggrieved person may

The new Siting Act makes a laudable attempt to promote the development of needed hazardous waste facilities in the Commonwealth while compensating host communities which must live with the impacts of such facilities within their borders. The siting process encourages informed public participation, not through adversary adjudicatory hearings, but through negotiations and public comment. It remains to be seen whether this incentive approach to siting will be successful. To date, only two proposals have progressed beyond the Council's feasible and deserving determination.⁴⁵

The promise of compensation may well reduce local opposition to new facility development, but is unlikely to eliminate it, particularly in view of historical tensions in Massachusetts between state intervention and home rule authority. Opponents who cannot stop a project through the siting process can resort to other tactics to delay issuance of the site assignment permit or the DEQE operating license. The siting process itself, while fair, is complex, time-consuming and extremely expensive for the developer. Part of the problem is that there are presently no new major facilities in any Massachusetts cities or towns to which new host communities can look for guidance and experience. The experience of most communities which host existing and often poorly managed facilities has been largely negative.⁴⁶ Until more positive experience is gained by communities

request an adjudicatory hearing within 21 days after DEQE's final license decision. *Id.* at 30.837-30.838; *see also* MASS. ADMIN. CODE tit. 301, § 1.00. The Phase II regulations for the chapter 21C program, including technical performance and location standards for all types of hazardous waste facilities, were not promulgated until October 15, 1983. MASS. ADMIN. CODE tit. 310, §§ 30.600, 30.700.

⁴⁵ In May 1981, Solv, Inc. submitted a Notice of Intent to construct a hazardous waste facility in City of Haverhill. On June 11, 1981, the Council issued a favorable feasible and deserving determination for the project. The LAC was then formed and moved to revoke the Council's determination based on new information regarding the proximity of the named site to an aquifer system and the financial ability of the developer. The Council voted not to reconsider its initial decision and on February 8, 1982, the city and several citizens filed suit against the Council. *City of Haverhill v. Hazardous Waste Facility Site Safety Council, et al.*, No. 82-683 (Middlesex Sup. Ct.). The superior court dismissed the case without opinion on June 7, 1982, and a subsequent appeal by the city was dismissed as moot by the parties when the developer agreed to temporarily suspend its proposal for further consideration.

The second project, proposed by IT Corporation for a facility in the Town of Warren, received a favorable initial determination from the Council on December 10, 1982. The town sought to overturn the Council's decision and challenged the constitutionality of chapter 21D in the superior court, which affirmed the Council's actions and the statute in every respect. *See supra* note 16. The case is now pending before the Supreme Judicial Court. On September 15, 1983, the developer filed a Project Notification Form thus triggering the impact review process. *See* MASS. ADMIN. CODE tit. 990, § 10.00.

⁴⁶ In 1982, Massachusetts added eight sites to the national "Superfund" priority list of hazardous waste sites which have been determined to present a risk or danger to health and the environment due to the release or threatened release of hazardous materials. *See* 42 U.S.C. § 9605(8)(A). At the end of the *Survey* year, Massachusetts had a total of 12 sites on the priority list, which are eligible for federal cleanup funds.

within the Commonwealth and the nation with more modern, safely operated facilities, local resistance to siting new hazardous waste facilities unfortunately can be expected to remain high.

§ 10.2. Section 404 of the Clean Water Act — Permits for Placement of Solid Fill — Judicial Review. During the *Survey* year in *Hough v. Marsh*¹ the United States District Court for the District of Massachusetts reviewed and set aside a decision of the U.S. Army Corps of Engineers (the "Corps") to issue a permit for the placement of fill in navigable waters subject to the regulatory jurisdiction of the Corps.² The permit, which had been issued under section 404 of the Federal Water Pollution Control Act,³ authorized the placement of 6,500 cubic yards of landfill on an approximately one-quarter acre tract of coastal wetlands abutting Edgartown Harbor on Martha's Vineyard.⁴ Following the completion of five years of local, state and federal permit proceedings, the permit was challenged in 1981 in the district court by ten residents of Edgartown.⁵ The district court's decision contains a useful summary of the important, but generally little-understood, administrative process and criteria under which the Corps reviews applications to place dredged or fill materials into "navigable waters" of the United States.⁶ In addition, this decision clearly explains what significant protections are afforded to wetlands subject to the jurisdiction of the Corps under section 404.

In February of 1980, private developers representing Harborview Hotel, Inc. submitted an application to the Corps for a so-called "404 permit" for the placement of fill on a tract in Edgartown.⁷ Previous to this application the Corps had issued a cease and desist order to these same developers because they had commenced filling operations in December of 1979 without a Corps permit.⁸ After receipt of the application, the Corps issued a

§ 10.2. ¹ 557 F. Supp. 74 (D. Mass. 1982).

² *Id.* at 88.

³ 33 U.S.C. § 1344. This legislation is commonly called the Clean Water Act.

