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C H A P T E R 18

Environmental Law

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

§18.1. Introduction. The *Survey* year was not marked by any radical alterations of environmental programs in Massachusetts. Rather, it was notable for the extent to which the state agencies charged with the responsibility for administering state environmental programs adapted to the new administrative configurations effected by the "reorganization" of the Executive Office of Environmental Affairs ("EOEA")¹ and attempted to fulfill their mandates despite budget paring. During the *Survey* year the state budget was cut radically. The budget for the EOEA and its component agencies, which was \$82,010,000 in fiscal year 1975,² was reduced to \$77,883,000 for fiscal year 1976,³ and may be reduced further if the Legislature pares the Governor's recommendation for a \$77,882,000 EOEA budget for fiscal year 1977.⁴ Massachusetts practitioners who must deal with agencies within the EOEA should consider the probable effect of these budget reductions upon the ability of state agencies to provide services.

Changes in environmental law during the *Survey* year occurred in the established areas of environmental impact review and air pollution control. In addition, the Commonwealth began to evaluate its existing programs in the areas of pesticide regulation and drinking water quality with a view towards implementing federal statutes in those areas.

§18.2. Environmental Impact Review: Introduction. Since 1970, when the National Environmental Policy Act ("NEPA")¹ became effec-

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§18.1. ¹ The "reorganization" of the EOEA was effected by Acts of 1974, c. 806, and Acts of 1975, c. 706.

² See Acts of 1974, c. 431, c. 698, & c. 855; Acts of 1975, c. 112 & c. 327.

³ See Acts of 1975, c. 404, c. 530, c. 597, & c. 684.

⁴ See H. 1 (1976).

§18.2. ¹ 42 U.S.C. §§ 4321 *et seq.* (1970). NEPA was amended by Pub. L. No. 94-83, 89 Stat. 424 (Aug. 9, 1975). See § 18.3 *infra*.

tive, environmental impact review has become an important feature of environmental law. NEPA requires that all federal agencies proposing action that might significantly affect the quality of the human environment include an environmental impact statement in their reports or recommendations.² In addition, many states have formulated environmental impact review systems based on NEPA.³ In 1972, the Massachusetts Legislature joined this trend and, through the enactment of the Massachusetts Environmental Policy Act ("MEPA"),⁴ created an environmental impact review system applicable to state government. MEPA requires, first, that state agencies and authorities consider the environmental impact of their programs and strive to minimize damage to the environment.⁵ MEPA also mandates that, before an agency undertakes any project that might cause significant damage to the environment, it prepare a formal document—termed an environmental impact report—defining the effect on the environment of that project.⁶

MEPA charges the Secretary of Environmental Affairs with chief administrative responsibility in the administration of the state environmental impact review program by vesting the Secretary with authority to comment on the adequacy of the environmental impact reports and to supervise the development of the regulations by which the implementation of the statute is to be facilitated.⁷ Although MEPA continues to require a broad scope of review in environmental impact statements for projects directly undertaken by state agencies through the expenditure of state funds, the statute was amended in 1974 to narrow the scope for those projects in which a state agency's involvement arises less directly through, for example, a licensing or regulatory function.⁸

During the *Survey* year, a number of developments, state and federal, administrative, judicial and legislative, have altered the environmental impact review programs applicable in the Commonwealth. On the federal level, Congress amended NEPA to modify the procedural

² 42 U.S.C. § 4332(2)(C) (1970). For a discussion of NEPA, the litigation that has taken place thereunder, and its effects on the federal bureaucracy, see Anderson, *The National Environmental Policy Act*, FEDERAL ENVIRONMENTAL LAW 238-419 (Env. Law Inst. 1974).

³ See O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.6, at 456 n.1.

⁴ G.L. c. 30, §§ 61, 62. For discussions of MEPA see Miller, *Environmental Law*, 1972 ANN. SURV. MASS. LAW §§ 21.8-10, at 605-12; O'Brien and Deland, *Environmental Law*, 1973 ANN. SURV. MASS. LAW § 6.8, at 178-88; and O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW §§ 18.2-.6, at 435-58.

⁵ G.L. c. 30, § 61.

⁶ *Id.* § 62.

⁷ *Id.*

⁸ *Id.* § 62, as amended by Acts of 1974, c. 257, § 1. See O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.3, at 437.

requirements to be followed by federal agencies in undertaking environmental impact review of certain federal actions.⁹ The regulatory scheme under which MEPA is to be implemented has been changed slightly as a result of rulemaking by the Secretary of Environmental Affairs.¹⁰ Unlike its federal model, NEPA, the Massachusetts Environmental Policy Act has not been subjected to extensive judicial scrutiny. In *Secretary of Environmental Affairs v. Massachusetts Port Authority*,¹¹ the Supreme Judicial Court made its first definitive ruling on the enforceability of MEPA.¹² Finally, as a result of the controversy underlying the 1974 amendment to MEPA, the Legislature created a special commission to study the efficacy of that statute; during the *Survey* year, the commission produced a First Interim Report.¹³

§18.3. NEPA Amendment: Environmental Impact Statements Prepared by State Agencies. In 1975, Congress amended NEPA to permit federal agencies to use an environmental impact statement ("EIS") prepared by a state agency to satisfy NEPA obligations in certain instances.¹ Under this amendment, a federal agency may satisfy NEPA with respect to programs in which it has a relatively minor substantive role—through the award of federal grants to state agencies having statewide jurisdiction—provided that (1) the federal agency "furnishes guidance and participates in" the preparation of the EIS by the state agency and (2) the federal agency "independently evaluates" each EIS prior to approving and adopting it.² Nonetheless, where a federal agency has thus delegated to a state agency the responsibility for preparing an EIS for a particular project that may have significant impacts on land managed by another state or federal agency and where that agency has filed comments disagreeing with the extent and magnitude of the impacts, the sponsoring federal agency must prepare and incorporate into the EIS a written assessment of the environmental impacts and the differing views thereon.³ Although the amendment thus allows federal agencies to delegate responsibilities for the preparation of certain impact statements, it specifically provides that the federal agencies shall remain responsible for their "scope, objectivity, and content," as well as for compliance with all other provisions of NEPA.⁴

⁹ § 18.3 *infra*.

¹⁰ § 18.4 *infra*.

¹¹ 1975 Mass. Adv. Sh. 285, 323 N.E.2d 329, 7 E.R.C. 1759, 5 E.L.R. 20200.

¹² § 18.5 *infra*.

¹³ § 18.6 *infra*.

§18.3. ¹ Pub. L. No. 94-83, 89 Stat. 424 (Aug. 9, 1975), *amending* 42 U.S.C. § 4332 (1970).

² *Id.*

³ *Id.*

⁴ *Id.*

This amendment was precipitated by the confusion resulting from the decision of the Second Circuit in *Conservation Society v. Secretary*.⁵ In *Conservation Society*, the court held that the Federal Highway Works Administration ("FHWA") could not delegate to the Vermont highway department the responsibility for preparing an EIS for a federally funded highway to be built in that state.⁶ The court reasoned that the federal agency was more likely to engage in a dispassionate review of the benefits of the proposed program and its costs to the environment.⁷

The *Conservation Society* decision had wide impact since several federal agencies, including the FHWA, had relied upon a divergence in case law⁸ and upon language in regulations promulgated by the Council on Environmental Quality⁹ as authorizing them to delegate the responsibility of preparing an EIS to the state agency primarily involved in the program. In reaction to the *Conservation Society* decision, the FHWA suspended highway projects in New York, Vermont, and Connecticut, the three Second Circuit states.¹⁰ The impact of *Conservation Society* appeared likely to become more widespread as, shortly after it was handed down, it was followed in two federal court decisions rendered elsewhere in the country.¹¹

In response, Congress amended NEPA to formulate a special procedure for the delegation of EIS responsibility to the states for those programs where federal agencies have a minor role.¹² Although this 1975 amendment was the first direct modification of NEPA, it was not the first instance in which the scope of that statute has been delimited by Congressional action. Several special exemptions have been made, indirectly by amendments to or provisions in other statutes, to exempt certain activities from the applicability of NEPA. For example, certain environmental regulatory functions exercised by the EPA in the areas of air¹³ and water¹⁴ pollution control have been exempted from

⁵ 508 F.2d 927, 7 E.R.C. 1236, 5 E.L.R. 20068 (2d Cir. 1974).

⁶ *Id.* at 931, 7 E.R.C. at 1239, 5 E.L.R. at 20070.

⁷ *Id.*

⁸ For a discussion of the case law on this point see Anderson, *The National Environmental Policy Act*, FEDERAL ENVIRONMENTAL LAW 366-72 (Env. Law Inst. 1974).

⁹ 40 C.F.R. § 1500.7(c) (1975). Under NEPA, the Council on Environmental Quality is given a role in supervising the implementation of NEPA similar to that given the Secretary of Environmental Affairs under MEPA. Compare 42 U.S.C. §§ 4341-47 (1970) with G.L. c. 30, § 62.

¹⁰ S. REP. NO. 152, 94th Cong., 1st Sess., reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1797, 1800.

¹¹ *Swain v. Brinegar*, 517 F.2d 766, 778-79, 7 E.R.C. 2046, 2054-55, 5 E.L.R. 20354, 20359 (7th Cir. 1975); *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 121, 5 E.L.R. 20311, 20317 (D.N.H. 1975).

¹² See generally S. REP. NO. 94th Cong., 1st Sess., reprinted in 1975 U.S. CODE CONG. & AD. NEWS 1797-1816.

¹³ Energy Supply and Environmental Coordination Act ("ESECA") § 7, 15 U.S.C.A. § 793 (Supp. 1976).

¹⁴ Federal Water Pollution Control Act Amendments of 1972 § 551(c), 33 U.S.C. § 1371(c) (Supp. II, 1972).

NEPA. Special projects or programs have also been exempted from the coverage of NEPA where Congress has determined that it would be impractical or inexpedient to hold the federal agencies administering these projects or programs to the requirements of full NEPA environmental impact review.¹⁵ One notable exemption from NEPA is that created for "community development block grants" made by the federal Department of Housing and Urban Development ("HUD") to local communities pursuant to the Housing and Community Development Act of 1974.¹⁶ That statute provides that HUD may exempt itself from responsibility for preparing an EIS for its award of block grant funds to a local community by conditioning the award upon the recipient's agreement to comply with NEPA, to assume the status of a "responsible Federal official" under NEPA, and to consent "to accept the jurisdiction of the Federal courts for the purposes of enforcement of [such] responsibilities as such an official."¹⁷

§18.4. MEPA Regulations: Executive Office of Environmental Affairs: Revised Guideline Regulations. Under MEPA, compliance with its environmental impact report requirements is to be facilitated by the promulgation by each executive office of rules and regulations applicable to each of its constituent state agencies.¹ MEPA further provides that these various executive office regulations are to be approved by the Secretary of Environmental Affairs.² Pursuant to this requirement, the Secretary, in June, 1973, adopted³ and in October, 1973, amended⁴ "guideline regulations" to serve both as models for the MEPA regulations to be adopted by each executive office and to serve as the MEPA procedures to be used by state agencies until MEPA regulations have been adopted by the appropriate executive office.⁵ In response to the 1974 amendment of MEPA,⁶ the Secretary

¹⁵ *E.g.*, the construction of the Trans-Alaska Pipeline, Trans-Alaska Pipeline Authorization Act § 203(d), 43 U.S.C. § 1652(d) (Supp. IV, 1974); and actions taken by the Federal Power Commission with regard to the issuance of an electric energy transmission facility permit for a specific site on the United States-Canada border. ESECA § 7(d), 15 U.S.C.A. § 793(d) (Supp. 1976).

¹⁶ 42 U.S.C. §§ 5301 *et seq.* (Supp. IV, 1974).

¹⁷ Housing and Community Development Act of 1974 § 104(h), 42 U.S.C. § 5304(h) (Supp. IV, 1974). For a discussion of the NEPA implications of a federal agency activity in a context analogous to that of the HUD block grant program see Note, *The Application of Federal Environmental Standards to the General Revenue Sharing Program: NEPA and Unrestricted Federal Grants*, 60 VA. L. REV. 114 (1974).

