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The Politics of Tidelands: A Case Study of the Massachusetts Chapter 91 Program

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THE POLITICS OF TIDELANDS:
A CASE STUDY OF THE MASSACHUSETTS CHAPTER 91 PROGRAM

BY

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ABSTRACT

The Massachusetts Chapter 91 Waterways Program is a licensing program through which the Commonwealth carries out its responsibilities under the Public Trust Doctrine. It was unclear when this study was undertaken whether public participation in the program development process resulted in a different program than the draft program the state originally proposed in 1986. This qualitative case study was developed based on hundreds of pages of letters, comments and testimony from the public, press clippings and interviews. The primary finding is that public participation, particularly from so-called special interest groups, resulted in a final program which was significantly different from the 1986 Draft Program which was developed without public input.
ACKNOWLEDGEMENT

Special thanks to Steve Pearlman of the Massachusetts DEQE Division of Wetlands and Waterways for leading me through the maze that is the Chapter 91 files; to Dennis Nixon for his patience and guidance; and to my friends and family, in particular Dan, for their love and encouragement.
PREFACE

This thesis is prepared according to the Manuscript Format, whereby the first part of the paper contains the text, and the second part contains the notes and bibliography.
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INTRODUCTION

The interface of sea and land -- the shore -- is the setting for a dynamic interaction of uses, laws, and living things. The myriad of activities which occur in the shore has spawned, over time, the development of management and legal tools. One such tool is the Public Trust Doctrine, an ancient idea which has been given new life and vigor by many states in the latter half of the twentieth century.

The Public Trust Doctrine is the fundamental legal principle which gives states the responsibility to manage trust lands, waters and certain resources with special care.¹ A national study of the Doctrine, published in November 1990, defines the principle this way:

The Public Trust Doctrine provides that title to tidal and navigable freshwaters, the lands beneath, as well as the living resources inhabiting these waters within a State is a special title. It is held by the State in trust for the benefit of the public, and establishes the right of the public to use and enjoy these trust waters, lands and resources for a wide variety of recognized public uses.²

While the Doctrine as a legal principle is recognized by the coastal states, "the Public Trust Doctrine is not self-executing. Even a judicially well-articulated Public Trust Doctrine is of limited value if there is no State official or agency empowered to implement and enforce it."³ To fully meet their responsibilities, states must bring the Doctrine to a new level -- implementation through regulation of trust lands and waters.

Because the states, and not the federal government, are empowered to administer public tidal and submerged lands, the
Public Trust Doctrine is a doctrine of state law. Thus from colonial times to the present, various state courts have offered a myriad of views on which lands and which public rights are protected under the Doctrine. In colonial times filling and building in harbors was encouraged, since coastal states believed the best use of submerged and tidal lands was their development for trade and navigation. The trend in the twentieth century has been a shift from encouraging development of trust lands to controlling and even limiting their development. The Public Trust Doctrine, then, is flexible because "it is the social value of the uses to which the public has put the land, rather than the nature of the land itself, which determines the existence of public trust." Changes in our social values this century have brought a new perspective on the Public Trust Doctrine. Demand for recreational uses of the coastline is high, while increasing population and development pressures are chipping away at access to the shoreline. Private and public users compete for a fixed amount of shoreline. The resultant tension must be addressed by the State through laws and regulations. At this point in the evolution of the management of our coastal resources, it is unclear how states should proceed from judicial directive to regulation of public trust lands.

Massachusetts was at a crossroads in coastal management in 1979, when the Supreme Judicial Court handed down a landmark decision on the Public Trust Doctrine in Massachusetts—Boston Waterfront Development Corporation v. Commonwealth. Pursuant to this case, the legislature amended Chapter 91 of
the Massachusetts General Laws -- the Waterways Statute -- in 1983 and again in 1986. The amendments directed the Department of Environmental Quality Engineering (DEQE), with the help of the Coastal Zone Management office (CZM), to overhaul its regulatory program to incorporate the changes to Chapter 91. Developing a new Chapter 91 Regulatory Program turned out to be an arduous and controversial process for the state. The Massachusetts program, called "an ambitious experiment to protect and expand public access to the coast" by one observer, illustrates the tensions between private and public users of the coastal zone. This paper is a case study of the Massachusetts Chapter 91 program, a case which "provides an example that may prove instructive to other States."*

**Statement of the Problem and Hypotheses**

It was unclear when this study was undertaken whether public participation in shaping new regulations resulted in a different program, compromised by the strident opposition of special interest groups such as marinas, yacht clubs and developers. The central issue is whether the program was revised because of the public controversy over the new Chapter 91 Waterways Program.

**Hypotheses**

The following are the three hypotheses to be tested in this study:

1. Widespread public criticism caused the state to significantly revise the original draft of Chapter 91 regulations.

2. The widespread public criticism of the first draft came primarily from special interests such as marinas and develop-
opers, with little participation by groups representing the
general public.

3. The final Chapter 91 Regulations, which include several
major changes from the first draft of the regulations, are
significantly different than the first draft in protecting
the general public's interests in trust lands in Massachu-
setts.

Methodology

The qualitative case study as described in Merriam's Case
Study Research in Education: A Qualitative Approach (1988)\textsuperscript{13}
is the method used to test the hypotheses. This method suits
a study of the dynamic interaction between a large number of
participants over the seven years of program development
within a specific context (Massachusetts). Most importantly,
some generalizations are made in the discussion chapter which
may be useful to other coastal states such as Rhode Island.
The qualitative case study was chosen because
"[g]eneralizations, concepts, or hypotheses emerge from an
examination of the data --data grounded in the context
itself."	extsuperscript{14}

Before undertaking the qualitative case study, the
researcher must identify the boundaries of the system. In
this case, after an introductory review of the history of the
public trust doctrine in Massachusetts and the events that led
up to 1986, the starting point of the case is the submission
of Draft Waterways Regulations for public comment in December
1986. The end of the process, or system, is October 1990, when
the final regulations were promulgated.

The primary source of data for this study was files of the State of Massachusetts Department of Environmental Protection (formerly the DEQE), Division of Wetlands and Waterways. This agency developed the regulations and presently administers the Chapter 91 program. Several hundred pages of written comment in the form of personal and form letters as well as page-by-page reviews of the draft regulations are on file and available to researchers. Newspaper articles were closely reviewed in order to determine which groups had the most influence on the program development process. Personal and telephone interviews with key players in the process also provided data for the study. The data culled from these sources were woven together to create a narrative of the case.

Chapter One briefly reviews the Public Trust Doctrine in light of unique legal developments in Massachusetts. This chapter is meant to provide a basic understanding of this cornerstone of the Chapter 91 Waterways Program. Chapter Two discusses the historic changes in Massachusetts case and statutory law which spurred the call for reform of the Waterways Regulatory Program. Chapter Three examines the key participants in the public comment period and their influence on the DEQE. Finally, Chapters Four and Five analyze and discuss the implications of the data presented in Chapters One, Two and Three.
CHAPTER ONE

THE PUBLIC TRUST DOCTRINE IN MASSACHUSETTS

The Evolution of the Doctrine in the U.S.

The Public Trust Doctrine has been extensively analyzed by legal scholars and coastal zone specialists alike. It is not within the scope of this paper to exhaustively trace the evolution of the Doctrine. However a brief overview will add understanding to the doctrine of Massachusetts, on which the Chapter 91 program is based.

The roots of the Public Trust Doctrine as it exists in Massachusetts are found in ancient times. The Romans developed this common law doctrine because they believed that the coastline and the sea were resources common to all. This belief was embodied in the Institutes of Justinian, ancient Rome's legal code, which reads in part:

By the law of nature these things are common to all mankind -- air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments and the buildings, which are not, like the sea, subject only to the law of nations.²

During the Middle Ages commerce and navigation diminished in importance.³ In England, the doctrine crumbled as the King allowed feudal lords to claim ownership of the adjacent shore.⁴ The public trust doctrine survived, nevertheless, and new life was breathed into it after the signing of the Magna Carta in 1215.⁵

England tailored the Doctrine according to its needs, and so it evolved from the ancient Roman version. According to the English law, title to all tidal waters and the lands


beneath them had two concurrent elements: the *jus publicum* and the *jus privatum*.$^6$ The *jus publicum*, the public’s rights of use, were held by the King in trust for the English people. The *jus privatum*, the private rights of ownership and exclusion, were also held by the King. Eventually the doctrine evolved so that while the King retained the *jus privatum* in tidal and submerged lands, the Parliament held the *jus publicum* in trust for the public.$^7$

The American colonies inherited the Public Trust Doctrine from England. According to the United States Supreme Court the common law of England became the common law of the United States "except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and the laws of the United States."$^8$ The states have gone on to develop different forms of the doctrine tailored to their particular needs and interpretations, although there is a significant body of federal case law guiding them.$^9$

**Origins of the Doctrine in Massachusetts**

Massachusetts was the first state to codify the public trust doctrine,$^{10}$ but it has a checkered history of upholding the doctrine in practice. In Massachusetts private property extends to the extreme low tide mark. This title was transferred wholesale by the 1647 Amendment to the Colonial Ordinance of 1641.$^{11}$ Title to tidal flats is held, in general, by adjacent upland property owner subject to the reserved public rights (an easement) to fish, fowl and navigate in privately
held tidelands. Even though undeveloped private tidelands are subject to reserved public uses, the courts have consistently ruled that "a littoral owner may build on his tidal land so as to exclude the public completely as long as he does not unreasonably interfere with navigation." 

The Colonial Ordinances of 1641-1647 were enacted to stimulate water-borne commerce by encouraging private wharf construction which the colony could not afford itself. The Ordinances extended private property to the low water mark (or to 100 rods from the high water mark, whichever was more landward). Section 3 of the Ordinance proclaimed:

It is declared, that in all creeks, coves, and other places about or upon salt water where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebb further; Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

The colony thus traded its title to tidal flats to stimulate maritime commerce and economic growth. The courts, the sole interpreter of the Ordinance until the 1860s (when the Board of Harbor Commissioners was created by the legislature), allowed construction and filling to the low water mark in spite of the public's reserved rights in the tidelands.

Massachusetts went even further in burying the public's trust rights during the 1800s. During this period, the General Court passed hundreds of special wharfing statutes which granted to private property owners the right to extend their wharves seaward of the low water line. Now private property owners could build wharves not only in the intertidal areas...
dal zone but also seaward of the low water line by obtaining a special legislative grant. The result was "a period of intense and sustained maritime development during which large tracts of tidal and submerged lands were reclaimed and developed by private parties." 20

This trend of unregulated development of tidelands was finally halted in 1866. That year the General Court created a permanent Board of Harbor Commissioners 21 The Board was given licensing authority over all development in Commonwealth tidelands. 22

The scope of the public's rights in tidal flats is narrow. The Massachusetts courts have been reluctant to expand public trust rights. 23 The reserved public rights in private tidelands are fishing, fowling and navigation and their "natural derivatives" 24 Derivative uses have been determined to include swimming the waters without touching bottom, 25 lateral access to fishing grounds, 26 and taking floating plants as long as they have not come to rest on the beach. 27 In 1974 the House of Representatives asked the Supreme Judicial Court for an advisory opinion on a bill which would have established a "a public on-foot right-of-passage" in tidal flats. 28 The court rejected the reasoning behind the bill, concluding that the proposed law would violate state and federal constitutional provisions against taking private property without fair compensation. 29 Massachusetts courts have consistently rejected the idea that public rights in tidal flats have grown to encompass more than those reserved in colonial times. The Massachusetts view of the public trust
is vastly different than the view of New Jersey and California courts, which have expanded the scope of reserved rights over time.30

What is the effect of the Massachusetts approach? The private ownership of tidal flats is firmly grounded in its history and law. According to the Boston Globe, "The Bay State’s image as a serene setting to stroll sandy beaches is a compelling one. It is also a myth... Only 7 percent of the state’s shore is open to the public and suitable for strolling or swimming."31 Increasing public access by urging the courts to expand the scope of the doctrine is unlikely. Private ownership of tidal flats is likely to continue. The state must look for other ways to increase public access besides challenging the considerable forces of history and law in Massachusetts. The Chapter 91 regulatory program is one such way.
CHAPTER 2

THE 1980S: HISTORIC CHANGES IN CHAPTER 91 LAW

Despite the Supreme Judicial Court’s narrow view of the public’s rights in trust lands, the state recently implemented a sweeping tidelands licensing program called the Chapter 91 Waterways Program. Acrimonious debate marked the years between the amendments to the waterways law, Chapter 91 of the Massachusetts General Code, and the final version of the regulations. The debate was spurred by a sweeping Supreme Judicial Court ruling in 1979 that filled former tidelands are still impressed with the public trust, even when they have been granted into private ownership. The following chapter will discuss the evolution of tidelands licensing in Massachusetts and the landmark Boston Waterfront Corporation decision and its impact.

