

Annual Survey of Massachusetts Law

Volume 1976

Article 20

1-1-1976

Chapter 16: Environmental Law

John J. O'Brien

James A. Thompson Jr.

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/asml>



Part of the [Environmental Law Commons](#)

Recommended Citation

O'Brien, John J. and Thompson, James A. Jr. (1976) "Chapter 16: Environmental Law," *Annual Survey of Massachusetts Law*: Vol. 1976, Article 20.

C H A P T E R 16

Environmental Law

JOHN J. O'BRIEN* AND JAMES A. THOMPSON, JR.**

§16.1. Introduction. During the 1976 *Survey* year there were a number of developments, state and federal, administrative and judicial, none of which, however, radically altered the environmental programs of Massachusetts. The Energy Facilities Siting Council adopted regulations regarding long-range planning and appellate review authority. In the area of water pollution control the past year marked a shift in emphasis from permit issuance to permit enforcement. In addition, the federal Environmental Protection Agency adopted several regulations which will have an impact on the Massachusetts safe drinking water program. Finally, the Supreme Judicial Court clarified its approach to cases involving the Massachusetts Environmental Policy Act.¹

A. ENERGY FACILITIES SITING

§16.2. Energy Facilities Siting Council. During the 1976 *Survey* year the Energy Facilities Siting Council (the "Council") adopted and amended regulations¹ to facilitate the implementation of the long-

* John J. O'Brien is Associate Counsel to the Division of Water Pollution Control of the Commonwealth of Massachusetts.

** James A. Thompson, Jr. is Assistant Regional Counsel, Region I, United States Environmental Protection Agency.

This article was written by the authors in their private capacities. No official support or endorsement by the Environmental Protection Agency, the Division of Water Pollution Control, or any other agency of the state or federal government is intended or should be inferred.

§16.1 ¹G.L. c. 30, §§61, 62.

§16.2 ¹G.L. c. 164, § 69H(2), authorizes the Council to adopt regulations. The original 1973 Council enactment required the adoption of such regulations by September 1975. Acts of 1973, c. 1232, § 3. In 1975 this requirement was modified to require the adoption of regulations by December 31, 1975. Acts of 1975, c. 617, § 13.

On October 27, 1975, the Council filed emergency regulations to govern the conduct of its business and the adoption of regulations. On December 1, 1975, the Council filed "Regulations of the Energy Facilities Siting Council," which supplanted the earlier emergency regulations and which were comprised of seven chapters dealing with each

range planning and appellate review authority conferred upon it by the terms of its enabling legislation.² To appreciate the import of these regulations, it is useful to review them within the context of the Council's mandate.

In 1973, on the basis of a report³ of a special legislative commission,⁴ the Legislature added sections 69G through 69R to chapter 164 of the General Laws.⁵ These sections, as amended,⁶ created the Council,⁷ comprised of four members of the Governor's Cabinet⁸ and five⁹ gubernatorial appointees representative of designated interest areas.¹⁰

of the following topics: general information and the conduct of business (Ch. A); rules of procedure (Ch. B); rules for the adoption of regulations (Ch. C); freedom of information and trade secret protection (Ch. D); environmental impact review (Ch. E); certificates of environmental impact and public need (Ch. F); and long-range forecasts and supplements (Ch. G). Subsequently, the Council has amended its regulations. On December 3, 1975 the Council filed "Regulations of the Emergency Facilities Siting Council—Amendment 1" which made a change in the informational requirements for the supply component of electric company forecasts (Ch. G, Rule 64.8). On January 29, 1976, the Council filed "Regulations of the Emergency Facilities Siting Council—Amendment 2" which added an eighth chapter, Ch. H, governing notices of intention to construct oil facilities. On April 13, 1976, the Siting Council filed "Regulations of the Emergency Facilities Siting Council—Amendment 3" which made technical amendments to Chapters F and G. On December 10, 1976, the Council filed "Regulations of the Emergency Facilities Siting Council—Amendment 4" which was a temporary regulation effective until March 10, 1977, and which amended Ch. G Rule 64.1(3).

² G.L. c. 164 §§ 69G-R as amended through Acts of 1975, c. 617.

³ THIRD REPORT OF THE MASSACHUSETTS ELECTRIC POWER PLANT SITING COMMISSION, H. DOC. NO. 6190 (1973).

⁴ Resolves of 1971, c. 78, established a Special Commission to study a number of matters pertaining to energy facilities and the manner in which such facilities relate to a suitable energy supply, to the environment, and to regulatory procedures of state and local government. The Legislature has demonstrated a continuing interest in the subject area of this commission's study. The commission has been "revived and continued," and expanded in scope of study, variously, by a number of enactments: Resolves of 1972, c. 1 & c. 74; Resolves of 1973, c. 54, c. 68, c. 110, & c. 137; Resolves of 1974, c. 26, c. 56.

⁵ Acts of 1973, c. 1232, §1.

⁶ The 1973 enactment limited the Council's jurisdiction to "electric energy facilities." Acts of 1973, c. 1232. By subsequent amendments in 1974 and 1975, the Council's jurisdiction was broadened to also include "gas facilities" and "oil facilities," respectively. Acts of 1974, c. 852; Acts of 1975, c. 617.

⁷ G.L. c. 164, § 69H.

⁸ The statute directs that the following cabinet members, or their designees, shall be on the Council; the secretaries of administration and finance, consumer affairs, environmental affairs, and manpower affairs. *Id.*, as amended by Acts of 1975, c. 617, § 2. The former version of G.L. c. 164, § 69H, provided for a Council comprised differently. See G.L. c. 164, § 69H, as originally added by Acts of 1973, c. 1232, § 1.

⁹ As this chapter was going to press the Legislature further amended the composition of the Council by increasing the number of gubernatorial appointees to six and specifying that the sixth member shall be "a representative of organized labor." Acts of 1977, c. 167, amending G.L. c. 164, § 69H.

¹⁰ G.L. c. 164, § 69H, specifies that one appointee be a professional engineer, one appointee "be experienced in the conservation and protection of the environment," and three members each "be experienced in matters relating to" one of the three energy industries subject to the Council's jurisdiction. See note 6 *supra*.

The statute requires that three of these appointees have expertise in matters pertaining to one of the three energy industry sectors regulated by the Council—electricity, gas, and oil¹¹—and, further restricts the issues upon which these industry experts may vote.¹² The Council is “responsible for implementing the energy policies contained in sections 69H through 69R of chapter 164 of the General Laws to provide a necessary energy supply to the commonwealth with a minimum impact on the environment at the lowest possible cost.”¹³ This mandate is to be fulfilled by two means: (1) the requirement that all energy companies prepare, and submit to the Council for approval, documentation of their long-range plans;¹⁴ and (2) the grant of authority to the Council to override certain actions by state and local governmental units which might interfere with the construction or operation of an approved energy facility.¹⁵ These two functions of the Council will each be set forth, followed by an evaluation and discussion of the interrelationship of the two regulatory programs.

The Council’s long-range planning authority is exercised, in the case of electric companies¹⁶ and gas companies,¹⁷ by the review and

¹¹ See note 6 *supra*.

¹² Presumably to preclude problems associated with competition among the three energy industries, the three industry experts may only vote on Council matters “directly related to” their respective industry. G.L. c. 164, § 69H.

¹³ *Id.* The Council’s interpretation of this mandate will, of course, be shaped by other mandates such as those found in the Massachusetts Environmental Policy Act, G.L. c. 30, § 61, and the “environmental bill of rights” provision in the Massachusetts Constitution, MASS. CONST. amend. art. 97. For a discussion of the Massachusetts Environmental Policy Act, see Miller, *Environmental Law*, 1972 ANN. SURV. MASS. LAW § 21.2, at 578; §§ 21.8-21.13 at 605-12.

¹⁴ G.L. c. 164, §§ 69I, 69K.

¹⁵ *Id.* § 69K.

¹⁶ The term “electric company” is defined in *id.*, § 69G, as follows: a corporation organized under the laws of the commonwealth empowered to generate, transmit, distribute or sell electricity for ultimate use by fifty or more persons; . . . a foreign corporation empowered under the laws of its state of incorporation to generate, transmit, distribute or sell electricity for ultimate use by fifty or more persons and qualified to do business in the commonwealth; . . . a municipal corporation empowered to operate a municipal lighting plant under the provision of section thirty-five or section thirty-six [of chapter 164 of the General Laws].

Also included in the § 69G definition of the term is the definition given “electric company” by G.L. c. 164, § 1:

a corporation organized under the laws of the commonwealth for the purpose of making by means of water power, steam power or otherwise and selling, or distributing and selling, electricity within the commonwealth, or authorized by special act so to do, even though subsequently authorized to make or sell gas.

The § 69G definition of “electric company” is also found in the Siting Council Regulations, Ch. A, Rule 3.3.

¹⁷ The term “gas company” is defined in G.L. c. 164, § 69G, as follows:

a corporation organized under the laws of the commonwealth empowered to manufacture or store gas for resale or distribution to a gas company as defined in section one; . . . a foreign corporation empowered under the laws of its state of in-

approval of long-range "forecasts" and "forecast supplements,"¹⁸ and, in the case of facilities planned by oil companies,¹⁹ by the review and approval of "notices of intention to construct."²⁰

Each electric and gas company is required to submit to the Council for its review and approval "a long-range forecast with respect to the [electric power or gas] needs and requirements of its market area, taking into account wholesale bulk [power or gas] sales or purchases or other cooperative arrangements with other [electric or gas] companies. . . ."²¹ All electric and gas companies were required to submit an initial forecast by May 1, 1976, a second forecast by the end of 1980, and subsequent forecasts every fifth year thereafter.²² In each intervening year, the long-range forecast must be revised and updated by the submission of a supplement thereto.²³ In their forecasts, electric and gas companies must provide detailed descriptions of their collaboration with other companies in planning, providing or forecasting for energy,²⁴ their forecast of the energy needs of their market

corporation to manufacture or store gas for resale or distribution to a gas company as defined in section one, and qualified to do business in the commonwealth; . . . a natural gas pipeline company as defined in section [seventy]-five B [of chapter 164 of the General Laws]; . . . a municipal corporation empowered to operate a municipal gas plant under the provisions of section thirty-five or section thirty-six [of chapter 164 of the General Laws].

Also included in the § 69G definition of the term is the definition given "gas company" by G.L. c. 164, § 1: "[A] corporation organized under the laws of the commonwealth for the purpose of making and selling, or distributing and selling, gas within the commonwealth, even though subsequently authorized to make or sell electricity."

The § 69G definition of "gas company" is also found in the Siting Council Regulations, Ch. A, Rule 3.3.

¹⁸ G.L. c. 164, §§ 69I, 69K.

¹⁹ The term "oil company" is defined in G.L. c. 164, § 69G, as follows:

(1) any person, authority or corporation organized under the laws of the commonwealth empowered or intending to construct or operate an oil facility; (2) a foreign corporation or person empowered under the laws of its state of incorporation to, or intending to construct or operate an oil facility, and qualified to do business in the Commonwealth.

The above definition is also found in the Siting Council Regulations, Ch. A, Rule 3.3.

²⁰ G.L. c. 164, §§ 69I, 69K.

²¹ *Id.* § 69I. Electric company forecasts must cover the ensuing ten-year period; gas company forecasts must cover the ensuing five-year period. *Id.* Siting Council Regulations, Ch. G, Rule 61.1.

The Siting Council Regulations also require that the forecasts include, "for purposes of establishing historical baseline data," such information as can be obtained regarding the year of submission as well as years prior thereto. Siting Council Regulations, Ch. G, Rules 63.4, 66.4.

²² G.L. c. 164, § 69I. Siting Council Regulations, Ch. G, Rule 62.3(1).

²³ G.L. c. 164, § 69I. Siting Council Regulations, Ch. G, Rule 62.3(2). See the Siting Council Regulations, Ch. G, Rules 65.1-65.3 (electric companies) and Rules 68.1-68.2 (gas companies) for a discussion of the purpose and contents of the supplements.

²⁴ G.L. c. 164, § 69I. Siting Council Regulations, Ch. G, Rule 63.2 (electric companies) and Rule 66.2 (gas companies).

area;²⁵ their resources;²⁶ and the actions that they propose to take, including the construction of facilities, “which will affect [their] capacity to meet [the] needs” of their market area.²⁷

Before certain oil facilities may be constructed in the Commonwealth, the Council must have received and approved a “notice of intention to construct” the facility.²⁸ Notices seeking approval of a facility designed so that a significant portion of its output could be gasoline or a similarly light oil product (termed a “complex refinery”)²⁹ must be filed with the Council “not later than two years prior to the commencement of construction” thereof.³⁰ Notices seeking approval of other oil facilities³¹ must be filed with the Council “not later than one year prior to commencement of construction” thereof.³² These notices must contain detailed descriptions of the proposed facility and its site,³³ the applicant,³⁴ the area in which the facility’s products are to be marketed,³⁵ and the means by which the facility is to be financed.³⁶ The notice must also contain analyses of the environmental impact of the proposed facility³⁷ and the need for the facility.³⁸

²⁵ G.L. c. 164, § 69I. Siting Council Regulations, Ch. G, Rules 63.3-63.7 (electric companies) and Rules 66.3-66.7 (gas companies).

²⁶ Siting Council Regulations, Ch. G, Rule 64.2 (electric companies) and Rule 67.2 (gas companies).

²⁷ G.L. c. 164, § 69I. Siting Council Regulations, Ch. G, Rules 64.4-64.9 (electric companies) and Rules 67.4-67.8 (gas companies). Forecast supplements must indicate significant changes occurring after the most recent long-range forecast as previously supplemented. Siting Council Regulations, Ch. G, Rule 65.2 (electric companies) and Rule 68.2 (gas companies). The Council’s regulations provide a special procedure, termed “occasional supplements,” applicable only to electric companies, to permit expeditious inclusion of certain small-scale facilities in an electric company’s long-range planning. Siting Council Regulations, Ch. G, Rule 65.3.

