

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

LR  
Shelf  
1982  
C.2

STATE GOVERNMENT. 1

STATE LAW LIBRARY  
AUGUSTA, MAINE

**REPORT TO THE GOVERNOR**

**BY THE**

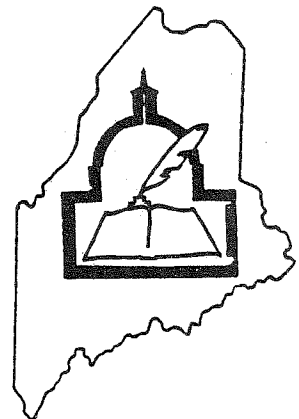
**CITIZENS' COMMISSION**

**TO EVALUATE THE**

**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**January 15, 1982**

EC  
107  
1982  
C.2



JAN 25 1982

TABLE OF CONTENTS

STATE LAW LIBRARY  
AUGUSTA, MAINE

	<u>Page</u>
INTRODUCTION-----	1
FINDINGS, DISCUSSION, AND RECOMMENDATIONS	
I. Board of Environmental Protection-----	4
II. Commissioner-----	11
III. Staff	
A. Management and Organization-----	13
B. Relations with the Public-----	18
IV. The Attorney General's Department-----	21
V. The Application Review Process-----	24
VI. Funding-----	27
VII. Rulemaking-----	30
VIII. Compliance and Enforcement-----	31
IX. Other Issues-----	33
CONCLUSION-----	34
APPENDICES-----	36



## INTRODUCTION

The Department of Environmental Protection has played an increasingly important role in Maine since the Department's reorganization in 1971. The statutory authority, staff, and budget of the Department have expanded dramatically. Since 1971, staff has increased from 33 to 176, while yearly expenditures have increased from about \$660,000 to almost \$5.4 million. Applications for the permits, licenses and approvals required by law to receive Department approval have increased from 263 in 1971 to almost 1,800 in 1981. During the same period, the complexity and technical nature of environmental regulation have also dramatically increased.

The Department has developed an extensive body of environmental regulations, policies and procedures. These regulatory measures impose requirements on activities ranging from placing sand in front of lake front homes to preventing significant deterioration of air quality. For example, diffusion modeling requiring computer skills and professional meteorologists is necessary to obtain a major air emission license. Toxicity testing is becoming a common requirement for approval of a waste discharge license. Groundwater testing is required for most solid waste permits. Construction of a beach house, seawall or pier may involve studies and analyses of wave action and sand transport. In addition to State regulation and licensing, extensive Federal environmental regulations apply to certain kinds of projects.

In the wake of this tremendous growth in the scope and detail of environmental regulation, many representatives of the industrial and environmental sectors, municipal officials, and private citizens have, with increasing frequency, expressed concern that the State government structures and procedures for environmental protection that were established in the early 1970's are not capable of meeting the demands of the 1980's. The coming decade will require an efficient and reliable system that will provide the degree of environmental protection demanded by the people of the State of Maine. It must also operate fairly and promptly to protect the interests of applicants and the public, and to provide a consistent regulatory climate which will allow economic growth.

In response to these concerns, the Governor, through Executive Order 10 FY 81, on April 8, 1981 established the Citizens' Commission to Evaluate the Department of Environmental Protection. Senator Barbara Trafton of Auburn was appointed to chair the Commission. Other members were Robert Gardiner, Executive Director of the Natural Resources Council of Maine; John Melrose, formerly with the Maine Municipal Association, and currently with Mallar Development Services, Inc., in Augusta; Daniel Boxer, Esquire, of Pierce, Atwood, Scribner, Allen, Smith and Lancaster in Portland; and James Vamvakias, President of the E.C. Jordan Company in Portland.

The Commission's charge, which is contained in Appendix B, required it to evaluate the Department. This evaluation was to include a review of its objectives, the role of the Board of Environmental Protection, Commissioner and staff of the Department, funding, the application review process, and promulgation of rules as well as other procedural issues. The Commission was not directed to and therefore did not review Maine's environmental goals or policies. Rather, the Commission's charge was to study and recommend procedural alterations in the administrative machinery of the Department of Environmental Protection. The Commission focused on the structures, procedures and general mode of operation of the Department and the Board. It concerned itself with the efficiency of the system, its effectiveness, and its interaction with the public.

Although Commission members were chosen because of their familiarity with the Department and its operations, early in their discussions they determined that the comments of a large number of persons representing all segments of society would be a valuable indicator of the effectiveness of the Department, as well as public perception of the Department. Accordingly, a list of issues was developed and mailed to more than 1,300 interested persons. This list was derived from records of the Department of Environmental Protection, including persons who had recently dealt with the Department or expressed interest in its operations. The Commission received a large number of comments, both verbal and written, in response to this mailing. The concerns or points raised in these responses were reviewed by all Commission members and carefully categorized.

The Commission also met with chief administrators of environmental protection agencies from Rhode Island, Massachusetts, Vermont and Georgia, and corresponded with a number of environmental officials from other states. The Commission also devoted attention to the structure of environmental regulation in other states. Because the Georgia Environmental Protection Division had been cited by the U.S. Environmental Protection Agency as a "model," particular attention was paid to that state. The Commission also met with the former U.S. Environmental Protection Agency Acting Assistant Administrator for Water and Waste Management, as well as William R. Adams Jr., formerly the Commissioner of Environmental Protection for the State of Maine and thereafter Administrator of Region I of the U.S. Environmental Protection Agency.

To assist their evaluation the Commission interviewed a number of representatives of industry, municipalities, environmental groups and the general public. The Commission also interviewed past and present members of the Board of Environmental Protection and Department of Environmental Protection. The Commission especially notes the complete openness and invaluable aid of the present Commissioner and his staff. Throughout the deliberations, Commissioner Henry Warren cooperatively provided information, assistance and suggestions for improving the Department.

In a series of meetings covering a six month period and more than 100 hours of discussions and deliberations, the Commission evaluated each area contained in its charge. The Commission concluded that certain changes to the present structure and method of operation of the Department would improve its capabilities to deliver efficient and effective services. For each issue considered, the report is divided into three sections. The findings, presented first, are those opinions on the nature of problems discovered in the study on which Commission members were able to agree unanimously. Discussions contained in the subsequent section examine the nature of problems, alternative solutions, and in some cases the divergent opinions of the Commission members. Recommendations, like the findings, represent the proposals which the Commission was able to agree unanimously should be implemented.

According to 38 MRSA Section 341, the purpose of the Department of Environmental Protection is to improve the quality of our natural environment and the resources which constitute it, and to enhance the public's opportunity to enjoy the environment by directing growth and development which will preserve for all time an ecologically sound and aesthetically pleasing environment. The Department has made steady progress toward meeting these goals. Since the Commission primarily focused on issues raised through public comment, this report deals almost exclusively with problems. It does not enumerate the strengths and accomplishments of the Department or the Board, although the Commission has taken cognizance of them in its recommendations.





## SECTION I. BOARD OF ENVIRONMENTAL PROTECTION

### FINDINGS

1. The present system whereby a group of lay people routinely issue environmental permits is not the most efficient and reliable means of dealing with complex and technical environmental permitting issues. These issues demand more time and technical expertise than the present system provides for Board members.