The Licensing and Development of Tidal Flats in Massachusetts

Although the Colonial Ordinances of 1641-1647 extended private property to include tidal flats (private tidelands), permission had to be obtained from the state to develop them. In addition, building or filling Commonwealth tidelands has always required the permission of the state. The ultimate responsibility for managing the public trust lands lies with the General Court, the Massachusetts legislature. In the early years the General Court was directly involved in tidelands licensing. Prior to 1866 a riparian property owner could develop adjacent tidelands lawfully only by obtaining a
special statute passed by the General Court. These statutes, known as wharfing statutes, generally granted a right to build a wharf beyond the extreme low tide line and into Commonwealth tidelands. Not only were private tidelands rapidly developed in response to the Colonial Ordinances, Commonwealth tidelands were also being developed because of a legislature known to be generous with special wharfing statutes.²

As a result, from colonial times until the early 1800s, Massachusetts harbors teemed with wharves and commerce.³ In response to the explosion in development, the legislature passed harbor line laws in 1837.⁴ The new harbor lines were challenged in court but withstood judicial scrutiny.⁵ The Supreme Judicial Court (SJC) ruled in 1851 that building a wharf in private tidelands is indeed subject to state regulation.⁶

From this point on private tidelands (generally, the intertidal zone) and Commonwealth tidelands (those submerged lands from the low water mark seaward to the limit of the state’s jurisdiction) were subject to regulation. The harbor line laws were codified and expanded in 1866 when the General Court enacted Chapter 91 of the Massachusetts General Laws, also known as the Waterways Statute.⁷ Chapter 91 was the first waterways licensing statute in the nation.⁸ The legislature also created a Board of Harbor Commission, thus delegating the legislative duty to regulate development in Commonwealth tidelands to the new agency.⁹ Licensing by the Board was to replace special statutes granted by the legisla-
ture. Since 1866 the only substantial changes in the statutory law came by way of amendments in 1983 and 1986. Prior to the 1980s amendments, if a proposed development was structurally sound and did not significantly interfere with navigation, license was granted. After the 1983 and 1986 amendments, proposed projects had to meet greatly increased substantive and procedural requirements.

The Boston Waterfront Decision: The SJC Turns Around

A 1979 decision by the Supreme Judicial Court has had a profound impact on tidelands law and policy in Massachusetts. The case, Boston Waterfront Development Corp. v. Commonwealth (1979), turned existing tidelands regulation on its end. In order to understand fully the impact of this decision, some prior legal developments should be discussed. Up until 1941, it was generally believed that licensed development of tidelands undertaken in good faith was "the equivalent of unconditional fee simple title". This belief was undermined by a judicial ruling in 1941. In the case, Commissioner of Public Works v. Cities Service Oil Co., the SJC declared tidelands licenses revocable without compensation, despite development undertaken at great expense to license holders. The ruling suddenly cast into uncertainty many developments whose tidelands licenses could be revoked at any time without compensation.

This case prompted a new era in licensing: that of "irrevocable licenses". In the wake of this decision, developers feared the threat of revocation could jeopardize
not only existing development but also future financing of new development. Aware that the General Court was ultimately responsible for the disposition of Commonwealth tidelands, developers began to bypass the licensing agency by requesting legislative declarations that their licenses were irrevocable. Many of these declarations "also provided for a complete transfer of all rights, title and interest held by the Commonwealth to the private parties in question -- the most expansive transfer of public rights since the original practice of land granting was discontinued in the mid-1800s." The impact of this giveaway of Commonwealth tidelands was far reaching. During the 1950s, 1960s, and 1970s many of the licenses issued under Chapter 91 were declared irrevocable by the General Court. Developers and their lawyers felt this was the only way to escape the threat of losing their property to a license revocation and assure banks that a project was financially viable. According to one observer, "In short, for almost two centuries the development taking place along the shores of Massachusetts harbors -- albeit 'lawful' in most cases -- buried not only large tracts of land but also the notion that public rights in such lands should be protected in perpetuity." Although the impact of the Commissioner of Public Works v. Cities Service Oil Cities was devastating to the development community, a 1979 case ultimately had more influence on the way tidelands are used in Massachusetts. The case, Boston Waterfront Development Corp. v. Commonwealth pitted a
developer against the state. The Boston Waterfront Development Corporation (BWDC) claimed ownership in fee simple absolute of a parcel of filled land located below the historic extreme low water mark, in former Commonwealth tidelands. BWDC asserted that its predecessor in title had been granted fee simple absolute title by the Lewis Wharf Statutes of the early 1800s prior to the enactment of Chapter 91 Waterways Licensing Statute in 1866.

The SJC ruled that indeed the Lewis Wharf Statutes had conveyed fee simple title to land below the extreme low water mark; yet, that title was not absolute. Instead, the grant was burdened with the "condition subsequent" that the property be "used for the public purpose for which it was granted." Furthermore, the SJC implied that the title would revert back to the state if the parcel ceased being used for that original public purpose.

The impact of the ruling was immediate. The decision "sent shockwaves throughout the Commonwealth’s real property industry." From the perspective of the state the opinion was a dramatic opportunity to increase public access to the waterfront. Hundreds of acres of filled lands could now be brought under the Chapter 91 umbrella. For the owners of condominiums, restaurants, and office buildings built on filled land the decision was a grave threat -- will the state reclaim the wharves which are not being used for the original public purpose? One MCZMP official wrote, "the Court was clearly emphasizing the tenacity of the public trust doctrine over time; in establishing that protection of the public
interest in each parcel of tidelands is a perpetual responsibility of government, the SJC laid the foundation for wholesale change in the Commonwealth's program of waterways regulation. The decision set the stage for a confrontation between the state, representing the general public's interest in Commonwealth tidelands, and private property owners who stood to lose thousands of dollars worth of waterfront investment.

The enthusiasm of public access champions was dampened two years later by the SJC's Opinion of the Justices (1981). Following the Boston Waterfront Development opinion, numerous bills were filed with the General Court. In response to one of these bills, the SJC issued this advisory opinion in 1981 in order to clarify the public and private rights in licensed tidelands. The Opinion of the Justices to the Senate (1981) is viewed by some as a retreat from the Boston Waterfront ruling. The SJC ruled that

A further and significant limitation on legislative action in the deposition of a public asset is that the action must be for a valid public purpose, and, where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose...The paramount test should be whether expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit.

In this ruling the SJC concluded that it is not constitutionally beyond the power of the legislature to extinguish the public interest in tidelands, although the standards which any grant of public land must meet are stringent. This ruling was, then, a retreat from the Boston Waterfront decision.
which had implied that the public interest in tidelands could never be extinguished. In the Opinion of the Justices in 1981 any grant extinguishing the public interest would have to meet stiff requirements in order to pass muster with the court. Finally, the high court's 1981 ruling found that the legislature could delegate its power to regulate tidelands. The two rulings together clarified the the public's rights in all tidelands, whether they be former tidelands, now filled and developed, or still flowed tidelands.

1983: Chapter 91 Amended

The stage then shifted from the court room to the floor of the legislature. The General Court now had to amend Chapter 91 to incorporate the new rulings. The SJC's 1979 and 1981 decisions prompted a Senate review of the the Chapter 91 statute. The Senate Committee on Ways and Means, responsible for reviewing legislative proposals affecting public lands in the Commonwealth, published Policy Report #13: "Protection of the Public Interest in Tidelands" in June, 1983. The report was issued because of "considerable divergence of opinion on the part of various legislators, public officials, and private parties concerning the most appropriate legislative response" to the change in tidelands case law.

The Senate Report recommended that the Chapter 91 Statute, virtually unchanged since it was written in 1866, be amended. The report made several recommendations to clarify the existing statute in light of the recent judicial pronouncements on the Public Trust Doctrine. Specific recommen-
ations were aimed at minimizing the discretion of the DEQE in issuing licenses, creating specific statutory guidelines for the Department, and making the license requirements more predictable for applicants.

In response to the Senate report, the Boston Globe published an editorial on tidelands use in the Bay State. The Globe urged that licensing be jettisoned from the political arena -- where irrevocable licenses were regularly declared. The Globe quotes Chester G. Atkins (D-Concord), chairman of the Committee, as saying that irrevocable licenses are "very troubling... because we are conferring enormous powers with no real definition of what the public interest is." The Globe wrote that tidelands will continue to be highly politicized -- "because of political pressures which can outweigh environmental, historical and legal concerns" -- until the General Court delegates all of its licensing authority to an independent agency. The Globe recommended against the DEQE: "The Ways and Means proposal to delegate all this authority to DEQE, the present licensing agency, appears to be going too far in the opposite direction." The newspaper instead said, "[W]hat is needed is a highly visible agency or commission, such as Coastal Management or a special Tidelands Commission, able to call on technical experts as needed, but also able to make and articulate broad policy decisions involving the balance between public and private rights." The potential for politics to influence the licensing process is evident from the highly politicized nature of tidelands licensing in Massachusetts up until
the new Program was put in place.

The 1983 amendments to the Chapter 91 Waterways Statute incorporated many of the recommendations outlined in the Senate Report. Still, the legal mandate of the DEQE with regard to tidelands remained broad and vague. The 1983 amendments were akin to an open door for the DEQE to overhaul the regulatory program, but they did not provide specific guidelines.

The 1983 amendments changed both the substance of the waterways law and the procedures for issuing licenses. First, the statute now identifies former tidal flats and submerged lands as being within the jurisdiction of the DEQE. Second, a new license is required for any change in use of licensed land and any substantial structural alteration. Third, the DEQE was to ensure that "tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose." This requirement was not meant to prohibit any non-water dependent development; rather, any non-water dependent projects would have to "be carried out specifically with an eye toward water-related public interests." Fourth, a public hearing is required in the municipality where any non-water dependent project is proposed.