§18.4. ¹ G.L. c. 30, § 62.

² *Id.* Curiously, this provision in MEPA does not apply to authorities of political subdivisions, although these entities are subject to the substantive requirements of MEPA.

³ Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports, filed on June 29, 1973.

⁴ Amendments to Regulations to Create a Uniform System for the Preparation of Environmental Impact Reports, filed on October 15, 1973.

⁵ The Procedures described by the regulations cited in notes 3 and 4 *supra* are described in O'Brien and Deland, *Environmental Law*, 1973 ANN. SURV. MASS. LAW § 6.8, at 178-88.

⁶ Acts of 1974, c. 257, § 1.

adopted additional "guideline regulations"⁷ detailing MEPA procedures reflecting the differing scopes of environmental impact analysis to be accorded "state agency projects" and "private projects."⁸ By the start of the *Survey* year, most executive offices had adopted regulations specifying MEPA procedures.⁹

As of October, 1975, the Secretary had revised the guideline regulations applicable to both private projects and state agency projects.¹⁰ These new guidelines contain new assessment forms applicable to state agency projects and private projects,¹¹ establish categorical exemptions applicable to the agencies within the EOEA,¹² and effect some other minor technical modifications to standard MEPA procedures.

Although none of this rulemaking effects any profound change in the administration of MEPA, the Massachusetts practitioner should keep in mind that the MEPA system is subject to change and modification as experience is gained in its administration, as state agencies operate within the constraints of fiscal and administrative resources, and as the underlying statutes are modified.

§18.5. MEPA Enforcement: *Massport II*. The first decisive ruling supporting enforcement of MEPA was made in *Secretary of Environmental Affairs v. Massachusetts Port Authority*¹ ("*Massport II*"),² a de-

⁷ Regulations to Implement c. 30, § 62, as amended by c. 257 of the Acts of 1974, filed on July 2, 1974.

⁸ For a description of the distinction between state agency projects and private projects see O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.3, at 437-42.

⁹ See *id.* § 18.4, at 442-49.

¹⁰ This revision was effected by way of three rulemakings. On December 31, 1974, the Secretary adopted "Regulations Governing the Preparation of Environmental Impact Reports," which supplanted the two prior sets of guideline regulations. On June 30, 1975, the Secretary, by emergency rulemaking, adopted regulations that amended those parts of the December, 1974, regulations applicable to agencies within the EOEA to reflect the new agency titles and administrative configurations effected by the reorganization of that executive office. These interim rules were replaced by regulations, titled "Amendments to Regulations Governing the Preparation of Environmental Impact Reports," adopted by the Secretary in September, 1975. As of this writing, these September, 1975 regulations are the only EOEA regulations under MEPA in force and effect.

¹¹ The initial evaluation of state agency projects is to be done by way of an Environmental Assessment Form ("EAF"); private projects are to be evaluated by use of a Limited Environmental Assessment Form ("LEAF"). The EAF and LEAF are attached as Appendices A to Parts One and Two of the September, 1975 regulations respectively.

In addition to the rulemaking described in note 10 *supra*, the Secretary, in March, 1975, published an "Environmental Assessment Form Manual" to facilitate the uniform use of the EAF and LEAF.

¹² Amendments to Regulations Governing the Preparation of Environmental Impact Reports, filed September 29, 1975, Appendix C to Part One.

§18.5. ¹ 1975 Mass. Adv. Sh. 285, 323 N.E.2d 329, 7 E.R.C. 1759, 5 E.L.R. 20200.

² Coincidentally, *Massport* has been defendant in the two actions in which MEPA had been before the Supreme Judicial Court within the context of adversary litigation. The decision in the first case was rendered in 1974, *City of Boston v. Massachusetts Port Authority*, 1974 Mass. Adv. Sh. 187, 308 N.E.2d 488, 6 E.R.C. 1337, 4 E.L.R.

cision rendered by the Supreme Judicial Court on February 5, 1975. The defendant Massachusetts Port Authority ("Massport"),³ was charged with failure to comply with MEPA upon undertaking a project to extend two existing runways and to construct a third in the Bird Island Flats portion of Massport's Logan Airport facility.⁴ On appeal, the Supreme Judicial Court held that since the runways project had not "commenced" until after the date when MEPA's environmental impact report ("EIR") requirements were effective,⁵ Massport was required to prepare an EIR before proceeding with the runways project.⁶

Between 1959 and 1974, Massport had undertaken a variety of actions related generally to the development of airport facilities in the Bird Island Flats. In this period, Massport had acquired title to the Flats, had received federal approval of the airport development plan, had undertaken basic site preparation, and had authorized bond issues to secure financing for the development of the Flats.⁷ Nonetheless, as of July 1, 1973, the date when MEPA became fully effective, Massport had not begun construction of the runways project. In May, 1974, Massport finally executed a contract for the actual construction of the runways project.⁸ The City of Boston and the Secretary of Environmental Affairs and the Secretary of Transportation and Construction brought suit against Massport and its contractor alleging violations of MEPA and seeking declaratory and injunctive relief.⁹ The superior court granted preliminary injunctive relief and enjoined further construction of the project pending compliance by Massport with MEPA.¹⁰

In affirming the trial court, the Supreme Judicial Court made findings regarding three issues presented by Massport's appeal. The Court found: (1) that the runways project had not commenced prior

20314. Because of the limited case law under MEPA and the close nexus between the holdings in these 1974 and 1975 decisions, they are referred to herein as *Massport I* and *Massport II* respectively.

³ Massport has frequently been charged with failure to comply with environmental statutes. *E.g.*, *City of Boston v. Brinegar*, 512 F.2d 319, 6 E.R.C. 1961, 5 E.L.R. 20241 (1st Cir. 1975); *City of Boston v. Coleman*, 397 F. Supp. 698, 5 E.L.R. 20502 (D. Mass. 1975).

⁴ 1975 Mass. Adv. Sh. at 285-86, 323 N.E.2d at 331, 7 E.R.C. at 1759-60, 5 E.L.R. at 20200. The two companion state court actions were brought by the City of Boston and by the Secretary of Environmental Affairs and the Secretary of Transportation and Construction.

⁵ G.L. c. 30, § 62, which imposes this EIR requirement, became effective on July 1, 1973. G.L. c. 30, § 61, the other MEPA section, was made effective on December 31, 1972. Acts of 1972, c. 781, § 3.

⁶ 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.

⁷ *Id.* at 287-93, 323 N.E.2d at 331-33, 7 E.R.C. at 1760-61, 5 E.L.R. at 20200-01.

⁸ *Id.* at 292, 323 N.E.2d at 333, 7 E.R.C. at 1761, 5 E.L.R. at 20201.

⁹ *Id.* at 285-86, 323 N.E.2d at 331, 7 E.R.C. at 1759-60, 5 E.L.R. at 20200.

¹⁰ *Id.* at 286, 323 N.E.2d at 331, 7 E.R.C. at 1760, 5 E.L.R. at 20200.

to the date when MEPA's EIR requirements were effective;¹¹ (2) that since the project could cause damage to the environment an EIR would be required;¹² and (3) that a determination of whether Massport had complied with MEPA could be made only on the basis of an EIR.¹³ The Court's opinion is noteworthy for its detailed examination of the bases for these rulings.

Commencement of the project. For purposes of establishing what projects had "commenced" prior to July 1, 1973, and thus would not require an EIR under section 62 of chapter 30 of the General Laws, the EOEA has defined as "commenced" those projects for which the state agency "has undertaken a continuous program of action or construction or has entered into a binding agreement or other obligation to undertake and complete a continuous program of action or construction."¹⁴ Massport argued that the runways project had commenced in 1969 when it had contracted for the construction of a drainage system for an emplacement of a rock dike around the entire 234-acre Flats. On the basis of this activity, Massport asserted that the project did not fall under MEPA's EIR requirement.¹⁵ The Court was not persuaded by this argument and noted two factors that undermined Massport's ability to use the 1969 activity as the commencement of the runways project. First, the 1969 activity was not specifically directed to the construction of the runways project, but instead was generally related to Massport's overall plan to prepare the Flats for several airport facilities.¹⁶ Second, in 1969, Massport's plans for runway expansion in the Flats included proposals for only one runway extension and did not encompass all three projects that constituted the controverted runways project.¹⁷ Because of the tenuous link between the 1969 construction activity and the runways project as undertaken in 1974, the Court rejected the earlier construction activity as the point of commencement of the runways project.¹⁸

The basic test used by the Court in determining the point of commencement was the "existence of a commitment entered into prior to

¹¹ *Id.* at 304, 323 N.E.2d at 337, 7 E.R.C. at 1764, 5 E.L.R. at 20203.

¹² *Id.* at 315, 323 N.E.2d at 341, 7 E.R.C. at 1767, 5 E.L.R. at 20204.

¹³ *Id.* at 322-23, 323 N.E.2d at 344, 7 E.R.C. at 1768, 5 E.L.R. at 20205.

¹⁴ EOEA State Project Guideline Regs. § 13 (1973). MEPA provides that its implementation is to be facilitated by a system of rules and regulations to be adopted by each of the various executive offices under the supervision of the Secretary of Environmental Affairs. G.L. c. 30, § 62. This system is described in O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.4, at 442-49.

¹⁵ 1975 Mass. Adv. Sh. at 297, 323 N.E.2d at 335, 7 E.R.C. at 1762, 5 E.L.R. at 20201-02.

¹⁶ *Id.* at 298-99, 323 N.E.2d at 336, 7 E.R.C. at 1762, 5 E.L.R. at 20202. Massport also planned to construct in the Flats facilities for fuel and cargo storage, airline hangers, and other improvements.

¹⁷ *Id.* at 299, 323 N.E.2d at 336, 7 E.R.C. at 1762, 5 E.L.R. at 20202.

¹⁸ *Id.* at 300, 323 N.E.2d at 336, 7 E.R.C. at 1763, 5 E.L.R. at 20202.

July 1, 1973, which [was] irreversible in nature, and which [had] a clearly defined objective."¹⁹ Although prior to this date Massport had executed a contract to surcharge a portion of the Flats to support runways, the Court noted that this contract was only intended to transform a portion of the Flats into dry land and did not commit Massport to further construction of any sort.²⁰ The Court also found that two other events evidenced the absence of the requisite irreversible commitment: first, Massport had issued public statements in January, 1973, that final decisions regarding the runways project had not yet been made; and, second, that, as of the effective date of section 62 of MEPA, Massport had not even contracted for preparation of preliminary plans for the runways project.²¹ On the basis of these considerations, the Court concluded that the runways project had not commenced until "well after the effective date of § 62."²²

It is not clear how useful *Massport II* will be in fashioning a general rule to establish a point of commencement for other projects alleged to have been undertaken in violation of MEPA.²³ In this regard, the most useful element of the Court's opinion on this point appears to be the Court's statement that the obligation to prepare a final EIR cannot be at "such an early stage that the agency could not possibly accord full consideration to the ultimate impact of a given [project] proposal."²⁴

Requirement of an environmental impact report. Contemporaneously with its execution, in May, 1974, of a contract to construct the runways project, Massport submitted to the Executive Office of Transportation and Construction ("EOTC") and to the EOEa its determination, made by an assessment form,²⁵ that the runways project would not cause "damage to the environment"²⁶ and that consequently an EIR would not be prepared.²⁷ The EOEa disagreed with Massport's determination and stated that, since the project could cause damage to the environment, MEPA required that an EIR be prepared.²⁸ The trial judge made an

¹⁹ *Id.* at 298, 323 N.E.2d at 335, 7 E.R.C. at 1762, 5 E.L.R. at 20202.

²⁰ *Id.* at 300-01, 323 N.E.2d at 336, 7 E.R.C. at 1763, 5 E.L.R. at 20202.

²¹ *Id.* at 301-03, 323 N.E.2d at 336-37, 7 E.R.C. at 1763, 5 E.L.R. at 20202.

²² *Id.* at 304, 323 N.E.2d at 337, 7 E.R.C. at 1764, 5 E.L.R. at 20202-03.