²⁸ G.L. c. 164, §§ 69I, J.

²⁹ Siting Council Regulations, Ch. H, Rule 71.3.

³⁰ G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 72.3(2).

³¹ Oil facilities are defined in G.L. c. 164, § 69G, as follows:

any new unit, including associated building and structures, designed for, or capable of, the refining, storage of more than five hundred thousand barrels or transportation of oil or refined oil products and any new pipeline for the transportation of oil or refined oil products which is greater than one mile in length except restructuring, rebuilding, or relaying of existing pipelines of the same capacity; provided, however, that this oil facility shall not include any facility covered by a long-range forecast or supplement thereto under section sixty-nine I [of chapter 164 of the General Laws].

The above definition is also found in the Siting Council Regulations, Ch. A, Rule 3.3.

³² G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 72.3(1).

³³ G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 73.2.

³⁴ G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 73.3.

³⁵ G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 73.4.

³⁶ G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 73.7. By contrast, financial data is not required of electric or gas facilities, doubtless because those two industries, as distinct from the oil industry, are regulated utilities. *See* G.L. c. 164, § 69I.

³⁷ G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 73.6.

³⁸ G.L. c. 164, § 69I. Siting Council Regulations, Ch. H, Rule 73.5.

Once it has received a forecast, a forecast supplement or a notice of intention to construct an oil facility, the Council must take certain actions within specified periods.³⁹ Within six months of receipt, the Council must hold a public hearing on the application.⁴⁰ These hearings are to be conducted as adjudicatory proceedings⁴¹ within the definition of the Administrative Procedure Act.⁴² However, prior to the commencement of an adjudicatory hearing on a forecast or forecast supplement which first proposes a facility,⁴³ a public hearing (termed an "informational hearing")⁴⁴ must be held in the locality⁴⁵ in which that facility is to be sited. Because notices of intention to construct oil facilities are by their nature proposals to construct specific facilities in specific sites, informational hearings must be conducted on *every* such filing.⁴⁶ Within twenty-four months of receipt, the Council must take action approving or rejecting⁴⁷ notices of intention to construct complex oil refineries.⁴⁸ The Council must take similar action with respect to notices of intention to construct other oil facilities,⁴⁹ and with respect to oil and gas company forecasts,⁵⁰ within twelve months of the receipt thereof.⁵¹ The statute prescribes standards for the Council's action on forecasts⁵² and notices of intention to construct.⁵³ Upon re-

³⁹ The statute prescribes no penalties for the failure of the Siting Council to act within these time periods.

⁴⁰ G.L. c. 164, § 69J. Siting Council Regulations, Ch. G, Rule 62.6 (electric and gas companies) and Ch. H, Rule 72.6 (oil companies).

⁴¹ G.L. c. 164, § 69J. The rules of procedure governing such adjudicatory hearings are found in Siting Council Regulations, Ch. B.

⁴² G.L. c. 30A.

⁴³ See note 27 and accompanying text *supra*.

⁴⁴ Siting Council Regulations, Ch. G, Rule 62.7 (electric and gas companies). See G.L. c. 164, § 69J.

⁴⁵ No definition of the term "locality" is provided either in the Siting Council's enabling legislation or in its regulations. Cf. note 95 *infra*.

⁴⁶ Siting Council Regulations, Ch. H, Rule 72.7 (oil companies).

⁴⁷ G.L. c. 164, § 69J. Siting Council Regulations, Ch. H, Rule 72.9(1). See notes 54 & 55 and accompanying text *infra*.

⁴⁸ See note 29 and accompanying text *supra*.

⁴⁹ G.L. c. 164, § 69J. Siting Council Regulations, Ch. H, Rule 72.9(1).

⁵⁰ No deadline is prescribed for action on forecast supplements.

⁵¹ G.L. c. 164, § 69J. Siting Council Regulations, Ch. G, Rule 62.9 (1).

⁵² No standards are provided for Council action on forecast supplements. The standards by which the Council intends to act upon supplements are set forth in Rule 62.9 (2) of Chapter G of the Siting Council Regulations.

⁵³ G.L. c. 164, § 69J. The standards are not stated with the utmost precision, but appear to impose differing requirements for approvals of forecasts, on one hand, and oil facilities, on the other hand.

For example, to approve a forecast the Council must find, *inter alia*, that the electric or gas company's projections are based on "substantially accurate historical information and reasonable statistical projection methods" and are "consistent with" forecasts of other companies subject to the Council's jurisdiction. Also, before it may approve forecasts that indicate planned expansion and construction of new facilities, the Council must determine that the facilities are consistent with the Commonwealth's health, environmental, resource use, and development policies, and are consistent with the Coun-

view of the record of the proceeding, the Council will approve, approve subject to stated conditions reject, or approve in part and reject in part, a forecast, forecast supplement or notice of intention to construct.⁵⁴ The Council will also consider issuing an approval while retaining jurisdiction for further review of a specific issue or detail, or issuing an approval subject to subsequent approval of a particular facility by another state or local agency.⁵⁵

The statute does not expressly provide for penalties or equitable remedies for the failure of an energy company to make a timely filing of a long-range plan or for the failure of an energy company to make such a filing that is approvable by the Council. However, adherence to the long-range plan approval requirements is to be secured, indirectly, through the operation of a dual-faceted prohibition. First, the statute prohibits construction⁵⁶ of any energy facility unless the facility, if an electric or gas facility, "is consistent with" the applicant company's most recently approved forecast or supplement thereto, or, if an oil facility, has been the subject of an approved notice of intention to construct.⁵⁷ Second, the statute prohibits state agencies⁵⁸ from issuing construction permits⁵⁹ for an energy facility unless the facility and the site therefor "conform" to the company's most recently approved forecast or supplement, or if the facility has been the subject of an approved notice of intention to construct.⁶⁰ To allay confusion regarding the phasing and import of the notice of intention to construct an oil facility, the statute expressly states that approval of such a notice is

cil's basic mandate—to provide a necessary power supply with a minimum impact on the environment at the lowest possible cost. See note 13 and accompanying text *supra*.

To approve a notice of intention to construct an oil facility the Council must determine that all information regarding the facility's proposed source of supply and financing, and its economic viability, are substantially accurate and adequate. The Council must also determine that the facility plans are consistent with the Commonwealth's health, environmental, resource use, and development policies. However, the statute does not appear to require that the Council determine that the facility is consistent with the Council's basic mandate.

No standards are provided for Council action on forecast supplements. The standards by which the Council intends to act upon supplements are set forth in Rule 62.9(2) of Chapter G of the Siting Council Regulations.

⁵⁴ Taken literally, the statute only authorizes the Council to act with such latitude in its review of forecasts. G.L. c. 164, § 69J. Nonetheless, in its regulations the Council has indicated an intent to be similarly flexible in its approval of forecast supplements. Siting Council Regulations, Ch. G, Rule 62.9 (1) (electric and gas companies). With regard to oil companies the regulations authorize the Council to approve the initial petition to construct, approve it subject to conditions, or disapprove it. *Id.*, Ch. H, Rule 72.9 (1).

⁵⁵ Siting Council Regulations, Ch. G, Rule 62.9 (1) (electric and gas companies) and Ch. H, Rule 72.9 (1) (oil companies).

⁵⁶ See note 62 and accompanying text *infra*.

⁵⁷ G.L. c. 164, § 69I. However, this prohibition is not necessarily conclusive. See text at note 107 *infra*.

⁵⁸ The prohibition does not also extend to municipalities.

⁵⁹ The term is not defined in the statute.

⁶⁰ G.L. c. 164, § 69I.

“not to be considered approval of construction permits by state agencies.”⁶¹ Additionally, to eliminate transitional problems which would be engendered were the statute to be applied retroactively, provision is made to exempt facilities “under construction” on May 1, 1976, the deadline for the submission of initial electric and gas company forecasts, from the requirement that their construction and operation be authorized by inclusion in an approved forecast, forecast supplement, or notice of intention to construct.⁶² All actions taken by the Council with regard to forecasts, forecast supplements, and notices of intention to construct are exempt from the provisions of sections 61 and 62 of chapter 31 of the General Laws, the Massachusetts Environmental Policy Act.⁶³

As an adjunct to its role in passing upon the long-range plans of energy companies, the Council is vested with extraordinary power to insure that the energy companies may construct, operate, and maintain the facilities contained in these plans without undue interference by any state or local agency. This second regulatory power is exercised, with respect to facilities by all energy companies, by the review of applications for, and the issuance of, “certificates of environmental impact and public need.”⁶⁴ The Council issues these certificates upon an energy company’s appeal from the action of a state or local agency.⁶⁵ Once issued, a certificate will be the basis for further regulation of the facility⁶⁶ and will supersede the state or local action⁶⁷ which gave rise to the petition to the Council.

The statute delineates six specific grounds upon which an energy company may petition the Council for a certificate.⁶⁸ Because of curious interpretive questions that may arise from an examination of the statute, it is useful to set forth the grounds stated in the statute:

[T]he . . . company is *prevented from building* a facility [1] because it cannot meet standards imposed by a state or local agency with commercially available equipment or [2] because the processing or granting by a state or local agency of any approval, consent, permit or certificate has been unduly delayed; or [3] the . . . company believes there are inconsistencies among resource use permits is-

⁶¹ *Id.*

⁶² The initial Council enactment provided for an exemption for facilities under construction prior to December 31, 1975. Acts of 1973, c. 1232, § 4. The 1975 amendments replaced this date with the May 1, 1976 date. Acts of 1975, c. 617, § 15. The Siting Council Regulations reflect the more recent date. Siting Council Regulations, Ch. G, Rule 61.6 (electric and gas companies) and Ch. H, Rule 71.6 (oil companies).

⁶³ G.L. c. 164, § 69I. Siting Council Regulations, Ch. E, Rule 41.3 (3). *Cf.* text at note 108 *infra*.

⁶⁴ G.L. c. 164, §§ 69K-O. Siting Council Regulations, Ch. F, Rules 51.1-56.2.

⁶⁵ *Id.*

⁶⁶ G.L. c. 164, § 69K. Siting Council Regulations, Ch. F, Rule 55.3.

⁶⁷ *Id.*

⁶⁸ G.L. c. 164, § 69K. Siting Council Regulations, Ch. F, Rule 52.2.

sued by such state or local agencies; or [4] the . . . company believes that a nonregulatory issue or condition has been raised or imposed by such state or local agencies such as but not limited to aesthetics and recreation; or [5] the facility *cannot be constructed* due to any disapprovals, conditions or denials by local governments, except with respect to any lands or interests therein, excluding public ways, owned or managed by any state agency or local government.⁶⁹

An additional ground is specified elsewhere in the statute, namely, that “[6] any state or local agency has imposed a burdensome condition or limitation on any license or permit which has a substantial impact on the council’s responsibilities as set forth in [section 69H of chapter 164 of the General Laws].”⁷⁰

The phrasing of and punctuation in these six grounds poses a number of questions. First, the fifth ground is applicable only to local actions and seems intended to provide energy companies with access to the Council’s appeal authority in instances in which their projects are impeded by local actions based on narrow parochial considerations. Second, a question arises from the form of the fourth ground—appeals based on “nonregulatory” issues or conditions such as aesthetics or recreation. The wording of the statute would appear to authorize the Council to override agency decisions intended to implement standards predicated in part on aesthetic or recreational goals.⁷¹ However, the question whether such decisions could be overridden is obviated in large measure by the Council itself: in its regulations the Council has attempted to define “nonregulatory issue” as a matter “not within the statutory jurisdiction of the agency in question.”⁷² Thus, decisions based on aesthetic considerations would not be overridden if the agency’s authority extended to such considerations. Third, three of the grounds—the first, second, and fifth—appear to be grounds for the challenge of actions interfering with facilities yet to be built or constructed. If these grounds are so interpreted and are not construed to apply to the construction of pollution control

⁶⁹ G.L. c. 164, § 69K. *Accord*, Siting Council Regulations, Ch. F, Rule 52.2 (numbering and emphasis added).

⁷⁰ G.L. c. 164, § 69K. *Accord*, Siting Council Regulations, Ch. F, Rule 52.2 (number added).

⁷¹ The identification of “aesthetic” and “recreational” components of agency decisions will not always be a simple task. For example, the several water quality classification groups established by the Massachusetts water quality standards are predicated upon recreational and aesthetic, as well as agricultural and industrial, use objectives. *See, e.g.*, Massachusetts Division of Water Pollution Control, Rules and Regulations for the Establishment of Minimum Water Quality Standards and for the Protection of the Quality and Value of Water Resources, Regulation II, Classes B and SA (filed, May 2, 1974) [hereinafter “the 1974 Water Quality Standards”]. For a discussion of the history behind the 1974 Water Quality Standards, see note 73 *infra*.

⁷² Siting Council Regulations, Ch. F, Rule 52.2(4).

technology added to an *existing* energy installation, they would eliminate the first ground as a basis for contesting a state agency requirement that additional technology be installed to attain progressively more stringent air or water pollution control standards.⁷³ Moreover, the first ground presents a further problem of interpretation. An energy company might find that, because the proposed facility site was on a stream segment that is subject to an antidegradation prohibition⁷⁴ or subject to stringent effluent limitation because of proximity to a vital wildlife habitat, there is no pollution abatement equipment "commercially available" to attain the required effluent limitation.