The 1983 amendments thus fundamentally changed the Massachusetts tidelands licensing system. Licensing was transformed from a rubber stamp approval of any project, as long as it was structurally sound and did not interfere with navigation, to a system far more protective of the public's rights in tidelands.
The 1986 Clarifying Amendments

After the 1983 amendments, developers clashed with the DEQE over the financing of large scale development under the stricter tidelands law. The Boston Globe reported one such incident on May 8, 1985.47 A developer from Hull who had proposed a ten story condominium on filled tidelands was seeking an irrevocable declaration of his license. Up until this point, the only way to secure long term financing was to obtain the special legislative declaration. The DEQE testified that such a bill would be a giveaway of public tidelands. A lawyer for the developer argued in front of the Joint Committee on Natural Resources that the project would be unmarketable without the declaration of irrevocability.

The issue of financing projects with tidelands licenses came up repeatedly. The DEQE urged the General Court to stop declaring tidelands licenses irrevocable.48 Developers and their lawyers feared that without the declaration, banks would not finance a project whose license could be revoked suddenly. Developer Robert Kenney was quoted in the Globe as saying, "We're not trying to circumvent [the licensing process]...The issue is that we have to know when we get all through we have something that is finance-able" (sic).49

Governor Dukakis promised to veto any irrevocable bills, in effect imposing a moratorium on them. In order to quell the complaints of the real estate and banking communities, the legislature further revised Chapter 91 three years later. The legislature passed "clarifying amendments" in 1986 to
reassure developers, bankers and lawyers that licenses would be "finance-able" in the absence of irrevocable bills. The 1986 provision in the law states that

A license issued pursuant to this chapter is hereby made a mortgageable interest lawful for investment by any banking association, trust company, savings bank, cooperative bank, investment company, insurance company, executor, trustee, or other fiduciary, and any other person who is now or may hereafter be authorized to invest in any mortgage or other obligation of a similar nature. 50

The 1986 amendments were enacted to quell the fears of the real estate, banking and development sectors. This provision appears to have put to rest the issue of financing long term projects with licenses. Even so, developers, bankers and lawyers harshly criticized the proposed draft regulations, as is discussed in Chapter 3 of this paper. The experience of Massachusetts at this stage of tidelands development should serve as a warning to other states: tidelands licensing can be a highly politicized issue.
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<td>Colonial Ordinances</td>
<td>Private property extended to low water mark, with reserved public easement to fish, fowl, and navigate.</td>
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<td>1866</td>
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<td>1941</td>
<td>Commissioner of Public Works v. Cities Service Oil Co.</td>
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<td>1940-ca. 1980</td>
<td>Period of &quot;Irrevocable Licences&quot; by the General Court</td>
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CHAPTER 3

THE REGULATIONS: CONTROVERSY AND NEGOTIATION

In December 1986 the DEQE released its first version of new tidelands regulations overhauling the tidelands licensing system in the Commonwealth. The 1986 Public Hearing Draft\textsuperscript{1} of its new regulations overhauled the former tidelands regulations in both substance and procedure.\textsuperscript{2} The DEQE scheduled four public hearings at which to discuss the draft.\textsuperscript{3} Department officials invited public comment and testimony; local newspapers, especially those in coastal communities, followed the process closely.

A storm of protest erupted in response to the draft regulations. Criticism emerged from an assortment of groups with a stake and interest in their impact on Massachusetts. These groups forced major revision of the regulations by submitting extensive written comment to the state and generating negative press coverage of the draft regulations.\textsuperscript{4} The final regulations were promulgated in October 1990, nearly four years after the first draft was released to the public in December 1986. This chapter will begin with a brief overview of the controversial elements of the first draft. The second part of this chapter will examine the major players and their influence on the regulations, as well as general perceptions of the regulations in the press. As the 1990 National Public Trust Study noted about the Massachusetts experience,

The difficulties that the division, the public and upland owners have had in arriving at agreement on the substantive portions of the regulations provide

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an excellent example of the inevitable conflict between competing bona fide public and private interests in the coastal area.5

The Architects of the Regulations

The Department of Environmental Quality Engineering (DEQE) and the Massachusetts Coastal Zone Management Office (MCZM) were the two agencies responsible for drafting the regulations.6 The DEQE was the primary agency, since it was vested with licensing authority under the law.7 The MCZM Office was involved so that the regulations would be consistent with the Massachusetts Coastal Zone Management Plan.8 In addition, a Tidelands Advisory Commission (TAC) was convened to review internal drafts and make recommendations on the proposed regulations. In January 1984 the General Court passed a resolution9 establishing TAC and directing it to study tidelands in the Commonwealth. The Commission was to consist of 32 members: three Senators appointed by the President; four Representatives appointed by Speaker of the House; and nineteen members appointed by the Governor representing various interest groups. In addition, the Secretary of Environmental Affairs, Commissioner of DEQE, Director of MCZM, Commissioner of Fisheries and Wildlife, and the Attorney General (or their designees) were directed to serve on the commission.10

TAC's primary responsibilities were to advise and assist DEQE and CZM staff in developing new licensing policies.11 TAC developed a series of issue papers, addressing geographic scope, water-dependent uses, change of uses, fee structures, and irrevocable licenses.12 The Commission identified
priorities and key tidelands issues. They also commented on a number of working drafts of the regulations prepared by the DEQE and CZM staffs.

TAC's influence was in commenting on drafts of the regulations which were circulated internally before the December 1986 Public Hearing Draft was presented. The Commission did not enter the public hearing fray, although several members of TAC were simultaneously representing their own interest groups at hearings and in written comments submitted to DEQE and CZM staff. Some TAC members felt that the Commission "may not have been utilized as effectively as it might have been in the development of the Public Hearing Draft." Some TAC members felt that the Commission "may not have been utilized as effectively as it might have been in the development of the Public Hearing Draft." Some TAC members felt that the Commission "may not have been utilized as effectively as it might have been in the development of the Public Hearing Draft." Some TAC members felt that the Commission "may not have been utilized as effectively as it might have been in the development of the Public Hearing Draft."

While the TAC was enormously helpful to the staffs of the DEQE and MCZM in drafting regulations, its most important function was symbolic and political. The regulations had at least had the benefit of scrutiny by a wide variety of interests represented on the Commission, and thus the state could try to avoid the appearance of being insensitive to certain groups. Politicians and DEQE/MCZM staff could point out the many interests represented by the group as indicating concensus about the regulations. While its work was important the Commission was also politically expedient.

The 1986 Public Hearing Draft

The ninety-three page Public Hearing Draft of the Waterways Regulations (referred to as the first draft in this paper) was distributed for public comment in December 1986. The draft proposed both substantive and technical changes in

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the regulation of tidelands in the Commonwealth in light of the sweeping changes made to the Chapter 91 Statute. The first draft proposed the following major changes in the licensing system:

1. Expand the geographic scope of program jurisdiction to include all tidelands, whether filled or flowed, to the seaward limit of the state's territory. Section 9.03 (2).

2. Preserve and enhance water dependent uses of tidelands by prohibiting the displacement of previous water dependent activity with non-water dependent projects (unless the water dependent use can be continued at an acceptable alternative site). In addition, strictly control accessory-to-water dependent uses. Section 9.04 (2).

3. Reserve Port Areas for nearly exclusive use by marine industrial projects.

4. Require every waterfront parcel to provide continuous on-foot public access along the waterfront, even above the high water mark where applicable. Section 9.05 (2) f).

5. Categorically prohibit new fill or structures for non-water dependent uses in flowed tidelands. Section 9.05 (5).

6. Raise fees. Section 9.06.

7. Create Waterfront Setback Zones of 100 feet which, among other things must provide "free public on foot passage" in private tidelands. Section 9.05 (3) 3) d).

8. Ban dockominiums by limiting the maximum term to one year for any contract for exclusive use of any docking facility (with option for renewal). Section 9.11 (1).

9. Require specific improvements for marinas which wish to expand by more than 10 slips, including: one toilet for every 35 berths; and one shower per sex for every 50 berths. Section 9.11.16

The elements listed above are some of the major rules proposed in the first draft of the regulations. In summary, the regulations effectively prohibited dockominiums, created
strict public access requirements, even in private tidelands, and prohibited non-water dependent and accessory water dependent uses unless the use provided greater public benefit than detriment. The regulations included a maximum of forty year terms for licenses, and there was no provision for amnesty or grandfathering existing uses. The following section will discuss how the public and special interests reacted to the proposed draft.

Marinas, Boat Yards, and Yacht Clubs

The following paragraphs discuss the boating sector, the most effective critic of the 1986 draft regulations because of its well financed and persuasive campaign against the draft rules. Representatives of boating interests argued that the regulations were fundamentally hostile to their businesses. By imposing strict licensing requirements and fees on marinas, boat yards, and yacht clubs, it was alleged that the DEQE would destroy marginal businesses and increase the operating costs of the remaining ones. Ultimately, the regulations would have the effect of shrinking access to the water by the boating public by making berths unaffordable to more people.

One of the most controversial parts of the 1986 draft was the Section 9.11 dealing with "Commercial Recreational Boating Facilities." The boating sector argued that the stringent requirements would cause widespread business failures in that industry, thus severely restricting access to the boating public. On the other hand, some newspaper editorials accused the boating sector of defending the privileges
of wealthy boat owners.¹⁸ The views of both critics and supporters of the draft are reviewed in this chapter.

**Waterways Action Committee**

Arguably the most well organized and financed group involved in the campaign to revise the first draft of regulations was the Waterways Action Committee (WAC). A second coalition consisted of the Massachusetts Bay Yacht Club Association and the Massachusetts Marine Trades Association, both represented by Attorney John W. Spillane. It is not clear how closely the two groups worked together or how much their memberships overlapped, although both represented yacht clubs, marinas and recreational boaters.

The WAC was founded by Edward J. Doherty, chairman of WAC and president of Kingman Marine in Cataumet and Marina Consult, "an interstate business specializing in long-term leasing and condominium ownership of boat slips."¹⁹ His organization quickly coalesced into a broad group representing about 300 marinas, yacht clubs and boat yards. WAC hired Boston lawyer Stanley Wallerstein, public relations firm Hill & Knowlton, a lobbyist, and hired consultants Arthur D. Little to write a report of the effects of the regulations on the marine businesses it represented.²⁰ A massive letter writing campaign to the Governor and DEQE head and other state officials involved was also very effective.²¹ The WAC was opposed to several sections of the regulations because they would cause "severe strain" to the boating community, forcing marinas, boat yards and yacht clubs out of business.
and thus reducing access for the boating public. The WAC, however, urged "reasonable modifications" to the draft, and emphasized that they wanted to negotiate with the state to address the boating sector's concerns.\textsuperscript{22}

Waterways Action Committee claimed to represent about 300 marinas, yacht clubs, boat yards and other water-dependent businesses and organizations.\textsuperscript{23} Specifically, WAC was concerned with increased jurisdiction of the regulations, increased fees, requirements that boat owners build facilities to accommodate boaters, making available boat slips to the general public, requiring lottery or first come first serve for distributing boat slips, mandating a one year limit on slips, limiting terms of licenses, requiring a new license for any structural change or change in use regardless of how small, and increases in insurance because of forced public access.\textsuperscript{24}

Doherty submitted written and oral testimony on the dockominium issue at the final public hearing on the December 1986 draft on April 15, 1987. Doherty defended dockominiums to DEQE officials. According to the WAC newsletter following that hearing, Doherty
defended the dockominium concept by explaining that long term leasing may be the only way to finance new slips; these slips have a higher turnover than those in a traditional marina thus giving people more access to a slip; and dockominiums can promote better management and maintenance...and they provide an alternative for boaters.\textsuperscript{25}

Importantly, Mr. Doherty had a financial stake in the outcome of the regulations. Not only was he the owner of Kingman Marine in Cataumet, he was also owner of a development firm.
specializing in the sale of dockomiums. According to an April 1987 Soundings article, the WAC budget at that point was $155,000 "raised from membership and underwritten by Marina/Consult" (Doherty's firm). In 1988 the Boston Globe featured Doherty in an article on dockomiums in New England. According to the article, Doherty is credited with introducing the dockominium to New England. The article states, "In Massachusetts, the buyer of a dockominium technically purchases a 99-year lease to use the dock space. Typically, a slip sells for at least $1,500 per foot. Slips usually range 30 to 70 feet long, so a buyer ordinarily pays at least $45,000 and sometimes more than $100,000." Thus while the WAC advocated revisions to the regulations to preserve access to the waterfront by the boating public, its chairman and chief financial backer also had a significant financial interest in the regulations.