²³ As this chapter was going to press, the Court rendered two decisions in which it held that projects had commenced prior to the effective date of § 62. *Marlow v. City of New Bedford*, 1976 Mass. Adv. Sh. 127, 141-42, 340 N.E.2d 494-99,—E.R.C.—, —E.L.R.—; *Springfield Y Trust v. Executive Director*, 1976 Mass. Adv. Sh. 435, 441-42, 341 N.E.2d 893,—E.R.C.—,—E.L.R.—.

²⁴ 1975 Mass. Adv. Sh. at 304, 323 N.E.2d at 337, 7 E.R.C. at 1764, 5 E.L.R. at 20202.

²⁵ Assessment forms indicating that environmental damage will not result from a project are termed "negative assessments." See O'Brien and Deland, *Environmental Law*, 1973 ANN. SURV. MASS. LAW § 6.8, at 181-82 n.14.

²⁶ The term "damage to the environment" is defined in G.L. c. 30, § 61.

²⁷ 1975 Mass. Adv. Sh. at 306, 323 N.E.2d at 338, 7 E.R.C. at 1764, 5 E.L.R. at 20203.

²⁸ *Id.* at 306, 323 N.E.2d at 338, 7 E.R.C. at 1764, 5 E.L.R. at 20203.

independent evaluation of the range of environmental impacts that might attend use of the runways project and also concluded that Massport's determination was incorrect.²⁹

On appeal, Massport challenged the propriety of the trial court's review, arguing that state agency MEPA determinations were subject only to the limited review provided by the Administrative Procedure Act.³⁰ The Court dismissed Massport's argument³¹ and ruled that the trial court had correctly relied on the broader standard for judicial review of MEPA determinations posited in *Boston v. Massachusetts Port Authority* ("*Massport I*").³² In *Massport I*, the first enforcement action involving MEPA to reach the appellate level, the Court held that judicial review of agency MEPA determinations should not be limited to inquiring whether an action was supported by substantial evidence or whether it was arbitrary and capricious.³³ The Court concluded that broad review was warranted because agency MEPA determinations are not appropriately characterized as either "adjudicatory" or "regulatory" within the meaning of the Administrative Procedure Act,³⁴ and because considerations of "health" or "life" may be at stake in such determinations.³⁵

In *Massport I*, however, the statutorily prescribed phased implementation of section 62 of MEPA was held to preclude full review of the challenged MEPA determination.³⁶ Since the section 62 EIR requirement was operative by the time *Massport II* was brought, the plaintiffs thus had access to the full administrative remedies comprehended by MEPA.³⁷ In reviewing the trial court's findings, the Supreme Judicial Court, relying on the language of MEPA and on precepts developed pursuant to environmental impact review statutes in other jurisdictions, articulated a "low threshold test" for evaluating the sufficiency of state agency MEPA determinations.³⁸ In *Massport II*, the trial court made this evaluation by reference to the EOE's statement that an EIR should be prepared by Massport and by adducing additional evidence regarding the impacts likely to result from the runways

²⁹ *Id.*

³⁰ G.L. c. 30A.

³¹ 1975 Mass. Adv. Sh. at 311, 323 N.E.2d at 340, 7 E.R.C. at 1765, 5 E.L.R. at 20203-04.

³² 1974 Mass. Adv. Sh. 187, 308 N.E.2d 488, 6 E.R.C. 1337, 4 E.L.R. 20314. This case is reviewed in O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.5, at 450-56.

³³ 1974 Mass. Adv. Sh. at 213, 308 N.E.2d at 505, 6 E.R.C. at 1348, 4 E.L.R. at 20321.

³⁴ *Id.* at 210, 308 N.E.2d at 503, 6 E.R.C. at 1346, 4 E.L.R. at 20320.

³⁵ *Id.* at 212, 308 N.E.2d at 504, 6 E.R.C. at 1346, 4 E.L.R. at 20321.

³⁶ *Id.* at 213, 308 N.E.2d at 505, 6 E.R.C. at 1348, 4 E.L.R. at 20321.

³⁷ *Massport II*, 1975 Mass. Adv. Sh. at 313, 323 N.E.2d at 340, 7 E.R.C. at 1766, 5 E.L.R. at 20204.

³⁸ *Id.* at 307-10, 323 N.E.2d at 338-39, 7 E.R.C. at 1764-65, 5 E.L.R. at 20203.

project.³⁹ Massport assailed the trial court's reliance upon the EOE statement, arguing that the court had incorrectly accorded the statement the status of an "administrative determination."⁴⁰ The Court rejected this characterization, but noted that, although MEPA did not vest the EOE with the power to require an agency to prepare an EIR,⁴¹ such a statement was part of the system of administrative regulations validly established under MEPA's directive. As such, the EOE statement was necessarily "part of the administrative record to be reviewed along with other competent and relevant evidence in connection with an agency decision not to file an EIR."⁴² Further, the Court strongly suggested that trial court findings regarding state agency MEPA determinations would not be overturned readily on appellate review when supported by the EOE's statement.⁴³

Although Massport admitted that certain significant environmental impacts would ensue if the various elements of the runways project were used to their full capacity, the state agency argued that it had no immediate obligation to prepare an EIR to document these impacts because a Memorandum of Understanding executed between the EOTC and Massport had limited the uses of the runways project. Massport maintained that environmental impact review would be appropriate as the restrictions in the Memorandum were modified and the elements of the runways project made subject to more intense and diverse use.⁴⁴ The Court rejected this argument, stating that such memoranda "should not be employed . . . as a means of avoidance of completion of an EIR prior to commencing . . . construction."⁴⁵ The Court stressed MEPA's explicit requirement that an EIR be prepared *prior* to construction, but noted that memoranda of the sort involved in the runways project were relevant to the MEPA process, as factors that "should be part of an EIR and [that] could constitute important evidence that [a state agency] had met its obligation under § 61 to minimize damage to the environment."⁴⁶

The section 61 determination. Having thus resolved the first two issues presented by Massport's appeal, the Court resolved the question regarding Massport's compliance with section 61 of MEPA. The Court's resolution was simply stated: because Massport was obliged to prepare an EIR for this project, the determination of its compliance with section 61 could be made only on the basis of a completed EIR.⁴⁷ The

³⁹ *Id.* at 316-21, 323 N.E.2d at 342-43, 7 E.R.C. at 1767-68, 5 E.L.R. at 20204-05.

⁴⁰ *Id.* at 316, 323 N.E.2d at 342, 7 E.R.C. at 1767, 5 E.L.R. at 20204.

⁴¹ *Id.* at 310 n.5, 323 N.E.2d at 339-40 n.5, 7 E.R.C. at 1765 n.5, 5 E.L.R. at 20203 n.5.

⁴² *Id.* at 317, 323 N.E.2d at 342, 7 E.R.C. at 1767, 5 E.L.R. at 20204.

⁴³ *Id.*

⁴⁴ *Id.* at 318, 323 N.E.2d at 342-43, 7 E.R.C. at 1767, 5 E.L.R. at 20205.

⁴⁵ *Id.* at 320, 323 N.E.2d at 343, 7 E.R.C. at 1768, 5 E.L.R. at 20205.

⁴⁶ *Id.*

⁴⁷ *Id.* at 322-23, 323 N.E.2d at 344, 7 E.R.C. at 1768, 5 E.L.R. at 20205.

section 61 issue must be deferred, then, until the completion of an EIR for the runways project.

§18.6. MEPA: Portents. In May, 1975, the MEPA study commission established by the Legislature in 1974 reported by recommending legislation to amend section 62 of chapter 30 of the General Laws.¹ The recommended legislation was intended to clarify the rulemaking responsibilities of the agencies subject to MEPA, to provide authorization for budgetary mechanisms to finance the environmental impact review process, and to clarify the textual error contained in the statute of limitations that the Legislature attempted to add by amendment in 1974.² The Legislature did not enact the recommended legislation, but instead authorized the continuation of the commission³ and expanded the scope of its mandate to include the advisability of having state agencies evaluate the economic and energy implications of their actions.⁴

§18.7. Regulation of Pesticides in Massachusetts: Pending Developments. In 1972, Congress revised the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") to produce a regulatory system intended to embrace virtually every activity related to the production and use of pesticides.¹ This 1972 enactment authorizes the EPA to develop a program for establishing comprehensive controls over the manufacture, shipment, distribution, sale, use, storage, and disposal of pesticides. FIFRA is intended to provide a uniform nationwide system of pesticide regulation, but, like many federal environmental programs, the 1972 FIFRA comprehends a pattern of state-federal interaction relying upon the states' inherent interests and abilities in monitoring and controlling the use of pesticides within their domain.

Of principal importance to those who would use, or be affected by the use of, a pesticide in Massachusetts is the elaborate use-classification scheme established by the 1972 FIFRA. This use-classification scheme is predicated upon a statutorily imposed standard that dictates the permissible uses for a given pesticide product and that is coupled with a program for the licensing of pesticide ap-

¹ §18.6. ¹ FIRST INTERIM REPORT OF THE SPECIAL COMMISSION ON ENVIRONMENTAL IMPACT LAWS, H. DOC. NO. 6199 (1975).

² See O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.5, at 454-56.

³ Resolves 1975, c. 10.

⁴ Resolves 1975, c. 33.

¹ §18.7. ¹ Federal Environmental Pesticide Control Act (FEPCA) of 1972, 7 U.S.C. §§ 136 *et seq.* (Supp. IV, 1974), as amended by Pub. L. No. 94-140, 89 Stat. 751 (Nov. 28, 1975). Prior to 1972, the federal pesticide law was contained in the FIFRA of 1947, ch. 125, 61 Stat. 163 (1947). Although the 1947 FIFRA was initially administered by the United States Department of Agriculture, Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623, 84 Stat. 2086 (July 9, 1970), transferred these functions to the EPA.

plicators. Any pesticide product that, when used in the manner for which it is registered, will “generally cause . . . unreasonable adverse effects on the environment,” must be registered for “restricted use” and applied only “by or under the direct supervision of” a duly licensed pesticide applicator.² The EPA has taken the position that it will not itself undertake the applicator licensing program, but will evaluate each state program for its adherence to the EPA-established applicator certification standards.³ The consequence of this position is that, after October, 1977, the date upon which the 1972 FIFRA becomes fully effective, no restricted-use pesticide will be available for use in any state not having an EPA-approved plan for the licensing of pesticide applicators.⁴ Such an event would be of grave consequence to those agricultural and other interests who rely greatly upon restricted-use pesticides.

In light of the consequences that would ensue should the Commonwealth fail to develop a suitable program for the implementation of FIFRA's requirements, attention has been directed to the status of the Massachusetts pesticide control program. Massachusetts has provided for control over pesticides since 1946.⁵ Since that time, primary authority over pesticide distribution and usage has been vested in the Department of Public Health (“DPH”). In recent years, pesticide regulatory functions have been exercised by two separate units within the DPH: authority over the registration of pesticide products⁶ is conferred upon the Division of Food and Drugs,⁷ whereas the use of pesticides has been regulated by the Pesticide Board.⁸ As a result of the reorganization of the EOEA,⁹ however, the Pesticide Board and its use-regulation functions were transferred to the newly constituted Department of Environmental Quality Engineering (“DEQE”).¹⁰ As this chapter is going to press, the Legislature is considering legislation, submitted on behalf of the DEQE, to revise existing pesticide statutes

² FEPCA (the 1972 FIFRA) § 3(d)(1)(c), 7 U.S.C.A. § 136a(d)(1)(c) (Supp. IV, 1974).

³ See 37 Fed. Reg. 6730-31 (1974). Section 4(a)(1) of FEPCA (the 1972 FIFRA) requires that the EPA establish standards for the certification of pesticide applicators, 7 U.S.C. § 136b(a)(1) (Supp. IV, 1974).

⁴ FEPCA (the 1972 FIFRA) originally provided that this prohibition would become effective in October, 1976. Pub. L. No. 92-516, § 4, 86 Stat. 973 (Oct. 21, 1972). As a result of an amendment to § 4 in 1975, however, this deadline was postponed by one year, to October, 1977. Pub. L. No. 94-140, § 4, 89 Stat. 751 (Nov. 28, 1975).

⁵ Acts of 1946, c. 517, adding G.L. c. 270, § 2B, which imposed labeling requirements upon products containing DDT. This statute was repealed by Acts of 1960, c. 727, § 1.