Of all the grounds for an energy company appeal, the sixth appears to be the most sweeping in its potential application. It is arguable that *any* expensive or elaborate condition or limitation could be claimed to be "burdensome" and of "substantial impact" to the Council's basic responsibility.⁷⁵ In its regulations the Council has attempted to interpret this ground and has said that it "may consider a condition or limitation to be burdensome if the resulting cost would be out of proportion to the cost of the facility or to the benefits to be gained from the condition or limitation."⁷⁶ The Council has similarly attempted to define the standard for evaluating claims based on the second ground. Claims of "undue delay" in the processing of a given agency permit will be evaluated in terms of the processing time which would be standard for all permit applications of similar complexity and con-

⁷³ The first water quality standards for the Commonwealth were adopted in 1967, Massachusetts Division of Water Pollution Control, Water Quality Standards (filed March 6, 1967), in response to a provision in the Water Quality Act of 1965, which provision encouraged states to set their own water quality standards for interstate waters or portions thereof within their borders, when such standards were consistent with the Act. 33 U.S.C. § 466g(b)(c) (Supp. V. 1965-1969).

In 1972 Congress enacted the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.* (Supp. IV 1974), which completely supplanted prior federal water pollution control law. This Act requires that states revise their water quality standards at least once every three years. *Id.*, § 1313(c). In 1974, in response to this requirement, the Commonwealth's water quality standards were revised and the 1974 Water Quality Standards, *supra* note 71, were filed. These 1974 revisions changed certain discharge parameters and generally upgraded the classification groups applicable to the various stream segments of the waters of the Commonwealth. Consistent with the requirements of the amendments to the Federal Water Pollution Control Act, the Commonwealth will be reviewing and revising its standards from time to time. It is possible that as various parameters in the standards are made more stringent additional control technology may be required of facilities now operational.

⁷⁴ The Massachusetts water quality standards generally prohibit new discharges into inland waters "upstream of the most upstream discharge of wastewater from a municipal waste treatment facility or municipal sewer," and into certain high quality coastal waters. The 1974 Water Quality Standards, *supra* note 71, Regulation III, Rules 1.A and 1.B, respectively. The antidegradation provision, however, does provide a procedure whereby cooling water discharges from certain energy facilities could be permitted into waters otherwise subject to the antidegradation provision. *Id.*

⁷⁵ *But see* note 13 *supra*.

⁷⁶ Siting Council Regulations, Ch. F, Rule 52.2 (5).

trovery.⁷⁷ In deference to the agencies from whom appeals would be taken on the issue of “undue delay,” the Council regulations require that the energy company seeking Council review on that ground provide the agency with advance notice.⁷⁸ On balance, however, it seems clear that the grounds provided for energy company appeals will provide ample ammunition for major challenges to state and local regulatory action.

The Council has prescribed a two-stage procedure for considering requests for certificates. An energy company must first present an initial petition stating the grounds of its claim,⁷⁹ and, if the Council finds that sufficient grounds exist, the company must then file an application for a certificate of environmental impact and public need.⁸⁰ More than one ground may be asserted in the initial petition⁸¹ and application.⁸² The entire process, from filing of petition to ultimate decision, is to take no more than seven and one-half months.⁸³

To obtain Council review of a decision of a state or local agency, an energy company, after appropriate notice,⁸⁴ must submit an initial petition stating the ground(s) for its claim for a certificate.⁸⁵ Within seven days of the receipt of this petition, the Council must elect either to schedule a formal hearing on the petition or to accept the application for a certificate deferring a decision on the merits of the initial petition.⁸⁶ If action on an initial petition is thus deferred, or if, after hearing, the initial petition is granted, the energy company may proceed to file an application for a certificate.⁸⁷ If, after hearing, the Council determines that adequate grounds do not exist for the submission of an application, the initial petition is denied and the petitioning energy company may proceed to seek judicial review of that determination.⁸⁸ If permitted to file an application, the energy company must adhere to specific requirements of notice⁸⁹ form and content.⁹⁰ Among other things, the energy company must provide notice

⁷⁷ *Id.*, Rule 52.2 (2).

⁷⁸ *Id.*

⁷⁹ *Id.*, Rules 52.1-52.4.

⁸⁰ *Id.*, Rules 53.2-53.7.

⁸¹ G.L. c. 164, §§ 69K, 69L. Siting Council Regulations, Ch. F, Rules 52.1, 53.3 (xiii).

⁸² G.L. c. 164, §§ 69K, 69L. Siting Council Regulations, Ch. F, Rule 53.7.

⁸³ G.L. c. 164, § 69O. Siting Council Regulations, Ch. F, Rule 55.1 (a decision on an application for a certificate shall be made within 6 months of filing). Siting Council Regulations, Ch. F, Rule 52.4 (a decision to accept an application shall be made within 6 weeks of the petition).

⁸⁴ Siting Council Regulations, Ch. F, Rule 52.3.

⁸⁵ *Id.*, Rule 52.1.

⁸⁶ *Id.*, Rule 52.4.

⁸⁷ *Id.*, Rule 53.1.

⁸⁸ G.L. c. 164, § 69P. *See* Siting Council Regulations, Ch. F, Rule 52.4.

⁸⁹ G.L. c. 164, § 69L(B). Siting Council Regulations, Ch. F, Rule 53.2. A deficient notice may be cured by a motion to the Council. G.L. c. 164, § 69L(C); Siting Council Regulations, Ch. F, Rule 53.2.

⁹⁰ G.L. c. 164, § 69L(A). Siting Council Regulations, Ch. F, Rule 53.3.

to each agency whose decision is being contested.⁹¹ Applications for certificates may be amended at any time prior to the conclusion of the proceeding, subject to additional notice requirements.⁹² Proceedings on applications for certificates, like forecast proceedings,⁹³ are adjudicatory proceedings.⁹⁴ Also, nonadjudicatory "informational" hearings may be conducted in the vicinity⁹⁵ of a facility for which a certificate proceeding has been commenced.⁹⁶

On the basis of the record assembled in the adjudicatory proceeding, the Council may issue certificates of environmental impact and public need which will supplant the state or local agency actions that were the subject of the energy company's petition.⁹⁷ Such certificates, moreover, become the basis for all further regulatory action by the affected state or local agency with respect to the subject facility, as if the certificate "had been directly granted by the . . . agency."⁹⁸ Certificates issued by the Council may be transferred to other energy companies by the holder.⁹⁹ The Council regulations also provide that, should a majority of its members be unable to agree upon the disposition of an application for a certificate, it is to be deemed denied and may be treated by the applicant therefor, at its option, either as a denial without prejudice or as a final agency action ripe for judicial review.¹⁰⁰ The Council may, upon the request of an appropriate party, undertake proceedings regarding the amendment of a certificate it has already issued.¹⁰¹

In deference to the influence exerted by the federal government in many major environmental control programs, the statute puts two constraints upon the Council. First, the Council is not empowered to issue a certificate, the effect of which would be to grant or modify a permit in a way that "if so granted or modified by the appropriate state or local agency, would be invalid because of a conflict with applicable federal water or air standards or requirements."¹⁰² Second, the statute details, in language mirroring federal water pollution control regulations,¹⁰³ a number of procedures that must be followed by the Council, should the Division of Water Pollution Control be "del-

⁹¹ Siting Council Regulations, Ch. F, Rule 53.2.

⁹² G.L. c. 164, § 69L (D); Siting Council Regulations, Ch. F, Rule 53.6.

⁹³ See notes 40-42 and accompanying text *supra*.

⁹⁴ G.L. c. 164, § 69M. Siting Council Regulations, Ch. F, Rule 54.1.

⁹⁵ The term "vicinity" is not defined either in the statute or the Siting Council Regulation. *Cf.* note 45 *supra*.

⁹⁶ Siting Council Regulations, Ch. F, Rule 54.2.

⁹⁷ G.L. c. 164, § 69K.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Siting Council Regulations, Ch. F, Rule 55.2. See note 116 *infra*.

¹⁰¹ G.L. c. 164, § 69L(E). Siting Council Regulations, Ch. F, Rule 55.4.

¹⁰² G.L. c. 164, § 69K.

¹⁰³ Compare 40 C.F.R. §§ 125.32, 125.33 with G.L. c. 164, § 69M.

egated" responsibility to assume the federal water pollution control permit program,¹⁰⁴ and should the Council consider issuing a certificate to override a determination of the Director of that Division regarding a discharge to surface waters of the Commonwealth.¹⁰⁵

As noted above, the statute intends that the linkage between the two regulatory programs of the Council be effected through a provision limiting the availability of the certificate procedures, in most instances, to facilities that were included in a previously approved long-range plan or supplement thereto.¹⁰⁶ However, this requirement is not ironclad. The provision can be waived by the Council "for emergency or unforeseen conditions which jeopardize the health and safety of the public."¹⁰⁷ Several other features of the two regulatory programs should be noted. First, whereas the long-range planning activities are exempt from the Massachusetts Environmental Policy Act,¹⁰⁸ no such exemption exists for the certificate process. Presumably, the Council will find the environmental data generated as part of the adjudicatory proceeding useful in satisfying the environmental impact review obligations that it faces in the exercise of its certificate powers.¹⁰⁹ Second, both of the Council's functions have been declared adjudicatory proceedings by the Legislature.¹¹⁰ In many cases, energy companies already have a right to formal review from state agency determinations with which they are dissatisfied.¹¹¹ Thus, in these instances, the Council is the second source of administrative review available to the energy company since the Council can, by issuing a certificate of environmental impact and public need, supersede state or local action.¹¹² Indeed, the Council, as a matter of policy, may decline to consider an application for a certificate if the company had not fully exhausted the administrative remedies which would initially

¹⁰⁴ The Federal Water Pollution Control Act Amendments of 1972 set up a nationwide system for the regulation of water pollution, the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342 (Supp. IV 1974). The federal statute comprehends that the system will be established by the United States Environmental Protection Agency (EPA), and may be administered either by the EPA or by qualifying states, upon delegation by the EPA. *Id.* § 1342(b)(c). At the present time Massachusetts has parallel regulatory authority in the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53, inclusive but has elected not to seek to assume NPDES program responsibility. Instead, the EPA and the Massachusetts Division of Water Pollution Control, each under their respective enabling legislation, issue "joint" permits. See O'Brien & Deland, *Environmental Law*, 1973 ANN. SURV. MASS. LAW §§ 6.2-6.7, at 144-78.

¹⁰⁵ G.L. c. 164, §§ 69K, 69M. Siting Council Regulations, Ch. F, Rule 55.6.

¹⁰⁶ See note 57 and accompanying text *supra*.

¹⁰⁷ G.L. c. 164, § 69L(A)(3).

¹⁰⁸ See note 63 and accompanying text *supra*.

¹⁰⁹ See G.L. c. 164, § 69L(A)(2).

¹¹⁰ See text at notes 40-42, 93-94 *supra*.

¹¹¹ See G.L. c. 30A, § 14. The State Administrative Procedure Act authorizes judicial review of final decisions of state agencies, but local government action is exempt. See *id.*, § 1(2).

¹¹² See text at notes 65-70 *supra*.

spring from the decision of the state or local agency.¹¹³ If the Council does not follow such a policy, an energy company dissatisfied with the treatment of its facility in the initial permit processing might elect to forego administrative and judicial review at that level and, instead, petition the Council directly.¹¹⁴ Another interesting situation is presented by the fact that, as a result of the Legislature's characterization of all Council proceedings as adjudicatory, the Legislature has transformed into adjudicatory proceedings certain proceedings not characterized as such by the state or local agency which originally administers the contested permit or approval procedure.¹¹⁵ In any event, all decisions of the Council are subject to judicial review,¹¹⁶ which can be requested by certain specified "parties in interest."¹¹⁷

One of the most notable features of the statute is the very nature of the Council. Although other high level policy councils, from time to time, have been created administratively¹¹⁸ by the governor from his

¹¹³ The Siting Council Regulations do not express any policy in this regard.

¹¹⁴ Energy companies face a dilemma in choosing a strategy to seek modification or reversal of an adverse state agency determination. Ordinarily, an energy company would be required to exhaust its administrative remedies (*e.g.*, request and participate in an adjudicatory hearing) before the agency prior to securing judicial review of the agency's action. *See* *Gallagher v. Metropolitan District Comm'n*, 1977 Mass. Adv. Sh. 32, 41, 359 N.E.2d 36,41, (dictum); *J. & J. Enterprises, Inc. v. Martignetti*, 1976 Mass. Adv. Sh. 172, 177-81, 341 N.E.2d 645, 648. *See also* *Curtin Jr. & Young, Civil Practice and Procedure*, 1975 ANN. SURV. MASS. LAW § 13.3, at 334-39. However, the potential for review by the Council would seem to require in most instances that an energy company exhaust *all* rights to administrative review both before the agency and before the Council before judicial review would be appropriate.

¹¹⁵ Because of peculiarities of statutory provisions, agency practice, and interpretive decisions, rights to adjudicatory review do not necessarily attach to all determinations of state and local agencies. *See, e.g.*, *Cambridge Elec. Light Co. v. Department of Pub. Util.*, 363 Mass. 474, 486-88, 295 N.E.2d 876, 884-85 (1973); *Reid v. Acting Comm'r of the Dep't of Community Affairs*, 362 Mass. 136, 140, 142-43, 284 N.E.2d 245, 247, 249 (1972).

¹¹⁶ G.L. c. 164, § 69P. Siting Council Regulations, Ch. B., Rule 17.2. The statute provides for judicial review in accordance with the provisions of G.L. c. 25, § 5, and thus vests the Supreme Judicial Court with original jurisdiction in such actions. *See* *Save the Bay, Inc. v. Department of Pub. Util.*, 1975 Mass. Adv. Sh. 139, 139 & n.2, 322 N.E.2d 742, 746 & n.2; *Cambridge Elec. Light Co. v. Department of Pub. Util.*, 363 Mass. 474, 502-04, 295 N.E.2d 876, 892-93 (1973). The statute also specifies the bases upon which such actions may be urged. G.L. c. 164, § 69P.