⁴ 557 F. Supp. at 76. The permit was issued on June 4, 1981, by the Division Engineer, New England Division, Army Corps of Engineers, under authority delegated by the Secretary of the Army and the Chief of Engineering by 33 C.F.R. § 325-8. The applicant, Harborview Hotel Co., Inc., requested the permit for construction of two homes and a tennis court.

⁵ 557 F. Supp. at 76. Prior to applying for the Corps 404 permit, applications for local building permits had been filed with the Edgartown Board of Selectmen; subdivision plan approval had been requested from the Edgartown Planning Board, pursuant to G.L. c. 41, § 81U; and approval of the project had been sought from the Edgartown Conservation Commission, under the Wetlands Protection Act, G.L. c. 131, § 40. 557 F. Supp. at 76-77.

⁶ Navigable waters are defined in § 502(7) of the Clean Water Act, 33 U.S.C. § 1362 (7), to be "the waters of the United States, including the territorial seas." By regulation the Corps has defined "waters of the United States" to include five specific classes of waters, one of which includes coastal waters and their adjacent wetlands. 33 C.F.R. § 323.2(a).

⁷ 557 F. Supp. at 77.

⁸ *Id.*

public notice inviting public comment on the permit application.⁹ The opportunity for public comment allowed the community to assist in an evaluation of the proposal, "including whether the unauthorized work should be allowed to remain."¹⁰ In response to the public notice, 259 written objections to the project and one letter of support were received by the Corps.¹¹ In addition, the Corps received comments from the three federal agencies responsible for commenting on 404 permit applications.¹² The Corps then decided it was not necessary for it to hold a public hearing, on the grounds that "it would not contribute anything of substance to the decision making process."¹³ Thereafter, upon consideration of the public and agency comments, a review of the Corps field reports, and a review of the transcript of the adjudicatory hearing before the Massachusetts Department of Environmental Quality Engineering ("DEQE"),¹⁴ the Corps decided to issue the permit, concluding that it was in the public interest to issue the permit and that the project's unfavorable impacts were insignificant.¹⁵

Plaintiffs then filed a complaint in federal district court¹⁶ against the Secretary of the Army, the Division Engineer of the Corps who issued the permit, the Building Inspector of the Town of Edgartown, and the two private developers and their corporate entity, Harborview Hotel, Inc.¹⁷ In this complaint, plaintiffs sought judicial review of the Corps' decision under the Administrative Procedure Act ("APA"),¹⁸ contending that the permit was issued in violation of the Clean Water Act,¹⁹ the National Environmen-

⁹ Public Notice dated April 10, 1980, No. NEDOD-R-25-80-045-C. This public notice was issued pursuant to 33 C.F.R. § 325.3.

¹⁰ 557 F. Supp. at 77.

¹¹ *Id.*

¹² *Id.* The Environmental Protection Agency is given general supervision over issuance of all 404 permits by section 404 of the Clean Water Act, 33 U.S.C. § 1344. Permits issued under section 404 are also subject to the requirements of the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c). Accordingly, the Corps must consult with the Fish and Wildlife Service prior to issuance of 404 permits. This same act requires that the Corps also consult with the National Marine Fisheries Service as to water resource development projects affecting migratory fish species. See Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (1970).

¹³ 557 F. Supp. at 77. Reference may be made to the Corps' "Determination of the Need for a Public Hearing," dated October 27, 1980, at p. 2.

¹⁴ This hearing was held by DEQE under the Wetlands Protection Act, G.L. c. 131, § 40, on an appeal from the decision of the Edgartown Conservation Commission.

¹⁵ 557 F. Supp. at 77. Reference may be made to the Corps' "Findings of Fact," dated May 6, 1981.

¹⁶ Civil Action No. 81-1822-N (July 20, 1981).

¹⁷ 557 F. Supp. at 77.

¹⁸ 5 U.S.C. §§ 701-706.

¹⁹ 33 U.S.C. § 1344.

tal Policy Act of 1969,²⁰ and the National Historic Preservation Act of 1966.²¹ In addition plaintiffs challenged the decision of the local building inspector to issue the necessary building permits.²² After plaintiffs moved unsuccessfully for a preliminary injunction to enjoin the private developers from taking any further action pursuant to the 404 permit or the building permit and to require them to remove all material previously discharged on the project site,²³ the parties filed cross-motions for summary judgment. On November 19, 1982, the district court issued its Memorandum and Order allowing plaintiffs' motion for summary judgment, denying defendants' motion, and remanding the case to the Corps for further hearings.²⁴

In its decision to set aside the 404 permit, the district court took the unusual step of reversing its own earlier preliminary review of the merits. When the court denied the plaintiffs' motion for preliminary injunction, it concluded that the plaintiffs were not likely to succeed on the merits.²⁵ Upon reexamination, however, the court determined that the Corps had totally misapplied a number of its own as well as relevant Environmental Protection Agency ("EPA") criteria for the issuance of 404 permits involving placement of fill in wetlands.²⁶ The case was remanded back to the Corps to consider five specific issues.²⁷

Before discussing the substantive law, the district court disposed of a preliminary issue concerning the jurisdiction of the court to review the Corps decision.²⁸ The court rejected the defendants' contention that review of the Corps decision under the APA was unavailable, and that review should be limited to the citizen-suit provision of section 505 of the Clean Water Act.²⁹ Relying principally upon the saving clause in section 505

²⁰ 42 U.S.C. § 4321 *et seq.*

²¹ 15 U.S.C. § 470 *et seq.*

²² 557 F. Supp. at 77.