2. A decision-making board separate from the Department is necessary to provide a check on arbitrary Department action.

3. The present appointment process has not been adequate to respond to the difficulty of finding Board members with sufficient time and expertise to fulfill their charge.

4. Too many decisions come before the Board for complete review within the present biweekly meeting schedule.

5. In a number of instances, inconsistent decisions based on seemingly similar facts have been rendered by the Board.

6. Even with recent changes in procedural rules, there have been inadequate opportunities for citizens and applicants to be heard before the Board.

7. It is difficult for staff, applicants, and the general public to determine the extent of evidence and documentation that the Board might require on a given application.

8. Board attendance at public hearings has been very low.

### DISCUSSION

A major issue for the Commission has been whether the present Board decision-making system and structure is the best method for rendering decisions on environmental applications while protecting the interests of applicants and the public. Many of the persons commenting to the Commission focused on this issue. With the exception of certain Board members, virtually everyone recommended some changes in the present system.

Written comments, interviews and the experience of Commission members produced a consensus that the complex and technical nature of most environmental permitting demands more time and technical expertise than the present system provides for Board members. This is not intended to be an indictment of Board members, but rather an inescapable conclusion that

part-time lay Board members cannot be expected to digest and assimilate voluminous technical data supplied a few days before Board meetings and to apply many complex regulations to those technical facts. In addition to this observation, there is general agreement that Board agendas have been excessively long with too much time spent on relatively minor issues. Attendance has been low at public hearings, educational workshops and, on occasion, Board meetings. Board decisions have sometimes been inconsistent as a result of several factors: the particular composition of the Board at a given meeting, inadequate time devoted to the facts of a case, and the Board's failure to adhere to established policies. Finally, there is agreement that there are a number of shortcomings in the present process of selection and confirmation of Board members.

The findings reflect the inevitable result of this situation; technical decisions are delegated to the staff either on a formal or a de facto basis. In many instances, the staff does not supply technical data to the Board. Only a staff presentation or summary of issues is delivered on the meeting date. Since the Board has in the past prohibited applicants and the general public from speaking at Board meetings, staff recommendations were generally, although not always, accepted by the Board. As a result of recently expressed concerns the Board has changed its policy and now allows brief statements by applicants and the general public, in addition to presentations by staff members. Some have complained that under this new policy the Board has been improperly overturning staff recommendations and disregarding technical evidence in response to less relevant statements by those speaking at public meetings. Others feel that the new policy is only a very slight step toward allowing applicants and the public the opportunity to balance staff presentations to the Board.

Although most persons commenting emphasized these difficulties, there was little agreement on how problems could be solved. Most persons did comment that without assurance of good appointments to the Board, structural changes alone would not necessarily result in improvements. Other than this commonly accepted principle, no one system was the consensus choice even within a particular interest group, such as municipalities, industry or environmental organizations.

The Commission outlined the important attributes of a Board and then evaluated how well various structural alternatives might satisfy these objectives. They agreed that the Board should have sufficient competence in environmental issues, applicable legal requirements and the details of particular applications. Board decisions should be responsible, reflecting a reasonable and consistent application of relevant statutes and regulations to the issues at hand. The size of the Board should be manageable. Full participation by the entire Board is desirable; adequate public access to the decision-making process is essential. The Board should be insulated from political pressure, but responsible to the needs of the public. The review process should not be excessively time

consuming or duplicative. The Board should have manageable agendas to devote sufficient time to important decisions and to continuing education. Board members should be fairly compensated for their time and not overly dependent on staff recommendations and opinions.

The Commission examined a number of structural alternatives, and extensively discussed and analyzed their advantages and disadvantages. The Commission recommends vesting responsibility for initial decisions with the Commissioner and changing the role of the Board to that of an appeals board to make the final decision on contested issues and on the interpretation of legislative policy. It was concluded that retention of citizen involvement in the environmental process was desirable. By acting as an appeals body when determinations of the Commissioner are challenged, a part-time, competent lay board should be able to decide the narrow issues raised on appeal. This should be especially true if the Board is not overwhelmed with the extensive agendas and voluminous materials which must be read in preparation for the regular bimonthly meetings under the current system. This alternative also recognizes the realities of present decision-making; technical determinations are made by the technical staff in all but a few cases when the staff is overruled by the Board. It is not thought that any element of environmental protection or preservation of applicants' rights would be lost by this alternative. The right of appeal to the Board would be available to the public as well as applicants.

It should be especially noted, however, that the role of such an appeals board would not be merely to decide whether evidence exists to support the Commissioner's decision. It is contemplated that when an issue is presented to the Board on appeal, the Board would decide how the issue should be determined, the weight to give the evidence and, in general, would be free to substitute its judgment for that of the Commissioner. Furthermore, although the Board would draft its own procedural rules, the Commission envisions that the Commissioner or his staff would present the Department's case, just as would the applicant or any aggrieved persons.

Consistent with the recommendation of the Commission that the Board expressly be allowed to substitute its judgment for that of the Commissioner, it is contemplated that the Board will have available to it a full range of options after hearing all sides. The Board may, based upon its interpretation of the evidence, law or regulations:

1. affirm the Commissioner's decision;
2. remand the matter to the Commissioner for further proceedings; or
3. reverse or modify the Commissioner's decision.

The Commission also discussed the method of appealing to the Board, and, although not intending to supply all the details, believes that a thirty day appeal period, with an additional 10 days for cross-appeals would be appropriate. Within the appeal period, the party appealing would be required to file with the Board a petition containing a brief statement

as to the issues being appealed, the basis for the appeal and the relief which the Board is requested to grant. A briefing, hearing and argument schedule would then be set by the Board, with such prehearing conferences as may be necessary. The Board would have the power to issue a stay of the Commissioner's order pending a final resolution of the appeal.

In considering this alternative, a number of Board sizes were discussed. The Commission concludes that for appeals purposes the Board should not be as large as ten members, but that less than five would not allow for sufficiently balanced representation. While it was difficult to decide on an optimum size, the Commission suggests a five member Board.

Because its function would be as an appeals body, it was determined that minimal staff would be necessary. Logistical demands of the Board could be met by having the chair, to be selected by Board members, devote limited amounts of extra time to administrative arrangements for appeals and to plan for continuing education programs.

To assure a high degree of participation in the very important appeals process, it was determined that four of the five Board members should constitute a quorum. Additionally, the Commission felt that during the selection process the Governor and Legislature should emphasize the importance of attendance at all Board functions. Some Commission members favored automatic termination of Board membership if two meetings in a row were missed, but this requirement was deleted in favor of the high quorum.

The Commission discussed qualifications for nominees to the Board at some length. Certain Commission members took the position that Board members should be representative of the public in general, while others felt that technical qualifications and expertise should be required of Board members. It was finally agreed that some competence in the types of issues which the Board would normally be expected to address should be expected of Board members. This competence could be demonstrated by education or experience, and could be further assured by a more extensive and detailed nomination and confirmation process. The process should include at least 30 days posting of nominations prior to public hearings, and the preparation of a written report by the legislative committee of jurisdiction on the suitability of the nominees to meet the proposed criteria. The Commission also agrees that the Governor should consult the Environmental Advisory Committee (described on page 19) in connection with the nominating process.