⁶ G.L. c. 94B, §§ 11-21.

⁷ *Id.* § 19.

⁸ See *id.* §§ 21A-22.

⁹ Acts of 1974, c. 806, § 41, effective July 1, 1975.

¹⁰ See G.L. c. 21A, §§ 7, 8, as added by Acts of 1974, c. 806, § 1; G.L. c. 17, § 9A, as amended by Acts of 1975, c. 706, § 25.

to bring them into conformance with federal requirements.¹¹

§18.8. Safe Drinking Water Act: Introduction. On December 16, 1974, President Ford signed into law the Safe Drinking Water Act,¹ which was intended to assure that water supply systems serving the public meet minimum national standards for the protection of public health.² Although it was Congress' conclusion that the problem of unsafe drinking water is primarily the concern of state and local governments, in passing the Safe Drinking Water Act, it mandated active federal participation through setting standards, providing research, and maintaining independent enforcement authority.³ This structure reflects the reasoning behind the cooperative federal-state effort to combat air and water pollution problems that is embodied in the Clean Air Act⁴ and the Federal Water Pollution Control Act:⁵ that the causes and effects of unhealthy drinking water are not confined within the borders of state or local jurisdictions.⁶

Specifically, the Safe Drinking Water Act (the "Act") requires that the Administrator of the Environmental Protection Agency ("EPA") prescribe national primary drinking water regulations for contaminants that may adversely affect the public health.⁷ These primary regulations are to include a maximum contaminant level, if monitoring the level of the contaminant is feasible; if it is not feasible, the regulations must include treatment technique requirements.⁸ In addition, the EPA is to prescribe interim primary regulations, which would be revised after completion of a study by the National Academy of Sciences to determine what maximum contaminant levels might be allowed in drinking water and, where no maximum levels can be ascertained, what contaminants pose a threat to human health.⁹ The Act also provides that a state may assume primary enforcement responsibility where the state has adopted regulations at least as stringent as the federal regulations, has formulated adequate surveillance and enforcement procedures, and—if the state allows variances and

¹¹ H. 4183 (1976). This legislation would repeal the existing bifurcated pesticide control program and replace it with a single program administered by the DEQE.

§18.8. ¹ 42 U.S.C.A. §§ 300f *et seq.* (Supp. 1976).

² H.R. REP. NO. 1185, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6454, [hereinafter cited as H.R. REP. NO. 1185].

³ *Id.* at 6473.

⁴ 42 U.S.C. §§ 1857-1857e (1970).

⁵ 33 U.S.C. §§ 1151 *et seq.* (1970).

⁶ H.R. REP. NO. 1185, *supra* note 2, at 6459.

⁷ Safe Drinking Water Act § 1412(b)(2), 42 U.S.C.A. § 300g-1(b)(2) (Supp. 1976). *See* H.R. REP. NO. 1185, *supra* note 2, at 6455.

⁸ Safe Drinking Water Act § 1412(b)(3), 42 U.S.C.A. § 300g-1(b)(3) (Supp. 1976).

⁹ *Id.* §§ 1412(b)(1)(B), 1412(b)(3), 42 U.S.C.A. §§ 300g-1(b)(1)(B), 300g-1(b)(3) (Supp. 1976). The study by the NAS is authorized in *id.* § 1412(e)(1), 42 U.S.C.A. § 300g-1(e)(1) (Supp. 1976).

exemptions—has set forth conditions for them that are equally stringent as the federal conditions for variances and exceptions.¹⁰ The various sections of the Act will be discussed in detail below.¹¹

§18.9. Safe Drinking Water Act: Background. Prior to passage of the Act, the EPA, pursuant to section 361 of the Public Health Service Act,¹ was authorized to prescribe federal drinking water standards only for water supplies used by interstate carriers.² The Department of Health, Education, and Welfare (“HEW”)³ had interpreted its authority under section 361 to permit enforcement of standards only with respect to contaminants that may cause or carry a communicable disease.⁴ Thus, existing law was regarded as not allowing for enforceable standards for contaminants that could cause chemical poisoning or other noncommunicable diseases. In addition, there was no provision of federal law that protected the public not traveling on interstate carriers from being supplied with drinking water that could cause communicable diseases.

In 1970, HEW conducted a survey of 969 public water systems. HEW found major deficiencies in the systems studied, a conclusion that is not surprising, given the lack of federal legislation regarding the quality of drinking water.⁵ In addition, Congress found that the

¹⁰ *Id.* § 1413(a), 42 U.S.C.A. § 300g-2(a) (Supp. 1976).

¹¹ §§ 18.9-.11 *infra*.

§18.9. ¹ 42 U.S.C. § 264 (1970).

² *Id.*

³ HEW was the federal agency administering section 361 of the Public Health Service Act prior to the EPA's assuming authority pursuant to Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970).

⁴ See H.R. REP. NO. 1185, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6454.

⁵ The major findings of the HEW study are set out in *id.* at 6457-58:

Quality of water being delivered:

Thirty-six percent of 2,600 individual tap water samples contained one or more bacteriological or chemical constituents exceeding the limits in the Public Health Service Drinking Water Standards (established under Section 361 of the Public Health Service Act).

Nine percent of these samples contained bacterial contamination at the consumer's tap evidencing potentially dangerous quality.

Eleven percent of the samples drawn from 94 systems using surface waters as a source of supply exceeded the recommended organic chemical limit of 200 parts per billion.

Status of physical facilities:

Fifty-six percent of the systems evidenced physical deficiencies including poorly protected ground water sources, inadequate disinfection capacity, inadequate clarification capacity, and/or inadequate system pressure.

In the eight metropolitan areas studied, the arrangements for providing water service were archaic and inefficient. While a majority of the population was served by one or a few large systems, each metropolitan area also contained small inefficient systems.

lack of quality in water systems was due to such factors as little public awareness of the dangers posed by drinking inadequately treated water, the costliness of effective treatment technology, and the introduction of new compounds into the environment prior to ascertaining their harmful effect on the environment.⁶ In passing the Safe Drinking Water Act, Congress sought to remedy these problems by directing that adequate standards for drinking water be developed and enforced.

§18.10. Safe Drinking Water Act: Analysis of Principal Sections.

Section 1401. Section 1401 of the Act defines “primary drinking water regulation” as a national regulation that is intended to protect public health to the maximum extent feasible from contaminants that may have any adverse health effect.¹ Thus, it was not intended that there be conclusive proof that any contaminant will cause adverse health effects as a condition precedent to regulation. All that is required is that the Administrator make a reasoned and plausible judgment that a contaminant may have such an effect.²

Further, this section defines “public water system” as a system that has fifteen or more service connections or regularly serves twenty-five or more persons, regardless of whether the system is publicly or privately owned or operated.³ This broad definition would encompass nearly all public accommodations, including motels and campgrounds.

Section 1412. Section 1412 requires that the EPA establish both interim and revised primary drinking water regulations.⁴ The interim

Operators’ qualifications:

Seventy-seven percent of the plant operators were inadequately trained in fundamental water microbiology; and 46 percent were deficient in chemistry relating to their plant operation.

Status of community programs:

The vast majority of systems were unprotected by programs to prevent drinking water supply pipes from being cross-connected with sewage or storm drainage pipes, programs for plumbing inspection on new construction, or programs for continuing surveillance of public water system operations.

Status of State inspection and technical assistance programs:

Seventy-nine percent of the systems were not inspected by State or county authorities in 1968, the last full calendar year prior to the study. In 50 percent of the cases, plant officials did not remember when, if ever, a State or local health department had last surveyed the supply.

An insufficient number of bacteriological samples were analyzed for 85 percent of the water systems—and 67 percent of the systems did not even analyze half of the numbers required by the PHS Drinking Water Standards.

⁶ *Id.* at 6459.

§18.10. ¹ Safe Drinking Water Act § 1401(1), 42 U.S.C.A. § 300f(1) (Supp. 1976).

² H.R. REP. NO. 1185, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6454, 6463 [hereinafter cited as H.R. REP. NO. 1185].

³ Safe Drinking Water Act § 1401(4), 42 U.S.C.A. § 300f(4) (Supp. 1976).

⁴ *Id.* § 1412, 42 U.S.C.A. § 300g-1(Supp. 1976).

standards,⁵ based largely on review of the existing Public Health Service drinking water standards, must protect the public health to the maximum extent feasible using treatment methods that are generally available as of December 16, 1974.⁶

Because of the lack of data on health effects from certain known contaminants and the potential impact of, among other things, organic and inorganic compounds finding their way into public water supplies, the National Academy of Sciences ("NAS") and the EPA will make arrangements for a study of maximum contaminant levels that should be permitted.⁷ The formulation of maximum contaminant levels is intended to protect the public against known or *anticipated* health effects, allowing an adequate margin of safety. It is interesting to note that Congress, apparently wishing to insulate the NAS study from political and budgetary pressures, prohibited release of the study or any draft to the Office of Management and Budget or to any other federal agency, except the EPA, prior to its submission to Congress.⁸ The report, which must be submitted no later than December 16, 1976,⁹ is thus to be based solely on considerations of public health.

Within ten days of release of the NAS report, the EPA must publish for comment its maximum contaminant level regulations and list of contaminants. At the same time, proposed revised national drinking water regulations must be published.¹⁰

Section 1413. Section 1413 prescribes the substantive conditions under which a state may be determined to have primary enforcement responsibility for the national standards.¹¹ For "primacy," the Administrator of the EPA must find (1) that the state has adopted regulations that the state can demonstrate are at least equally as stringent as national primary regulations; (2) adequate surveillance and enforcement procedures;¹² and (3) if the state permits variances and ex-

⁵ 40 Fed. Reg. 11994-98 (1975).

⁶ Safe Drinking Water Act § 1412(a)(2), 42 U.S.C.A. § 300g-1(a)(2) (Supp. 1976).

⁷ *Id.* § 1412(e), 42 U.S.C.A. § 300g-1(e) (Supp. 1976).

⁸ *Id.* § 1412(e)(5), 42 U.S.C.A. § 300g-1(e)(5) (Supp. 1976).

⁹ *Id.* § 1412(e)(2), 42 U.S.C.A. § 300g-1(e)(2) (Supp. 1976).

¹⁰ *Id.* § 1412(b)(1)(A), 42 U.S.C.A. § 300g-1(b)(1)(A) (Supp. 1976).

¹¹ *Id.* § 1413(a), 42 U.S.C.A. § 300g-2(a) (Supp. 1976). A state can continue to enforce its own laws and regulations governing drinking water supplies until the national interim primary regulation goes into effect in December, 1976.

¹² *See* 40 Fed. Reg. 33224-39 (1975). According to these proposed regulations, a state seeking EPA approval of its procedures for enforcement of equivalent state primary regulations must have a minimum capability in six distinct areas—inventory of public water systems, sanitary surveys, laboratory certification, availability of laboratory facilities to the state, design and construction, and statutory and regulatory enforcement authority—although such capabilities need not be completely implemented before primacy may be granted. For example, the requirement of proposed § 142.10(b)(2) for a systematic state program for sanitary sewers does not impose specific priorities for

emptions, measures that assure that such variances and exemptions are permitted under conditions no less stringent than those required by sections 1415 and 1416.¹³

Section 1443. In order to implement the Congressional finding that safe drinking water requires a federal-state-local partnership, section 1443 was added to provide funds for states to carry out public water system supervision programs. However, funding is tied to the requirement that the EPA cannot make a grant to develop a state supervisory program unless it has assurances from the state that it will, within one year of the date of any grant, establish a public water system supervisory program and assume primary enforcement responsibility.¹⁴ Many state officials have expressed reluctance to give such assurances where the costs of administering an effective program will exceed the funds available by way of federal grant¹⁵ and impose several demands on already deficient state budgets. One way for state and local governments to reduce the economic impact of the Act is to take advantage of the economies of scale inherent in regional water supply systems and management.