²³ In considering the motion for a preliminary injunction the district court in essence found that the proposed filling would not cause irreparable harm to the local ecosystem and that plaintiffs' contentions as to violations of various laws were not meritorious. (Memorandum and Order, January 23, 1982). An appeal of this decision was dismissed after the issues were briefed, but prior to oral argument, in November 1982 after the district court's decision in favor of the plaintiffs on summary judgment.

²⁴ 557 F. Supp. at 88. An appeal of this order was taken by the private defendants, but not the Corps, on January 17, 1983.

²⁵ See *supra* note 23.

²⁶ See *infra* notes 40-57 and accompanying text.

²⁷ 557 F. Supp. at 88. The Court found it unnecessary to make an independent examination of the claim that the federal defendants had failed, as required by § 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(E), to consider alternative courses of action from the action proposed by the agency, concluding that the requirement in the agency regulation is at least or more demanding than the NEPA requirement. 557 F. Supp. at 84 n.3.

²⁸ 557 F. Supp. at 77-79.

²⁹ 33 U.S.C. § 1365. Plaintiffs had failed to provide the necessary 60 days notice of intent to sue. See 557 F. Supp. at 78.

itself³⁰ as well as the grant of federal-question jurisdiction,³¹ the court concluded that review of the Corps decision was proper under the familiar APA standard of either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."³²

Next the district court reviewed the plaintiffs' contention that the failure of the Corps to conduct a public hearing was itself an abuse of discretion.³³ The court identified several factors which indicated the desirability of a public hearing.³⁴ The court found: it was arguable that one citizen had met the threshold burden under a Corps regulation³⁵ by asserting a specific factual issue requiring a hearing; the project was controversial as evidenced by "considerable public opposition" and negative recommendations of two federal agencies; the prior DEQE adjudicatory hearing was of limited applicability;³⁶ and the legislative history indicated a strong Congressional desire for public participation.³⁷ The court nevertheless concluded that the agency had considerable discretion in this area.³⁸ Accordingly, without deciding whether the failure to conduct a public hearing standing alone would be cause for reversal, the court suggested that the Corps hold a public hearing upon remand to it of the other matters requiring further proceedings.³⁹

The heart of the court's decision is its analysis of the Corps' compliance with the relevant 404 permit criteria. The Clean Water Act itself does not set forth any substantive criteria which must be met for the issuance of 404 permits. Instead, the 404 permit process is governed simultaneously by permit criteria contained in various regulations of the

³⁰ 33 U.S.C. § 1365(e).

³¹ 28 U.S.C. § 1331(a).

³² 557 F. Supp. at 78-79. *See* 5 U.S.C. § 706(2)(A), (D); *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

³³ 557 F. Supp. at 79-80.

³⁴ *Id.*

³⁵ 33 C.F.R. § 327.4. The Clean Water Act at 33 U.S.C. § 1344(a) contains the more general standard that the Corps must provide "notice and opportunity for public hearings" prior to issuance of a 404 permit.

³⁶ *See supra* note 14 and accompanying text. The court referred to the fact that the scope of the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, is less expansive than the protection offered by section 404 of the Clean Water Act. 557 F. Supp. at 80.

³⁷ The district court quoted from *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 215 (1980), and the *Sea Coast Anti-Pollution League v. Costle*, 572 F.2d 872, 879 (1st Cir.), *cert. denied*, 439 U.S. 824 (1978). 557 F. Supp. at 80.

³⁸ 557 F. Supp. at 80.

³⁹ *Id.*

Corps⁴⁰ and in guidelines of the EPA.⁴¹ Part 320 of the Corps regulations sets forth the general regulatory policies for evaluating all Department of the Army permits. These regulations state twelve "general policies for evaluating permit applications," which include: a "public interest review" requiring balancing of the relevant public interest benefits against reasonably foreseeable detriments;⁴² the consideration of the effects of the project on wetlands;⁴³ the evaluation of the impacts on fish and wildlife,⁴⁴ water quality standards,⁴⁵ and historic, scenic, and recreational values;⁴⁶ and consideration of other federal, state, and local requirements.⁴⁷ The EPA guidelines for evaluation of 404 permit applications state a general presumption against discharge of dredged or fill material into the aquatic ecosystem.⁴⁸ The guidelines further provide that wetlands merit special protection⁴⁹ and that wetlands, along with other "special sites," generally cannot be used for the discharge of fill material where the activity proposed does not require proximity to the aquatic site, absent a demonstration that practicable alternatives do not exist.⁵⁰