In discussing legal representation and Attorney General issues, questions were raised as to how to ensure impartial legal advice to the Board. Concerns were expressed that the same members of the Attorney General's staff who advise the Commissioner and staff members should not be advising the Board when the appearance of conflict or lack of impartiality could exist. Some Commission members favored providing wholly independent advice to the Board from a source other than the

Attorney General's Department, if that Department were advising the Department of Environmental Protection staff. All members of the Commission agree that, at the least, these issues should be taken up through a memorandum of understanding among the Department, the Board, and the Attorney General's Department.

In connection with the recommendation to constitute the Board as an appeals body and delegate all permitting to the Commissioner, questions arose as to the respective roles of the Commissioner and the Board with regard to establishing regulations. It was decided that in addition to the responsibility for initial decisions on licenses and applications, the Commissioner should promulgate regulations, consistent with the Administrative Procedure Act. Because some commenters expressed concerns that the staff had not been responsive to public input in the regulatory process, it was agreed the Board should also serve as a body which hears petitions from interested persons to amend or revoke regulations promulgated by the Commissioner.

Finally, after determining that the Board should act as an appeals forum, the Commission discussed the nature of evidence which could be heard by the Board. The two principal options were appeals based upon the record before the Commissioner and a de novo appeal to the Board. The Commission favors the latter, allowing the Board to hear any evidence, including new evidence, on appeal. Appeal to the Board should be required as an exhaustion of administrative remedies, and, therefore, the opportunity should exist to make an independent record before the Board in the event an appeal to the Superior Court is contemplated. Furthermore, concern for the rights of persons who are not involved in the permitting process dictated that those not involved but aggrieved should have the opportunity to present relevant evidence to the Board. Finally, the rights of applicants are also protected by such a procedure since, in many cases, the evidence as submitted by applicants in support of an application is less than that which would be submitted if an appeal were contemplated by either the applicant or a third party. The present regulations allowing legal standing for appeals by the applicant, municipal agencies, adjoining landowners, local and statewide environmental organizations, and other aggrieved persons should continue to be applied.

Although the part-time appeals board concept was finally adopted, it should be noted that other alternatives were seriously considered. The Commission thoroughly discussed a full-time board. As envisioned, the full-time board would be comprised of three members nominated by the Governor and confirmed by the Legislature for staggered, four year terms. The Commissioner of the Department of Environmental Protection would not serve on this Board but would be the chief staff officer of the Department as well as a member of the Governor's Cabinet. He would supervise Department of Environmental Protection staff who would review applications and make recommendations for action by the full-time board. The board would review these applications at public meetings, providing an

opportunity for applicants and other interested persons to participate. Decisions on certain types of applications could be delegated to the Commissioner. Board members would be required to have some education or experience which demonstrated competency in some of the issues normally addressed, and would be expected to develop expertise in all aspects of environmental regulations as they served on the job. Although no independent technical staff would be necessary other than through the Department, some secretarial support and legal counsel would be required.

Although not selected, the principal advantages of this alternative are that a full-time board would give more time to public hearing of evidence relating to applications, board members working full-time would be expected to develop greater expertise, and decisions by persons serving for a fixed term would be free of undue political influence. While this system would be more expensive, the major reason for rejecting it was that some Commission members thought the work load did not justify a full-time board and certain features of a lay board were considered more desirable.

The Commission also considered in some depth maintaining the present structure but increasing delegation to the staff. Under this concept, the Commissioner would make all decisions on permit applications. The Board, however, could revoke delegation on its own or by request of one of the parties involved in the proceedings. It was felt that this would only occur if the Board felt the application were of sufficient significance to warrant its deciding the matter or if one of the parties involved in the proceedings requested a Board decision. The principal advantage to this alternative would have been the retention of the present Board structure without involving it with most routine applications that come before the Board. The Commission rejected this alternative as unlikely to substantially change the current situation and to respond to the many complaints about the present system.

#### RECOMMENDATIONS

1. The Commissioner should be responsible for the initial decision on all licenses and applications. The role of the Board should be hearing appeals of decisions by the Commissioner and reviewing rules upon petition by interested persons. The functions of the Board, as an appeals body, should be kept distinct from the rest of the Department.

2. The number of members on the Board of Environmental Protection should be reduced from ten to five. The Commissioner of the Department of Environmental Protection should not serve on the Board. All members should be appointed by the Governor for four year staggered terms. The Board should elect annually one of its members to serve as chair for one year. Members of the Board should, by education or experience, be

competent in at least some of the issues normally addressed by the Board. Members should be chosen for their ability to make informed decisions on the basis of their knowledge and experience on the facts before them.

3. The Governor should consult with the Environmental Advisory Committee (described on page 19) for nominations to the Board. Nominations should be posted 30 days prior to public hearing and the legislative committee reviewing the appointment should forward written reports on the suitability of nominees prior to the Senate confirmation vote.

4. A quorum for all Board actions should be four members, but the full Board should participate to the maximum extent possible.

5. The chair should be responsible for coordinating the activities of the Board, scheduling meetings and public hearings and communicating with the Department. This person should be responsible for establishing a continuing education process for the Board dealing with statutes, issues and problems that are likely to come before the Board. The chair should be compensated for workdays other than scheduled Board meetings.

6. The Board should receive legal advice through the Attorney General's Department, but there may be occasions where the Attorney General will have to provide outside counsel to avoid a conflict of interest situation.

7. Petitions for appeal should outline the issues on appeal. The Board should be allowed to hear any evidence the parties or interested persons wish to present that is relevant to the issues on appeal.





## SECTION II. COMMISSIONER

### FINDINGS

1. There is an inherent conflict in the role of the Commissioner as both chief administrator of his<sup>1</sup> Department and as a member of the Board of Environmental Protection.

2. There is a need to strengthen the office of the Commissioner to enable him to manage his Department more effectively and efficiently .

3. There is a need for the Commissioner to play a more active role in coordinating and facilitating the licensing process as well as resolving disputes between staff and the public.

### DISCUSSION

The Commissioner presently is the chief administrator of the Department of Environmental Protection. He is also ex officio chairperson and nonvoting member of the Board of Environmental Protection. There are inherent conflicts in the discharge of these different, and at times contradictory, roles. These conflicts make it difficult for the Commissioner to perform duties expected of him by the Board, staff, applicants, and the general public. In short, the Commissioner is often placed in a no-win situation. For example, when the Board considers action contrary to the staff recommendations, it is difficult for him to be an impartial chairman of the Board while defending the staff recommendations. There may also be statutory restrictions (5 MRSA Section 9052) on his participation in permit negotiations when he will later chair the Board that makes the final adjudication. His role on the Board is also limited. When the Board was originally established, the Commissioner could vote to break ties; this authority was repealed in 1976. In his present role as chair, he is able to provide some guidance and continuity to the Board, but he is unable to serve fully as either administrator of the staff or member of the Board.

The ambiguity in the role of the Commissioner results in a degree of disorder in the permit review process. Many persons have been critical of the Department's lack of tight administrative procedures. With the new licensing responsibilities envisioned in this report, the Commissioner will be even more hard pressed to carry out adequately his administrative responsibilities. To correct this situation, the Commission recommends providing a Deputy Commissioner for administration, financial matters, and

---

<sup>1</sup> Masculine pronouns are used generically in this report to denote both genders.