Massachusetts Bay Yacht Club Association and the Massachusetts Marine Trades Association

The Massachusetts Bay Yacht Club Association (MBYCA) and Massachusetts Marine Trades Association (MMTA) also joined forces to fight the 1986 draft regulations. While WAC sought to have the regulations revised and moderated to accommodate its own interests, the MBYCA and MMTA attacked the very legality of them.

The MBYCA and MMTA were represented by John W. Spil-lane, an attorney from Worcester, who submitted extensive comments on the drafts in March 1987. His comments on behalf of the MBYCA and MMTA hammered away at the regulations
in two ways. First, Spillane recommended that all provisions be struck which were not specifically authorized in the Chapter 91 statute. Spillane repeatedly accused the DEQE of creating its own interpretation of the public trust doctrine not included in the statutory law.31

Second, in his twenty-eight pages of comments, Spillane attacked many of the provisions as "arbitrary and capricious and exceed[ing] all reasonable statutory authority."32 With regard to Section 9.11, "Commercial Recreational Boating Facilities," Spillane recommended that key passages of the draft regulations be stricken because they are "overbroad and beyond the statutory authority" of the DEQE.33 In particular Spillane said that the DEQE had no legislative authority to charge different tidewater displacement fees for water dependent and non-water dependent uses.34 Throughout his comments Spillane attacked the fundamental legality of the regulations and repeated the refrain that many of the regulations were arbitrary, capricious and exceeded the statutory authority of Chapter 91.35

Dockominiums and the Allocation of Vacant Boat Slips

Section 9.11 of the 1986 Draft Regulations, "Commercial Recreational Boating Facilities," limited the term for a leasing a slip to one year with the option for yearly renewal; and required the "fair and equitable assignment from a waiting list for use of vacant or new docking facilities."36 By limiting the maximum term for exclusive use of a boat slip, the regulations effectively banned dockominium
ownership in Massachusetts. This ban was attacked by dockominium defenders such as Doherty because it would force marinas to close one option by which owners stay in business in difficult economic times.

The allocation of vacant slips was another one of the most controversial and most misunderstood elements of the 1986 Draft. The regulations required "a fair and equitable assignment from a waiting list" compiled by date of application, lottery, size and type of vessel, or "any other method deemed appropriate by the Department." Critics from the boating sector cited this portion of the regulations as an example of the state interfering in local businesses. Paul R. Neelon, President of Hewitts Cove Marina in Hingham, reacted to the regulation of slips this way:

Assignment procedures for docking facilities are properly the realm of private business subject to the already existing laws against discrimination. Private marina operators should be allowed to exercise discretion in assignments. In the past few years I have twice exercised such discretion which would be technically illegal under the proposed rules -- in one case, a handicapped person and the other, a terminal illness.

On the other side of the issue, many perceived the boating sector as the privileged and wealthy attempting to preserve the status quo in their favor and at the expense of the general public. The New Bedford Standard-Times published an editorial on the draft regulations which said in part:

Big money interests and property owners who spent big bucks for a spot near the water don’t want Beacon Hill coming down and telling them that they have to let a Pittsfield or Podunk family come down and be able to gain access to the waterfront and maybe -- heaven forbid -- a mooring. These things are treated almost as an exclusive birthright of
In addition to the Standard-Times, the Boston Globe also hammered the critics of the 1986 draft regulations in an April 11th editorial. The Globe harshly criticized the recreational boaters for joining forces with the marina, yacht club and boat yard coalition. The editors wrote,

[A] group of marina operators has drawn boaters into a coalition opposing the regulations with a well-organized campaign of disinformation. It has led some boaters to believe that each year they will be assigned a mooring space by statewide lottery, some years winning one at Mattapoisett on Buzzards Bay, but the next year forced to move their boat to Lake Quinsigamond.40

The "disinformation" accusation was heard repeatedly, and like any rumor it is impossible to uncover its source. It is quite possible that instead of disinformation it was misinformation, as the regulations were not written very clearly.41 Nevertheless the WAC denied the disinformation accusation, instead pointing to the vagueness of the regulations as the source of confusion.

Yacht Clubs

When the 1986 draft regulations came out there was some confusion about how they applied to yacht clubs. Many yacht clubs were under the impression that they were subject to the same rules as the marinas. Section 9.02 seemed to include yacht clubs in its definition of "Facilities of Private Tenancy":

"Facilities of Private Tenancy" means facilities at which the advantages of use accrue to a relatively limited group of specified individuals (e.g. the members of a private club, the owners of a condominium building) rather than to the public-at-large
or to a generic community of beneficiaries (e.g. patrons of a public restaurant, visitors to an aquarium or museum) on either a transient or permanent basis. 42

Sixty-two yacht clubs, comprising the Massachusetts Bay Yacht Club Association, joined forces with the Massachusetts Marine Trades Association, comprised of about 134 marinas, boat yards and other marine facilities to battle the 1986 Draft Regulations. 43

One of the most vocal yacht clubs was the Lynn Yacht Club, whose Commodore Carl Hall and Secretary Robert Feener submitted comment to the DEQE. 44 Hall and Feener testified that Lynn Yacht Club was a "sweat-equity" organization -- that members exchanged work at the club for boating and other privileges. This arrangement made yacht clubs affordable to moderate income people. They argued that the perception of yacht clubs as enclaves of wealthy boat owners was out of date. The new regulations would thus be unfair and would put a financial squeeze on clubs which provide access to the water for many boaters. 45

Other Comments on the 1983 Draft Regulations

The boating sector was not the only group which criticized the first draft of the regulations. Developers, bankers, environmentalists and conservationists, building and engineering associations also submitted written comments to the DEQE. Following is a brief overview of the views of the most important groups.

Bankers and Lawyers

The Massachusetts Bankers Association (MBA), represent-
ing 248 commercial and savings banks, was predictably concerned with the clouding of titles of filled lands.\textsuperscript{46} In a letter to Gary Clayton, the MBA "strongly endorse[d] the positions of" the Lawyers Committee on Chapter 91, an ad hoc group of attorneys which submitted a lengthy comment on the proposed Chapter 91 regulations.\textsuperscript{47}

The Lawyers Committee (LC) on Chapter 91 submitted a fifteen page memorandum to the DEQE. According to the memorandum, the LC consisted of twenty-one attorneys who represent owners, developers, tenants, lenders and title insurers.\textsuperscript{48} Attorney Herbert Vaughan, of the law firm Hale and Dorr in Boston, was chairman of the group. The Committee argued that the proposed regulations assert jurisdiction far beyond what the statute authorizes. Vaughan argued:

The proposed regulations seek to assert jurisdiction over areas in which the Commonwealth has retained no rights. There are large tracts of former tidelands in which the Commonwealth granted all its rights and interests and which, for that reason, are not subject to regulation under the 1983 Amendments.\textsuperscript{49}

The Lawyers Committee on Chapter 91 criticized the proposed regulations on two points. First, many of the tidelands purported to be within the jurisdiction of the DEQE under the law are now entirely private property. In particular, LC asserted that where former private tidelands which have been properly filled or wharfed out, there no longer exists the public easement for fishing, fowling and navigation.\textsuperscript{50} The group argued that many former Commonwealth tidelands over which the DEQE asserts jurisdiction were granted in fee, and the public rights in such parcels were
terminated. 51

Second, the Lawyers Committee asserted that the draft regulations "assert a sweeping zoning-type regulatory authority for the Department, which has no basis in Chapter 91 or any other law." 52 This complaint, that the regulations interfere with the home rule of municipalities with respect to zoning, echoed the sentiments of some municipal planning boards. 53 Finally, the Committee argued that by limiting terms to 40 years 54 the regulations would make "privately financed significant waterfront improvements" infeasible. This limitation on terms of licenses, Vaughan argued, would also run counter to the 1986 Amendment to make licenses a mortgageable interest. 55

The comments of Vaughan on behalf of the Lawyers Committee on Chapter 91 -- that the regulations overreached the jurisdiction of the DEQE -- echoed the arguments made by John Spillane on behalf of the Massachusetts Bay Yacht Club Association and the Massachusetts Marine Trades Association. Both attacked the fundamental legality of the regulations, including the DEQE’s jurisdiction over filled private tidelands. According to the 1990 National Public Trust Study,

The division has acknowledged the uncertain state of the law surrounding filled private tidelands but takes the position that it must in the first instance decide doubtful issues in the public’s favor and leave it to the courts to resolve the issue. This position seems both reasonable and responsible. 56

Questions remain concerning DEQE’s interpretation of its regulatory authority under tidelands laws in the Bay State. The DEQE, meanwhile, decided that they should err on the side
of the public by interpreting their authority under Chapter 91 liberally, and let the courts decide the issue if the regulations are challenged.\textsuperscript{57} The DEQE thus presumes formerly filled private tidelands and Commonwealth tidelands within its geographical jurisdiction to be impressed with public rights unless the owner can prove otherwise.

Yet the DEQE did make a serious concessions to those who argued that jurisdiction over filled former tidelands may be illegal. First, it refined its definitions of "private tidelands" and "Commonwealth tidelands" so that ownership in absolute fee simple free of any easement or other burden, and thus not subject to regulation could be proved.\textsuperscript{58} Second, jurisdiction excluded "landlocked tidelands,"\textsuperscript{59} thus exempting from regulation large amounts of filled tidelands. Hundreds of minor revisions and changes in wording were incorporated into the second public hearing draft of July 1989. The second draft is essentially what became the Final Promulgated Regulations. The primary differences between the two versions are discussed in detail in Chapter Chapter 4 of this thesis.

This point of contention illustrates the need for comprehensive and concise statutory language so that the regulatory agency charged with carrying out the legislative mandates will be clear in its mission. The Massachusetts courts will likely be the final arbitor of this issue. The arguments of legal scholars questioning the DEQE's interpretation of its jurisdiction under the Chapter 91 statute and tidelands case law, and indeed the legal underpinnings of the

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Supporters of the 1986 Draft Regulations

The environmental groups came out generally in favor of the proposed regulations, although they did not defend them as vigorously as the marinas and boat yards attacked them. Perhaps it was because there was some doubt that public access and environmental preservation necessarily had very much to do with each other. The environmental groups appeared not able to decide whether to defend the regulations on the grounds that they protected nature or that they fostered increased public access to nature. In fact, many see these two issues as quite different and sometimes competing. Nevertheless, these groups acted as important counter balances to the strident voices opposing the regulations.

The Environmental and Conservation Groups

Several environmental and conservation groups submitted comments to the DEQE on the 1986 draft regulations. For the purposes of this study, these groups are considered "special interest groups." The Conservation Law Foundation, the Environmental Lobby of Massachusetts, the Massachusetts Audubon Society, the Massachusetts Association of Conservation Commissions, and the Charles River Watershed Association participated in the public hearings and submitted comments to the Commonwealth. Predictably, they applauded the regulations and advocated increased protection of the environment and the public's access to tidelands.