¹¹⁷ The Siting Council Regulations discuss how a person may intervene as a party. *See* Siting Council Regulations, Ch. A Rule 3.3, Ch. B, Rules 15.2 & 15.3. *See also* *Save the Bay, Inc. v. Department of Pub. Util.*, 1975 Mass. Adv. Sh. 139, 144-151, 322 N.E.2d 742, 748-50, where the Supreme Judicial Court discusses what constitutes a "party in interest."

¹¹⁸ For example, on February 25, 1974, Francis W. Sargent, the then Governor of the Commonwealth, established a Resource Management Policy Council, comprised of the Secretaries of eight cabinet secretariats, to "make recommendations . . . and . . . develop policy concerning the development, conservation, and management of the land and other physical resources of the Commonwealth in order to best meet the social and economic needs of its citizens." Executive Order No. 103 (1974). The Resource Management Policy Council has not been continued during the term of Governor Sargent's immediate successor.

executive staff, this appears to be the first time such an entity has been created by statute and vested with direct authority to implement its policy objectives. By virtue of its composition of cabinet members and gubernatorial appointees, all members are direct appointees of the Governor and thus can be expected to reflect his predilections and priorities insofar as they relate to matters before the Council. Curiously, however, there is no provision for a member representative of local government interests, notwithstanding the fact that the Council is empowered to override local determinations. The powers vested in the Council are also unusual in that this is the first time such a council has been empowered to exercise adjudicative responsibilities as part of its official duties.¹¹⁹ Presumably the ex officio cabinet members will suitably articulate and espouse the interests of the agencies constituent within their respective executive offices, yet maintain the degree of impartiality which is necessary and appropriate for the proper discharge of their adjudicative responsibilities.

Another salient feature of the Council's creation is the Council's role as an agency to which appeals of lower agency decisions, both on the state and local level, may be urged for review and, if necessary, overridden. While the arrangement is admittedly unusual, it is by no means unique. In at least two other contexts, the Legislature has seen fit to vest an entity with such appellate power. Under section 10 of chapter 40A of the General Laws, the Department of Public Utilities is authorized to exempt certain gas facilities from restrictions imposed pursuant to a local zoning restriction.¹²⁰ A similar authority to override local jurisdiction is found in sections 20 through 23 of chapter 40B of the General Laws, the so-called "Anti-Snob Zoning Act," which creates a process whereby certain qualified developers may seek and obtain review and override of actions of local officials and agencies having jurisdiction over different aspects of a proposed low income housing project.¹²¹ The use of both these administrative appeal schemes has been endorsed by the Supreme Judicial Court.¹²² Perhaps

¹¹⁹ The executive office secretaries are not vested with responsibilities which entail adjudicative determinations. Of the executive office secretariats, the Secretary of Environmental Affairs does have a functional responsibility which somewhat approaches the type of responsibility conferred upon the Council. Under G.L. c. 30, § 62, the Secretary of Environmental Affairs reviews environmental impact reports of state agencies. This function has been characterized as a "regulatory" (as opposed to an "adjudicatory") activity. *City of Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 662, 308 N.E.2d 488, 503, 6 E.R.C. 1337, 1347, 4 E.L.R. 20314, 20320 (1974). For a discussion of *Massachusetts Port Authority*, see O'Brien & Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.5, 449-53.

¹²⁰ See *Pereira v. New England LNG Co.*, 364 Mass. 109, 112-13, 301 N.E.2d 441, 444 (1973); Huber, *Zoning and Land Use*, 1975 ANN. SURV. MASS. LAW § 19.12, at 540-45.

¹²¹ See *Board of Appeals of Hanover v. Housing Appeals Comm. in the Dep't of Community Affairs*, 363 Mass. 339, 354, 294 N.E.2d 393, 406 (1973); Student Comment, 1973 ANN. SURV. MASS. LAW § 12.30, at 454-73.

¹²² See notes 120 & 121 *supra*.

more unusual, but also with precedent, is the provision in the Council's enabling legislation authorizing it to issue a "comprehensive permit."¹²³ The Anti-Snob Zoning Act contains a similar "comprehensive permit" provision, but the range of authorities vested in the Act's appellate entities is confined to local powers and thus is much narrower in scope than that given to the Council.¹²⁴

By creating the Council, the Legislature has added Massachusetts to the list of states having similarly high level policy units empowered to monitor the planning for and development of key energy facilities.¹²⁵ The composition of the Council, its mandate, and indeed its very existence, at once reflect the tensions between energy supply, consumer needs, industrial needs, and environmental protection objectives. The immediate challenge for the Council and its staff is to develop the expertise necessary for a critical review of the long-range plans submitted by the energy companies.¹²⁶ It remains to be seen whether the Council will zealously employ its mandate to strive to compel¹²⁷ the energy companies subject to its jurisdiction to be precise in their long-range planning, to use less harmful and more efficient forms of

¹²³ G.L. c. 164, § 69K. Under the statute: "A certificate, if issued, shall be in the form of a composite of all individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the facility . . ." *Id.*

¹²⁴ See G.L. c. 40B, § 23.

¹²⁵ A number of states have enacted legislation conferring comprehensive policy setting, planning and/or regulatory authority upon a single state entity. For a discussion of these measures and the motivation which led to the creation thereof, see: Bronstein, *State Regulation of Powerplant Siting*, 3 ENV. L. 273 (1973); Luce, *Power for Tomorrow: The Siting Dilemma*, 1 ENV. L. 60 (1970); Ramey, *Old and New Concepts in Siting and Licensing Nuclear Power Plants*, 9 FORUM 211 (1973); see also Ramey & Murray, *Delays and Bottlenecks in the Licensing Process Affecting Utilities: The Role of Improved Procedures and Advance Planning*, 1970 DUKE L.J. 25. For a listing of other law review articles on point see Note, 52 N.D. L. REV. 703, 704-05 n.11 (1976). In recent years growing attention has been paid to the myriad regulatory procedures (federal, state and local) that apply to the siting of key facilities of all kinds. One outgrowth of this concern has been an American Bar Association recommendation that states consider the establishment of a high-level body, such as the Energy Facilities Siting Council, to provide an ability to resolve virtually all environmental and developmental conflicts. Special Committee on Environmental Law (Industrial Siting), American Bar Association, *Development and the Environment: Legal Reforms to Facilitate Industrial Site Selection* (Final Report 1974). For a discussion of the American Bar Association report see Comment, 55 NEB. L. REV. 440 (1976).

¹²⁶ The Council has developed several documents to facilitate the review of forecasts submitted to it. See, e.g., Energy Facilities Siting Council, *Gas Sendout: A Compilation of Long Range Forecasts From Massachusetts Gas Company Reports* (May 1976); and Energy Facilities Siting Council, *Electrical Energy: A Compilation of Long Range Forecasts From Massachusetts Utility Company Reports* (May 1976).

¹²⁷ It would appear that such influence upon the activities of energy companies would be most effectively brought to bear through the Council's determinations upon forecasts submitted to it, see note 52 and accompanying text *supra*, and would be based upon an interpretation of the Council's statutory mandate. See note 13 and accompanying text *supra*.

energy supply and technology, and to force energy companies to discourage energy extravagance by their consumers. And, it also remains to be seen how judiciously the Council, in the exercise of its certificate authority, treats appeals taken from the determinations of state and local governmental units. The full reach of the Council's jurisdiction is somewhat uncertain at this juncture. By nature, energy supply activities necessarily entail arrangements that transcend state and national boundaries. Thus, many, if not all, of the energy companies subject to the Council's jurisdiction are also subject to the exercise of federal energy jurisdiction. It remains to be seen how far the Council can extend its jurisdiction into areas in which the federal jurisdiction is exclusive because of preemption or because of other constitutional impediments.¹²⁸

B. WATER POLLUTION CONTROL

§16.3. Introduction. The 1973 *Survey*¹ contained an extensive analysis of the Federal Water Pollution Control Act Amendments of 1972 (the "federal Act"),² and the Massachusetts Clean Waters Act, as amended (the "state Act"),³ which emphasized the National Pollutant Discharge Elimination System (NPDES) permits⁴ and the "joint per-

¹²⁸ There is some uncertainty as to the range of the jurisdiction actually enjoyed by the Council and similar entities in other states. It has been suggested that the jurisdiction of such entities could be circumscribed by judicial interpretations that the state agency's action or its enabling legislation contravenes the federal constitution, either because the state action placed an undue burden on interstate commerce or because it contravened an area of federal preemption. Note, 52 N.D.L. REV. 703, 704 n. 10 (1976). See also Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and The Supremacy Clause: A Case of Express Preemption* 69-99. (Atomic Indus. F., Inc. Nov. 1975).

The jurisdiction of the Council has already been subjected to such a challenge. *Tenneco, Inc. v. Energy Facilities Siting Council of the Commonwealth of Massachusetts*, Civ. Act. No. 76-1662G (D. Mass. April 28, 1976). The plaintiff in that action is a company engaged in the interstate pumping of gas through pipeline facilities which have been the subject of certificates of public convenience and necessity issued by the Federal Power Commission (FPC) pursuant to the Natural Gas Act, 15 U.S.C. 717 *et seq.* (1970). The plaintiff has asserted that by the enactment of that Act, Congress has preempted the field of the regulation of transshipment of natural gas in interstate commerce, that the requirements that these facilities also be approved by the Council is duplicative of the FPC requirements, and that the Massachusetts regulation places an undue burden on interstate commerce.

§16.3.¹ See O'Brien & Deland, *Environmental Law*, 1973 ANN. SURV. MASS. LAW. §§ 6.2-6.6, at 144-76.

² 33 U.S.C. §§ 1251 *et seq.* (Supp. IV 1974).

³ G.L. c. 21, §§26-53, as amended through Acts of 1975, c. 706, §71.

⁴ 33 U.S.C. §1311(a) (Supp. IV, 1974). Briefly, the federal Act prohibits the discharge of effluents into the Nation's waterways unless authorized by a permit issued pursuant to §1311(a). The NPDES permit is based upon effluent limitations, which are quantities of certain pollutants that a source may discharge, *See id.* §1311(b), and water quality limitations, which are founded on a technical conclusion of the requirements necessary to protect certain uses of the waters receiving the discharge, *See id.* §1312(a). Under the

mit" program being used in Massachusetts.⁵

During the 1976 *Survey* year, there was a shift in emphasis under the federal and state Acts from permit issuance, which spanned the 1973-1975 *Survey* periods, to permit enforcement. In part, this can be attributed to significant decisions of the EPA Administrator⁶ and the federal courts⁷ regarding the deadlines imposed by the federal Act⁸ and largely because of the increased efforts of the Environmental Protection Division of the Department of the Attorney General.

§16.4. Permit Enforcement. A critical issue which the EPA faced after its long struggle to issue permits to industrial dischargers was whether sources could meet compliance schedules phased to achieve the best practicable control technology currently available ("BPT") by July 1, 1977.¹ That issue was first addressed in an opinion of the EPA Administrator issued on September 30, 1975 in the matter of the NPDES Permit for the Bethlehem, Pennsylvania Plant, Bethlehem Steel Corporation (*In Re Bethlehem Steel*).²

Bethlehem Steel Corporation (the "Permittee"), in December, 1974, was issued a discharge permit which required its facility to achieve the final permit conditions by July 1, 1977.³ At a public hearing on the draft permit, the Permittee argued that to meet this deadline, construction would have to be completed by April 1, 1977. It claimed that

federal Act's phased program, by July 1, 1977, a publicly-owned treatment works must provide a minimum of secondary treatment as defined by the Administrator of the EPA at 40 C.F.R. § 133.102 (1976) 33 U.S.C. § 1311(b)(1)(B) (Supp. IV 1974), while all other dischargers must achieve the best practicable control technology currently available ("BPT") by the same date. *Id.* § 1311(b)(1)(B). By July 1, 1983 (Phase II), publicly-owned plants must utilize the best practicable waste treatment technology in order to qualify for a discharge permit *id.* at § 1311(b)(2)(B); dischargers other than publicly-owned treatment works must apply the best available technology economically achievable by that date. *Id.* § 1311(b)(2)(A).

⁵ After Massachusetts' interim authority to issue discharge permits under 33 U.S.C. § 1342(a)(5) (Supp. IV 1974), terminated, an agreement was executed between the Federal Environmental Protection Agency (the "EPA") Region I and the Division of Water Pollution Control, the agency charged with administering the state Act, (the "DWPC"), whereby state and federal permits to a point source were in a single integrated document known as a "joint permit." For a detailed explanation of the joint permit process, see O'Brien & Deland, *Environmental Law*, 1973 ANN. SURV. MASS. LAW § 6.3, at 150-55.

⁶ *In re* NPDES Permit Bethlehem, Pennsylvania Plant, Bethlehem Steel Corp., Docket No. PA-AH-0058, 9 E.R.C. 1063 (1975), *petition for review dismissed sub. nom.*, Bethlehem Steel Corp. v. Train, 544 F.2d 657, 663, 9 E.R.C. 1420, 1425 (3d Cir. 1976).

⁷ *State Water Control Board v. Train*, 424 F. Supp. 146, 8 E.R.C. 1609, 6 E.L.R. 20243 (E.D. Va., 1976).

⁸ See note 4 *supra*.

§16.4. ¹ See §11.3, note 4 *supra*.

² *In re* NPDES Permit Bethlehem, Pennsylvania Plant, Bethlehem Steel Corp., Docket No. PA-AH-0058, 9 E.R.C. 1063 (1975), *petition for review dismissed sub. nom.*, Bethlehem Steel Corp. v. Train, 544 F.2d 657, 663, 9 E.R.C. 1420, 1425 (3d Cir. 1976).