Section 1414. Although the Act contemplates that states will assume the lead role in enforcing the drinking water regulations, it provides for federal enforcement where a state, having assumed enforcement authority pursuant to section 1413, fails to enforce the primary regulations.¹⁶ Where the EPA finds a violation,¹⁷ notice must be given to the state.¹⁸ If the alleged noncompliance extends beyond the

either kinds of systems or the timing of such surveys, except to require some attention to systems clearly not in compliance with applicable standards. 40 Fed. Reg. at 33233. Similarly, with regard to laboratory facilities, a state administering agency need not have its own fully equipped laboratory. *Id.* (proposed § 142.10(b)(4)). This requirement may be satisfied by access to other public or private facilities, as long as there is the ability to have lab analyses performed when necessary. *Id.* at 33229.

¹³ Safe Drinking Water Act § 1413(a), 42 U.S.C.A. § 300g-2(a) (Supp. 1976).

¹⁴ *Id.* § 1443(a)(2), 42 U.S.C.A. § 300j-2(a)(2) (Supp. 1976).

¹⁵ The fiscal year ("FY") 1976 authorization was \$15,000,000, of which only \$7,200,000 was actually appropriated. It is expected that the entire \$25,000,000 authorized for expenditure on state program grants in FY 1977 will be appropriated. The EPA projects that, by the end of the assumed six-year phase-in period, state program costs would reach \$70,000,000 annually. See 40 Fed. Reg. 33231 (1975).

¹⁶ Safe Drinking Water Act § 1414(a), 42 U.S.C.A. § 300g-3(a) (Supp. 1976).

¹⁷ A violation occurs whenever a maximum contaminant level is exceeded or a treatment technique is not followed, however briefly. H.R. REP. NO. 1185, *supra* note 2, at 6476.

¹⁸ Safe Drinking Water Act § 1414(a), 42 U.S.C.A. § 300g-3(a) (Supp. 1976). In the event that the EPA finds evidence of a violation occurring in a state that does not have primary enforcement responsibility, notice need not be given to the state prior to commencing suit to compel compliance. *Id.*

thirtieth day after notice, the EPA must notify the public of this finding and, at the same time, request the state to report within fifteen days the specific measures to be taken to bring the system into compliance.¹⁹

If a system remains in noncompliance sixty days after the EPA's initial notice and the state failed to submit the required report or if the EPA, after considering the report, determines that the state abused its discretion²⁰ in carrying out primary enforcement by failing to implement adequate compliance procedures within sixty days, the EPA may bring a civil action in the appropriate United States district court.²¹ A willful violation of the primary drinking water regulation or compliance schedule may result in the imposition of a civil penalty not to exceed \$5,000 for each day of violation.²²

Finally, and most significantly, section 1414 (c) requires each owner or operator of a public water system to give notice,²³ in a form prescribed by the EPA, to the users of the system and the public under certain circumstances of noncompliance with the Act.²⁴ The purpose of the notice requirement is to make the public aware of real and potential health hazards and foment public awareness of the problems of public water systems to stimulate necessary local spending to cure such problems.²⁵

¹⁹ *Id.* § 1414(a)(1)(B), 42 U.S.C.A. § 300g-3(a)(1)(B) (Supp. 1976). In its discussion of this section, the House Committee on Interstate and Foreign Commerce proclaimed that the report should include a statement of the legal authority that a state would rely on for effecting compliance. It stated unequivocally that mere declarations of intent to commence legal proceedings or initiate other actions would be deemed insufficient for purposes of this section. H.R. REP. NO. 1185, *supra* note 2, at 6475.

²⁰ Regarding its interpretation of "abuse of discretion," the Committee on Interstate and Foreign Commerce stated that any failure to implement adequate procedures by the sixtieth day to effect compliance by the earliest feasible time is to be considered a *per se* abuse of discretion by the state. Such a failure would constitute an abuse whether it results from negligence, inattention, or lack of adequate technical and enforcement personnel. See H.R. REP. NO. 1185, *supra* note 2, at 6475.

²¹ Safe Drinking Water Act § 1414(a)(1)(B), 42 U.S.C.A. § 300g-3(a)(1)(B) (Supp. 1976).

²² *Id.* § 1414(b), 42 U.S.C.A. § 300g-3(b) (Supp. 1976).

²³ *Id.* § 1414(c), 42 U.S.C.A. § 300g-3(c) (Supp. 1976). Such notice must be given not less than once every three months. Any person who willfully violates this provision shall be fined not more than \$5,000. *Id.*

²⁴ *Id.* (1) When a system fails to comply with a maximum contaminant level; (2) when a system fails to use any of the required treatment techniques; (3) when a system fails to perform testing or monitoring as required by regulation or by § 1445; (4) when a system has received a variance under § 1415(a)(1)(A) or 1415(a)(2), or an exemption under § 1416; or (5) when a system has failed to comply with any schedule or control measure prescribed pursuant to a variance or exemption. *Id.*

²⁵ H.R. REP. NO. 1185, *supra* note 2, at 6476.

Sections 1415 and 1416. Congress included provisions for variances and exemptions in recognition of the particular difficulty that certain systems would have in meeting the standards prescribed in the regulations.²⁶ These provisions are designed to provide additional time for compliance where the public health would not be endangered.

Section 1415 permits variances from drinking water regulations after notice, opportunity for a public hearing, and review by the EPA to assure that a state has not abused its discretion in granting variances.²⁷ Variances may be granted in two instances by a state with primary enforcement responsibility: (1) where a system cannot meet maximum contaminant level requirements despite application of the most effective treatment methods,²⁸ and (2) where a satisfactory showing can be made that the prescribed treatment is unnecessary to protect the public health.²⁹ In states that have not assumed primary enforcement responsibility, the EPA may grant variances in the same manner that a state, having enforcement responsibility, could grant such variances.³⁰ It should be noted that schedules of variances, whether granted by the EPA or a state, are enforceable by the EPA under section 1414 as if such schedules were part of a national primary drinking water regulation.³¹

Upon a finding that a public water system is unable to comply with any maximum contaminant level or treatment technique requirement due to compelling factors,³² a state with primary enforcement responsibility may grant an exemption to such system pursuant to section 1416.³³ A state-granted exemption carries with it a requirement that within one year of issuance, the state, after notice and opportunity for

²⁶ See Safe Water Drinking Act §§ 1415(a)(1)(A), 1416(a), 42 U.S.C.A. §§ 300g-4(a)(1)(A), 300g-5(a) (Supp. 1976).

²⁷ *Id.* § 1415, 42 U.S.C.A. § 300g-4 (Supp. 1976). Although some EPA review of state-granted variances was warranted, it was not intended that the EPA undertake a case-by-case review. EPA notice to a state under this section is therefore only warranted when in a significant number of cases it can be shown that a state's action in granting such variances was inconsistent with the requirements of the Act. See H.R. REP. NO. 1185, *supra* note 2, at 6478-79.

²⁸ Safe Drinking Water Act § 1415(a)(1)(A), 42 U.S.C.A. § 300g-4(a)(1)(A) (Supp. 1976). Before a state may grant such a variance, it must ascertain that the variance will not result in an unreasonable risk to health.

²⁹ *Id.* § 1415(a)(1)(B), 42 U.S.C.A. § 300g-4(a)(1)(B) (Supp. 1976). This variance would apply where a system's raw water source is substantially cleaner than the minimum intake requirements.

³⁰ *Id.* § 1415(a)(2), 42 U.S.C.A. § 300g-4(a)(2) (Supp. 1976).

³¹ *Id.* § 1414(b), 42 U.S.C.A. § 300g-3(b) (Supp. 1976).

³² "Compelling factors" include economic factors, such as the high costs of purchasing and constructing necessary equipment or facilities and the low per capita income and small number of residents in a community served by the system. H.R. REP. NO. 1185, *supra* note 2, at 6480.

³³ Safe Drinking Water Act § 1416(a)(1), 42 U.S.C.A. § 300g-5(a)(1) (Supp. 1976).

a public hearing, must prescribe a schedule, including increments of progress and interim control measures, for the life of the exemption.³⁴ The compliance schedule must require compliance as expeditiously as practicable, but no later than January 1, 1981, in the case of an exemption from an interim regulation, and no later than seven years after the effective date of a revised regulation.³⁵ As in the case of variances, exemptions are subject to review by the EPA³⁶ and the EPA may issue exemptions for states that do not have primary enforcement responsibility.³⁷

Section 1431. Section 1431 confers emergency powers upon the Administrator, which are exercisable upon receipt of information regarding a contaminant that poses "an imminent and substantial endangerment to the health of persons."³⁸ These emergency powers, which override any limitations of other sections of the Act, are to be invoked only if state and local authorities have failed to initiate emergency abatement efforts.³⁹ Orders may be issued under this authority notwithstanding existing regulations, variances, exemptions, or other requirements.⁴⁰

Other Provisions. Part C of the Act provides for the protection of underground sources from which drinking water is drawn, by means of a regulatory program similar to that governing public water systems.⁴¹ The Act prohibits control program regulations from interfering with oil or natural gas production, or disposal of production by-products, unless such regulations are essential to prevent danger to underground drinking water sources.⁴²

Section 1441 provides a mechanism to alleviate the difficulty that many public systems have experienced in recent months in obtaining adequate supplies of chlorine for treatment of contaminants.⁴³ It au-

³⁴ *Id.* § 1416(b), 42 U.S.C.A. § 300g-5(b) (Supp. 1976).

³⁵ *Id.* § 1416(b)(2), 42 U.S.C.A. § 300g-5(b)(2) (Supp. 1976). In either case, two additional years may be granted if the system is entering into a regional water system.

³⁶ *Id.* § 1416(d), 42 U.S.C.A. § 300g-5(d) (Supp. 1976).

³⁷ *Id.* § 1416(f), 42 U.S.C.A. § 300g-5(f) (Supp. 1976).

³⁸ *Id.* § 1431(a), 42 U.S.C.A. § 300i(a) (Supp. 1976).

³⁹ *Id.*

⁴⁰ *Id.* Any person who willfully violates or fails or refuses to comply with an order issued under this section may be fined up to \$5,000 per day of violation. *Id.* § 1431(b), 42 U.S.C.A. § 300i(b) (Supp. 1976).

⁴¹ *Id.* §§ 1421-24, 42 U.S.C.A. §§ 300h-300h-3 (Supp. 1976).

⁴² *Id.* § 1422(c), 42 U.S.C.A. § 300h-1(c) (Supp. 1976).

⁴³ According to the EPA, in the past year, fifty-seven water and wastewater utilities had reported shortages of chlorine (down to one to ten days' supply on hand) and thirty-three wastewater and four public water supply treatment systems were reported to have ceased chlorinating for periods up to two weeks. It appears that only a portion of the shortages have been reported to the EPA. Among the cities experiencing such shortages have been Denver, Jersey City, Newark, Chicago, and New York, and many smaller public water supply systems. Increased demand from private industry, delay in the construction of new chlorine production facilities, and downtime in existing facilities have contributed to this problem. See H.R. REP. NO. 1185, *supra* note 2, at 6460.

thorizes the EPA to issue, in advance of actual need, certificates of need for chlorine and other substances used for treatment of water in both public water systems and wastewater treatment works. Upon issuance of a certificate of need, the President or his delegate must issue a mandatory allocation order to assure the availability of the needed substance by the time required.⁴⁴ Although the President has discretion as to which processor, manufacturer, or producer must supply the requirements of a certificate of need, he has no discretion in deciding whether to issue an allocation order.

Section 1445 establishes broad authority for the EPA to promulgate rules for record keeping, reporting, and monitoring to assure the public availability of information on drinking water. The section also permits the right of entry to premises of systems and persons subject to provisions of the Act for inspection and sampling.⁴⁵

Finally, section 1449 provides for commencement of civil suits by citizens to enforce the provisions of the Act. The right to bring suit is limited only by the requirement that sixty-days' prior notice be given to the EPA, to the state in which the violation occurs, and to the source alleged to be in violation.⁴⁶ This provision is comparable to the citizen suit provisions of the Clean Air Act⁴⁷ and the Federal Water Pollution Control Act Amendments of 1972,⁴⁸ except that section 1449 provides that a judge may require the filing of a bond or equivalent security if a temporary restraining order or preliminary injunction is sought.⁴⁹

§18.11. Safe Drinking Water Act: Federal Implementation. Pursuant to sections 1412, 1414, 1415, and 1450 of the Act, the EPA proposed its interim primary drinking water standards on March 14, 1975.¹ These standards were based largely on the 1962 Public Health Service Drinking Water Standards and a review of those standards by the EPA Advisory Committee Report on the Revision and Application of the Drinking Water Standards.² Since past monitoring evidence made it clear that it was feasible to ascertain maximum contaminant levels, the Administrator of the EPA determined that it was economically and technologically feasible to monitor drinking water for contaminants at the maximum levels. Thus, the interim regulations do not contain required treatment techniques.³

The proposed regulations also include strict requirements for in-

⁴⁴ Safe Drinking Water Act § 1441(c)(1), 42 U.S.C.A. § 300j(c)(1) (Supp. 1976).