Departmental training. This position is described fully in Section III. It should be noted here that the Deputy should provide sufficient management assistance to allow the Commissioner to play a more active role in policy formulation, processing applications, and communicating with the Department's various constituencies.

In the course of normal licensing, enforcement and other departmental activities, disagreements between staff and the regulated community often occur. These disputes usually concern complex technical issues such as the choice of air emission models or the extent of baseline environmental data required for an application. These matters should be settled early in any proceeding, but there is no good mechanism available for resolving these disputes. Both the Commissioner and applicants suggested the need for such a mechanism. In response to comments from a number of persons, the Commission discussed the establishment of a technical mediation process, but the majority felt that problems of conflict of interest could prevent such a system from working effectively. All Commission members believe that in his newly defined licensing role, it would be appropriate for the Commissioner to fulfill the mediation role in the first instance, utilizing such outside expertise as he deems appropriate.

#### RECOMMENDATIONS

1. The Commissioner should not be a member of the Board of Environmental Protection. His primary responsibilities should be the effective management of the Department of Environmental Protection and the licensing decisions.
2. The position of Deputy Commissioner for Administration should be created within the Department. The Deputy should report directly to the Commissioner, assisting him in assuring consistent and effective management of the bureaus. Specific duties and responsibilities of the Deputy are described in Section III.
3. The Commissioner should take a more active role in the application review process. The provision of a deputy will allow the Commissioner to participate personally in overseeing the application review process.

### SECTION III. STAFF

#### A. MANAGEMENT AND ORGANIZATION

##### FINDINGS

1. There is a need to strengthen the management, organization, technical training and competence of the staff.
2. The level of management involvement in permitting decisions has sometimes been inadequate to ensure proper accountability for staff actions.
3. Staff review of applications is sometimes carried out without adequate internal coordination, management, or tracking to ensure prompt and orderly processing.
4. Disputes between applicants and staff over technical data requirements sometimes cause delays in processing applications. Presently there are no adequate means available to resolve these disputes expeditiously.
5. The Department of Environmental Protection has only one unclassified position: the Commissioner. Most other State departments have several unclassified positions to allow Commissioners flexibility to assemble their own management team.
6. There is a need within the Department for an effective time management system to maximize staff resources and to help determine whether overall staff levels are adequate to carry out the Department's objectives.
7. Low salary levels make it difficult for the Department to attract and keep highly trained and competent staff. It is difficult for the staff to be properly recognized and rewarded for above average performance.
8. There is a need to provide better training and educational opportunities to assist in upgrading the technical and administrative competence of staff.
9. A mechanism is needed to coordinate permit applications involving more than one bureau.

##### DISCUSSION

Of all the issues considered by the Commission, none received more attention or comment than those concerning the Department staff. The comments came from virtually every sector; other governmental agencies, municipalities, environmental groups, industry, and the business community. While some expressed satisfaction with the operation of the Department, the majority were critical of the operations and staff performance.

Many commenters felt the staff was lacking in accountability. The staff was felt to be free to operate without close supervision or direction and not held responsible for its actions or decisions. Other commenters felt the real focus of the problem rested with managers who were not properly exercising their responsibilities to direct and control staff.

Another problem identified by the Commission dealt with insufficient review of data requests and contacts with applicants by top level managers. One of the most frequent complaints expressed to the Commission dealt with the information necessary to process an application. Many people described the problems they experienced as endless requests for additional information from the staff. Along with this, they spoke of the frustration of changing requirements frequently imposed by the staff during the negotiation of permit conditions.

Many people expressed the view that the information requested was not necessary to make a decision and was being used by staff to delay a decision. Others commenting to the Commission expressed the view that the requests were a result of the staff's inexperience and lack of expertise in the area being considered. Still others criticized staff for not requiring more information on certain applications. Staff felt that the criticism was unwarranted. They indicated that the need for additional data could only be determined after the evaluation had begun. Additionally, they indicated that sometimes the applicant refused or was unable to submit sufficient data in a timely manner.

The Commission believes that delays and disputes during the permitting process can be reduced and inter-bureau coordination facilitated by establishing a permanent task force, with the Commissioner as chair, to deal with applicants during the pre-application and application process. This Application Task Force (ATF) approach has worked well in other states, and, if structured and operated in the manner envisioned by the Commission, should eliminate most criticisms of the present application process with respect to major applications.

The basic approach to the ATF would require the Commissioner to pick a permanent "team" of four high level, technically proficient staff persons, one from each bureau (who could be the Bureau Directors) to coordinate and facilitate the application process through a teamwork approach. The Commissioner would be the chair, and would call meetings as necessary to advise applicants on permit requirements, receive staff comments, discuss the application with staff and applicants and otherwise oversee the smooth progress of the application. Applicants would deal only with those task force members designated by the Commissioner. Although data requests and comments on an application would presumably originate with the staff, they would be screened by the ATF.

The Commission does not believe that the jurisdiction of the ATF need be precisely spelled out. It is the intention of the Commission, however, that most major applications involving substantial expenditures, impact on the environment, or controversial issues will proceed through the ATF process.

Due to the unavailability of sufficient time management data, the Commission had difficulty evaluating the allocation of staff time to Department activities and the need for additional resources to carry out the Department's responsibilities. A review of the growth in number of staff members over the last decade did, however, provide an important insight into the management problems. Despite an almost four-fold increase in the Department's personnel, a management team has not emerged to deal with the complexities inherent in the larger organization. The lack of a strong management team has been evidenced in part by the problems cited in this section. With the addition of new responsibilities for all permitting decisions [see Section II], the shortage of management resources becomes more acute.

The Commission recommends the following unclassified positions to achieve this purpose: a Deputy Commissioner for Administration, a Director of Policy Analysis, and a Director of Public Assistance. The Deputy Commissioner should report directly to the Commissioner, and coordinate with the bureaus on administrative and procedural issues. His primary responsibility should be to assure consistent and efficient management of the bureaus. The Deputy should provide coordination among bureaus and agencies, establish a staff time management system, manage finances, evaluate staff levels and priorities, supervise data management, and be responsible for staff training.

The Director of Policy Analysis should be responsible for assisting in the formulation of Department policy and regulations. At the direction of the Commissioner, the Director should be responsible for the preparation of draft legislation to be submitted to the Governor and should coordinate requests for legislative assistance received from the Governor and Legislature. He should coordinate the policy research activities of the Department and assist in the identification of research needs. He should work closely with bureau directors and coordinate overall Department policies.

The Director of Public Assistance should be the initial contact between the Department and the public. All initial contacts with prospective applicants would be through this division, and the division would accept all applications for licenses and permits. The Director would be responsible for determining what permits might be required.

The present Division of Computer Services should remain unchanged, although the division should increase its support of application review. The Director of Computer Services, in cooperation with the Deputy Commissioner and the Director of Public Assistance, should establish an

automated on-line application tracking system. The present Divisions of Finance, Purchasing, and Personnel should be combined into a single Division of Finance and Administration. In the Commission's opinion, sufficient support and secretarial staff exist to support the new management positions. The existing positions of Assistant to the Commissioner and Director of Administration Services should be reevaluated by the Commissioner in light of the proposed management structure.