³ 9 E.R.C. at 1064.

this would be physically impossible, despite good faith efforts, and the earliest date it could achieve the standards was January 1, 1979 ("Phase I") and July 1, 1979 ("Phase II"). In an attempt to win an extension of the compliance date, on January 16, 1975 the Permittee requested an adjudicatory hearing on the issue of whether EPA may establish an effective date for final permit conditions later than July 1, 1977, where those conditions are based on BPT and water quality standards.⁴ The question was referred to the EPA General Counsel as a certified issue of law, and on July 24, 1975, the General Counsel concluded that the Administrator has no discretion to extend the statutory compliance date. The conclusion of law was subsequently adopted by the Regional Administrator, Region III, and a petition for review of that decision was filed.⁵ In response to the Permittee's contention that the July 1, 1977 compliance date is merely an interim date set by Congress for achieving the ultimate objectives and goals of the federal Act by 1983 and 1985, the Administrator concluded that based on his examination of the statutory language, as well as its legislative history, the conclusion of the General Counsel should stand and, therefore, the permit, with a final date of July 1, 1977, should take effect immediately.⁶

Akin to the statutory standard that industrial dischargers achieve BPT on or before July 1, 1977, is a requirement that municipal dischargers achieve a minimum of secondary treatment by the same date. The first judicial decision affirming that compliance date was issued in *State Water Control Board v. Train*⁷ on February 6, 1976.⁸ The action was brought by an agency of the Commonwealth of Virginia on behalf of its municipalities to obtain relief from the July 1, 1977 deadline.⁹ It was the Water Control Board's contention that publicly-owned treatment works need not comply with otherwise applicable effluent discharge limitations until such time as (1) federal grant assistance is available in the amount of seventy-five percent of the eligible cost of construction of said works, and (2) a reasonable time has been afforded to complete the necessary construction.¹⁰

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* After the end of the *Survey* year but prior to publication, the United States Court of Appeals for the Third Circuit dismissed Bethlehem Steel Corporation's petition for review. 544 F.2d 657, 663, 9 E.R.C. 1420, 1425 (3d Cir. 1976). The court concluded that on the basis of the legislative history and adjudicated cases, the EPA is without authority to grant an extension beyond the July 1, 1977 date in NPDES permits. *Id.*, citing *State Water Control Bd. v. Train*, 424 F. Supp. 146, 8 E.R.C. 1609, 6 E.L.R. 20243 (E.D. Va. 1976), which case is discussed at notes 7-25 *infra*.

⁷ 424 F. Supp. 146, 8 E.R.C. 1609, 6 E.L.R. 20243 (E.D. Va. 1976).

⁸ *Id.*

⁹ *Id.* at 147, 8 E.R.C. at 1609, 6 E.L.R. at 20243.

¹⁰ *Id.* The basis for this argument is found in a section of the Act which provides for federal grants to help construct treatment facilities. 33 U.S.C. § 1281(g)(1) (Supp. IV 1974). The provision authorizes grants amounting to 75% of the construction cost of

Plaintiff's argument that the discharge limitations for municipal dischargers are inextricably linked to the funding provisions was founded on its construction of the federal Act, as well as the legislative history and the policy behind that Act. Plaintiff postulated that when Congress appropriated \$18 billion for publicly-owned treatment works for fiscal years 1973, 1974, and 1975, Congress estimated that that would cover the federal share of the anticipated cost of compliance.¹¹ Plaintiff buttressed this assertion with comments made during the floor debate on the House version of the bill.¹² Plaintiff further noted that one provision of the Act authorizes reimbursement for funds expended prior to the Act on publicly-owned treatment works,¹³ whereas there is no similar reimbursement provision for projects commenced after the effective date of the Act. This, plaintiff indicated, was further evidence that Congress believed the \$18 billion appropriated would be sufficient to cover the federal share of the construction cost.¹⁴ Plaintiff concluded that since Congress did not wish to tax the limited financial resources of municipalities, Congress must have intended to condition the duty to comply with the Act on the availability of the federal share of funds.¹⁵

The *State Water Control Board* court agreed that there was support in the legislative history both for plaintiff's premise that Congress believed that \$18 billion would be sufficient to cover the federal share of all necessary public construction as well as plaintiff's premise that Congress did not intend to place unreasonable financial burdens on municipalities.¹⁶ The court stated, however, that those two factors

the project. *Id.* §1282(a). Once a treatment works project receives the approval of the Administrator of the EPA with regard to plans, specifications, and cost estimates, the United States becomes contractually obligated to pay its proportional contribution to the project. *Id.* §§1282(a), 1283(a). There is a considerable lag time, however, between approval of the project and actual receipt of funds. 424 F. Supp. at 149, 8 E.R.C. at 1611, 6 E.L.R. at 20244. Moreover, the plaintiff pointed out that there simply were not enough funds authorized under the Act to provide 75% grants to each project. *Id.*

¹¹ 424 F. Supp. at 153, 8 E.R.C. at 1614, 6 E.L.R. at 20245. See 33 U.S.C. §1287 (Supp. IV 1974).

¹² 424 F. Supp. at 153, 8 E.R.C. at 1614, 6 E.L.R. at 20245. For example, plaintiff noted that one congressman stated "[t]he \$18 billion provided in this bill is a realistic figure of the funding that will be needed to get the job done." *Id.* See 92 CONG. REC. 10210 (1972) (remarks of Rep. Grover), reprinted in SEN. COMM. ON PUBLIC WORKS, 93D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 367 (1973) [hereinafter cited as LEGISLATIVE HISTORY]. Another congressman was quoted as stating that "we will not lure them out on a limb only to saw it off behind them for want of available funds." 424 F. Supp. at 154, 8 E.R.C. at 1615, 6 E.L.R. at 20246. See 92 CONG. REC. 10756 (1972) (remarks of Rep. Wright), reprinted in LEGISLATIVE HISTORY, *supra* at 628.

¹³ 424 F. Supp. at 153, 8 E.R.C. at 1615, 6 E.L.R. at 20246, citing 33 U.S.C. §1286 (Supp. IV 1974).

¹⁴ 424 F. Supp. at 153, 8 E.R.C. at 1615, 6 E.L.R. at 20246.

¹⁵ *Id.*, 8 E.R.C. at 1614, 6 E.L.R. at 20245.

¹⁶ *Id.* at 154, 8 E.R.C. at 1615, 6 E.L.R. at 20246.

alone did not “clearly establish that the congressional solution to this dilemma would be conditioning compliance upon obtaining federal funds.”¹⁷

First the court noted that the language of the Act evidenced a clear intent by Congress that the duties of municipalities to comply with the effluent limitations and deadlines were to be strictly adhered to.¹⁸ The court found the funding provisions to be equally clear,¹⁹ and, further, that neither of the enforcement sections of the Act²⁰ conditioned the powers for enforcement conferred therein upon federal funding.²¹ Thus, applying the “plain meaning” rule of statutory interpretation, the court rejected plaintiff’s construction of the Act.²²

The court further buttressed its conclusion by noting that the legislative history of the Act showed that Congress was aware that the federal funding might be inadequate.²³ Moreover, the court pointed out that Congress was presented with and rejected a proposal which would have conditioned compliance upon the availability of federal funding.²⁴ Absent explicit statutory language, the court was unwilling to depart from its conceived responsibility to uphold the Act’s strict standards and guidelines. It therefore refused to establish the possibility of an exception to compliance as proposed by the plaintiff.²⁵ The alternatives to strict compliance with the Act, the court stated, were matters appropriately left to Congress for consideration.²⁶

¹⁷ *Id.*

¹⁸ *Id.* at 150, 8 E.R.C. at 1612, 6 E.L.R. at 20244. The court found the following statement of Senator Montoya to be indicative of Congress’ intent: “This bill contains deadlines and it imposes rather tough standards on industry [and] municipalities Only under such conditions are we likely to press the technological threshold of invention into new and imaginative developments that will allow us to meet the objectives stated in our bill.” *Id.* at 151, 8 E.R.C. at 1613, 6 E.L.R. at 20245. See 92 CONG. REC. 38808 (1971), reprinted in LEGISLATIVE HISTORY, *supra* note 12, at 1278.

¹⁹ 424 F. Supp. at 151, 8 E.R.C. at 1613, 6 E.L.R. at 20245.

²⁰ 33 U.S.C. §§ 1319(a)(3), 1365 (Supp. IV 1974).

²¹ 424 F. Supp. at 152, 8 E.R.C. at 1614, 6 E.L.R. at 20245.

²² *Id.*

²³ *Id.* at 154-55, 8 E.R.C. at 1615-16, 6 E.L.R. at 20246.

²⁴ *Id.* at 155, 8 E.R.C. at 1616, 6 E.L.R. at 20246. Among those urging flexibility were former EPA Administrator William D. Ruckelshaus and Administrator Train. In testimony given before the House Committee on Public Works, Train stated “[s]ome provision should be made, however, for an extension of the 1976 deadlines for facilities where it cannot be achieved despite the best good faith efforts.” LEGISLATIVE HISTORY, *supra* note 12, at 1115. Ruckelshaus was even more emphatic: “a 2-year extension from the 1976 deadline will be necessary for some industrial sources. Similarly, we are of the view that all municipal sources in existence in 1976 cannot achieve secondary treatment; the secondary treatment requirement should only apply to projects for which Federal grants are provided.” “Letter from Ruckelshaus to John A. Blatnik, Chairman, House Committee on Public Works, dated December 13, 1971, reprinted in LEGISLATIVE HISTORY, *supra* note 12, at 1197.

²⁵ 424 F. Supp. at 155, 8 E.R.C. at 1616, 6 E.L.R. at 20246.

²⁶ *Id.* at 156, 8 E.R.C. at 1617, 6 E.L.R. at 20247.

§16.5. National Policy on Industrial and Municipal Dischargers Failing to Meet July 1, 1977 BPT and Secondary Treatment Deadlines. Prompted, in part, by federal decisions holding that there can be no issuance of permits which do not require compliance by July 1, 1977 with the best practicable control technology currently available ("BPT") or secondary treatment requirements,¹ and by the recognition that some industrial and municipal dischargers would not physically achieve the limitations set forth in the Federal Water Pollution Control Act Amendments of 1972 (the "federal Act")² the EPA issued a series of memoranda establishing a federal enforcement policy with regard to such dischargers.³

The policy memoranda attempt to draw a distinction between dischargers whose failure to achieve BPT or a minimum of secondary treatment is occasioned in whole or in part by its own lack of good faith efforts to comply, and those who have proceeded in good faith, but cannot physically achieve compliance. In those instances where a lack of good faith effort is evident, the memoranda state that the traditional enforcement tools provided in the federal Act⁴ should be vig-

§16.5 ¹ *In re* NPDES Permit Bethlehem, Pennsylvania Plant, Bethlehem Steel Corp., Docket No. PA-AH-0058, 9 E.R.C. 1063 (1975), *petition for review dismissed sub nom.*, Bethlehem Steel v. Train, 544 F.2d 657, 663, 9 E.R.C. 1420, 1425 (3d Cir. 1976); State Water Control Bd. v. Train, 424 F. Supp. 146, 8 E.R.C. 1609, 6 E.L.R. 20243 (E.D. Va. 1976). For a further discussion of *Bethlehem* and *State Water Control Board*, see §16.4 *supra*.

² 33 U.S.C. §§ 1251 *et seq.* (Supp. IV 1974). For a discussion of a case in which a discharger claimed it could not physically achieve the limitations set forth in the federal Act see text at notes 3-4 of § 16.4 *supra*.

³ "Enforcement Actions Where an Industrial Discharger Fails to Meet the July 1, 1977, Statutory Deadline for Achieving Best Practicable Control Technology or Other Applicable Effluent Limitations," Stanley W. Legro, Assistant Administrator for Enforcement, EPA, to Regional Administrators, EPA (June 3, 1976) [hereinafter Memorandum on Industrial Dischargers]; "Enforcement Actions Against a Municipal Discharger that Fails to Meet the July 1, 1977, Statutory Deadline for Achieving Secondary Treatment Where the Municipal Discharger is Currently Funded for a Step 1, 2 and/or 3 Construction Grant Directed Toward Achieving Secondary Treatment or Occupies a Position on a Priority List Such that It Can Reasonably Be Expected to Be so Funded Prior to July 1, 1977," Stanley W. Legro, Assistant Administrator for Enforcement, EPA, to Regional Administrators, EPA (June 3, 1976) [hereinafter Memorandum on Municipal Dischargers]; and "Procedures for Issuance of Enforcement Compliance Schedule Letters," Stanley W. Legro, Assistant Administrator for Enforcement, EPA, to Regional Administrators, EPA (June 3, 1976) [hereinafter Memorandum on ECSLs]. These memoranda have been published at [1976-1977] 7 ENVIR. REP. (BNA) 241-245. In December, 1975, EPA proposed a policy which would have granted extensions to certain publicly-owned waste water treatment works only. At that time, congressional staffers and the Natural Resources Defense Council openly criticized the proposal as being illegal. See [1975-1976] 6 ENVIR. REP. (BNA) 1345. For unstated reasons, but apparently because of concerns expressed by the congressional staff, the policy was not implemented. See *id.* at 1380.