⁴⁵ *Id.* § 1445, 42 U.S.C.A. § 300j-4 (Supp. 1976).

⁴⁶ *Id.* § 1449, 42 U.S.C.A. § 300j-8 (Supp. 1976).

⁴⁷ 42 U.S.C. § 1857h-2 (1970).

⁴⁸ 33 U.S.C. § 1365 (Supp. III 1973).

⁴⁹ Safe Drinking Water Act § 1449(d), 42 U.S.C.A. § 300j-8(d) (Supp. 1976).

§18.11. ¹ 40 Fed. Reg. 11994-98 (1975). These standards are intended to compose 40 C.F.R. Part 141.

² 40 Fed. Reg. at 11991.

³ *Id.* at 11990-91.

forming water system users and the general public on a tri-monthly basis whenever any part of a water system fails to comply with the requirements of Part 141, which includes the various maximum standards and monitoring requirements. The notice must be by publication in local newspapers, by giving copies to television and radio stations serving the area within thirty-six hours of confirmation of non-compliance, and by inclusion of the notice in all water bills. As a part of the notice, suppliers are permitted to include a fair explanation of the public health significance of any violation, variance, or exemption.⁴ The notice provisions also apply where a system has received a variance or an exemption under the Act or has failed to comply with any schedule or control measure prescribed pursuant to a variance or exemption.⁵

The EPA's objective, having proposed its interim contaminant standards, was to develop regulations governing federal grants for state public water system supervisory programs and establishing procedures to implement the standards, including assumption of primary enforcement responsibility by the states in accordance with section 1413 of the Act.⁶

To assist the states in establishing programs in order to assume primary enforcement responsibility, section 1443(a) of the Act authorizes the EPA to make grants not to exceed 75 percent of the eligible costs of a state program.⁷ Nonetheless, section 1443(a)(2) provides that no state may receive its first grant until the EPA determines that the state has established or will establish within one year of the grant, a public water system supervisory program, and within that same period, assume primary enforcement responsibility for all public water systems within its jurisdiction.⁸ Thus, section 35.630(e) of the grant regulations requires a state's initial application to include a letter from its chief executive officer stating whether it has or intends to assume the enforcement and supervisory program responsibilities.⁹ If a state makes these commitments but fails to assume and maintain enforcement responsibility, it cannot receive any grant after the initial year's funding.¹⁰ In addition, an EPA Regional Administrator may reduce a state's grant if the submitted program does not contain planned accomplishments¹¹ or if the actual accomplishments fall below the level approved in the state's program plan.¹²

⁴ *Id.* at 11998 (proposed § 141.32(a)).

⁵ *Id.* (proposed § 141.32(b)).

⁶ *Id.* at 33224-39.

⁷ Safe Drinking Water Act § 1443(a), 42 U.S.C.A. § 300j-2(a) (Supp. 1976).

⁸ *Id.* § 1443(a)(2), 42 U.S.C.A. § 300j-2(a)(2) (Supp. 1976).

⁹ 40 Fed. Reg. 33227 (1975). These regulations are intended to compose 40 C.F.R. Part 35.

¹⁰ 40 Fed. Reg. at 33227 (proposed § 35.634(b)).

¹¹ *Id.* at 33226-27 (proposed §§ 35.615(a), 35.618).

¹² *Id.* at 33227 (proposed § 35.640).

In subpart A of proposed Part 142,¹³ which implements the national primary drinking water standards contained in Part 141, the EPA has modified two definitions originally proposed in the March 14, 1975, proposed Interim Primary Standards.¹⁴ First, "maximum contaminant level"¹⁵ was altered to exclude contamination that is the fault of the user.¹⁶ As a result of language in the legislative history of the Act that implied that contaminants were to be measured at the consumer's tap,¹⁷ the interim standards extended the Act's definition of "maximum contaminant level"¹⁸ to refer to contaminant levels "in water which is delivered to the free flowing outlet of the ultimate user of a public water system."¹⁹ Such a definition ignores the lack of control that a public water system has over contamination of water after it has been delivered to the consumer, unless the contamination is caused by deterioration of the user's pipes from corrosive qualities of the water.²⁰

Second, the definition of "public water system" was also modified. The proposed interim standards concluded that the phrase "regularly serves an average of at least twenty-five individuals" meant at least three months per year.²¹ Because it was determined that this definition was not adequate to control seasonal public water systems operating only two months a year, which include many campgrounds and other tourist facilities, the definition of "public water system" was altered accordingly.²²

State enforcement. It was the EPA's conclusion that in order to effectuate Congress's intent that the states have the principal responsibility for regulating public water systems, a flexible approach to state enforcement was necessary. Therefore, in the draft of its *National Safe Drinking Water Strategy* released in May, 1975, the EPA described five levels of state participation that could occur under section 1413 of the

¹³ *Id.* at 33232. These regulations are intended to compose 40 C.F.R. Part 142.

¹⁴ These standards are set out at 40 Fed. Reg. 11994-98 (1975).

¹⁵ *Id.* at 11994 (proposed § 141.2(d)).

¹⁶ *Id.* at 33232 (proposed § 142.2(b)).

¹⁷ See H.R. REP. NO. 1185, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6454, 6466.

¹⁸ Safe Drinking Water Act § 1401(3), 42 U.S.C.A. § 300f(3) (Supp. 1976).

¹⁹ 40 Fed. Reg. at 11994 (proposed § 141.2(d)).

²⁰ This issue recently arose as a result of an EPA funded study of Boston, Somerville, and Cambridge drinking water by Dr. Worth of the Tufts-New England Medical Center. The study showed levels of lead in excess of the proposed interim standard of .050 micrograms per liter. As a result, the Metropolitan District Commission asked the Legislature for additional funds for anticorrosion control that would alleviate the contamination taking place in old lead service lines that run into homes in the studied area from the iron water mains of the public system. Boston Globe, June 5, 1975, § 1, at 1, col. 3.

²¹ 40 Fed. Reg. at 11994 (proposed § 141.2(f)).

²² *Id.* at 33232 (proposed § 142.2(c)).

Act, four of which would entitle the state to some federal assistance under section 1443:

I. *Fully operational* State programs, certified for primary enforcement responsibility, without limitations or extensive Federal assistance beyond the State Program Grants.

II. State programs *certified* for primary enforcement responsibility with EPA providing *limited and informal technical assistance* (along with State Program Grants).

III. State programs *certified* for primary enforcement responsibility *contingent* on certain limited *formal agreements* for EPA to provide specific assistance to the State *for a limited time period* (along with State Program Grants). The formal assistance provided to the State could be used as part of the justification to obtain certification of its primary enforcement program.

IV. EPA retaining primary responsibility for the program, with provisions for *working agreements* whereby the State would carry out certain aspects of the program. (State program grant would be available only for FY 76).

V. EPA retaining full responsibility for the program with the State assuming no part of the program.

The subpart B regulations, while setting forth the requirements that a state must meet in order to qualify for primary enforcement responsibility, and the manner in which it may apply for a determination by EPA on this issue, reflect the notion of flexibility by permitting local differences in implementing the five basic requirements of section 1413(a) listed above. As an example, the preamble states that although a state cannot be determined to have primary enforcement responsibility until it has adopted and will have an effective standard when comparable federal standards become effective, there is no requirement that the state standard be identical to the national standard. Thus, a state may specify a sample analysis method not contained in the national standard, provided this alternate analysis is as accurate and reliable as the method prescribed in the national standard.²³

Of some concern, however, is the EPA's enforcement requirement, proposed section 142.10(b) of title 40 of the *Code of Federal Regulations*, which divides the criteria for state enforcement into six distinct elements.²⁴ According to the preamble to the proposed regulations, a state is required to have a minimum capability in these six areas as a prerequisite to assuming primary enforcement responsibility.²⁵ This

²³ *Id.* at 33229.

²⁴ *Id.* at 33233 (proposed § 142.10(b)). These elements are inventory of public water systems, sanitary surveys, laboratory certification, availability of laboratory facilities to the state, design and construction, and statutory and regulatory enforcement authority.

²⁵ See the discussion of proposed § 142.10(a) in 40 Fed. Reg. at 33229.

would appear to be somewhat more restrictive than either Congress, or the EPA elsewhere in its regulations, intended, and may in fact delay timely assumption of primary enforcement responsibility. Consider, for example, a state that does not have a laboratory certification program because of a lack of statutory authority, but meets all other requirements of the subpart B regulations. Section 142.10(b), as proposed, appears to preclude a favorable finding for purposes of primary enforcement until that statutory authority is obtained, even though the state may be otherwise capable and ready to assume such responsibility. This problem could be eliminated by permitting limited EPA assistance on a temporary basis. In the above example, the state could request the EPA to operate the certification program on an interim basis, pending adequate statutory enactment. Program grants under section 1443 of the Act could be tailored to take into account this temporary deficiency. It would appear that this approach is consistent with Congress' intention that safe drinking water be the result of a federal-state partnership.

In assessing the evaluation criteria of section 142.10(b), it should be noted that the EPA has given no guidance as to what constitutes "statutory and regulatory enforcement authority adequate to compel compliance with the State primary drinking water standards."²⁶ Presumably, adequate enforcement authority would include the following: (1) authority to enjoin and assess or sue to recover appropriate civil or criminal fines for violations or threatened violations of the regulations (no specific penalty is required, but the federal maximum penalty of \$5,000 per day for willful violations has been urged as an appropriate amount); (2) procedures enabling the state to halt or eliminate any imminent or substantial endangerment of the public health; (3) authority to enforce the regulations against all public water systems covered by the Act within its jurisdiction; (4) procedures for right of entry, sampling, and inspection of public water supply systems; (5) procedures requiring owners, operators of water supply systems, or both, to monitor, accumulate, and submit records; (6) procedures requiring that the public be notified whenever any public water supply system fails to meet the requirements of law or regulations promulgated thereunder; (7) citizen suit provisions; and (8) variance and exemption provisions no less stringent than those contained in sections 1415 and 1416 of the Act. It must be assumed, however, that a judgment as to the adequacy of a state's enforcement authority will be made on a state-by-state basis, taking into account not only available statutory authority but also the ability and willingness to implement it.

²⁶ *Id.* at 33233 (proposed § 142.10(b)(6)).

§18.12. Air Pollution: Introduction. Several judicial decisions were rendered during the *Survey* year that have had a significant impact on enforcement of the air pollution regulatory requirements of the Massachusetts Department of Public Health. First, the United States Supreme Court, in *Train v. Natural Resources Defense Council, Inc.*,¹ definitively established a state's authority to grant variances from air pollution control requirements, provided such variances do not interfere with attainment and maintenance of the national ambient air quality standards. Second, in late summer, the Superior Court for Suffolk County, in *Bicknell v. City of Boston*,² exercised its injunctive powers to enforce the state's air pollution emission limitations against the City's municipal refuse incinerator and ordered the facility to cease operations. Finally, as a result of the decision by the First Circuit in *South Terminal Corp. v. EPA*,³ both EPA and the Commonwealth undertook a substantial effort to develop enforceable transportation controls for the Metropolitan Boston area that would achieve the necessary air emission reductions without economic and social chaos. These plans were published on June 12, 1975,⁴ and by the end of the *Survey* year, seemed certain to be implemented unless challenged further by the *South Terminal* petitioners.