It is the opinion of the Commission that the Commissioner should be free to assemble his own team to manage the Department. Currently, all persons within the Department fill classified positions. This is different from many state departments, where bureau director positions are filled with people who serve at the pleasure of the Commissioner. The Commission discussed at length the issue of declassifying the existing four Bureau Director positions. Some believed that declassification of these positions with regulatory responsibilities was inappropriate. While the Commission realized that there was some validity to this point of view, the consensus was that the need for a coordinated and responsive management team outweighed the disadvantages of declassification. It is, therefore, recommended that the four existing Bureau Directors and the three new management positions be unclassified.

In its review of staff issues, the Commission looked at Department salary levels. A comparison of salary levels is included in Appendix D. For key technical positions, these levels are lower than for comparable positions in the private sector. For a few job classifications pay scales are comparable. For most positions, however, salaries are 8 to 35 percent lower in State service. The salary differential is particularly striking for engineering positions. There can be little doubt that low salaries hinder the Department in hiring technical staff. This situation, however, is generally found throughout State government. Also, staff interviewed by the Commission did not identify pay as a major factor in low employee morale. Since maximum rates for job classifications are set by Statewide personnel policy, the Department has trouble promoting and retaining quality staff in some technical positions. While overall staff turnover is a function of general economic conditions and is not particularly high at this time, retention of the best staff may be more of a problem. Some commenters noted that civil service tends to weed out the most productive staff. Representatives of the Department reported that to keep good technical people, they are promoted to management, usually Division Director positions. This may solve one problem while creating another. The Commission feels that a system should be established separate from salary levels to recognize and reward outstanding staff performance.

#### RECOMMENDATIONS

1. The administrative organization of the Department should be revised to achieve an effective and accountable management apparatus.

2. The Commissioner should have the flexibility to assemble a management team. The four existing Bureau Director positions should be declassified. The three newly created positions of Deputy Commissioner for Administration, Director of Policy Analysis and Director of Public Assistance should also be unclassified.

3. Department Bureau Directors and Division Directors should review all data requests, draft orders, and other communications with applicants which originate in their jurisdiction.

4. An Applications Task Force (ATF) should be established, consisting of the Commissioner and representatives of the four bureaus. Permit applications for major projects and projects involving more than one bureau should be referred to the task force by the Director of Public Assistance.

5. The Deputy Commissioner for Administration should coordinate a more active staff training program. This program should increase staff knowledge of the activities they regulate, treatment technologies, and other related information. Techniques could include staff seminars, educational leaves of absence, academic and industrial exchange programs, and other innovative methods. The Environmental Advisory Committee should be actively involved in the development of this program.

6. The Commissioner should establish additional methods, separate from salary levels, to recognize and reward outstanding staff performance.





## B. RELATIONS WITH THE PUBLIC

### FINDINGS

1. The staff has divergent views on the Department's role. The public also has conflicting expectations of how the Department should perform its regulatory functions.
2. Some staff members have shown considerably more skill than others in dealing with the public. There is a need to maximize these positive interactions through appropriate selection, training and utilization of staff.
3. In developing policies, rules, and procedures the adversarial relationship between the Department and the regulated community impairs constructive communication.
4. Certain types of applicants need Departmental guidance through the regulatory process.

### DISCUSSION

In his welcoming remarks to the Commission, Governor Brennan stated that Maine needs an effective and efficient regulatory process that protects the environment and allows economic growth. Probably everyone in Maine would agree with this statement, yet there is little consensus on how the Department should be operated to achieve that objective.

Varying views exist not only among different sectors of the public but also within the ranks of the staff itself. Some felt that the Department's role was to review and act impartially on applications, while others felt the Department should actively assist private citizens and businesses. According to a third point of view, the Department should neither be neutral nor help applicants, but rather should act as advocates for and protectors of the environment.

The Commission believes that a clear understanding of the role of the Department by both the staff and the public is fundamental to improving the operations of the Department. Through new opportunities for communication with the various sectors of the public, the Department can encourage a consistent and coherent set of expectations about its role and the means that have been established to carry it out. The Department, however now lacks a formal mechanism to communicate with its various constituencies.

To meet this need, the Commission recommends establishing a permanent Environmental Advisory Committee to maintain regular communication between the Department and interested groups. It is recommended that one be established in Maine, with representatives from industry, environmental groups, municipalities and the general public. The first three categories should pick their own members.

Although the Board would render decisions, an advisory committee is needed to involve interested groups in Department operations and to inform those representative organizations of Department affairs. In other sections of this report, more specific recommendations are made concerning the use of the Advisory Committee to screen candidates for the Board and to recommend public participation procedures for rulemaking. The Committee should also serve as advisor to the Commissioner concerning the functioning of the licensing process, the effectiveness of the Department's organization, need for changes in legislation and other matters of general importance to the Department.

A related issue was frequently cited by a number of the commenters as an important problem: the adversary relationship which was perceived to exist between some staff members and applicants. Many of these comments dealt with specific bureaus. Certain staff members and bureaus were commended by some commenters for their cooperative, positive attitude. On the other hand, some noted that many staff persons have tended to be overly cautious and skeptical of the applicant's intent. They said that adversary relationships have too frequently been created between staff and applicants, causing frustration on both sides and generally resulting in delays in permit reviews. Some staff members, on the other hand, suggested that they are subjected to continual criticism regardless of their particular actions. They cited examples where some members of the public have complained that the staff was too aggressive and others where staff was criticized for not being aggressive enough. These criticisms have hurt morale within the Department and affected the performance of the staff.

The Commission unanimously agreed that the proper role of the staff should be to review permit applications comprehensively, impartially and expeditiously and to recommend to the Commissioner whether or not they comply with the environmental laws of the State of Maine. In such cases where the applicant appears to be meeting all relevant requirements, the staff should be expected to be expeditious in processing the applications. Where questions exist, the staff should try to assist the applicant by clearly delineating the requirements in a cooperative manner. In some limited situations, an adversarial relationship may develop. The Commissioner and staff should be careful to ensure that the Department is not the cause of this relationship. Comments from a number of persons indicated that the Department has not succeeded in

avoiding responsibility for unnecessarily adversarial relationships. The Commission is confident that more control of Departmental determinations by top level personnel and greater involvement by the Commissioner (as described in Section II) will provide the solution to this problem.

Finally some commenters pointed to the need for greater staff involvement in assisting applicants through the permitting process. Creating a specific, recognizable organizational unit within the Department to assist applicants and the public in their dealings with the Department would serve several purposes. First, it would provide procedural help to those applicants who needed it. Second, it would provide the Department with some insight into and possible solutions for the problems faced by those applicants subject to regulations or permit requirements. Finally, it would make it clearer that the role of the Department is to provide a fair and objective review of issues based on the merits of applications or proposals, in accordance with legislative and regulatory criteria.