⁴ The Act authorizes the EPA Administrator, *inter alia*, to bring a civil action for permanent or temporary injunctive relief for certain violations of the Act. 33 U.S.C. §1319(b)(Supp. IV 1974). Moreover, violators of some of the Act's provisions may be liable for civil and criminal penalties. *Id.* §1319(c)-(d).

ously applied to (1) preserve the integrity of the NPDES permit program, (2) make all dischargers aware that the Act's Phase II deadlines⁵ will also be strictly enforced, and (3) provided equitable treatment to the vast majority of dischargers who have moved quickly and cooperatively to install necessary control technology to meet the statutory deadline.⁶ Failure to vigorously enforce the deadline, the memoranda conclude, would afford undue and unfair advantages to those recalcitrant dischargers who have delayed the installation of required equipment without good cause, allowing them to profit through postponement of capital and operating costs.⁷

Industrial dischargers. According to the EPA policy, a discharger that has proceeded in good faith but which does not have a finally effective permit and which cannot achieve BPT by July 1, 1977 should be simultaneously issued (1) a permit requiring BPT by July 1, 1977, and (2) an Enforcement Compliance Schedule Letter ("ECSL") establishing a compliance schedule to achieve BPT in the shortest reasonable period of time after July 1, 1977.⁸ The ECSL shall, in addition, state the permit issuing authority's intention to refrain from enforcing the July 1, 1977 date as long as the discharger complies with the terms of the ECSL and all terms of its permit, other than that requiring BPT by July 1, 1977.⁹

Municipal dischargers. With regard to a municipal discharger who (1) does not have a finally effective permit (or has a permit expiring prior to July 1, 1977, which must be reissued), cannot achieve secondary treatment by July 1, 1977, and is currently funded for a construction grant directed toward achieving a minimum of secondary treatment, or (2) occupies a position on a priority list such that it can reasonably be expected to be so funded prior to July 1, 1977 from funds authorized under the federal Act, the June 3, 1976 policy statement provides that a permit requiring a minimum of secondary treatment by July 1, 1977 and an ECSL which establishes a schedule to achieve that level of treatment in the shortest reasonable period of time after July 1, 1977 should be simultaneously issued.¹⁰ As with industrial dischargers, the ECSL for municipal dischargers would contain language reflecting the issuing authority's nonenforcement posture where the terms of the ECSL and the permit (except for the July 1, 1977 deadline) are met.¹¹

⁵ *Id.* §1311(b)(2)(A)-(B). See note 4 at §16.3 *supra*.

⁶ *Id.* §1311(b)(1)(A)-(B). See note 4 at §16.3 *supra*.

⁷ Memorandum on Industrial Dischargers, *supra* note 3, [1976-1977] 7 ENVIR. REP. (BNA) at 241; Memorandum on Municipal Dischargers, *supra* note 3, [1976-1977] 7 ENVIR. REP. (BNA) at 243.

⁸ Memorandum on Industrial Dischargers, *supra* note 3, [1976-1977] 7 ENVIR. REP. (BNA) at 242.

⁹ *Id.*

¹⁰ Memorandum on Municipal Dischargers, *supra* note 3, [1976-1977] 7 ENVIR. REP. (BNA) at 243-44.

¹¹ *Id.* at 244.

In the case of both industrial and municipal dischargers, an ECSL may not be issued unless the discharger has submitted (1) documented evidence that, despite all efforts made in good faith, it cannot achieve the final effluent limitations in the permit by July 1, 1977, and (2) a construction management analysis of the shortest reasonable schedule by which such limitations can be achieved.¹² Whenever an ECSL is to be used in connection with a National Pollutant Discharge Elimination System ("NPDES") permit, the ECSL must be subject to the same public participation requirements as the permit.¹³ Also, where an ECSL is to be issued by a state with an approved NPDES program, the letter will not be binding upon the EPA.¹⁴ Therefore, a source receiving such an ECSL should insist on EPA being a joint signator. Finally, it should be noted that any issued ECSL must contain a statement that its issuance does not preclude enforcement of the underlying permit by third parties under the citizen suit provision of the federal Act.¹⁵

The ECSL policy was severely criticized by congressional staff members, many of whom had a major role in drafting the federal Act.¹⁶ Most characterized the announced exercise of prosecutorial discretion by EPA as a "nonenforcement" policy that was contrary to the express provisions of the law, clearly beyond the purview of an administrative agency, and only available to Congress.¹⁷ One senior senate staff aide challenged the policy, stating that the EPA was guilty of "deliberate, systematic misinterpretation and misapplication of the law."¹⁸ He noted that the federal Act clearly limited the EPA Administrator's flexibility in enforcing the provisions of the Act and required efforts at compliance beyond those specific limits to be pursued in the courts.¹⁹ The result of EPA's policy, he said, is that negotiations will be conducted beyond the visibility of the judicial process and without sanctions envisioned by the Act.²⁰

§ 16.6. Joint Permit Enforcement in the Commonwealth. During the *Survey* year, the Environmental Protection Division, Department of the Attorney General (the "Division"), initiated a significant number of suits to enforce the provisions of joint discharge permits.¹ In support of that effort, the EPA made a grant of \$86,000 during the 1976 fiscal year to provide for additional enforcement capability.²

¹² Memorandum on ECSLS, *supra* note 3, [1976-1977] 7 ENVIR. REP. (BNA) at 244.

¹³ *Id.* at 245.

¹⁴ *Id.*

¹⁵ *Id.* See 33 U.S.C. §1365 (Supp. IV 1974).

¹⁶ [1976-1977] 7 ENVIR. REP. (BNA) 220.

¹⁷ *Id.* at 220, 289.

¹⁸ *Id.* at 289. Statement of Leon G. Billings who was instrumental in writing the Act as an aide to Senator Edmund S. Muskie. *Id.*

¹⁹ [1976-1977] 7 ENVIR. REP. (BNA) 289.

²⁰ *Id.*

§16.6. ¹ See MASS. ATTY. GEN. FISCAL 1976 ANN. REP. 4, 8-9.

² *Id.* at 1.

In what has been perhaps its most significant case to date under the state Act, the Division brought suit to enforce a joint discharge permit against the City of Revere.³ The case served notice on the municipalities of the Commonwealth that despite the financial and political problems associated with municipal government, cities and towns would be held accountable for their failure to comply with the strict performance schedules in the joint water discharge permits.

The case against Revere arose out of the terms of a December 1974 joint permit which required, *inter alia*, for investigation and correction of problems with sewage being introduced into the storm drainage system in the Point of Pines area of the City.⁴ The complaint, filed in March 1976 charged the City with violating the compliance schedule set forth in its permit and sought \$10,000 a day in fines for each day of violation of state and federal orders which provided a revised schedule for completion of the necessary work by July 1, 1975.⁵ What is significant about this case, in addition to its being the first action against a municipal permittee, was the Division's insistence that the judgment include liquidated damages provisions⁶ and establish a sizeable escrow account⁷ to assure completion of the agreed to tasks. It appears that these sanctions may be more effective than the traditional administrative order and civil suits which require lengthy proceedings before issuance and subsequent action to enforce, since they require the City to guarantee its own performance and vest the control over its financial commitment directly in the Environmental Protection Division.

C. SAFE DRINKING WATER SUPPLY

§ 16.7. Safe Drinking Water Act: Introduction. Because of its potential impact on the Commonwealth, the Safe Drinking Water Act (the "Act")¹ and proposed implementing regulations² were analyzed extensively in the 1975 *Survey*.³ During the 1976 *Survey* year, the En-

³ Division of Water Pollution Control v. Revere, Civil No. 13424 (Super. Ct. Mass., April 12, 1976).

⁴ Complaint, Division of Water Pollution Control v. Revere, Civil No. 13424 (Super. Ct. Mass., filed March 30, 1976).

⁵ *Id.*

⁶ The consent judgment required the City of Revere to pay the Commonwealth \$1,000 for each day of noncompliance with the terms of said judgment. *Division of Water Pollution Control*, (consent judgment). In the event the City failed to make payment within fourteen days of receipt of a demand of the Attorney General for payment based on a violation of the judgment, the Commonwealth would not be bound by the damage limits established in the judgment. *Id.*

⁷ The escrow account, to be administered by the Department of the Attorney General, was \$50,000. *Division of Water Pollution Control* (consent judgment).

§16.7. ¹ 42 U.S.C. §300f *et seq.* (Supp. IV 1974).

² 40 Fed. Reg. 11994, 33224, 33232 (1975).

³ See O'Brien & Thompson, *Environmental Law*, 1975 ANN. SURV. MASS. LAW §§18.8-18.11, at 490-502.

vironmental Protection Agency (the EPA), the federal agency charged with responsibility for administering the Act, promulgated several regulations which will have a significant impact on the Commonwealth's drinking water program and the Commonwealth's continued access to federal assistance. In this period, the Commonwealth received its first award of grant assistance to develop an effective public water system supervision program and began its efforts to assume primary enforcement responsibility for the Act in the state.

§ 16.8. **Safe Drinking Water Act: Federal Implementation.** *National Interim Primary Drinking Water Regulations.* On March 14, 1975, the EPA had proposed national interim primary drinking water standards¹ as required by the Safe Drinking Water Act (the "Act").² Subsequently, the final interim standards were published on December 24, 1975,³ and become effective on June 24, 1977.⁴ They include several significant changes which are particularly important for the Commonwealth's drinking water program.

Because Massachusetts experiences a substantial amount of tourist trade, the modifications of the definition of water systems covered are pertinent. The Act applies to public and private systems having at least fifteen service connections or regularly serving at least twenty-five individuals, which systems provide piped water to the public for human consumption.⁵ In an effort to interpret the meaning of regular service, EPA's proposed interim standards include service for as much as three months a year.⁶ Since this would have excluded facilities serving tourists which are open slightly less than this period each year, the final version covers systems serving an average of at least twenty-five individuals at least sixty days out of a year.⁷ Since the health effects of a contaminant may vary with the frequency of consumption, the regulations established two categories of public water systems—those serving residents (community water system) and those serving transients or intermittent users (noncommunity water system).⁸ A community water system is defined as a system which serves at least fifteen service connections used by year-round residents or serves at least twenty-five year-round residents.⁹ Noncommunity systems are basically those which serve transients. They include hotels, restaurants,

§16.8. ¹ 40 Fed. Reg. 11994 (1975). See O'Brien & Thompson, *Environmental Law*, 1975 ANN. SURV. MASS. LAW §18.11, 498-502.

² 42 U.S.C. §300g-1 (Supp. IV 1974).

³ 40 C.F.R. Part 141 (1976); 40 Fed. Reg. 59566 (1975). The interim standards are based largely on the Public Health Service's 1962 Drinking Water Standards. *Id.* at 59567.

⁴ 40 Fed. Reg. 59569 (1975).

⁵ 42 U.S.C. §300f(4) (Supp. IV 1974).

⁶ 40 Fed. Reg. 11994, 11994 (1975).

⁷ 40 C.F.R. §141.2(e) (1976), 40 Fed. Reg. 59566, 59566 (1975).

⁸ *Id.*

⁹ 40 C.F.R. §141.2(e)(i) (1976).

campgrounds, service stations and other public accommodations which have at least fifteen service connections or serve water to a daily average of at least twenty-five persons.¹⁰ While the proposed regulations would have applied all maximum contaminant levels to both categories,¹¹ the final version exempts noncommunity systems from maximum contaminant levels for organic chemicals and for inorganic chemicals other than nitrates¹² because such levels were based on long-term exposures and, thus, are not needed to protect transients or intermittent users.¹³

The second major area of change in the final regulations is in the maximum contaminant levels. Three such levels have been deleted and several were rejected despite urgings for their inclusion.¹⁴ First, the proposed level for the bacterial plate count was eliminated because the EPA determined that the coliform and turbidity levels adequately address bacterial contamination.¹⁵ Second, the level for cyanide was eliminated since historical data showed that no system studied revealed the presence of cyanide at a level greater than one-thousandth of the level at which it is toxic to humans.¹⁶ It was determined that toxic levels of cyanide would be present in a water system only as a result of an accidental spillage (such as a barge collision) and, therefore, could be more effectively dealt with by emergency powers conferred under the Act.¹⁷

The third, and most controversial¹⁸ of the deletions from the proposed regulations was the elimination of a maximum contaminant level of .7 milligrams per liter for the total concentration of organic

¹⁰ *Id.* §141.2(e)(ii) (1976), 40 Fed. Reg. 59566, 59566 (1975).

¹¹ 40 Fed. Reg. 11994, 11994-95 (1975).

¹² The nitrate levels were retained because they can have adverse health effects on susceptible infants in a short period of time. *Id.* at 59566.

¹³ 40 C.F.R. §§141.11-141.14; 40 Fed. Reg. 59566, 59566 (1975). The EPA analyzed the economic and inflationary impacts of the Interim Primary Drinking Regulations and concluded that the capital costs to community systems to achieve compliance will range between \$1 billion and \$1.8 billion. Noncommunity systems will have to invest an additional \$24 million. 40 Fed. Reg. at 59569.

¹⁴ 40 Fed. Reg. at 59567 (1975).

¹⁵ *See id.* The EPA, however, endorsed its use as an operational tool in conjunction with the coliform tests to assess the bacteriological quality of drinking water. *Id.*

¹⁶ *Id.*

¹⁷ *Id.* See 42 U.S.C. §300i(a) (Supp. IV 1974), which section empowers the EPA Administrator, upon receipt of information that a contaminant poses an imminent and substantial danger to the health of persons, to initiate abatement efforts. Orders may be issued under this authority notwithstanding existing regulations, variances, exemptions, or other requirements under the Act.

¹⁸ On December 17, 1975 (after a release of the national interim standards, but prior to publication in the Federal Register), the Environmental Defense Fund ("EDF") filed suit in the United States Court of Appeals for the District of Columbia seeking to have the regulations remanded to the EPA for inclusion of an organics standard and to cure other deficiencies, including the failure to require adequate disinfection procedures to control viruses and other disease-causing organisms, and failure to set maximum levels for certain toxic substances (asbestos, dieldrin and sodium). *See* [1975-1976] 6 ENVIR. REP. (BNA) 1412.

chemicals, as determined by the carbon chloroform extract method ("CCE").¹⁹ The EPA stated that Congress had anticipated that organic chemicals would be addressed in the Revised Primary Drinking Water Regulations because of the lack of accurate data on the large number of organic chemicals and the uncertainties of proper treatment techniques.²⁰ Under these circumstances, the EPA adopted the CCE standard as an interim measure, pending development of the Revised Primary Regulations.²¹ However, according to experts commenting on the proposed standard, CCE has many failings as an indicator of health effects of organic chemicals.²² First, they argued that the test gathers data on only a small portion of the total organics in the water sampled.²³ In addition, the experts claimed that CCE was unreliable in identifying those organics most suspected of adverse health effects and that there was "no existing data on which a specific level for CCE can be set on a rational basis."²⁴ Thus, according to EPA:

To establish a maximum contaminant level under these circumstances would almost certainly do more harm than good. It could give a false sense of security to persons served by systems which are within the established level and a false sense of alarm to persons served by systems which exceed the level. It also would divert resources from efforts to find more effective ways of dealing with the organic chemicals problem.²⁵

The EPA's approach to the issue of organics is to require an intensive monitoring and sample analysis effort²⁶ and to embark on an extensive research program.²⁷

¹⁹ 40 Fed. Reg. at 59568 (1975).