The Conservation Law Foundation (CLF) in particular
argued that the physical boundary of private tidelands should be the mean low water mark instead of the extreme low water mark used in the regulations. Citing several cases⁶¹ CLF argued for the more restricted definition of "private tidelands" under the law. Interestingly, the regulations define private tidelands in part as bounded by the "historic low water mark or of a line running 100 rods (1650 feet) seaward of the historic high water mark, whichever is farther landward...".⁶² Thus the DEQE declined to define the boundaries of private tidelands within the regulations, leaving the issue to judicial interpretation.

CLF also lamented the absence of strict resource protection provisions in the regulations. Specifically, the CLF wrote:

Of specific concern are the cumulative and long-term effects of granting licenses for many small, usually private projects in the tidelands that permit a proliferation of activities, such as the operation of motorboats, that tend to disturb the productive fisheries near shore. To deal with such long-term, cumulative threats, CLF believes that the proposed regulations should permit the Department to reject a license application on the basis of such cumulative impacts, both current and anticipated.⁶³

The Environmental Lobby of Massachusetts (ELM) and the Massachusetts Audubon Society (MAS), like the CLF, applauded the regulations while recommending stricter controls on development and increased protection of the public's rights in tidelands. ELM advocated increasing the geographic scope of jurisdiction from 200 feet to 400 feet from the high water mark. ELM also advocated 25 year terms for most projects with longer terms of fifty or ninety-nine years in certain
circumstances. The Audubon Society wrote, "However, in improving access, it is essential that those areas of the coast that are ecologically fragile not be inadvertently damaged." Finally, the Charles River Watershed Association (CRWA) suggested that fragile areas such as Areas of Critical Environmental Concern should "receive special attention in the determination of appropriate public use and access requirements. There should be some way of favoring passive, low-impact recreational uses of these areas." After receiving comments from these environmental groups, the Department decided to refrain from making determinations based on environmental impact which would prohibit public access. Evaluations of ecological sensitivity would be left to other state and federal agencies whose responsibility it is to make such determinations.

This type of provision, while certainly admirable in its projection of the natural environment in which the public has certain rights, would thrust the DEQE into a policy-making role. If the DEQE were controlling otherwise lawful development of tidelands because of potential cumulative effects in the future, the Department would certainly be stepping out of its regulatory shoes. The final regulations did not assume this broad policy making authority, and instead deferred environmental assessments to the appropriate agencies and legal authorities. The regulations do require compliance with "applicable environmental regulatory programs of the Commonwealth" in Section 9.33 of the final regulations.

Over a thousand pages of comments on the 1986 Draft Reg-
ulations were sent to the DEQE, nearly all of them critical to some degree. While the players mentioned above are some of the most important, numerous smaller participants' comments were incorporated into the second version which was finalized in October 1990. The well organized coalition of boating interests, in particular, forced the DEQE back to the drawing board in 1990.
CHAPTER 4
ANALYSIS OF DATA

This chapter analyzes the data which was presented in the preceding chapters. The study’s hypotheses are individually tested in light of the research. The analysis relies primarily on the public comments and a comparison between the 1986 Draft and the 1990 Waterways Regulations in their final form.

Hypothesis #1: Widespread public criticism caused the state to significantly revise the original draft of the Chapter 91 regulations.

Public Criticism of the 1986 Draft Was Widespread

Hundreds of pages of written comments, the testimony of observers and participants, and numerous newspaper articles attest to the fact that the 1986 Draft was revised because of criticism from many angles of the community. One might assume that those people who supported the regulations did not bother to write, and so by their silence tacitly accepted them. Still, a preponderance of the evidence supports this assertion that public criticism was widespread.

The first source of information which supports Hypothesis #1 is written testimony in the DEP files. A close review of the hundreds of responses to the 1986 Draft reveals a more than 3 to 1 ratio of generally critical letters to generally supportive letters. The substance of the criticisms, discussed in Chapter 3, corresponds with the special interest group of which each writer is a member. Despite the array of concerns, it is clear from these comments that the 1986 Draft
was extremely unpopular among the writers.

The second source of data supporting this assertion is the testimony of observers and participants in the public hearing process. Personal interviews with key participants reveal that many people, particularly in the recreational boating sector, were outraged over the Draft. The authors of a 1990 Maine Law Review article wrote, "Curiously, few came to the defense of the DEP's proposal. Local and statewide environmental groups said little in support of the DEP's effort. In the wake of widespread and vocal opposition, DEP withdrew its proposed regulations in early 1987." Dennis Ducsik, one of the authors of the 1986 Draft, also concurred with other observers after more than a year and a half of public comment period:

Written comments on the public hearing draft totaled in excess of 1000 pages...The principal architects of the regulations (DEQE-Waterways Director Clayton, DEQE-Deputy Counsel Dierker, CZM Tidelands Coordinator Ducsik) have spent nearly two full months this summer formulating appropriate revisions, with the aim of strengthening the underlying policy concepts while reducing the alienating affect (sic) the draft had on the development community.

While specific criticisms varied greatly, the common sentiment was that they were unacceptable as written. By the state officials' admission, the extensive review and revisions were an attempt to bring about a consensus acceptance of the final regulations.

The third and final source of evidence which supports Hypothesis #1 is the array of items in state and local newspapers. A cursory look at some of the headlines reflects the contents of these articles: "Marina owners say plan will sink
them;" "Armada: Firms aiming to torpedo tidelands rules;"
"Waterfront landowners fight changes in law;" "Attack readied
on Chapter 91;" "Coastal regs deep-sixed." These are just a
few of many dramatic headlines which attest to the unpopularity
of the 1986 Draft Regulations.

Hypothesis #2: The widespread public criticism of the
first draft came primarily from special interests
such as marinas and developers, with little participation by groups representing the general public.

Special interest is defined for the purposes of this
study as a particular segment of the public which has a
financial interest at stake which collides with the trust
rights of the general public. A special interest is a particular group of people who directly benefit from private use
of tidelands. They do not represent the the general public,
many of whom are citizens of Massachusetts who own no coastal
property and live inland but whose rights are protected under
the public trust doctrine. Non-profit groups such as the
environmental groups and state agencies, which do not have a
significant financial interest at stake, are considered general interest groups.

Of the written comments examined for this study, well
over half of the letters received were from members of special interests. Approximately 90% of the comments classified
as special interest either rejected the proposed regulations
entirely or called for serious, substantive revisions. In
contrast, approximately half of the comments classified as
general interest were critical of the First Draft. Of all of
the letters received, both special interest and general
interest, 75% of the comments either rejected the draft outright or had serious misgivings about it, while only 25% generally supported the proposed regulations.

While this survey is non-scientific and did not include many comments which are no longer in the DEQE files, the results indicate that this assertion is supported by the data. The group which was most vocal in protesting the draft regulations, the boating sector, is certainly a special interest group. As was discussed in Chapter 3, the boating sector -- including marinas, yacht clubs, boat yards and recreational boaters -- formed a powerful and well-financed coalition in order to force a massive overhaul of the 1986 Draft Regulations. While general interest groups such as the Environmental Lobby of Massachusetts and the Conservation Law Foundation defended the main provisions of the regulations, the boating sector, in its fight to force wholesale revision of the regulations, was better financed and in the end the most successful special interest opposition group. For example, the New Bedford Standard Times quoted the Development Director of the New Bedford-Fairhaven waterfront as saying, "People along the coastline are practically armed...to get some bear." The public hearing in Gloucester on April 15, 1987 was packed with "600 or more yachtmen...who were in no mood for...reassurances."

Hypothesis #3: The final Chapter 91 Regulations, which include several major changes from the first draft, are significantly different than the first draft in protecting the general public's interests in trust lands in Massachusetts.
The following paragraphs compare the 1986 Draft and the 1990 Final Regulations and highlight the major compromises which are reflected in the differences between the two versions.

The assumption underlying this hypothesis is that the public’s rights under the Public Trust Doctrine in Massachusetts (discussed in Chapter 2 of this paper) are the following: an easement for fishing, fowling and navigation and their natural derivatives in private tidelands; and broader rights, including recreational uses, in Commonwealth tidelands.

The Primary Differences Between the 1986 Draft and the 1990 Final Regulations

The research clearly indicates that the 1986 Draft was an unpopular foray into the world of comprehensive tidelands regulation. Hypothesis number one asserts that this public criticism sent the DEQE back to the drawing board to revise the regulations. A comparison of the 1986 Public Hearing Draft and the 1990 Final Regulations shows that the second version of the regulations, which was presented for public comment in 1989 and finalized in 1990, incorporated many points of compromise which the critics of the first draft demanded. The following paragraphs discuss the primary areas of compromise reflected in the Final Regulations of 1990.

I. Geographic Scope

The geographic scope of the 1986 Draft was significantly broader than that of the final regulations. This revision substantially reduced the area of jurisdiction of the pro-
gram. A variety of factors led to this change, not the least of which was the outcry during the public comment period. The nature of the change will be discussed first, and the impetus for the change will then be examined.

With regard to geographic scope, the final version of the regulations are significantly weaker than the 1986 Draft. The first version asserted jurisdiction over all "trustlands" 9, which included lands underlying Great Ponds, certain rivers, and tidelands, including "present and former submerged and tidal lands lying between the natural high water mark and the seaward limit of state jurisdiction. Tidelands include both flowed and filled tidelands." 10 The natural high water mark was defined in Section 9.02 as the tide line as it existed before any alteration of the shoreline by filling, dredging or impounding. 11 In other words, the 1986 Draft asserted jurisdiction not only over filled tidelands abutting the water but also over hundreds of acres of filled landlocked tidelands. One third of the city of Boston, for example, which includes millions of dollars worth of development in the Back Bay area, would have been subject to the program as written in 1986. 12

This regulatory jurisdiction is entirely consistent with the definition of tidelands in the 1983 amendments to Chapter 91 Statute. According to the law, tidelands include "present and former submerged lands and tidal flats held lying below the mean high water mark." 13 Furthermore, the law states that

no structures or fill may be licensed on private
tidelands or commonwealth tidelands unless such structures or fill are necessary to accommodate a water dependent use; provided that for commonwealth tidelands said structures or fill shall also serve a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands. 14

From the wording of the statute it is evident that lawmakers intended that former submerged and tidal lands might be included in the program's bailiwick. Thus, the first draft asserted a large geographical scope consistent with the directive of the law.

Complex legal arguments by groups such as the Lawyers Committee on Chapter 91, 15 along with doubts about whether such a large geographical scope would be practical, 16 led DEQE officials to consider revising this provision in the second draft. The DEQE was faced with three basic options with regard to the jurisdiction of the program. First, the state could maintain regulatory control over landlocked filled tidelands as it did in the 1986 Draft. Second, it could create a mechanism whereby the occupier of a filled landlocked tideland could purchase whatever vestigial public interest remained from the state to clear his title forever. Last, the state could merely limit the regulatory jurisdiction to filled tidelands in which it was sure that a public interest related to the original precepts of the public trust remained. This last option, where the state simply "ignores" the Back Bay and other filled landlocked tidelands in its regulations despite the much broader definition of trustlands in the law, is the one exercised by the DEQE in the Final Regulations.
The Final Regulations exclude a large portion of tidelands — landlocked tidelands — from the program's jurisdiction. The jurisdiction of the Final Regulations includes "all filled tidelands except for landlocked tidelands".¹⁷ Landlocked tidelands are defined in Section 9.02 as

any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located:
(a) within 250 feet of the high water mark
(b) within any Designated Port Area. Said public way or ways shall also be defined as landlocked tidelands, except that portion thereof which is presently within 250 feet of the high water mark.¹⁸

The new definition of the geographical scope of the regulatory program thus significantly limits the amount of area subject to scrutiny under the Chapter 91 Waterways Program. Thus any remaining vestigial public interest in filled landlocked tidelands was, in effect, given away without any public compensation.