#### RECOMMENDATIONS

1. An Environmental Advisory Committee should be established to assist the Department in fulfilling its mandate. This committee should provide advice on public participation, comment on proposed legislation, advise the Governor on Board appointments, and provide communication between the Department of Environmental Protection and the public. Members should be representative of industry, environmental groups, municipalities and the general public. To the extent possible, the first three groups should select their own members.
2. A Division of Public Assistance should be established. This division should be responsible for relations with the public, education and outreach efforts. It should serve applicants by looking at the environmental review process from the applicant's point of view and by facilitating public involvement in the decision-making process.
3. The Commissioner should make it clear that the staff should not act as advocates for or against the applicant or any other entity throughout the permitting process. The role of the staff should be to review permit applications comprehensively, impartially, and expeditiously to determine whether or not they comply with the environmental laws of the State of Maine.

## SECTION IV. THE ATTORNEY GENERAL'S DEPARTMENT

### FINDINGS

1. The statutory role of the Attorney General's Department and the need of the Department of Environmental Protection for prompt, independent legal advice have resulted in situations marked by administrative and policy conflicts.
2. The Attorney General's Department provides legal advice to almost all State departments. In the case of the Department of Environmental Protection, the same legal staff in the Attorney General's Department reviews applications, provides legal advice to the Board and Commissioner, and conducts enforcement actions. Administrative authority over these staff members is exercised by the Attorney General.
3. A coordinated system for utilizing the services of the Attorney General's Department does not appear to exist.
4. The level of participation by lawyers for the State, applicants and public groups in Department of Environmental Protection proceedings has increased significantly over the past decade.

### DISCUSSION

The Department of Environmental Protection receives the equivalent of three and one half persons for legal assistance and enforcement. Three of these positions are funded by grants administered by the Department, but the positions are located within the independent Attorney General's Department. This situation creates the possibility of two types of conflicts. First, there is an administrative conflict. Assistant Attorneys General provide a variety of legal services to the Board and staff. They review Board orders and proposed permits, draft rules and legislation, negotiate consent decrees, and initiate enforcement actions. While most of their time is used on behalf of the Board and staff, they are not under the administrative direction of the Commissioner. Their priorities are established by the Attorney General, but generally address requests from the Department of Environmental Protection. This has resulted on occasion in lack of coordination between the Departments.

Second, there is a potential policy conflict. The Attorney General's Department is directed (5 MRSA Section 191) to represent State agencies in all civil actions. No State agency may employ private counsel without the written approval of the Attorney General. As a constitutional officer, the Attorney General and his assistants are given broad common-law powers, and unless legislatively restricted, may exercise "all power and authority as public interests may require." The Commissioner and the Attorney General may not agree on certain policy issues. This is aggravated by the

often ambiguous distinction between providing legal and policy advice. While there is no easy solution to this problem the role of Assistants in Department policy should be better defined. The Commission believes that the principal role of the Assistants should be to render legal advice to the Department and that determinations of environmental policy should be made by the Legislature or the Department. The Commission recognizes that the Attorney General will undertake independent policy initiatives assisted by the same Assistant Attorneys General outside their role as counsel to the Department of Environmental Protection.

Each state administrator the Commission contacted stated that he would like legal staff available within his Department in addition to lawyers of the Attorney General's Department. In Vermont the Commissioner's counterpart does not have legal counsel within his office but has filled certain upper level policy positions with lawyers. The Commission believes that the Vermont example provides a useful approach for Maine.

The Commission recognizes that its recommendation to enhance the decision-making authority of the Commissioner and to transform the current Board into an appeals board raises new questions of how the Department and Board should receive legal counsel. While there was considerable sentiment among Commission members in favor of recommending the specific interrelationships between the Department of Environmental Protection and the Attorney General that would minimize conflicts, a majority of the Commission believes the two departments affected are in a better position to develop the most appropriate arrangement to avoid the problems mentioned.

Separate from the above discussion and the involvement of the Attorney General's Department, the Commission received comments from several sources on the increasing level of participation of lawyers for applicants and public interest groups in Department procedures. The commenters noted that this can result in increased demands upon the Assistant Attorneys General, increased caution and delay on the part of the staff, and an increase in adversarial proceedings. The Commissioner's counterpart in Georgia seeks to reduce the use of legal counsel on all sides when applicants and staff meet on routine permit applications by requesting members of the Attorney General's staff to be present only when applicants propose to bring their attorneys to such meetings. It was felt that such a policy would encourage both sides to work out routine, technical matters before attorneys became involved. The Commission believes that such a policy could be of benefit in Maine. If such a policy were attempted, the Commission noted that applicants, public groups and the Department of Environmental Protection would all have to work cooperatively to assure that problems are fairly worked out and that no party is disadvantaged by not having legal representation present as needed. The Commission does not intend by this discussion to suggest that attorneys for public groups, applicants and the Attorney General's Department do not have a role in significant or controversial applications or proceedings to ensure that statutes and regulations are properly interpreted and complied with, that records which will withstand challenge are established, and that the interests of applicants, the State and other parties are protected.

## RECOMMENDATIONS

1. The Commissioner, Chairman of the Board of Environmental Protection, and Attorney General should execute a written memo of understanding describing the responsibilities of each party and the procedures whereby the Attorney General renders legal services to meet the needs of the Department and Board.
2. The Commissioner should work to encourage the resolution of routine technical matters without the use of lawyers by staff, applicants, and environmental groups in informal, non-controversial or technical meetings.

## SECTION V. THE APPLICATION REVIEW PROCESS

### FINDINGS

1. The procedures for processing applications sometimes result in review times which exceed statutory limits and are unreasonable.
2. Procedural requirements are not consistent for each statute administered by the Department of Environmental Protection.
3. There is a need for a flexible permitting procedure to enable applications to be processed in a time proportional to their complexity.

### DISCUSSION

Department statutes establish mandatory time limits for processing applications. Most permits are subject to a 180 day time limit for review (38 MRSA Section 344, subsection 1). Other statutes specify shorter review times. For example, Site Law applications (38 MRSA Section 481 et seq.) must be approved or disapproved within 30 days of the application submission, or if there is a public hearing, within 30 days of the close of the hearing. Most people consider time limits of less than 60 days unrealistic for anything other than routine permits. Recent data (see Appendix C) indicate that most routine applications are processed within the 180 day time limit. These data also show, however, that a number of long delays in the permitting process have occurred on major applications for air emission licenses and Land Bureau permits.

Department of Environmental Protection staff as well as some Board members have suggested that delays are often caused by either insufficient numbers of staff or the failure of an applicant to supply necessary information. Other commenters have suggested a number of different reasons including lack of coordination of staff actions, changing demands for information and generally confusing procedural requirements. Several persons with the perspective of multi-state experience consider the application process of the Maine Department of Environmental Protection as most difficult compared with other states.

While it is not clear which factors are primarily responsible for the delays in the permitting process, the Commission recommends several changes to expedite permit review. The Department should establish a range of procedures that are flexible enough to provide review that is consistent with the complexity, controversial nature, and potential environmental impact of particular projects. Definite time limits should be established and followed for the review of each application. Based on analysis of the permit review steps and experience in other states, the Commission determined that all applications could be processed within 120 days unless a public hearing is held. Most applications could be processed within 60 days.

Some State and Federal agencies use a process called "permit by standard" to expedite routine permit review. For example, under existing provisions of the Great Ponds Act (38 MRSA Section 394) the Department automatically permits routine activities that are conducted according to established standards. These provisions work well, and should be expanded to apply to other activities.