²⁰ *Id.* See 42 U.S.C. §300g-1 (Supp. IV 1974).

²¹ 40 Fed. Reg. at 59568 (1975).

²² *Id.* at 59568. The CCE standard was first developed as a test for undesirable tastes and odors in drinking water. *Id.*

²³ 40 Fed. Reg. at 59568 (1975).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 40 C.F.R. §141.40 (1976). These activities are to be conducted under authority of 42 U.S.C. §§300j-4 and 300j-9 (Supp. IV 1974). See 40 Fed. Reg. at 59568, 59587-88 (1975).

²⁷ The program is intended to answer the following four questions:

1. What are the effects of commonly occurring organic compounds on human health?
 2. What analytical procedures should be used to monitor finished drinking water to assure that any Primary Drinking Water Regulations dealing with organics are met?
 3. Because some of these organic compounds are formed during water treatment, what changes in treatment practices are required to minimize the formation of these compounds in treated water?
 4. What treatment technology must be applied to reduce contaminant levels to concentrations that may be specified in the Primary Drinking Water Regulations?
- 40 Fed. Reg. at 59568 (1975).

State Public Water System Supervision Program Grants. On August 7, 1975, the EPA proposed regulations governing grants to assist states in the funding of public water supervision programs under the Act.²⁸ In the final regulations published on January 20, 1976,²⁹ the EPA retained the majority of the proposed provisions, including the following formula for allocation of grant funds among the states:³⁰

Population	30 percent ³¹
Land area	10 percent
Public water systems ³²	60 percent

More importantly, for the Commonwealth,³³ the final regulations have corrected a problem in the proposed regulations which could have led to a hiatus between the first and second awards of grant funds. The EPA had proposed that no grant award could be made to a state for any fiscal year subsequent to the state's first grant unless the state had assumed and was maintaining primary enforcement responsibility under the Act.³⁴ The EPA was persuaded, however, by the argument that the Act "does not prohibit the award of a second program grant to a State within 12 months of the first grant award, even if the State does not have [primary enforcement responsibility] at that time,"³⁵ and thus amended the regulations to permit the second award.³⁶ The final regulation makes it clear, however, that in order to qualify for the second award, a state must demonstrate that it is moving toward assuming primary enforcement responsibility.³⁷

National Interim Primary Drinking Water Regulations Implementation. On January 20, 1976, the EPA published its final regulations implementing the Act's primary drinking water regulations.³⁸ Of prime im-

²⁸ *Id.* at 33224.

²⁹ 41 Fed. Reg. 2912 (1976).

³⁰ 40 C.F.R. §35.605 (1976); 40 Fed. Reg. 2912, 2912 (1976).

³¹ This allocation gives a weight factor of 30% and takes into account the population of each state in proportion to the total population of all states.

³² This factor takes into account the number of public water systems in each state in proportion to the number of such systems in all states. The water systems statistics are drawn from EPA inventory forms and the predominant service area characteristic must include one of the following: community, company town, mobile home park, or an institution. 40 C.F.R. §35.605 (1976).

³³ See discussion of the Massachusetts effort to obtain primary enforcement responsibility at §16.9 *infra*.

³⁴ 40 Fed. Reg. 33224 (1975). See 42 U.S.C. §300g-2(a) (Supp. IV 1974), for a description of what "primary enforcement responsibility" entails. Such responsibility includes the adoption and implementation of drinking water regulations which are at least as stringent as the national primary drinking water regulations. See §16.9, note 3 *infra*.

³⁵ 41 Fed. Reg. 2912, 2912 (1976).

³⁶ *Id.* See 40 C.F.R. § 35.613(b) (1976).

³⁷ 40 C.F.R. §35.613(c) (1976).

³⁸ *Id.* Part 142, 41 Fed. Reg. 2916, 2916 (1976).

portance to the Commonwealth are the provisions of 40 C.F.R. Part 142, Subpart B, which establish the prerequisites for approval of state programs for the enforcement of state drinking water regulations.

One of the notable additions to the proposed implementing regulations is the inclusion of provisions to insure greater dissemination of information to the public and public participation in the states' enforcement efforts. For example, the section dealing with record-keeping requirements has been expanded to require that records covered be maintained and made available for public inspection, either by the state or the appropriate public water systems.³⁹ Also, a provision has been added requiring states to make their annual reports to the EPA available to the public.⁴⁰ Finally, 40 C.F.R. §142.10 has been revised to require public notification of violations by public water systems in order for a state's enforcement program to be deemed adequate.⁴¹

Another change from the proposed regulations which will have a significant impact on the Commonwealth's plans for assuming primary enforcement responsibility is the clarification of the extent of a state's legal authority. Section 142.10(b)(6) has been expanded to make it clear that in addition to such matters as the authority to adopt primary drinking water regulations that are at least as stringent as the federal standards, a state's legal authority must include: (1) the power to seek injunctions against violations of the state's standards; (2) the right to require appropriate recordkeeping and reporting by public water systems covered; (3) the power to assess penalties;⁴² and (4) the public notification requirements discussed in the preceding paragraph.⁴³

³⁹ *Id.* §142.14(f) (1976); 41 Fed. Reg. at 2916 (1976).

⁴⁰ *Id.* §142.15(d) (1976); 41 Fed. Reg. at 2916 (1976).

⁴¹ *Id.* §142.10(6)(v) (1976); 41 Fed. Reg. at 2916 (1976). Other amendments insuring wider distribution of public information are included in 40 C.F.R. §§142.13, 142.23, 142.44 and 142.54, and provide for notice in newspapers of public hearings. 41 Fed. Reg. at 2916 (1976).

⁴² Subparagraph (vi) of §142.10(b)(6), provides that an approvable state program must include authority to assess civil or criminal penalties for violation of the state's primary drinking water regulations or public notification requirements. While states have been urged to adopt the penalty levels under the Act (up to \$5,000 per day civil penalty for a willful violation), a lower level, or different type of penalty will not preclude qualifying for primary enforcement responsibility. EPA intends to judge the adequacy of penalties in light of the state's overall enforcement authority. *See* 41 Fed. Reg. at 2917 (1976).

⁴³ 41 Fed. Reg. at 2917 (1976). The final regulations also clarified the limits of a state's responsibilities to assume primary enforcement. Because of persuasive arguments from states, the EPA conceded that regulation of water on interstate carriers (airplanes, buses, trains) should remain the responsibility of the federal government and, therefore, provided that a state could qualify for primary enforcement responsibility without regulating systems on interstate carriers. *Id.* *See* 40 C.F.R. §142.3(b)(1) (1976). In addition, systems on Indian lands remained the responsibility of the federal government. 40 C.F.R. §142.3(b)(2) (1976).

§16.9. Safe Drinking Water Act: Primary Enforcement Responsibility for the Commonwealth. In May, 1976, the Commonwealth was awarded its first grant under the Act¹ for development of a public water system supervision program. As a result of the final amendments to the grant regulations,² it is anticipated that a second program grant will be made before the primary enforcement responsibilities are assumed.³

By the end of the *Survey* year, significant progress had been made to align the Commonwealth's drinking water program with the federal requirements.⁴ These included efforts to develop a systematic sanitary survey program, the preparation of certification requirements for laboratories, efforts to revise existing regulations⁵ to conform to the Federal Interim Primary Regulations, and efforts to consolidate existing requirements. These regulations, which will be promulgated pursuant to section 2(28) of chapter 21A, section 17 of chapter 92, and section 160 of chapter 111 of the General Laws shall be used to im-

§16.9. ¹ Grants are made to states pursuant to 42 U.S.C. §300j-2(a)(2) (Supp. IV 1974).

² 40 C.F.R. §35.613 (1976).

³ See text at §16.8, notes 34-36 *supra*. "Primary enforcement responsibilities" are described at 42 U.S.C. §300g-2(a) (Supp. IV 1974). See note 4 *infra*.

⁴ These requirements, promulgated pursuant to 42 U.S.C. §300g-2(a)(b) (Supp. IV 1974), are as follows: (1) the adoption of regulations no less stringent than federal regulations, 40 C.F.R. §142.10(a)(2) (1976); (2) the maintenance of an inventory of public water systems, *id.* §142.10(b)(1); (3) the maintenance of a program for conducting sanitary surveys of public water systems, *id.* §142.10(b)(2); (4) the maintenance of a program to certify laboratories conducting analytical measurements of drinking water contaminants, or the establishment of a state laboratory for conducting such measurements, *id.* §142.10(b)(3); (5) the establishment and maintenance of a program to review design and construction of new or modified systems, *id.* §142.10(b)(5); (6) the authority to apply state primary regulations to all public water systems covered by national primary standards, *id.* §142.10(b)(6)(i); (7) the authority to sue to enjoin threatened or continuing violations of state regulations, *id.* §142.10(b)(6)(ii); (8) the authority to inspect public water systems, including the right to take water samples, regardless of whether there is evidence of a violation, *id.* §142.10(b)(6)(iii); (9) the authority to require suppliers to keep records and make reports to the state, *id.* §142.10(b)(6)(iv); (10) the authority to require public water systems to give public notice of violations, *id.* §142.10(b)(6)(v); and (11) the authority to assess civil or criminal penalties including daily ones for continuing violations, *id.* §142.10(b)(6)(vi). Other requirements include the keeping of records and reporting of activities, and the authority to adopt a plan for the provision of safe drinking water under emergency conditions. 42 U.S.C. §300g-2(a)(3) (Supp. IV 1974); 40 C.F.R. §§ 142.10(c),(e) (1976). In addition, if variances or exemptions are authorized by a state, such variances and exemptions must be permitted under conditions no less stringent than federal procedures. See 42 U.S.C. §300g-4 (Supp. IV 1974); 40 C.F.R. §§142.40-142.46 (1976) (variances); 42 U.S.C. §300g-5 (Supp. IV 1974); 40 C.F.R. §§142.50-142.55 (1976) (exemptions).

Preventing the Polluting and Securing the Sanitary Protection of Certain Waters Used As Sources of Public Water Supply, approved and adopted by the Department of Public Health on October 11, 1960, and filed with the Secretary of State of the Commonwealth on June 1, 1961.

plement, interpret, and enforce the Commonwealth's authority to deal with public drinking water systems.⁶

Regarding the Commonwealth's present statutory framework, the Department of the Attorney General has suggested several areas where legislative amendments would strengthen its ability to qualify for assumption of primary enforcement responsibility. Among other changes, it was suggested that the Department of Environmental Quality ("DEQE") obtain an amendment to section 17 of chapter 111 of the General Laws so that DEQE would have the authority to assess daily or multiple penalties for violations of its rules and regulations.⁷ Although it appears that with minor amendments the Commonwealth would have the legal authority required by the federal Act, it is evident that a complete overhaul of the present statutory structure is advisable to eliminate the lack of overall cohesion. The Commonwealth should consider comprehensive legislation in the form of the model for a state drinking water act prepared by the Committee on Suggested Legislation of the Council of State Governments.⁸

D. ENVIRONMENTAL IMPACT REVIEW

§ 16.10. MEPA: Environmental Impact Review. In 1972, through the enactment of the Massachusetts Environmental Policy Act ("MEPA"), the Legislature created for the Commonwealth an environmental impact review process somewhat akin to that required in other states and by the federal government.¹ MEPA requires, first, that state agencies and authorities consider the environmental impacts of their programs,² and second, that they evidence this consideration by preparing a document, termed an environmental impact report ("EIR"), before proceeding with any activity that might cause significant damage to the environment.³ The two requirements did not be-

⁶ The Commonwealth's power to deal with public drinking water systems is currently found in the following statutes: G.L. c. 40, §§15B, 38, 39B, 39C, 40, 41 & 41A; G.L. c. 111, §§2C, 5G, 17, 143, 159, 160A, 160B, 162 & 165; G.L. c. 114, §§35 & 36; G.L. c. 140, §§32B & 32H; and G.L. c. 165, §§4B & 6.

⁷ See note 4, cl. (11) *supra*.

⁸ COUNCIL OF STATE GOVERNMENTS, 1974 SUGGESTED STATE LEGISLATION, 49, "Safe Drinking Water Act," (1974).

§16.10. ¹ Acts of 1972, c. 781, §§2, 3, *adding* G.L. c. 30, §§ 61, 62. For other discussions of this enactment and its counterparts, see generally O'Brien & Thompson, *Environmental Law*, 1975 ANN. SURV. MASS. LAW §§ 18.2-18.6, at 477-88, and particularly, *id.* at § 18.2, n.4, at 478.

² G.L. c. 30, § 61.

³ *Id.* § 62, *as amended through* Acts of 1974, c. 257, §§ 1, 2. As a result of the 1974 amendment to MEPA, a different scope of environmental impact review is required in such reports, depending upon whether the project is a state project or a private project. Acts of 1974, c. 257, § 1, *amending* G.L. c. 30, § 62; O'Brien & Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.3, at 437-42.

come effective simultaneously. The first became effective on December 31, 1972 and the second on July 1, 1973.⁴

Prior to the 1976 *Survey* year, the Supreme Judicial Court had had only two occasions to consider the MEPA in actions brought before it. In *City of Boston v. Massachusetts Port Authority*⁵ (*Massport I*), the Court ruled that MEPA's EIR requirements were not applicable to a given state agency project because the project had "commenced" prior to July 1, 1973, when the EIR requirement became operative.⁶ In *Secretary of Environmental Affairs v. Massachusetts Port Authority*⁷ (*Massport II*), the Court found that the EIR requirements were applicable to another project because the project had not "commenced" until after July 1, 1973.⁸ During the *Survey* year, the Supreme Judicial Court, in two cases, again had occasion to consider whether state agency projects had "commenced" prior to the date when MEPA's EIR requirements became fully effective.