The DEQE felt that this limit would "focus the Department's tidelands efforts"¹⁹ so that filled lands which remained adaptable to public trust uses — filled lands adjacent to the water — could be more strictly regulated. While it is understandable that with the DEQE's limited resources an exhaustive mapping of landlocked tidelands and the increased workload of issuing hundreds more licenses might have been impractical, this particular solution is less than ideal. By in effect giving away the public's interest in landlocked tidelands, especially those which have been generating huge amounts of revenue for occupiers, the state lost
the opportunity to gain some sort of compensation for the
general public. Other options, such as setting up a program
whereby landlocked real estate owners could buy quitclaim
deeds for a fee, albeit even a nominal fee, would have been
more in the public interest. The one time revenue that could
have been generated could have been used, for example, as
seed money for a Public Trust Fund. The route taken by Mas-
sachusetts, while quelling the fears and criticisms of many,
may be a missed opportunity.

II. Compensation

The fees proposed in the 1986 Draft Regulations would
have provided greater compensation to the general public than
the fees included in the Final Regulations. The following
discussion of fees is illustrated by tables 2 and 3, which
compare proposed and finalized fees.

The first issue of the compensation provisions of the
Chapter 91 Waterways Program is the fee schedule. In the
spirit of compromise, the DEQE agreed to review the fee
schedule it proposed in the draft regulations. The fees were
adjusted downward substantially in the Final Regulations.
The occupation fee refers to the "imprint"\textsuperscript{20} of the project,
or the two dimensional area of Commonwealth tidelands occu-
pied by the project. This fee is the rent paid to the state
for using public land. The occupation fees proposed in the
draft regulations were more than 50% greater for water depen-
dent uses than those included in the Final Regulations (see
Table 2). For non-water dependent uses, the occupation fee
proposed in 1986 was to be determined by appraisal and based
on the full fair market value of the tideland. The appraisal-set fee was changed to a fixed fee of $2 per square yard in the Final Regulations. The DEQE dropped the fees in response to complaints that the fees were burdensome and unreasonable. For example, Edward Dinis of Fairhaven, MA was outraged that under the proposed fees he would have to pay $6,000 each year for a 220 slip marina he had proposed in front of his Skipper Motor Inn. Under the finalized fee schedule, he pays less than half that amount.

The second type of fee is the tidewater displacement fee, a one-time payment for the project’s displacement of tidal water in the "tidal prism," or water column (see Table 3). This fee was also reduced by the DEQE in the final regulations. For example, under the draft regulations a commercial water dependent project would have paid $10 per cubic yard of tidewater displaced; under the final regulations, the amount is only $2 per square yard.

The two types of fees, tidewater displacement and occupation, are appropriate for the Massachusetts situation because they account for the bifurcated nature of public trust lands in the Commonwealth. Still, the greatly reduced fees of the Final Regulations illustrate the serious compromise on the part of the state, and the success of the lobbying efforts of special interest groups. The total financial compensation to the public for the private use of public lands is, therefore, significantly lower in the Final Regulations than in the First Draft.

III. Dockominiums
One of the most bitterly contested provisions of the 1986 Draft Regulations was the prohibition of dockominiums. A dockominium, essentially a ninety-nine year lease of a boat slip which is marketed as if it is a piece of real estate, was effectively banned in the 1986 Draft Regulations. According to the 1986 Draft, "Section 9.11: Commercial Recreational Boating Facilities," the maximum term for any exclusive slip, including a dockominium, was one year. Since the dockominium necessitates long-term exclusive use, this provision was hotly contested by marina owners. Edward Doherty of the Waterways Action Committee, "the man who...is credited with introducing the dockominium concept to New England," led the crusade against the dockominium ban in 1987. Because of the highly effective lobbying and public relations campaign of the WAC and other recreational boating interests, the ban was rescinded in the 1990 Final Regulations.

What did dockominium developers like Doherty stand to lose by the prohibition? According to the Boston Globe in a 1990 article, even in the depressed market of 1990 dockominiums were selling for $30,000 to $70,000 for a medium sized boat. In the article, the DEQE is said to have estimated that there were about 1,000 dockominiums at 17 marinas around the state in 1990. That would mean an average of more than 58 dockominiums per marina. At $30,000 each, the average revenue would exceed $1.7 million per marina. The Globe article states that Doherty’s Kingman Marina in Cataumet included 235 dockominiums. Again, at $30,000 per slip, the
dockominiums netted at least an estimated $7 million in one time revenue for Kingman Marine and Doherty. The revenue raised from selling dockominiums is staggering especially when one considers that what is being "sold" is actually publicly owned submerged land. Certainly numbers like this, along with the speculative nature of the business, moved the DEQE to ban dockominiums in its 1986 waterways rules.27

Yet the DEQE did accede to pressure from the recreational boating sector. The Final Regulations repealed the ban and replaced it with provisions which instead put limits on dockominium development. Section 9.38 (2) of the 1990 Final Regulations allows marinas to lease up to fifty percent of the total berths as dockominiums as long as "said marina provides water-related public benefits commensurate with the degree of privatization."28 In addition, the fees for dockominiums are based on the full fair market rental value of the underwater land, rather than the fixed fees discussed above.29 Nevertheless, the DEQE’s retreat on the issue of dockominiums attests to the power of the monied boating interests and the weakened protection of the public interest in the Final Regulations.

III. Amnesty Provisions

The 1986 Draft Regulations did not have any grandfather clause or amnesty program, and this set of howls of protest. All existing uses of land within the jurisdiction of the program would have had to be re-licensed under the new rules and fees. Again, the DEQE acceded to pressure from special interests and created amnesty provisions in the Final Regula-
tions. Under the Section 9.10 of the 1990 Final Regulations, a three year amnesty window is offered for unauthorized uses and structures which have been in place since January 1, 1984. The provision is meant to bring into compliance as many unlicensed projects as possible. An amnesty license is offered for 99 years for water-dependent use projects on Commonwealth tidelands (30 years for other types of projects), with fees assessed according to the old schedule. To qualify for amnesty, the project must not have changed since 1984. In addition, small scale water-dependent structures on residential property, such as docks and piers, are offered interim approval licenses which have 30 year terms and no fees other than application fees. The DEQE included the new policy as a result of pressures from the public and as a way to bring as many projects into the system without having to resort to penalties and threats.

It is clear that after analyzing the data that Hypothesis #3 is indeed true. The dramatic shrinking of the geographic scope of the program in the Final Regulations leaves the public interest unprotected in hundreds of acres of landlocked filled tidelands. Some level of public interest in these landlocked areas is assumed to remain, since both the landmark Boston Waterfront decision and the 1983 amendments to the Waterways Statute explicitly say so. Nevertheless, the public interest in filled lands which are clearly not waterfront has not been defined or delineated by any court. The result of this grey area of the law is that vestigial public interest in landlocked filled areas, if it indeed
exists, is practically impossible to define for the purpose of this type of program. This study indicates that the DEQE was caught between a rock and a hard place with regard to landlocked filled tidelands, although its solution -- to write them out of the program -- may not have been in the public interest. On the other hand, the compromises in the form of dockominium provisions, lower fees and the amnesty program appear to have been included in the Final Program purely in order to satisfy the protests of special interest lobbyists.
Table 2 -- COMPARISON OF PROPOSED AND FINALIZED FEE SCHEDULES: OCCUPATION FEE

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<th>Finalized in 1990 310 CMR 9.00 Regs</th>
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<td>Proposed in 1987 Public Hearing Draft</td>
<td>Finalized in 1990 310 CMR 9.00 Regs</td>
</tr>
<tr>
<td>Non-Commercial Water Dependent</td>
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<td>1</td>
</tr>
<tr>
<td>Commercial Water Dependent</td>
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<td>1</td>
</tr>
<tr>
<td>Non-Water Dependent</td>
<td>Appraised based on full fair market</td>
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</tr>
<tr>
<td></td>
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<td>Category</td>
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CHAPTER 5
DISCUSSION AND CONCLUSION

The case study presented in the first four chapters of this paper illustrates the pitfalls and problems which Massachusetts faced in creating a tidelands licensing program. This chapter will highlight the important issues which emerged from this research followed by the paper's conclusion.

Findings

1. The "public interest" must be defined at the outset of the development of a tidelands program; it is matter of policy which underlies the entire process.

One question which repeatedly surfaced over the course of this study is, "What is the public interest in this context?" The Public Trust Doctrine is a principle which exists in order to protect the public interest in trust lands and resources; therefore, a tidelands licensing program must answer this question in order to be cohesive and effective. In Massachusetts, the 1983 amendments to the Chapter 91 Waterways Statute gave a very broad definition of the uses which should be considered in the public interest -- water dependent uses, or, if non-water dependent, uses whose benefits outweigh detriments to the public. Massachusetts administrators faced a difficult time of refining this broad criterion within the body of the regulations. The definitions of "detriments" and "benefit" can be at times a very subjective.

A related question for lawmakers and regulators is, "Who comprises the 'public'?" Does the public include the myriad of special interest groups, or are special interest groups
outside of the 'public'? This question must be answered so that criticism from groups like developers and marinas can be given the appropriate weight in the process. Developers have more money to spend on a campaign against this type of program; Edward Doherty's WAC is such an example. That does not mean that their input is any more important than that of a non-profit environmental group. In Massachusetts, the DEQE acceded on many points to pressure from the boating sector and real estate community. It is unclear whether the DEQE really thought through its compromises on issues such as dockominiums.

The last question with regard to the public interest is, "What is the aim of this program -- a balance between public and private interests, or an assertion of public rights in the shore?" In other words, the state must make a policy decision: should we aim for a balance of public and private rights, even in lands which are clearly public under the law, or should we assert the public rights under the public trust doctrine at any cost to special interests? The Massachusetts case is an example of the former. Clearly, DEQE compromised on several major issues such as fees, geographical scope, and dockominiums. One could argue that they reached an equilibrium of private and public rights in the shore. On the other hand, one could argue as this paper does that the state's compromises weakened the overall effect of the program. Perhaps the DEQE submitted far reaching regulations in 1986 expecting to compromise.
2. Compensation to the public by private users of the shore can be in many forms, ranging from physical access across a project site to the payment of fees in lieu of access.

When the state discusses this type of program in public for the first time, officials should not describe the program as a way to raise revenues for the state. The Public Trust Doctrine is not meant to provide state government with another source of revenue for its General Fund. Fees should be paid in lieu of preferable forms of compensation such as public walkways and boat launching ramps. The fees assessed a particular project should relate to the degree of "publicness" of the site. If the project is water dependent, fees should be lower than if the project is non-water dependent. Revenue from a tidelands program should go into a fund dedicated to increasing public access opportunities around the state. A policy of "no net loss" of public access would ensure protection of the public's rights to the shore in perpetuity.

3. Marinas, yacht clubs and boat yards provide a form of public access by their very nature. As such, they should not be subject to exactly the same public access requirements as other similar uses.