Review by outside agencies should be coordinated and expedited. There is a statutory requirement (38 MRSA Section 344) that the Department of Environmental Protection must notify applicants of the official date on which the application was accepted within 10 days of receipt of the application, or else return the application specifying why it is not acceptable. The application is then sent to other divisions and agencies for review. Another agency, such as the Department of Inland Fisheries and Wildlife or the Division of Health Engineering, may indicate on their review that the applicant has not provided sufficient documentation to sustain an affirmative finding that a particular resource will not be harmed. These comments are sometimes submitted late in the review process, and often are not critically reviewed by Department of Environmental Protection staff. The applicant must provide further supporting documentation, or the staff will recommend that the application be denied. These requests for further information create misunderstanding, animosity, and sometimes needless delay. To correct this problem, the Department should define more clearly the concept of a "project manager" for each application. The project manager should be responsible for coordinating the receipt of comments and the framing of questions by staff with outside review agencies.

Finally, the Commission notes that the procedural requirements for each of the 24 statutes administered by the Department of Environmental Protection are not the same. Since a particular project may require more than one license or permit, it would be desirable to review statutory procedures for consistency relating to public hearings, timing, public notice, and other procedural requirements.

The recommendations which follow, together with a positive attitude towards the permitting process by both applicants and Department staff, should encourage an expeditious, yet thorough, review process. It is worth noting that the time limits and process recommended here have been effective in other states to the extent that the system has been favorably received by all interested parties.

#### RECOMMENDATIONS

1. Statutes administered by the Department of Environmental Protection should be amended to provide consistent specific requirements for expeditious review. The Commission believes that this consistency can be encouraged within the following guidelines:



- a. All applications should be reviewed immediately for procedural completeness;
- b. Determinations on most applications should be made within 60 days and all determinations should be made within 120 days after the receipt of a complete application unless voluntarily extended by the applicant and the Department.
- c. The Department should establish "permit by standard" status for those activities which would not have significant environmental impact if executed in accordance with the prescribed standards.

2. The new application review procedures should provide sufficient time for applicant and public review of draft permits.

3. For major projects the Application Task Force should be the principal contact with applicants throughout the pre-application and application process. The Task Force should screen and coordinate all staff and agency questions and requests for information. The Director of Public Assistance should serve this function for smaller projects.

4. Pre-application conferences between applicants and the Director of Public Assistance or the Application Task Force should be encouraged to establish requirements in a timely and definitive manner.

5. After submission of an application, the Director of Public Assistance or the Application Task Force should ensure adherence to target dates for receipt of comments and questions from staff and other agencies, supplying of further information by the applicant, the preparation of and comment upon proposed permits and the drafting and publication of draft permits.



## SECTION VI. FUNDING

### FINDINGS

1. The Department is dependent upon Federal revenues for 58% of its funding. It is expected that Federal support will be decreased in the near future, but the amount of the decrease is very uncertain. Alternative sources of funding have to be studied.

2. A major portion of the Department's expenses are for personnel. Assuming no new programs are mandated for the Department, the 207 personnel presently authorized could carry out the duties required of staff. There is, however, inadequate information available to determine whether those duties can be carried out by the existing staff level of 176 persons.

3. The recommendations for expanded management and public assistance services contained elsewhere in this report will require some additional General Fund support.

4. Fees for permits and licenses do not provide substantial revenues in comparison to total Department expenses. This situation is common in all other states surveyed.

### DISCUSSION

The current operating budget of this Department is over \$5 million per year. About 58% of this revenue is from Federal funds. The General Fund supports about 30% and the remaining 12% comes from special revenue accounts. The largest special revenue account is the Maine Coastal Conveyance Fund.

The Department receives Federal funds for a dozen different programs. In many programs, the State contracts with the Federal government to perform specific tasks with those funds. As a result, the Commissioner cannot shift Federal monies to meet his own sense of priorities for spending. President Reagan is proposing cuts in funds for the U.S. Environmental Protection Agency which is the source of almost all Department of Environmental Protection's Federal funds. Cuts of 12% in EPA's funds for both FY 81 and FY 82 have been made. The Administration is now considering additional funding cuts up to 30% in FY 83, but this figure is uncertain even within the Administration.

It is clear that Federal funding cuts will greatly affect Maine's Department of Environmental Protection. In 1981, the Air Bureau received 66% of its program funds from Federal sources, the Water Bureau 63%, and the Land Bureau 63%. While the exact amount of the FY 83 cuts will not be known for several months, they will take effect before Maine's next

biennial budget is presented to the Legislature in January 1983. Hence, it will be necessary for Maine to respond to the Federal cuts soon after they become effective if losses in Federal funding are to be replaced. The lack of firm information available at this time leaves the Commission in the position of making no recommendation for specific action. However, it is clear that the Governor and the Legislature should be alert to changes in Federal funding and the possibility that a Special Legislative Session may be required if no interruption in programs is desired.

Personnel costs are a major portion of the Department's expenses. As a result, funding levels are largely determined by personnel requirements. There is a staff accounting system used by the Department, but it allocates time according to general programs and not according to particular projects or license applications. Therefore, it is difficult to assess whether the Department's staff time is being utilized to achieve maximum results. In 1978, a preliminary analysis of staffing requirements<sup>2</sup> encountered a similar lack of information. Consultants performing the study felt, therefore, that they could not draw definite conclusions on the need for additional staff. Most staff persons interviewed by the Commission and several other persons as well indicated that insufficient staff is a major problem. On the other hand, other persons including some Commission members thought that with proper management and realistic permitting requirements, adequate staff exists.

The Department has 207 positions authorized but only 176 currently filled due to budget limitations. The Commissioner stated that without additional legislative mandates or significant budget cuts, the authorized staff levels were sufficient, but suggested that the actual staff levels were too low. After much discussion, the Commission concluded that more specific time accounting is needed to produce data so the Governor and Legislature will have more solid information to assess Department needs. Several Commission members felt that an additional advantage of tighter time accounting may be to improve the utilization of existing resources, and, therefore, reduce the need for additional revenues and staff.

Elsewhere in this report, the Commission is recommending creation of several new positions within the Department, changes in its structure, and incentives to reward superior staff performance. It is estimated that the total net cost of these recommendations will be \$79,000. There is clearly a strong need for improved management and public assistance functions within the Department, and it was felt by all Commission members that these improvements in Department operations were well worth the additional expense. It is anticipated that the addition of a Deputy Commissioner for Administration would require approximately \$35,000, and the positions of Director of Public Assistance and Director of Policy Analysis would each

<sup>2</sup> James D. Brown, Northern Consultants, Inc., 1978. Short and Long Term Staffing Needs of the Department of Environmental Protection.

cost \$28,000. In regard to the expenses of the Board, it is expected that the Department would save \$12,000 over the present system.

The Commission considered whether license fees should be raised to help generate funds for the Department. Air license fees for some states are set forth in Appendix E. Other states surveyed by the Commission indicated that they charge comparable fees or no fees at all. Some members of the Commission wanted to increase the fees on a sliding scale, based upon the cost of projects seeking licenses and the cost of Department review of the application. They thought fees could become an important revenue source to offset the loss of Federal funds. Others thought that having significantly higher fees in Maine than in other states would hurt Maine's prospects of attracting new industry. They argued that unless fees were increased well beyond levels they would be willing to support, the license fees would still be more of a nuisance than a significant revenue source. These Commission members thought that without a clear demonstration that management practices would result in prompt and efficient licensing, it would be inappropriate even to consider an increase in fees.