Upon a careful scrutiny of the Corps administrative record to determine

⁴⁰ In 1977 the Corps adopted a series of regulations, 33 C.F.R. pts. 320-29, which govern all of its permit programs. In addition to 404 permits, the Corps issues permits for dams and dikes in navigable waters of the United States, for structures or work in or affecting navigable waters of the United States, and for ocean dumping of dredged material. Permits under section 404 are subject to the general regulatory policies of Part 320; the particular provisions of Part 323; the administrative, enforcement, and public hearing provisions of Parts 325-27; and the navigable waters definition of Part 329. For some 1982 revisions of the Corps' permit regulations which are not discussed herein, see 47 Fed. Reg. 31,794 (July 22, 1982).

⁴¹ 40 C.F.R. pt. 230. The term "guidelines" is a misnomer, since observance of the EPA criteria for issuance of permits is required by section 404(b) of the Clean Water Act. See also the Corps' own regulations, 33 C.F.R. § 320.2(a). Where the EPA guidelines alone would prohibit issuance of a 404 permit, the Corps can only override these guidelines on the basis of the economic impact that permit denial would have on navigation and anchorage. 33 U.S.C. § 1344(b)(2).

⁴² 33 C.F.R. § 320.4(a). This regulation requires consideration of all relevant factors that may affect the public interest and provides that "no permit will be granted unless its issuance is found to be in the public interest."

⁴³ *Id.* at § 320.4(b). This regulation spells out in some detail the reasons why wetlands are important to the public interest and why unnecessary alteration or destruction of wetlands should be discouraged. This regulation does not, however, preclude issuance of permits requiring alteration or destruction of wetlands.

⁴⁴ *Id.* at § 320.4(c).

⁴⁵ *Id.* at § 320.4(d).

⁴⁶ *Id.* at § 320.4(e).

⁴⁷ *Id.* at § 320.4(j).

⁴⁸ 40 C.F.R. §§ 230.1(c), (d).

⁴⁹ *Id.* at §§ 230.1(d), 230.3(q-l), 230.41.

⁵⁰ *Id.* at § 320.10(a). This regulation presumes that practicable alternatives do exist which do not require placement of fill in wetlands for activities which are not water dependent. *Id.* at § 230.10(a)(3). The regulation places the burden on the applicant to demonstrate the absence of a practicable alternative. *Id.*

whether the Corps had considered the relevant factors,⁵¹ the district court concluded that the applicant had not carried its burden of clearly demonstrating the absence of any practicable alternatives to the use of wetlands for the construction of two private dwellings, a non-water-dependent project requiring “a more persuasive showing than otherwise concerning the lack of alternatives.”⁵² What the record showed in this regard, the court observed, was that the applicant’s entire efforts to demonstrate lack of practicable alternatives consisted of one letter from a local realtor, written more than fourteen months prior to the Corps decision, stating that there was only one alternative parcel “in the prime residential and central area of Edgartown.”⁵³ The court found that nothing in the record showed this letter remained an accurate depiction of the real estate market up until the time of the Corps decision, that no inquiry had been made outside of the “prime residential area,” that there was no showing why the dwellings had to be constructed adjacent to each other, and that the Corps determination that the one alternative parcel’s cost was too expensive misconstrued the definition of “practicable” in the EPA guidelines.⁵⁴

The district court also found it necessary to remand several other issues to the Corps for a further consideration under the Clean Water Act criteria, namely: the necessity for the developers to resubmit their application for subdivision approval to the local planning board, based upon Edgartown’s withdrawal from the Martha’s Vineyard Commission; compliance with Edgartown’s zoning by-laws and a land use regulation of the Commission; consideration of the project’s adverse economic effects, particularly in regard to elimination of the Edgartown lighthouse as a tourist attraction; and consideration of the cumulative effects of this project and other existing and anticipated projects.⁵⁵ In addition, the court found that the Corps had not satisfied its affirmative obligation to determine if grant of the permit would have an adverse effect upon the eligibility of the Edgartown lighthouse for inclusion in the National Register of Historic Places.⁵⁶ Finally, the court stated that the Corps should not have passively relied upon the absence of an official determination from the relevant federal and state agencies.⁵⁷

⁵¹ The Court recognized, however, that its function was not to substitute its judgment for that of the Corps. 557 F. Supp. at 83 (citing *Overton Park Inc. v. Volpe*, 401 U.S. 402 (1971); *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Roosevelt Campobello Int’l Park Comm’n v. EPA*, 684 F.2d 1041, 1045 (1st Cir. 1982); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1071-72 (1st Cir. 1980)).

⁵² *Id.* at 83-84. See especially the EPA guidelines at 40 C.F.R. § 230.10(a)(3).

⁵³ 557 F. Supp. at 83-84.

⁵⁴ *Id.*

⁵⁵ *Id.* at 84-86.