The first decision dealing with the issue of commencement was *Marlow v. City of New Bedford*,⁹ rendered by the Court on January 9, 1976.

⁴ Acts of 1972, c. 781, § 3.

⁵ 364 Mass. 639, 308 N.E.2d 488, 6 E.R.C. 1337, 4 E.L.R. 20314 (1974), *discussed in* O'Brien & Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.5, at 450-53.

⁶ 364 Mass. at 660-61, 308 N.E.2d at 502, 6 E.R.C. at 1346, 4 E.L.R. at 20320. In *Massport I*, the Massachusetts Port Authority ("Massport") became committed in April 1973 to construct a new South Passenger Terminal and ancillary facilities at Logan Airport. *Id.* at 643-44, 308 N.E.2d at 492-93, 6 E.R.C. at 1339, 4 E.L.R. at 20315-16. The Supreme Judicial Court ruled that Massport was bound to comply with G.L. c. 31, § 61, which had an effective date of December 1972, but that it was not bound by G.L. c. 31, § 62. 364 Mass. at 660, 308 N.E.2d at 502, 6 E.R.C. at 1346, 4 E.L.R. at 20320. For a detailed discussion and analysis of *Massport I*, see O'Brien & Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.5, at 450-53.

⁷ 1975 Mass. Adv. Sh. 285, 323 N.E.2d 329, 7 E.R.C. 1759, 5 E.L.R. 20200, *discussed in* O'Brien & Thompson, *Environmental Law*, 1975 ANN. SURV. MASS. LAW § 18.5, at 482-88.

⁸ 1975 Mass. Adv. Sh. at 297-98, 323 N.E.2d at 335, 7 E.R.C. at 1762, 5 E.L.R. at 20201-02. In *Massport II*, the Massachusetts Port Authority ("Massport") undertook a project to extend the two runways and to construct a third at Logan Airport. *Id.* at 285-86, 323 N.E.2d at 331, 7 E.R.C. at 1759, 5 E.L.R. at 20200. Between 1959 and 1972, Massport had prepared generally for the expansion of the airport by acquiring title to land, receiving federal approval of the airport development plan, and contracting for basic site preparation. *Id.* at 287-91, 343 N.E.2d at 331-33, 7 E.R.C. at 1760, 5 E.L.R. at 20200-01. In January 1973, Massport gave notice of a public hearing on the runways project. *Id.* at 291, 323 N.E.2d at 333, 7 E.R.C. at 1760-61, 5 E.L.R. at 20201. It was not until May 1974, however, that Massport entered into a binding contract for the runways work. *Id.* at 292, 323 N.E.2d at 333, 7 E.R.C. at 1761, 5 E.L.R. at 20201. Faced with the question whether G.L. c. 30, § 62, was applicable to a project with such a history, the Supreme Judicial Court ruled that the runways project had not commenced prior to the effective date for the EIR requirements. *Id.* at 304, 323 N.E.2d at 337, 7 E.R.C. at 1764, 5 E.L.R. at 20202-03. For a detailed discussion and analysis of *Massport II*, see O'Brien & Thompson, *Environmental Law*, 1975 ANN. SURV. MASS. LAW § 18.5, at 482-88.

⁹ 1976 Mass. Adv. Sh. 127, 340 N.E.2d 494, — E.R.C. —, — E.L.R. —.

The City of New Bedford and its redevelopment authority were charged with failure to comply with the environmental impact report requirements of MEPA before undertaking work on a combined highway/sewer project in that city.¹⁰ On appeal, the Court held that such compliance was unnecessary since the project had commenced prior to July 1, 1973, the date upon which MEPA's environmental impact report requirements became fully effective.¹¹

The site of the controversial project was Country Street, a major thoroughfare in an area "of historical significance" in the City of New Bedford. The project was directed towards two objectives, traffic safety improvements and sewer rehabilitation.¹² The traffic safety improvements were to consist principally of the straightening and widening of Country Street, but necessitated the removal of many shade trees thought by some to be aesthetic assets.¹³ The sewer rehabilitation aspect of the project entailed the emplacement of a drainage system to permit the separation of storm water flows from sewage flows, and was a necessary precondition for federal assistance in the financing of a municipal sewage treatment plant. The dominant motivation for the city's undertaking of the project was its desire to be eligible for this federal funding.¹⁴ To assist it in financing the project, the city sought a grant from the Massachusetts Department of Public Works ("DPW"). By June 18, 1973, the city had secured such a grant commitment and had contracted for and received completed engineering plans for the project.¹⁵ Subsequent to July 1, 1973, the city received final plan approval from the DPW, undertook public bidding procedures, and executed a contract for construction of the project. Actual construction commenced on March 5, 1974.¹⁶ On the same day, the plaintiffs initiated the litigation, seeking to enjoin the city from continuing work on the project.¹⁷

After trial in the superior court, an order was entered adverse to the plaintiffs.¹⁸ The trial judge stated as his basis for the order two alternate grounds: first, that the environmental impact of the Country Road project was "insignificant," and second, that the city had commenced the project prior to July 1, 1973.¹⁹ The trial judge based his first finding, that the impact of the project was insignificant, on the premise that, because the dominant motivation for the project was to

¹⁰ *Id.* at 127-30, 340 N.E.2d at 494-95, — E.R.C. —, — E.L.R. —.

¹¹ *Id.* at 139, 340 N.E.2d at 498, — E.R.C. —, — E.L.R. —.

¹² *Id.* at 128-30, 340 N.E.2d at 495, — E.R.C. —, — E.L.R. —.

¹³ *Id.*, 340 N.E.2d at 495, — E.R.C. —, — E.L.R. —.

¹⁴ *Id.* at 130, 340 N.E.2d at 495, — E.R.C. —, — E.L.R. —.

¹⁵ *Id.* at 130-31 n.5, 340 N.E.2d at 495-96 n.5, — E.R.C. —, — E.L.R. —.

¹⁶ *Id.* at 131 n.5, 340 N.E.2d at 496 n.5, — E.R.C. —, — E.L.R. —.

¹⁷ Bill of Complaint of plaintiffs filed in Superior Court Bristol County, (filed March 5, 1974).

¹⁸ *Id.* at 128, 340 N.E.2d at 495, — E.R.C. —, — E.L.R. —.

¹⁹ *Id.* at 135, 340 N.E.2d at 497, — E.R.C. —, — E.L.R. —.

secure eligibility for federal sewage treatment facility grants, the benefits in improved water quality to be gained from the operation of the facility outweighed any adverse impacts to be suffered in the Country Road area. The judge's second finding, that the project had commenced before MEPA's EIR requirements became effective, was based on his conclusion that, as of that date, the project was complete to the point where it was ready to be subjected to public bidding procedures. The plaintiffs appealed from the superior court judgment. As to the first ground expressed by the judge, they argued that by making the judiciary rather than the appropriate administrative agency the forum for the balancing of environmental impacts and benefits, the intent of MEPA was "subverted."²⁰ The plaintiffs also disputed the judge's finding that the project had commenced before July 1, 1973.

On appeal, the Supreme Judicial Court affirmed the superior court judgment. The Court's decision concerned only the second ground for the judgment, the point of commencement of the project.²¹ The Court repeated its statement that the basic test to be used in determining the point of commencement "is the existence of a commitment . . . which is irreversible in nature, and which has a clearly defined objective."²² Using this test in *Marlow*, the Court found that the circumstances of the city's scheme to improve Country Road, to rehabilitate the sewers underneath, and to build its sewage treatment plant entailed a "matrix of commitments among [the city], the Commonwealth, and the Federal government in which the commitments to act and fund were interdependent."²³ The Court expressly rejected plaintiffs' contention that the point of commencement would be determined by reference to a commitment between a public agency and a construction contractor for actual construction work on a project.²⁴ In reaching its result in *Marlow*, the Court distinguished *Marlow* from *Massport II*. In the latter case, the Court found no such commitment because as of July 1, 1973, the defendant state agency had only received preliminary engineering plans and had not made its "decision" to proceed or not proceed with the project. The Court noted that in *Marlow* the project had reached a more refined stage of development insofar as by the critical date, final plans had been completed and the decision to undertake the project had been made.²⁵

The second case dealing with the issue of commencement was

²⁰ *Id.*, 340 N.E.2d at 497, — E.R.C. —, — E.L.R. —.

²¹ *Id.*, 340 N.E.2d at 497, — E.R.C. —, — E.L.R. —.

²² *Id.* at 138, 340 N.E.2d at 498, — E.R.C. —, — E.L.R. —, citing *Massport II*, 1975 Mass. Adv. Sh. at 298, 323 N.E.2d at 335, 7 E.R.C. at 1762, 5 E.L.R. at 20202. See note 8 *supra*.

²³ 1976 Mass. Adv. Sh. at 138-39, 340 N.E.2d at 498, — E.R.C. —, — E.L.R. —.

²⁴ *Id.* at 139, 340 N.E.2d at 498, — E.R.C. —, — E.L.R. —.

²⁵ *Id.* at 140-41, 340 N.E.2d at 499, — E.R.C. —, — E.L.R. —.

Springfield Y Trust v. Executive Director of the Massachusetts Housing Finance Agency,²⁶ rendered by the Court on February 11, 1976. In that action, the Massachusetts Housing Finance Agency ("MHFA") was assailed for an asserted failure to comply with MEPA's EIR requirements incident to its award of a subsidy for the construction of a commercial/mixed-income-residential development (the "development") in the City of Springfield.²⁷ On appeal,²⁸ the Supreme Judicial Court held that the development had commenced prior to the date when MEPA became fully effective.²⁹

Prior to July 1, 1973, the MHFA issued and modified, and the developer accepted, a letter of commitment for a construction loan for the development. Also prior to July 1, 1973, the developer had executed a contract for the construction of the development.³⁰ However, several notable events took place *after* that date. Between July 1, 1973 and July 31, 1973, the developer executed a contract for engineering services for the project, all final documents pertaining to the MHFA financing were completed and recorded, and the MHFA made its initial advancement of funds to the developer.³¹ Approximately six months later, the plaintiffs commenced the action in superior court seeking to enjoin the advancement of further funds for the development. The action was dismissed by the trial court, and the plaintiffs appealed.³²

Upon review, the Supreme Judicial Court found it unnecessary to engage in a restatement of its previous holdings regarding commencement. Instead, the Court summarized this precedent as reflecting "a common-sense appreciation of when the stage of tentative planning passes to the stage of an engagement to act."³³ The Court noted further that commencement is a "functional concept" to be de-

²⁶ 1976 Mass. Adv. Sh. 435, 341 N.E.2d 893, — E.R.C. —, — E.L.R. —.

²⁷ *Id.* at 435-37, 341 N.E.2d at 894, — E.R.C. —, — E.L.R. —.

²⁸ The suit took a circuitous route to the Supreme Judicial Court. It commenced when Charles Gould, as trustee of a real estate trust, petitioned in February, 1974 for a mandamus to compel the director of MHFA to meet the EIR requirements of G.L. c. 30, § 62, regarding the Springfield housing project. Gould sought a temporary restraining order enjoining further funding for the project. A superior court judge denied the application and Gould did not appeal that decision. Later Gould filed an "amended petition for writ of mandamus" bringing in other parties as defendants. The director of MHFA and the other parties moved for and were granted a judgment dismissing the claim for failure to state a claim. Gould appealed this dismissal to the Appeals Court, whereupon the Supreme Judicial Court ordered the case transferred to the latter court. On the appeal, the Springfield Y Trust was substituted as the successor in interest to the original real estate trust. 1976 Mass. Adv. Sh. at 435-37, 341 N.E.2d at 893-94, — E.R.C. —, — E.L.R. —.

²⁹ 1976 Mass. Adv. Sh. at 441-42, 341 N.E.2d at 896, — E.R.C. —, — E.L.R. —.

³⁰ *Id.* at 437-38, 341 N.E.2d at 894, — E.R.C. —, — E.L.R. —.

³¹ *Id.* at 438, 341 N.E.2d at 894, — E.R.C. —, — E.L.R. —.

³² See note 28 *supra*.

³³ 1976 Mass. Adv. Sh. at 440-41, 341 N.E.2d at 895, — E.R.C. —, — E.L.R. —.

terminated with respect to a given state agency in terms of the statutory mandate of that agency and its role in the overall context of a given project.³⁴ Applying this approach to the facts in *Springfield Y Trust*, the Court found that MHFA's role was that of a "lender" whose "lending activity" was commenced by the tendering of a letter of commitment, which established between the MHFA and the developer "a solid commercial engagement . . . not dissimilar to other loan commitments."³⁵ The Court thus concluded that, as to the MHFA, the development had commenced prior to July 1, 1973.

The *Marlow* and the *Springfield Y Trust* cases illustrate the Court's apparent resolve not to be held to rigid tests in determining the point of commencement. In both opinions the Court found that the point of commencement had occurred, not at the execution of construction contracts, but at the earlier point at which the agency had formed its decision to undertake the project. Admittedly, the attempt to identify a point of decisionmaking necessitates an inquiry which can entail an evaluation of subjective considerations. However, as can be seen from *Marlow*, it is possible to overcome any frailties in basing a decision on such subjective considerations by a careful examination into the circumstances underlying an agency's decision to embark upon a given project.

³⁴ *Id.* at 441, 341 N.E.2d at 896, — E.R.C. —, — E.L.R. —.

³⁵ *Id.* at 441-42, 341 N.E.2d at 896, — E.R.C. —, — E.L.R. —.