The boating sector in Massachusetts made a very convincing argument that marinas and the like provide public access to the water for a great many people relative to the area occupied by the marina site. They also convincingly argued that their patrons were not only the privileged and wealthy but primarily middle class people whose boats are their "second home" so to speak. While it is reasonable that marinas,
yacht clubs and boat yards be recognized for the access they provide to a certain segment of society, they should be distinguished from an exclusive long term use such as dockominiums. The Massachusetts Program makes such a distinction in its regulations by levying higher fees for dockominiums.

4. The payment of fees is often **symbolic** as much as **cost-efficient**.

The annual payment of fees reinforces with the licensee every year the knowledge that the land private party occupies is public property (or subject to a public easement). Even a token fee serves as a reminder of unique nature of tidelands. The symbolic nature of fees is important when one considers how the public rights in urban waterfronts have been obscured for so many years. Massachusetts, again, is an excellent example of a state where the public’s rights in tidelands were buried under acres of fill for decades.

5. An important consideration in creating a tidelands program is whether the administrative agency will be just a "landlord," or whether the agency will combine the "landlord" function with the coastal permitting program.

The Massachusetts Chapter 91 program combines its permitting and leasing function in its license program. Other states have a a bifurcated system where a coastal property owner must apply for a permit from one agency and a lease from another. While the licensing program provides a more streamlined process for project applicants, this may not be practical.

6. Expect strong opposition from groups which feel
threatened by the mere existence of this type of program -- developers of waterfront condominiums and dock-ominium developers, for example.

Regardless of how many compromises are made by the state, there will likely be a segment of the public which is fundamentally hostile to the idea of tidelands leasing. Massachusetts received several letters from individuals who believed that the state was trying to steal private property from the wealthy. For instance, Charles Rich wrote

These changes run in complete conflict with the concept of private ownership, profit, and motivation upon which this country and its’ [sic] economy grew as it has in the past. There’s no question this is a bad and probably illegal attempt of a one-party controlled state administration to reap the financial income of the marine business community under the guise of being interested in the public benefit.¹

7. Advocacy of the general public’s rights is necessary to a balanced discussion.

Massachusetts special interests were well represented in the public dialogue over Chapter 91 because they felt they had a lot at stake. The greater the financial interest at stake, the greater expenditure of time and money fighting the proposed rules. The general public can be underrepresented in these debates. The DEQE was under fire and buried in paperwork and therefore was not very effective as a counterbalance to the special interests.

8. One of the greatest concerns of special interests is that a new licensing/leasing program will be yet another layer of bureaucracy. Criteria should be well defined and the discretion of the administrators minimized.

One of the primary goals of the amendments to Chapter 91 was to minimize the unpredictability of the application pro-
cess. Applicants felt that they should be given a set of conditions at the outset and if they are met, they can expect their application to be approved. John Lund, a marina developer from Fall River complained that during the seven year process of developing regulations he was repeatedly required to modify his plans to meet the public interest standards. He said, "If they just told me once what I needed to do to get my application approved, I would have had this marina built six months ago."

**Conclusion**

The shore is a Massachusetts' most precious resource. It is a locus of activity ranging from international trade to catching a glimpse of the sun rising over the water. The Public Trust Doctrine, the common law that insures all citizens of the Commonwealth have access to the resources and beauty of the coast, is the cornerstone of the Chapter 91 Waterways Program. The Program is one way Massachusetts preserves the unique public character of tidal and submerged lands for future generations.

The Massachusetts example illustrates the complexities of tidelands regulation and weaknesses to guard against. For example, the public would be better served by a program which poured lease revenues back into a trust dedicated to creating or maintaining new access opportunities. A dedicated fund would enable the Commonwealth to aim for no net loss of access where the public could exercise its rights to fish, fowl and navigate without interference from private individu-
The conclusion of this study is that while it is preferable that the process of developing a tidelands program include an open, public dialogue, special interest groups can shift the focus of the process. The opposition of special interest groups is significant because certain groups such as dockominium developers spent large amounts of money lobbying against the program, and thus succeeded in gaining concessions from the state. The unorganized public, on the other hand, did not counter the special interests with a public relations campaign. This imbalance resulted in the focus of the discussion being shifted from public benefits to costs to private parties. This imbalance skews the discussion away from the general public, especially citizens from inland Massachusetts, who deserve access to trust lands which belong to them as much as they belong to citizens of coastal communities. A better tidelands program will invite public debate while being mindful that certain critics are often motivated by self-interest in conflict with the spirit of the Public Trust Doctrine. The process would have benefitted from the involvement of at least one advocacy group whose goal is to protect public rights to fish, fowl and navigate under the law. The Massachusetts Chapter 91 Program is a valuable example to other states which seek to balance private and public interests in the coastal zone.
NOTES

INTRODUCTION

1 For a comprehensive and current discussion of recent judicial decisions regarding the Public Trust Doctrine, see Coastal States Organization, Putting the Public Trust Doctrine to Work (Washington: U.S. Dept. of Commerce, 1990).

2 Ibid., xvi.

3 Ibid., 345.

4 Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367 (1842) clearly stated the Supreme Court’s view that title to navigable waters and the lands lying beneath is held by the states, subject only to the federal navigational servitude. See also Heather J. Wilson, "The Public Trust Doctrine in Massachusetts Land Law," Boston College Environmental Affairs L. Rev. 11 (1984): 845.

5 Coastal States Organization, Putting the Public Trust Doctrine to Work, 345.

6 Coastal States Organization, Putting the Public Trust Doctrine to Work, 348.

7 Wilson, "The Public Trust Doctrine in Massachusetts Land Law," 847.


12 Coastal States Organization, Putting the Public Trust Doctrine to Work, 345.

13 Sharan Merriam, Case Study Research in Education: A Qualitative Approach (San Francisco: Jossey Bass, 1988) discusses in detail the research design to be used in this study.
14 Ibid., 13.
CHAPTER ONE


3 Kalo, Coastal and Ocean Law, 73.


5 Kalo, Coastal and Ocean Law, 73.

6 Coastal States Organization, Putting the Public Trust Doctrine to Work, 15.

7 Ibid.

8 Shively v. Bowlby, 152 U.S. 1, 26 (1894).


11 Colonial Ordinances 1641-1647. In Mass., the term "tidal flats" refers to the land between the mean high and extreme low water marks: "Grants under the Ordinance conveyed fee simple title to the extreme low water mark or 100 rods from the mean high water mark, whichever measure was further landward. Storer v. Freeman, 6 Mass. 435 (1810)," quoted in Coastal States Organization, Putting the Public Trust Doctrine to Work, 354 (note 4).


13 "Until 1860, the courts were the sole interpreter of the Colonial Ordinance. Generally, the courts recognized that the purpose of the Ordinance was to encourage and facilitate the building of wharves. As a result, the courts allowed
such construction even when it might diminish the common rights of navigation and fishing" Coastal States Organization, Putting the Public Trust Doctrine to Work, 346; see also, William L. Lahey, "Waterfront Development and the Public Trust Doctrine," Mass. L. Rev. 70 (Summer 1985): 56.

14 Colonial Ordinances 1641-1647.

15 Ibid, 50.


17 Coastal States Organization, Putting the Public Trust Doctrine to Work, 347.

18 The Massachusetts state legislature is known as the General Court. For a detailed history of the General Court, see Cornelius Dalton, J. Wirkkala & A. Thomas, Leading the Way: A History of the Massachusetts General Court 1629-1980 (Boston: Office of the Mass. Sec. of State, 1984).


22 Ibid.

23 A bill to declare and affirm a public right to "on-foot free right-of-passage along the shore of the coastline between the mean high water line and the extreme low water line..." was called unconstitutional by the Supreme Judicial Court in a 1974 advisory opinion, Opinion of the Justices, 365 Mass. 682-684, 313 N.E. 2d 563-564 (1974). In Massachusetts, the General Court and Governor may request an advisory opinion on a bill from the Supreme Judicial Court. Mass. Constitution Pt. 2, c. 3, art. 11. These opinions "are not adjudications by the court, and do not fall within the doctrine of stare decisis." Commonwealth v. Welosky, 276 Mass. 400, 177 N.E. 656, 658 (1931).


CHAPTER TWO

1 After the enactment of the first waterways statute in 1866 (1866 Mass. Acts c. 149) through the end of the 1970s, a license would be given for any development which was structurally sound and did not interfere with navigation, according to William L. Lahey, "Waterfront Development and the Public Trust Doctrine," 70 Mass. L. Rev. (1985), 55, 57.

2 One example of special wharfing statutes is the Lewis Wharf Statutes, Statute 1832, c. 102; statute 1834, c. 115, section 1; statute 1835, c. 76; 1837 Sen. Doc. No. 47; Statute 1837, c. 229; and Statute 1840, c. 18, as cited in Land Court document No. 111132.

3 In Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 638, 393 N.E.2d 356, 361 (1979), the court reviews the history of harbor development in Massachusetts.


5 Commonwealth v. Alger, 61 Mass. 53 (1851), confirmed that the legislature could "make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce those restraints by suitable penalties" (at 95); and that "the legislature has the power, by a general law affecting all riparian proprietors on the same line of shore equally and alike, to make reasonable regulations..." affecting Commonwealth tidelands, quoted in Coastal States Organization, Putting the Public Trust Doctrine to Work, 347.

6 Ibid.


9 1866 Mass. Acts c. 149 created a permanent Board of Harbor Commissioners to administer the licensing of projects in Massachusetts waterways. Over the years this authority has passed through five agencies. Today, the Department of Environmental Management (formerly the Department of Environmental Quality Engineering) Division of Wetlands and Waterways administers the licensing program. 1974 Mass. Acts c. 806, Section 8.


14 Coastal States Organization, Putting the Public Trust Doctrine to Work, 348.

15 308 Mass. 349 (1941).

16 It is unclear where this term originated, although it appears throughout the literature. Actually the legislature declared that a particular license was irrevocable by enacting a special statute.


19 Ibid, 3.


21 Statute 1832, c. 102; statute 1834, c. 115, section 1; statute 1835, c. 76; 1837 Sen. Doc. No. 47; Statute 1837, c. 229; and Statute 1840, c. 18, as cited in Land Court document No. 111132.


27 Massachusetts Senate Committee on Ways and Means, "Protection of the Public Interest in Tidelands," Policy Report #13 (Boston, June 1983), 266.


29 The Senate Committee on Ways and Means wrote that the 1981 advisory opinion was a retreat from the Boston Waterfront decision. Senate Policy Report #13, 266. The Report stated, "In that opinion, the Court clarified, and to a certain extent, limited the holding of the Boston Waterfront Development case with regard to the nature and extent of public and private rights in licensed tidelands." Policy Report #13 at 4-266. Also, Heather Wilson writes of the 1981 Opinion, "The court also implied that it would overrule its decision in Boston Waterfront if it could." H. Wilson, "The Public Trust Doctrine in Massachusetts Land Law," B.C. Environmental Aff. L. Rev. 11 (1984): 855.


31 Coastal States Organization, Putting the Public Trust Doctrine to Work, 350.

32 Ibid.

33 The Senate Committee on Ways and Means was charged with investigating the status of tidelands in the Commonwealth in preparation for amendments to Chapter 91, the Waterways Statute. In the report the committee wrote, "Pursuant to its responsibility to evaluate legislation which affects public lands in the Commonwealth, the Senate Committee on Ways and Means has been called upon to review numerous legislative proposals on the subject of tidelands," 261.
34 Senate Committee on Ways and Means, "Policy Report #13, 266.