⁵⁶ *Id.*

⁵⁷ *Id.*

This decision clearly shows that courts are willing to step in and make a careful examination of the details of how the Corps has applied the relevant 404 permit criteria, especially where adequate facts are presented to suggest that the Corps has failed to follow the requirements of its own regulations. The decision also suggests that once the criteria have been correctly applied, the courts will be unwilling, absent extraordinary circumstances, to substitute their judgment for that of the responsible agencies.

§ 10.3. Wetlands Regulation. The *Survey* year included a major change in the state wetlands protection program. On November 9, 1982, the Department of Environmental Quality Engineering ("DEQE") promulgated a new set of regulations¹ for administering the Massachusetts Wetlands Protection Act.² The new regulations clarify the program's jurisdiction and procedures of the program and set forth new substantive standards for projects in inland wetlands. The effective date of the new regulations was delayed until April 1, 1983, presumably to give the public and the local conservation commissions, which administer the program, adequate time to familiarize themselves with the new requirements. Accordingly, any application, referred to as a Notice of Intent, filed before

§ 10.3. ¹ The new regulations are entitled "Revisions to the Existing Wetlands Protection Act Regulations." MASS. ADMIN. CODE tit. 310, § 10.00.

² G.L. c. 131, § 40. Massachusetts has a long history of strict wetlands protection commencing in 1963 with the Jones Act (chapter 426 of the Acts of 1963), which regulated development of coastal wetlands, and in 1965 with the Hatch Act (chapter 220 of the Acts of 1965), which regulated inland wetlands. The wetlands protection program requires the filing of a Notice of Intent before any removal, filling, dredging or altering of wetland areas. The Notice is filed with the local conservation commission which then must hold a public hearing within 21 days of filing of the Notice and issue an Order of Conditions within 21 days of holding the hearing. The Order of Conditions sets forth the performance standards for the project. The Order can be a flat denial of the project. Although the Supreme Judicial Court has not directly reviewed this issue, authority for the power to deny any filing can be found in *Commissioner of Natural Resources v. S. Volpe and Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965); *John Donnelly and Sons, Inc. v. Outdoor Advertising Board*, 369 Mass. 206, 339 N.E.2d 709 (1975); *Lovequist v. Conservation Commission of the Town of Dennis*, 379 Mass. 7, 393 N.E.2d 858 (1979). Appeals of local decisions are permitted to DEQE.

The above described program under the Wetlands Protection Act should not be confused with another statewide program of wetland regulation known as the Wetland Restriction Program, under the coastal and inland wetland restriction acts, G.L. c. 130, § 105 (coastal) and G.L. c. 131, § 40A (inland). In 1983, the restriction program was moved from the Department of Environmental Management to DEQE. The state is authorized to adopt restriction orders on a town-by-town basis, prohibiting any dredging, filling or altering of a wetland, with certain exceptions for construction of utilities, roadways, beaches, foot-bridges, agricultural improvements and drainage ditches. *See* MASS. ADMIN. CODE tit. 302, §§ 4.00 (coastal program), 6.00 (inland program). In the case of *Moskow v. Commissioner of the Department of Environmental Management*, 1981 Mass. Adv. Sh. 2134, 427 N.E.2d 750, the Supreme Judicial Court upheld an inland wetland restriction order in the City of Newton, finding that the order did not constitute a taking.

April 1, 1983 is governed by the old regulations. In addition, any Extension of an Order of Conditions for which the Notice of Intent was filed before April 1 likewise is governed by the old regulations.

The new regulations are divided into three parts. Part I, "Regulations for All Wetlands," sets forth the jurisdiction of the program, the definitions and procedures for filing applications, review thereof, and appeals. Part II, entitled "Additional Regulations for Coastal Wetlands," recodifies without change existing regulations for coastal wetlands. Part III, entitled "Additional Regulations for Inland Wetlands," sets forth new substantive performance standards for reviewing and regulating activities in inland wetlands. Part III is patterned after Part II, the coastal regulations.

The new regulations clarify the jurisdiction of the program. Under the old regulations, the jurisdiction included activities³ in certain statutorily enumerated resource areas, such as banks, fresh water or coastal wetlands, beaches and swamps,⁴ which bordered on certain specified water bodies, namely, estuaries, creeks, rivers, streams, ponds, lakes or the ocean. The jurisdiction of conservation commissions and DEQE also included a 100 foot buffer strip measured from the resource area, which received inconsistent interpretation and lead to confusion as to the scope of the program. The new regulations continue to include any development in a resource area which borders on an enumerated water body as well as land under any of the enumerated water bodies, and land subject to tidal action, coastal storm flowage or flooding. Such resource areas now are called Areas Subject to Protection.⁵ The location of the buffer zone is clarified by a more precise definition. The new regulations define a buffer zone of 100 feet horizontally from an Area Subject to Protection.⁶ Activities in the buffer zone, however, are not automatically included. Instead, an applicant submits a Request for Determination of Applicability.⁷ The Conservation Commission then decides whether the activity will alter an Area Subject to Protection. If the Conservation Commission makes an affirmative determination, a Notice of Intent will be required. If a Nega-

³ The following types of activities are enumerated in the statute: "remove, fill, dredge or alter." G.L. c. 131, § 40. The term "alter" is broadly defined under the new and old regulations. MASS. ADMIN. CODE tit. 310, §§ 10.04 (new regulations), 10.02(3) (old regulations).