§18.13. Air Pollution: *Train v. Natural Resources Defense Council*.¹ In its first extensive examination of the Clean Air Act (the "Act"),² the United States Supreme Court held that the Act permits states to grant variances from state implementation plan ("SIP") requirements, provided that these variances do not interfere with attainment or maintenance of the national ambient air quality standards.³ The Court entertained the case on the EPA's petition for certiorari because of the disagreement among the circuit courts of appeal whether a state could revise its implementation plan, subject to EPA approval in accordance with section 110(a)(3) of the Act,⁴ to delay compliance with emission limitations for individual sources, or whether all deferrals of plan requirements had to be treated under the more stringent procedural and substantive standards of section 110(f) of the Act.⁵ It was the EPA's position that a state could revise

§18.12. ¹ 421 U.S. 60, 7 E.R.C. 1735, 5 E.L.R. 20264 (1975).

² 8 E.R.C. 1241, 5 E.L.R. 20712 (Super. Ct. 1975).

³ 504 F.2d 646, 6 E.R.C. 2025, 4 E.L.R. 20768 (1st Cir. 1974).

⁴ 40 Fed. Reg. 8661-81 (1975).

§18.13. ¹ 421 U.S. 60, 7 E.R.C. 1735, 5 E.L.R. 20264 (1975).

² 42 U.S.C. §§ 1857-1857e (1970).

³ 421 U.S. at 98-99, 7 E.R.C. at 1748, 5 E.L.R. at 20273. For a background discussion of the Clean Air Act and its implementation see § 18.14, at notes 4-7 *infra*.

⁴ 42 U.S.C. § 1857c-5(a)(3) (1970).

⁵ 42 U.S.C. § 1857c-5(f) (1970).

its plan if the individual variance would not affect attainment or maintenance of the national standards.⁶

In reviewing the variance provisions of the Georgia SIP, the United States Court of Appeals for the Fifth Circuit, in *Natural Resources Defense Council, Inc. v. EPA*,⁷ had rejected the EPA's construction of the Act and held that section 110(f) provided the exclusive mechanism for granting variances from SIP requirements.⁸ In part, the Fifth Circuit relied on the technology-forcing nature of the Act, reasoning that because the statute was intended to force technology to meet specific standards, it was essential that commitments made during initial planning stages could not be readily abandoned when the time for compliance arrived.⁹

Although none of the other circuits adopted the Fifth Circuit's position, neither did they agree with the EPA position. The First Circuit, in *Natural Resources Defense Council, Inc. v. EPA*,¹⁰ a case challenging, *inter alia*, the variance provisions of the Massachusetts SIP, concluded that a state could grant variances during the period before the three-year date for mandatory attainment of primary standards, but that after attainment, section 110(f) was the exclusive procedure by which variances could be granted.¹¹ This view was subsequently adopted by the Eighth Circuit¹² and the Second Circuit¹³ in similar actions brought by the Natural Resources Defense Council. The Ninth Circuit,¹⁴ however, chose a third interpretation, which was closer to the EPA's position before the Supreme Court, holding that since the legislative history of the Act did not support any "pre-attainment" and "post-attainment" distinction, a state could grant variances at any time, provided that any such variance would not interfere with attainment or maintenance of the national ambient standards.¹⁵

In the Supreme Court's opinion, Mr. Justice Rehnquist stated that although it is the EPA's responsibility under the Act to set national ambient standards, the Act does not give the agency authority to question a SIP that provides for the attainment of these standards.¹⁶ Thus, it is left to each state to adopt whatever mix of emission limitations it

⁶ 421 U.S. at 70, 7 E.R.C. at 1738, 5 E.L.R. at 20266.

⁷ 489 F.2d 390, 6 E.R.C. 1248, 4 E.L.R. 20204 (5th Cir. 1974).

⁸ *Id.* at 401, 6 E.R.C. at 1254-55, 4 E.L.R. at 20208.

⁹ *Id.*, 6 E.R.C. at 1255, 4 E.L.R. at 20208.

¹⁰ 478 F.2d 875, 5 E.R.C. 1879, 3 E.L.R. 20375 (1st Cir. 1973).

¹¹ *Id.* at 886, 5 E.R.C. at 1885, 3 E.L.R. at 20378.

¹² *Natural Resources Defense Council, Inc. v. EPA*, 483 F.2d 690, 693-94, 5 E.R.C. 1917, 1919, 3 E.L.R. 20821, 20822-23 (8th Cir. 1973).

¹³ *Natural Resources Defense Council, Inc. v. EPA*, 494 F.2d 519, 523, 6 E.R.C. 1475, 1477, 4 E.L.R. 20345, 20346 (2d Cir. 1974).

¹⁴ *Natural Resources Defense Council, Inc. v. EPA*, 507 F.2d 905, 7 E.R.C. 1181, 5 E.L.R. 20032 (9th Cir. 1974).

¹⁵ *Id.* at 914, 7 E.R.C. at 1186, 5 E.L.R. at 20035.

¹⁶ 421 U.S. at 79, 7 E.R.C. at 1741, 5 E.L.R. at 20268-69.

deems appropriate to satisfy the national requirements. The Court viewed the variance procedure as being consistent with the authority under section 110(a)(3) of the Act, which it regarded as “the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.”¹⁷

The Supreme Court’s decision presumably permits the EPA to allow state-granted variances at any time so long as they do not interfere with attainment and maintenance of the standards. This will prove to be a significant decision for the Commonwealth since Massachusetts’ SIP and its variance authority has been bound by the First Circuit’s holding in the first case brought by the Natural Resources Defense Council, that variances may be permitted without resorting to section 110(f) procedures only during the preattainment period.¹⁸

§18.14. Air Pollution: *Bicknell v. City of Boston*.¹ On August 1, 1975, the Superior Court for Suffolk County entered two decisions and orders for judgment restraining and enjoining the City of Boston from further operation of its South Bay Avenue municipal incinerator until the City complied with an order of the Commissioner of Public Health² and certain air pollution control regulations of the Metropolitan Boston Air Pollution Control District.³ The case is a landmark victory, evidencing a judicial willingness to enforce environmental standards against municipal governments by requiring expeditious correction or prompt shutdown of the offending facilities.

Background. As a prelude to a discussion of the *Bicknell* case, it is appropriate to set forth some background information on the control of air pollution in the Commonwealth.⁴ In enacting the federal Clean Air Act,⁵ Congress declared its intention to develop a national strategy to control air pollution, while leaving each state to develop its own plan to achieve the national objectives within its jurisdiction. Thus, according to federal guidelines,⁶ each state developed its plans to

¹⁷ *Id.* at 80, 7 E.R.C. at 1741, 5 E.L.R. at 20269.

¹⁸ *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875, 886, 5 E.R.C. 1879, 1885, 3 E.L.R. 20375, 20378 (1st Cir. 1973).

§18.14. ¹ 8 E.R.C. 1241, 5 E.L.R. 20712 (Super. Ct. 1975).

² *Id.* at 1245, 5 E.L.R. at 20715.

³ *Id.* at 1249, 5 E.L.R. at 20717.

⁴ For an extensive discussion of the basic statutory and regulatory requirements for controlling air pollution under the federal Clean Air Act by the Massachusetts Department of Public Health and the federal Environmental Protection Agency, see Miller, *Environmental Law*, 1972 ANN. SURV. MASS. LAW §§ 21.2-.6, at 578-602.

⁵ 42 U.S.C. §§ 1857-1857e (1970).

⁶ 42 U.S.C. §§ 1857c-5(a)(2)(B)-(H) (1970); 40 C.F.R. §§ 51.1-.22 (1975).

achieve the national established ambient air quality standards within its designated air quality control regions.⁷ The Massachusetts State Implementation Plan ("SIP") was adopted by the Department of Public Health ("DPH") in January, 1972, and submitted to the EPA for approval. Once it was approved by the EPA, its substantive provisions became enforceable both by the EPA under section 1857c-8 of title 42 of the *United States Code* and by the Commonwealth under sections 142B and 142D of chapter 111 of the General Laws.

A portion of the SIP included the Regulations for Control of Air Pollution in the Metropolitan Boston Air Pollution Control District (the "District").⁸ In order to achieve the national primary ambient particulate matter standard in the District, the regulations contain several sections specifically aimed at reducing particulate emissions from new and existing stationary sources. Regulation 2 limits emissions of particulates from various categories of industrial sources, including fossil fuel utilization facilities, foundries, asphalt batching plants, and incinerators, while regulation 6 prohibits the emission of smoke from a source of density, shade, or appearance greater than number 1 of the Ringelmann Chart.⁹ Regulation 8 expresses certain limitations on incineration of refuse, and regulation 1 is a general nuisance provision enforceable against sources causing or contributing to a condition of air pollution.¹⁰ These regulations are enforceable under the authority of section 142B of chapter 111 of the General Laws, which makes knowing violation of any District rule or regulation punishable by fines of \$10 to \$50 per day. Section 142B also permits the DPH to issue administrative orders to any person controlling a source to abate its air pollution problem.¹¹ Violation of an order carries a fine of \$50 to \$100 per day for first offenses, and \$200 to \$500 for subsequent violations. The superior court, sitting in equity, has the power to restrain violations of such orders under authority of section 142B.

Bicknell. The superior court action against the City of Boston's incinerator operation represents the final chapter in a lengthy struggle

⁷ 40 C.F.R. §§ 81.12-.267 (1975).

⁸ Originally filed with the Secretary of State on April 24, 1972, and made effective as of June 1, 1972.

⁹ The Ringelmann Chart or Scale was developed for grading the density of smoke; it is published in the U.S. Bureau of Mines Information Circular No. 8333.

¹⁰ The regulations define air pollution as the presence in the ambient air space of one or more air contaminants or combinations thereof in such concentrations and of such duration as to:

- a. cause a nuisance;
- b. be injurious, or be on the basis of current information, potentially injurious to human or animal life, to vegetation, or to property; or
- c. unreasonably interfere with the comfortable enjoyment of life and property or the conduct of business.

¹¹ Any such order is subject to the state's Administrative Procedure Act, G.L. c. 30A.

by the DPH to control a significant source of air pollution in the Metropolitan Boston area. In October, 1972, the City submitted a schedule to the DPH that reflected installation of a new incinerator as its selected means of complying with various District regulations, particularly regulation 2.5.3, which limits particulate emissions from existing incinerators operating in the District to .10 grains per Standard Cubic Foot at 12 percent CO₂.¹² After conferring with the City, the DPH issued an order on March 7, 1973, requiring successful completion of the compliance effort by July 31, 1975. As a result of an administrative hearing held pursuant to chapter 30A of the General Laws, a revised compliance schedule, maintaining the July 31, 1975 compliance date, was made final on December 20, 1973.¹³ When the City failed to satisfy the initial increments of its ordered schedule, the matter was referred to the Attorney General for enforcement in the superior court. During the pendency of the matter before the state court, the EPA initiated enforcement action against the City under section 1857c-8(a)(1) of title 42 of the *United States Code* for its failure to comply with the requirements of regulation 2.5 and regulation 6, which became federally enforceable when the EPA approved the Massachusetts SIP.¹⁴ Subsequently, a federal order was issued and its enforcement in federal district court was being considered at the time the action was heard before the superior court.

The Commissioner's suit was brought to enforce the DPH's December 20, 1973 order or, in the alternative, to restrain the City from violating sections 142A through 142H of chapter 111 of the General Laws and the regulations promulgated thereunder, particularly regulation 6.2.1 and regulations 8.1.3 and 8.1.5.¹⁵ Pursuant to rule 42(b) of the Massachusetts Rules of Civil Procedure, the court ordered that the matters be tried separately.¹⁶

¹² In connection with the promulgation of regulation 2 in June, 1972, forms were sent to owners and operators of various air pollution sources, including the City for its South Bay Avenue incinerator, to ascertain their status regarding the established emission limitations. The City's Commissioner of Public Works, by letter dated October 26, 1972, stated that the applicable limitation was not capable of being achieved by January 31, 1974, and, therefore, a compliance schedule was being submitted. The City's schedule contained a final compliance date of June 1976, although regulation 2 gives the DPH authority to order noncomplying sources to submit schedules to achieve compliance not later than July 31, 1975. 8 E.R.C. at 1241-42, 5 E.L.R. at 20713.

¹³ *Id.* at 1242, 5 E.L.R. at 20713. The City did not seek judicial review of this order, as permitted by G.L. c. 30A.