36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

40 St. 1983 c. 589.

41 M.G.L. Chapter 91, Section 1 [Definitions]: "'Tidelands', present and former submerged lands and tidal flats lying below the mean high water mark."

42 M.G.L. Chapter 91, Section 1 [Definitions]: "'Substantial structural alterations', a change in the dimensions of a principal building or structure which increase by more than ten percent the height or ground coverage of the building or structure or structure specified in the authorization or license, or an increase by more than ten percent of the surface area of the fill specified in the authorization or license."

43 M.G.L. Chapter 91, Section 2.


45 Chapter 91, Section 18 [Licenses; notice; hearings; records]: "A public hearing shall be held in the affected city or town on any license application for non-water dependent uses of tidelands.


48 Upon the urging of CZM and DEQE, both Governor Dukakis and the General Court vowed to start rejecting requests for irrevocable licenses. Ducsik, "Notes on Urban Waterfront Development and the Public Trust Doctrine," 5.


50 M.G.L. Chapter 91, Section 15: "A license issued pursuant to this chapter is hereby made a mortgageable interest lawful
for investment by any banking association, trust company, savings bank, cooperative bank, investment company, insurance company, executor, trustee, or other fiduciary, and any other person who is now or may hereafter be authorized to invest in any mortgage or other obligation of a similar nature.

CHAPTER 3 NOTES

1 310 CMR 9.00 Waterways Regulations, Dec. 1986 Public Hearing Draft. Also referred to in this paper as the "first draft". Hereinafter cited as "1986 December Public Hearing Draft."


3 The four hearings were: Springfield DEQE Offices, Feb. 2; Lakeville Hospital Auditorium, Feb. 9; Gardener Auditorium at the State House in Boston on Feb. 12. A fourth hearing was added at Gloucester on April 15 after the public comment period was extended by the DEQE. Source: New England Offshore, "Sweeping Tidelands Regs Weighed in MA," Tom McNiff, Jr., March '87.


5 Coastal States Organization, Putting the Public Trust Doctrine to Work, 353.

6 DEQE Division of Waterways Director Gary Clayton, DEQE Deputy Counsel Carl Dierker, and CZM Tidelands Coordinator Dennis Ducsik were the "principal architects of the regulations." Ducsik, "Notes on Urban Waterfront Development and the Public Trust Doctrine in Massachusetts," Addendum of 10 Aug. 1988.

7 Regulatory authority rested with the DEQE according to M.G.L. Chapter 91A, s. 18; M.G.L. Chapter 91, s. 1-63; and M.G.L. Chapter 21A, s. 2, 4, 8 &14.

8 M.G.L. Chapter 91.

9 Senate petition No. 1231 followed by Resolve No. 1231, "Resolve to establish a special commission relative to the tidelands," January 1984, on file at the DEQE.

10 The resolve directed the committee to "...assess and make recommendations relative to the residual rights in landlocked..."
lands, criteria for granting irrevocable licenses, changes of use of tidelands, policies regrading future filling of tidelands, the private and public development of tidelands in both submerged and tidal flats, lands up to the historic high and low water marks, all lands filled before the effective date of this resolve, public access, public purpose and the public trust doctrine. Said commission shall also study, assess, and make recommendations regarding regulatory procedures for granting licenses to include fees, leases, public participation, mapping and defining tidal property and the proper uses of tidelands." Senate Resolve No. 1231, lines 35-46.

11 Tidelands Advisory Committee binder of Gary Clayton, chairman of TAC and Director of DEQE Division of Wetlands and Waterways; also directed by Senate Resolve No. 1231, lines 32-33.

12 TAC binder of Clayton.

13 Attorney John W. Spillane represented the Massachusetts Bay Yacht Club Association and the Massachusetts Marine Trades Association in public comment periods. He also served on the TAC according to his correspondence to Mr. Philip Goodwin, Quincy Boat and Engine Co., July 12, 1989, although it is not clear whether these were ever simultaneous roles.

14 Correspondence, Donald L. Connors, Esq. to Gary Clayton, 12 March 1987. From the files of the DEQE. All correspondence cited hereinafter is from the DEQE files unless otherwise noted.


16 These provisions were culled from a close examination of the 1986 December Public Hearing Draft.


20 Ibid.

21 Form letters were distributed to the boating public by WAC; individuals signed them and sent mailed them to Governor Dukakis, state legislators, Gary Clayton, DEQE Director of Wetlands and Waterways. The forms read in part: "...The proposed regulations are disastrous to marinas, yacht clubs and boat yards throughout the Commonwealth, and ultimately, will
reduce the public access the DEQE seeks. I urge you to sup-
port reasonable modifications to the regulations as proposed
by the Waterways Action Committee, which serve the policy
goals of the Legislature without adversely affecting the
marine community throughout the Commonwealth." Correspon-
dence, Charles Petine to Governor Dukakis, Mar. 16, 1987.

22 WAC's demands for revision were well documented in newspa-
paper articles: Andrew J. Dabilis, "Marina owners say plan will
sink them," Boston Globe, 25 Mar. 1987; Richard Holmes,
"Armada: Firms aiming to torpedo tidelands rules," Cape Cod
Times, 4 Mar. 1987; Scott Withiam, "Boatyard owners prepare
for DEQE hearing," The [Marion, MA] Sentinel, 1 April 1987,
e.g.

23 "WAC Newsletter #9," April 24, 1987 published by Hill and
Knowlton, Inc., Boston, MA.

24 Ibid.

25 Ibid.

26 Robert Lowe, "AND NOW...DOCKOMINIUMS --Marinas add their
boat slips to the condo-conversion trend," Boston Globe, 25

27 Soundings, April 1987, "New Mass. permit plan may curtail
development," Gail Sleeman; Richard Holmes, "Armada: Firms
aiming to torpedo tidelands rules," Cape Cod Times, 4 Mar.
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28 Lowe, "AND NOW...DOCKOMINIUMS...", Boston Globe.

29 Ibid.

30 Correspondence, John W. Spillane, Esq. to Gary Clayton,
DEQE Director of Wetlands and Waterways, 12 Mar. 1987, tew-
ny-eight pages of comments.

31 In his letter Spillane wrote, "As previously discussed,
the primary and unauthorized land use decision making respon-
sibilities assigned by the DEQE in the proposed regulations,
in areas where the DEQE has no genuine expertise, will be
found to be duplicative and extremely wasteful of public
funds and a violation of Home Rule." Ibid.

32 For example, Spillane recommended that all three public
purpose standards be eliminated. Correspondence to Gary
Clayton, Director of the Division of Wetlands and Waterways,


34 Ibid, 23, no. 2: "The DEQE has also abused its legislative
directive by qualifying fee determination on tidewater dis-

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placement, based on water dependent and non-water dependent uses. Sec. 21, 22, and 23 gives [sic] no such discretion.

35 Ibid.

36 1990 Final Waterways Regulations, 310 CMR (.00, Section 9.11 (1) (a). Hereinafter cited as 1990 Final Waterways Regulations.

37 1986 Public Hearing Draft, Sec. 9.11 (1) (a).

38 Correspondence, Paul R. Neelon, President of Hewitt's Cove Marina, to Gary Clayton, DEQE Director, Division of Wetlands and Waterways, 7 April 1987.


41 Mrs. A. Homer Skinner of Marblehead wrote to DEQE to complain, "[T]hese regulations need extensive revision in the interest of clarity. I have read many many different regulations promulgated by federal and state agencies and never have I had such a difficult time extracting the intent and meaning as in the case of these Regs which are in places vague, in places verbose and often opaque." Correspondence to Gary Clayton, Director of the Division of Wetlands and Waterways, Mar. 16, 1987. Even the New Bedford Standard-Times, highly critical of the opponents of the regulations, wrote, "The DEQE, in classic fashion, hurt its case by hammering together a proposed set of procedures that has made everyone dizzy..." Editorial, "Our view: Coastal access rules step on privileged toes, draw fire," 24 Feb. 1987.

42 1986 Public Hearing Draft.

43 Correspondence, Spillane to Clayton, Mar. 12, 1987.

44 Correspondence, Carl Hall, Commodor of the Lynn Yacht Club, to Gary Clayton, 12 Mar. 1987.

45 Ibid.


47 Correspondence, Herbert W. Vaughan, Esq., Chairman of the Lawyers Committee on Chapter 91, to Thomas F. McLoughlin, Deputy Commissioner of the DEQE, 11 March 1987.

48 Ibid, 1.
For example, town officials from Newbury and Bourne expressed typical concerns that the regulations would remove traditional "home rule" with regard to harbor ordinances and waterfront zoning requirements. Correspondence, Edwin H. Sternfelt, Harbormaster, Town of Newbury, to Robert Alvarez, DEQE Licensing Engineer, 18 Mar. 1987; T.W. Kingman, Chairman, Town of Bourne Shore and Harbor Committee, to Gary Clayton, Director, DEQE Division of Wetlands and Waterways, 12 Mar. 1987.


M.G.L. Chapter 91, Sec. 15.

Coastal States Organization, Putting the Public Trust Doctrine to Work, 352.


The draft definition (310 CMR 9.00 Draft Regulations December 1986) defined private tidelands in the following way: "...those tidelands not defined as Commonwealth tidelands in 9.02 Private tidelands are held by private parties other than the Commonwealth subject to an easement which reserves for the public the rights of fishing, fowling navigation, and their natural derivatives, and of passing freely over and through the water." The final regulations revised this definition, adding that the easement is presumed unless it is "overcome upon showing that such tidelands...are not held by a private person or upon a final judicial decree that such tidelands are not subject to said easement of the public" (310 CMR 9.00, 1990, at 170).

The definition of Commonwealth tidelands was also amended to allow for special circumstances. The 1986 draft definition asserted that all Commonwealth tidelands were presumed to be subject to a condition subsequent that they be used for a public trust purpose. The revised definition added this caveat: "...such presumption may be overcome only if the Department issues a written determination based upon a financial judicial decree concerning the tidelands in question or other conclusive legal documentation that, notwithstanding the Boston Waterfront decision of the Supreme Judicial Court, such tidelands are unconditionally free of any proprietary interest in the Commonwealth" (310 CMR 9.00, 1990 at 165).

According to the final regulations (310 CMR 9.00, 1990, at
landlocked tidelands are "any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands" except for filled tidelands within 250 feet of the high water mark or filled tidelands within Designated Port Areas.


64 Correspondence, Kelly McClintock, Environmental Lobby of Massachusetts, to the DEQE, Sep. 11, 1989.


66 Correspondence, Cassie Thomas, Environmental Director, Charles River Watershed Association, to the DEQE, 9 Mar. 1987.
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1 Steve Pearlman, DEQE Tidelands Coordinator, telephone interview by Jane McNally, May 1990.

2 Lahey, Zurier and Salinger, "Expanding the Public Access by Codifying the Public Trust Doctrine: The Massachusetts Experience," 76.


4 Pearlman and Carl Dierker, DEQE Deputy Legal Counsel, telephone interviews by Jane McNally, May 1990.


6 Holmes, "Armada: Firms aiming to torpedo tidelands rules," Cape & Islands.


9 1987 Draft Regulations, Section 9.03 (2).

10 Ibid., Section 9.02.

11 Ibid.


13 M.G.L. Chapter 91, Section 1.

14 Ibid., Section 14.

15 Correspondence, Vaughan, Lawyers Committee on Chapter 91 to Clayton, Mar. 11, 1987.


17 1990 Final Regulations, Section 9.04 (2).

18 1990 Final Regulations, Section 9.02.
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31 1990 Final Waterways Regulations, Section 9.10.
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