⁴ The complete list of resource areas is stated in the Wetland Protection Act as follows: bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp. G.L. c. 131, § 40.

⁵ MASS. ADMIN. CODE tit. 310, § 10.02(1).

⁶ *Id.* at § 10.02(2)(b).

⁷ In the alternative, the applicant can choose to dispense with the jurisdictional inquiry and file a Notice of Intent immediately. The new regulations contain new forms for these filings, including an abbreviated Notice of Intent.

tive Determination is reached, no further filing or regulation of the project under the wetland program is required. Areas outside of the buffer zone are not included unless and until the activity actually alters an Area Subject to Protection.⁸

For each type of Area Subject to Protection, Part III of the new regulations sets forth presumptions of significance which guide conservation commissions and DEQE in determining how the resource area protects the interests identified in the Wetland Protection Act.⁹ The presumptions can be overcome by showing that the resource area in a particular case functions atypically. In addition, performance standards are set for activities in each type of wetland resource area. The standards are to be used by conservation commissions in drafting Orders of Conditions once the area has been determined to be significant to an interest(s) to be protected.

The new regulations single out for more strict protection wetland resource areas called bordering vegetated wetlands, which include wet meadows, marshes, swamps and bogs. The type of activities which can be performed in bordering vegetated wetlands is strictly limited. Bordering vegetative wetlands are defined as fresh-water wetlands which border on creeks, rivers, streams, ponds and lakes. The boundary line of a bordering vegetated wetland is defined by the extent of wetland plant species. If 50% or more of the vegetation community consists of these wetland plant species, then the area is included. With minor exceptions, under the strict performance standard for bordering vegetated wetlands a project cannot destroy or otherwise impair the area.¹⁰ Part III of the regulations contains a list of "limited projects" that may go forward at the discretion of the conservation commission even if they do not meet the strict performance standards. These include such projects as utility construction, new agricultural projects and roadway construction where there is no alternative means to reach otherwise developable upland areas.

An Order of Conditions is now effective for three years, and up to five years under special circumstances.¹¹ An Extension may be issued for up

⁸ MASS. ADMIN. CODE tit. 310, § 10.02(2)(c).

⁹ The interests to be protected are set forth in statute as follows: public and private water supply, ground water supply, flood control, storm damage prevention, prevention of pollution, protection of land containing shellfish, protection of fisheries. G.L. c. 131, § 40.

¹⁰ An exception is made for (1) the loss of 5,000 square feet of Bordering Vegetated Wetland when said area is replaced or (2) the loss of 500 square feet of linear "finger-like" areas. MASS. ADMIN. CODE tit. 310, § 10.94(b) and (c). In addition, if the applicant can show that the bordering vegetative wetland is not significant to protection of the interests specified to be protected under section 10.55(1) of these regulations, the work will be allowed and a Determination of Non-Significance is issued by the Conservation Commission.

¹¹ *Id.* at § 10.05(6)(d).

to three years.¹² Formerly Orders and Extensions were effective for only one year periods.

The new regulations also clarify time periods under the statute. Time periods of ten days or less are measured by business days and time periods of more than ten days are measured by calendar days.¹³ Hence, the ten-day time period allowed for appealing an Order of Conditions will be calculated using business days only. The date of mailing of an Order of Conditions, as opposed to the date of the Order, is now defined as the date of its issuance. This change is also important for determining how to count the ten days for filing an appeal.¹⁴

The underlying philosophy of the revised regulations, explained in a lengthy preamble, is to decrease regulatory control over upland areas. At the same time, the new regulations impose stronger controls on development in wetland areas. The direction of development in these upland areas will hopefully facilitate the increased protection of the important wetland resource areas so that the wetlands will remain intact in order to perform their natural functions.

§ 10.4. Department of Environmental Quality Engineering — Air Pollution — Protection of the Public Health. During the *Survey* year in *Brookline v. Commissioner of the Department of Environmental Quality Engineering*¹ the Supreme Judicial Court set forth important principles in the areas of review of agency regulations and decisions and the state's authority to protect the public health. The case arose from an appeal of the Department of Environmental Quality Engineering's ("DEQE") approval of construction of the Medical Area Total Energy Plant, Inc. ("MATEP") in the Mission Hill section of Boston, adjacent to the Town of Brookline.² Pursuant to DEQE air pollution regulations,³ MATEP submitted an application to DEQE for preconstruction approval to build a co-generation facility which would generate steam, chilled water and electricity for hospitals, educational and research institutions, and the Mission Park housing complex in Boston through power produced by six diesel engine generators.⁴ DEQE held a series of adjudicatory hearings on the application and initially issued two decisions; the first approved the steam and chilled water portion of the system while the second disap-

¹² *Id.* at § 10.05(8)(a). An Extension may be denied where no work has begun on the project except in the case of unavoidable delay. *Id.* at § 10.05(8)(b)(1).