¹⁴ Regulation 6.2.1 provides: "No person shall cause, suffer, allow, or permit the emission of smoke, from any incinerator, which has a shade density, or appearance equal to or greater than No. 1 of the Chart at any time." The "chart" refers to the Ringelmann Chart. See note 9 *supra*.

¹⁵ 8 E.R.C. at 1241, 5 E.L.R. at 20713.

¹⁶ *Id.*

In reviewing the enforceability of the DPH's order, the court addressed three issues: (1) whether the City's failure to seek judicial review of the final order under chapter 30A of the General Laws foreclosed consideration of any issue other than jurisdiction in the enforcement proceeding before the court; (2) whether the DPH had authority to issue an order consisting of a compliance schedule or whether the DPH could only order the City to "stop and abate" under section 142D of chapter 111 of the General Laws, or to "cease and desist" under section 142E; and (3) if the DPH could issue an order containing a compliance schedule, whether such order could be issued without first requiring performance of smokestack gas emission tests, as allegedly required by regulation 2.5.3.¹⁷

Regarding the first issue, the court concluded that where a defendant had failed to seek timely judicial review under chapter 30A, the only issue in a subsequent proceeding to enforce the order was whether the administrative decision was within the agency's jurisdiction.¹⁸ The court found that the order was within the DPH's jurisdiction because the incinerator was an "air contaminant source" under the City's control.¹⁹

As for the DPH's authority to issue orders containing compliance schedules under section 142B, it was the court's opinion that the phrase "to stop and abate violation of any rules and regulations" in section 142B encompasses the power to order schedules, particularly when viewed in the light of the overall federal regulatory scheme under the Clean Air Act and the remedial nature of sections 142A through 142E.²⁰

The third issue addressed by the court was the most significant in terms of its potential impact on the DPH's overall enforcement effort, since if the court had adopted the City's construction of regulation 2.5.3,²¹ the DPH would have had to require costly stack gas emission testing in accordance with EPA Test Method number 5 for every source prior to issuance of an administrative compliance order. After admitting evidence from experts in the field of air pollution control and stack gas sampling that indicated that there were other, less sophisticated methods to determine whether an incinerator's smoke-

¹⁷ *Id.* at 1242, 5 E.L.R. at 20713.

¹⁸ *Id.* at 1243, 5 E.L.R. at 20714.

¹⁹ *Id.*

²⁰ *Id.* See Miller, *Environmental Law*, 1972 ANN. SURV. MASS. LAW §§ 21.2-.6, at 578-602, cited in the court's opinion.

²¹ Regulation 2.5.3 provides, in part:

Any emission testing to be compared to these limitations must be conducted under isokinetic sampling conditions and in accordance with the method described by Subpart E—"Standards of Performance for Incinerators" as specified in the Federal Register, Volume 36, No. 247, December 23, 1971, or by another method which has been correlated to the above method to the satisfaction of the Department of Public Health.

stack emissions met current air pollution requirements,²² the court ruled that the language of regulation 2.5.3 nowhere made any testing mandatory and thus would not support the construction advanced by the City. It acknowledged the cost of stack gas testing to be high in every case, and concluded:

The clear intent of the regulation is rather to engage in such testing only in those cases where there is no other way to determine the compliance or non-compliance of a particular source. In this case all the evidence indicates that with respect to the Boston incinerator, no test was needed.²³

In its order for judgment, the court found the DPH order valid, binding, and enforceable, and further ordered that if its terms were not complied with, the incinerator must cease burning any refuse.²⁴

Turning to the second portion of the Commissioner's complaint, the court first ruled that it had jurisdiction under section 142B²⁵ to restrain violations of the DPH's rules and regulations, and found,²⁶ after receiving testimonial evidence presented by affected area residents, a medical expert, and from various admissions of the City and its Commissioner of Public Works, that the City was in violation of regulations 1,²⁷ 6.2.1,²⁸ 8.1.3,²⁹ 8.1.5,³⁰ and 8.2.2.³¹

²² One method was the use of emission factors in accordance with the EPA's AP42 Air Pollution Engineering Manual. This method is a numerical calculation of emissions based on a table of empirically observed calculations. For the subject incinerator, such calculations show that it would produce 30 pounds of particulates per ton of material burned. If converted to grains/Standard Cubic Foot at 12 percent CO₂, this would equal 1.5, or 15 times the .10 grains/SCF at 12 percent CO₂ promulgated in regulation 2.5.3. Although the court's finding that no stack tests were required rendered consideration of the various tests unnecessary, the court stated that "if relevant, the court infers, separately and independently, that the Department has found such calculation methods to have been correlated to EPA Method 5, with sufficient reliability." 8 E.R.C. at 1244, 5 E.L.R. at 20715.

²³ *Id.* at 1245, 5 E.L.R. at 20715.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1247, 5 E.L.R. at 20716.

²⁷ See note 10 *supra*.

²⁸ See note 14 *supra*.

²⁹ Regulation 8.1.3 provides: "No person shall cause, suffer, allow, or permit the burning of refuse or any other material in any incinerator in a manner that is not in conformance with a Standard Operating Procedure (for the incinerator) that has been approved by the Department in writing."

³⁰ Regulation 8.1.5 provides: "No person shall cause, suffer, allow, or permit the burning of refuse or any other material in an incinerator at a specific site location that, in the opinion of the Department, is likely to cause or contribute to a condition of air pollution and when the person responsible for the operation of the incinerator has been notified of said opinion."

³¹ Regulation 8.2.2 provides: "No person shall cause, suffer, allow or permit the operation of a municipal incinerator unless said incinerator has complied with the provisions of Regulation 2."

During the proceedings, the Court received evidence of possible alternative solutions to continued use of the incinerator. Whereas the City maintained that its only solution was to construct a new incinerator, which would cost approximately \$30,000,000 and require several years to construct, the DPH argued that alternative solutions to the problem of waste disposal existed.³² In its findings of fact, the court agreed with the DPH, and concluded:

16. [The court] does not believe that this is a situation of impossibility, or extreme hardship, involving one who has made and is making good faith efforts to comply with the law.

17. On the contrary, the overall picture in this case shows considerable foot-dragging by the City.

27. The pattern is one of indifference and delay bordering on almost deliberate flouting of the law and does not commend itself to lenient treatment.³³

Consequently, on August 1, the court enjoined further operation of the incinerator in violation of the cited regulations.³⁴ On August 8, 1975, the Supreme Judicial Court, having heard argument on the City's application for a stay pending appeal, granted a stay of the orders of the superior court to the limited extent necessary to dispose of the refuse located at the incinerator as of that date. The limited stay expired on August 27, 1975, without further appeal, and the incinerator ceased operations, thereby ending the DPH's four year effort to resolve this significant air pollution problem.

§18.15. The Boston Transportation Control Plan. In the 1974 *Survey*,¹ the basic principles of transportation control plans ("TCP's") and, in particular, the Boston TCP and the *South Terminal Corp. v. EPA*² suit challenging the plan were discussed at length. Although in *South Terminal Corp.*, the First Circuit upheld the EPA's authority to promulgate the TCP for Boston,³ it stayed final compliance with certain control strategies.⁴ The court's determination was the result of the petitioners' attack on the data base used by the EPA to establish the percent reduction in pollutants for the plan.⁵ The First Circuit found that the administrative record of preparation of the original plan⁶ was insufficient to demonstrate that petitioners' technical objec-

³² 8 E.R.C. at 1247, 5 E.L.R. at 20716.

³³ *Id.* at 1248-49, 5 E.L.R. at 20717.

³⁴ *Id.* at 1249, 5 E.L.R. at 20717.

§18.15. ¹ O'Brien and Miller, *Environmental Law*, 1974 ANN. SURV. MASS. LAW § 18.14, at 475.

² 504 F.2d 646, 6 E.R.C. 2025, 4 E.L.R. 20768 (1st Cir. 1974).

³ *Id.* at 668, 6 E.R.C. at 2036, 4 E.L.R. at 20776.

⁴ *Id.* at 667, 6 E.R.C. at 2036, 4 E.L.R. at 20775.

⁵ *Id.* at 662-66, 6 E.R.C. at 2032-35, 4 E.L.R. at 20772-75.

⁶ 38 Fed. Reg. 30960 (1973).

tions to the measurements had been adequately considered.⁷ The court intended that the EPA would use its technical reassessment to resolve petitioners' objections and consequently affirm or modify its conclusions as to the emission reductions required to be achieved by the Boston TCP.⁸ As a result of this decision, the EPA proposed certain amendments on February 28, 1975,⁹ and held public hearings in March, 1975, to permit further comment on the technical data presented in support of the original plan and on recent carbon monoxide and photochemical oxidant data collected from the Massachusetts air monitoring network.¹⁰

The proposed amendments published in February, 1975, included a program that would reduce commuter travel by employees and students¹¹ and would be implemented in conjunction with the Commonwealth's carpool matching plan¹² and the Massachusetts Bay Transportation Authority's pass program.¹³ Also added to the original TCP were a provision for limiting overall hydrocarbon emissions from major users of organic compounds,¹⁴ a strategy for controlling carbon monoxide levels outside the Boston core area,¹⁵ a procedure for the periodic monitoring and updating of the plan,¹⁶ and a proposal for encouraging bicycle use.¹⁷ In addition, several modifications to existing provisions were proposed, including limiting on-street commuter parking,¹⁸ a ceiling on the level of commercial parking spaces in the freeze area,¹⁹ and incentives for carpool and transit use.²⁰

On June 12, 1975, the EPA promulgated its final amendments for the Boston TCP²¹ after considering comments received during the March hearing and written comments submitted in response to the February 28, 1975 *Federal Register* proposals.²² In these final regulations, the EPA eliminated from the original plan requirements for: (1) vacancy rates established for Boston core area off-street commercial parking facilities, (2) building bus and carpool incentives at specifically

⁷ 504 F.2d at 665, 6 E.R.C. at 2034, 4 E.L.R. at 20774.

⁸ *Id.* at 666, 6 E.R.C. at 2035, 4 E.L.R. at 20775.

⁹ 40 Fed. Reg. 8668-81 (1975).

¹⁰ As a part of its data collection program, the EPA conducted an intensive quality control program to verify the reliability of the monitoring devices at each site. *Id.* at 8668.

¹¹ *Id.* at 8678 (proposed § 52.1161).

¹² *Id.* at 8676 (proposed § 52.1138).

¹³ *Id.* at 8678 (proposed § 52.1161).

¹⁴ *Id.* at 8677 (proposed § 52.1145).

¹⁵ *Id.* at 8680-81 (proposed § 52.1164).

¹⁶ *Id.* at 8677 (proposed § 52.1160).

¹⁷ *Id.* at 8679 (proposed § 52.1162).

¹⁸ *Id.* at 8675 (proposed § 52.1134).

¹⁹ *Id.* at 8675-76 (proposed § 52.1135).

²⁰ *Id.* at 8676 (proposed § 52.1139).

²¹ *Id.* at 25152-70.

²² *Id.* at 8661-81.

identified locations in the highway system, and (3) requirements for retrofitting older vehicles with the air bleed and vacuum spark advance disconnect devices.²³ In addition, certain modifications, originally proposed in February, 1975, were incorporated with minor refinements including: (1) limitations on on-street commuter parking,²⁴ (2) an annual inspection and maintenance program for an idle emission evaluation,²⁵ (3) incentives for carpool and transit use,²⁶ and (4) controls on emissions of organic compounds from stationary sources.²⁷ Finally, the Boston TCP includes proposals for controlling carbon monoxide at certain "suburban hot spots" outside the Boston core area,²⁸ for periodic monitoring to update the plan,²⁹ and for a detailed study leading to comprehensive measures to encourage bicycle use.³⁰

²³ *Id.* at 25152.

²⁴ *Id.* at 25162 (proposed § 52.1134).

²⁵ *Id.* at 25164-65 (proposed § 52.1140).

²⁶ *Id.* at 25164 (proposed § 52.1139).

²⁷ *Id.* at 25165 (proposed § 52.1145).

²⁸ *Id.* at 25170 (proposed § 52.1164).

²⁹ *Id.* at 25166 (proposed § 52.1160).

³⁰ *Id.* at 25168-69 (proposed § 52.1162).