¹³ *Id.* at § 10.05(1).

¹⁴ *Id.* at §§ 10.04, 10.05(7)(c).

§ 10.4. ¹ 387 Mass. 372, 439 N.E.2d 792 (1982).

² Petitions for judicial review were filed in superior court pursuant to G.L. c. 30A, § 14.

³ MASS. ADMIN. CODE tit. 310, § 7.02(2).

⁴ 387 Mass. at 374-75, 439 N.E.2d at 797.

proved the six diesel engine generators.⁵ Revised plans were later submitted by MATEP⁶ and, after a rehearing, DEQE approved the diesel engines subject to certain conditions to protect the public health.⁷ The Town of Brookline, a group of residents of Brookline and a resident of Mission Hill brought suit, challenging the DEQE decisions approving construction.⁸ MATEP also initiated a court action, challenging the initial denial of the diesel engines and the subsequent limitations of emissions and operating conditions of the later approval.⁹ The superior court judge consolidated the cases and reported them to the Appeals Court, and the Supreme Judicial Court granted the parties application for direct appellate review.¹⁰

The Court affirmed DEQE's decisions, deferring to the agency's expertise, but remanded the case to DEQE for a determination of the potential adverse health effects of the carcinogenic and mutagenic emissions from the facility.¹¹ The outcome of the hearing on remand should be of major significance because it will probably lead to legal precedents in the unchartered areas of the burden of proof and risk analysis in hearings concerning potential health effects.

On MATEP's challenges to the decisions, the Court found, *inter alia*, that the DEQE regulation which did not set specific quantitative levels of air pollution emissions but defined air pollution in general nuisance terminology was not unconstitutionally vague, nor did it constitute an abuse of discretion.¹² The Court left this determination to DEQE "on a case-by-case basis in light of the current scientific evidence."¹³ The Court upheld DEQE's setting a short-term standard for nitrogen dioxide in an ad-

⁵ *Id.* at 375-76, 439 N.E.2d at 797.

⁶ *Id.* at 376, 439 N.E.2d at 797.

⁷ The dates of DEQE's three decisions were November 30, 1979, May 27, 1980 and November 24, 1980 respectively.

⁸ 387 Mass. at 374-75, 439 N.E.2d at 796-97.

⁹ *Id.* at 376, 439 N.E.2d at 798.

¹⁰ *Id.* at 374, 439 N.E.2d at 796-97.

¹¹ The hearing on these remanded issues commenced on September 12, 1983.

¹² 387 Mass. at 376-79, 439 N.E.2d at 798-99. The challenged regulation states: "No person owning, leasing, or controlling the operation of any air contamination source shall willfully, negligently, or through failure to provide necessary equipment or to take necessary precautions, permit any emission from said air contamination source or sources of such quantities of air contaminants which will cause, by themselves or in conjunction with other air contaminants, a condition of air pollution." MASS. ADMIN. CODE tit. 310, § 7.01. "Air pollution" is defined in the regulations as the presence of air contaminants which would: "a. cause a nuisance; b. be injurious, or be on the basis of current information, potentially injurious to human or animal life, to vegetation, or to property; or c. unreasonably interfere with the comfortable enjoyment of life and property or the conduct of business." *Id.* at § 7.00 (Definitions).

¹³ 387 Mass. at 379, 439 N.E.2d at 799.

judicatory proceeding, as opposed to a formal rulemaking procedure.¹⁴ DEQE found that the long-term federal ambient air standard for nitrogen dioxide, which was based on an annual average, was not sufficient to protect the public health and therefore set an hourly standard for nitrogen dioxide.¹⁵ The Court also rejected MATEP's argument that chapter 111, section 142D of the General Laws does not permit the state to set more stringent ambient air standards than the analogous federal standards.¹⁶

As to the objections to DEQE's decision by the opponents of the plant, the Court affirmed DEQE except, as related above, on the issue of carcinogens.¹⁷ The DEQE hearing officer had found that the issue regarding the possibility of carcinogenic or mutagenic effects were not raised in a timely fashion.¹⁸ The Court, after reviewing the various memoranda submitted by the opponents, although "not lightly overturn[ing] an administrative agency's finding of fact," found that the question was properly before the agency, and hence remanded the case to DEQE for consideration of this issue.¹⁹ As to the other issues raised by the opponents, the Court upheld DEQE's findings as supported by substantial evidence and not arbitrary or capricious.²⁰ The Court stated that even if it disagreed with DEQE's conclusion, it would not disturb it if based on sufficient evidence and repeatedly deferred to DEQE's expertise.²¹

§ 10.5. Sewer Connection Permits. Since environmental issues last were covered in the *Survey*,¹ Massachusetts has instituted a new sewer connection permit program. Although there were no regulatory changes in the permit program during this *Survey* year, the program's general framework warrants some comment.

Under the Massachusetts Clean Water Act, the Division of Water

¹⁴ *Id.* at 379-80, 439 N.E.2d at 799-800.

¹⁵ Diesel engines such as those involved in this case emit oxides of nitrogen (NO_x), primarily including nitric oxide (NO), which rises in the atmosphere and combines with ozone to produce nitrogen dioxide (NO₂), a harmful pollutant. Although DEQE and EPA have established standards for long-term (yearly) exposure to NO₂, no standards have been set for short-term (hourly) exposures. The Clean Air Act amendments of 1977 required EPA to establish a short term NO₂ standard within one year. While several draft criteria documents were issued, EPA has not yet formally proposed such a standard.

¹⁶ 387 Mass. at 381-82, 439 N.E.2d at 800-01.

¹⁷ *Id.* at 383-84, 439 N.E.2d at 801-02. See *supra* note 11 and accompanying text.

¹⁸ *Id.* at 383, 439 N.E.2d at 801. The emissions which might be carcinogenic or mutagenic include polycyclic aromatic hydrocarbons (PAH), polynuclear organic matter (POM) and trace metals.

¹⁹ *Id.* at 383-84, 439 N.E.2d at 801-02.

²⁰ See *id.* at 393, 439 N.E.2d at 807.

²¹ See *id.* at 389, 439 N.E.2d at 805.

§ 10.5. ¹ Environmental law was last covered in the *Survey* in the 1976 ANN. SURV. MASS. LAW §§ 16.1-16.10, at 543-74.

Pollution Control ("DWPC") is authorized to issue sewer extension or connection permits.² The DWPC's current regulations state that a party seeking to construct, effect, modify, maintain or use a sewer connection or extension must file a permit application with the DWPC.³ Connections which will add less than 2,000 gallons of sanitary sewage per day to an existing sewer system are exempt from the permit requirement.⁴ Also exempt are extensions and connections that were already in existence on May 10, 1979, the date the regulations were promulgated.⁵ A permit is required, however, for any modification, increase in flow, or change in use of such a preexisting extension or connection.⁶ The regulations require public notice of all permit applications and public hearings in controversial cases.⁷ In instances where a sewer system is overloaded,⁸ the DWPC is authorized to order a ban or restrictions on connections in the affected municipality.⁹ In sewer ban communities, the DWPC requires the municipality to maintain a "sewer bank" whereby up to one gallon of sewage can be discharged into the system for every two gallons of inflow or infiltration correction.¹⁰ Permits may only be issued when the necessary repairs are made to correct infiltration or inflow problems.¹¹ Sewer connections are also regulated by municipal regulations, federal pre-treatment standards and, if in the Metropolitan District Commission's ("MDC") area, the MDC's rules and regulations.¹²

² G.L. c. 21, § 43(2).

³ MASS. ADMIN. CODE tit. 314, § 8.02(1). Emergency regulations were promulgated February 1, 1979 after the decision in *Town of Holden v. Division of Water Pollution Control*, 6 Mass. App. Ct. 423, 376 N.E.2d 1259 (1978).

⁴ In municipalities where the DWPC has issued a sewer connection ban, however, a permit may be required for connections adding less than 2,000 gallons of sanitary sewage per day. Sewer connection bans are discussed *supra* at notes 8-10 and accompanying text.

⁵ MASS. ADMIN. CODE tit. 314, § 8.03(2).

⁶ *Id.*

⁷ *Id.* at § 8.02(4) and (5).

⁸ Overload of the sewer system can be caused by "inflow," which is additional flow from storm drainage or cooling water system connections, and by "infiltration," which consists of leaks of groundwater into the sewer.

⁹ MASS. ADMIN. CODE tit. 314, § 8.03(5) and (6). As of December 31, 1982, partial or total sewer bans affected the following municipalities: Ashland, Bridgewater, Cohasset, Dudley, Framingham, Holden, Natick, Norwood, Plymouth, Quincy, Revere, Rutland, Shrewsbury, Sturbridge, and Westborough.

¹⁰ See *supra* note 8.

¹¹ *Id.*

¹² Under the Clean Water Act, the EPA sets pre-treatment standards for industrial wastes discharging into a sewer treatment plant. 40 C.F.R. § 403; see also 47 Fed. Reg. 4,518 (1982) (deferring the effective date of portions of the general pretreatment regulations); 47 Fed. Reg. 42,688 (1982) (reinstating the general pretreatment regulations as of March 30, 1983). Specific treatment standards have been established for certain industrial users. 40 C.F.R. § 405 *et seq.* MDC regulations for industrial wastes are found at MASS. ADMIN. CODE tit. 350, § 11.00 *et seq.*