A number of persons suggested that the Department of Environmental Protection could stretch its available resources by eliminating areas of overlap with other departments and by adopting other measures to reduce the Department's workload. Such changes could be made only with legislative approval. Specifically, it was suggested that applications for certain developments that have only local impacts might be licensed by local agencies. Legislative action eliminating dual responsibilities between the Department and either the Land Use Regulation Commission or the Department of Inland Fisheries and Wildlife might expedite the licensing process and save the State money. Unless personnel are transferred from other Departments, however, it is possible that the savings would not benefit the Department of Environmental Protection. The Commission concluded that this issue would require further study.

#### RECOMMENDATIONS:

1. The Commissioner should institute a more detailed staff time accounting system. This system will allow future evaluation of budget and staffing needs as revenue sources change.
2. The Governor should monitor changes in Federal funding levels and make proposals to the Legislature for alternative funding sources. The Governor should request an additional \$79,000 for improved management and public assistance services during this Legislative Session.
3. The Governor should authorize a study to determine whether additional funds or personnel could be made available to the Department of Environmental Protection by eliminating overlapping jurisdiction and by transferring licensing of certain local impact developments to municipalities.



## SECTION VII. RULEMAKING

### FINDINGS

1. Public participation in the promulgation of Department of Environmental Protection rules needs to be increased and made more meaningful.

### DISCUSSION

Several commenters expressed concerns about the complexity of Department rules, requirements that differed from Federal requirements, and the insensitivity of the Department to their comments during the public review process. The Commission has not examined specific rules or their substantive requirements, but has concentrated on the need for a more constructive dialogue between the Department and the public to ease tensions and improve the quality and acceptability of rules.

In a previous section of this report the Commission recommends that the Commissioner be granted the authority to promulgate all rules, with the provision that interested parties would have the right of appeal to the Board of Environmental Protection. Few Board members have attended public hearings on proposed rules, and Board action on rules has been perfunctory. Allowing the Commissioner to adopt rules makes his authority consistent with that of other department heads. This new authority will also focus and clarify his role in rulemaking and end the present minimal Board participation. In the future, the Board would become involved only on appeal when a controversy exists that the Commissioner has not been able to resolve.

Several comments received by the Commission expressed satisfaction with the Department's occasional practice of holding workshops prior to drafting rules concerning highly technical matters. Such workshops provide the participants with a good opportunity to discuss openly the intent and effect of different rulemaking proposals before preliminary decisions have been made by the Department. The previously recommended Environmental Advisory Committee should aid the Department in notifying interested parties and encouraging their participation.

### RECOMMENDATION

1. The Department should improve communication with the public and affected parties to ensure that persons wishing to voice concerns about rules have an ample opportunity to do so. On proposed rules of a significant and controversial nature, the Department should consult with interested persons in a workshop format prior to developing draft rules. The Department should make available for comment all draft rules prior to posting for public hearings.





## SECTION VIII. COMPLIANCE AND ENFORCEMENT

There are enforcement divisions in each of the bureaus of the Department with a total of 11 people working in these divisions. The Commission received less criticism of Department enforcement activities than other matters and, therefore, has not concentrated on this area. There has been sufficient concern expressed to warrant a more thorough examination of ways to expedite enforcement, produce a more fair and meaningful result and achieve consistent compliance with State laws.

Some people see enforcement of environmental laws as one of the most important Department functions. Others view enforcement as a lesser priority. They feel enforcement action should be only undertaken after efforts to gain compliance voluntarily have failed, and even then, as a tool for achieving compliance, not inflicting punishment.

There are two general types of compliance and enforcement cases. First, there are self-reporting installations, and second, there are non-reporting installations. Most municipal and industrial water treatment plants, most large industrial air emission sources, and some other facilities are required to monitor and report their own emission levels on a regular basis. Department personnel review the reports and check up on violations. All other compliance and enforcement monitoring is performed by the Department on such matters as municipal solid waste facilities and construction in wetlands areas. A large percentage of the Department's enforcement activities in this category are in response to citizens' complaints.

In most cases where the Department believes a violation is sufficiently serious to require remedial action or payment of a penalty, the Department will propose an administrative enforcement action or consent agreement. Through this agreement, most matters can be resolved without litigation in the courts. Some industrial representatives have complained that in many cases the Department is too quick to propose a consent decree when violations have only been technical and industry claims no environmental harm has occurred. Some believe that decrees are used too frequently against well intentioned companies, thus creating an unnecessarily adversarial situation. The serious cases which cannot be resolved administratively are referred to the Attorney General's Department for prosecution.

There are considerable data available on enforcement activities, but much of it is of limited use. For example, in 1980 the Department inspected all 355 municipally operated solid waste disposal facilities for compliance with operational guidelines. Of these, only 121 were found to be completely without violations, but it is difficult to tell how many of the violations were extremely minor or beyond the control of the

licensees. One recent but limited study<sup>3</sup> of compliance with four land-related environmental laws within the coastal zone of five towns was completed in August 1981. The study concluded that while compliance with the terms and conditions of licenses for mostly residential development has been improving in recent years, more than 30% of the projects studied were not completely in compliance. Several persons commenting to the Commission expressed a need for more and tougher enforcement of environmental laws by the Department. On the other hand, industrial representatives generally complained that enforcement efforts have been unreasonable and the penalties sought too high.

In some other states, the Commissioner has authority to impose fines for violations within certain limits, subject to protective procedures before a hearing officer or other forum. Georgia's Commissioner explained that he used this authority more to gain swift compliance with the law than to heavily penalize most violators. Based on amounts collected as civil penalties, it appears that Georgia does not seek penalties as high as Maine's.

Many departments enforce various State statutes and rules. In some departments, such as Marine Resources and Inland Fisheries and Wildlife, certain employees are given the power to arrest violators and issue summonses. Environmental issues are far more complex than those handled routinely by these departments and violators frequently have reasonable excuses for not meeting environmental standards. Therefore the Commission does not think that it would be appropriate for Department of Environmental Protection staff members to have powers to arrest or issue summonses. However, there was strong sentiment among some Commission members that giving summons power to the Commissioner would be appropriate and would improve the speed and fairness of enforcement actions. Other members felt just as strongly that the courts should continue to be the appropriate forum for assessing fines and penalties.

While the Commission is not prepared to make detailed recommendations on this issue, a more thorough examination of the present enforcement activities and penalties should be made to assure that the system operates fairly and efficiently for those who are the subject of the enforcement as well as for the general public.

#### RECOMMENDATION

1. The Governor should initiate a study of ways to improve the delivery of fair and consistent enforcement of environmental laws. This study should consider measures to resolve matters in a less adversarial manner and to achieve swifter compliance with the law.

<sup>3</sup> Arthur Lerman, Arthur Lerman Associates, August 1981. Evaluation of the Enforcement of Four Maine Environmental Statutes.

## SECTION IX. OTHER ISSUES

In the Executive Order creating the Commission, the Governor recognized that other issues in addition to those in the charge might be raised in the course of the study. One such issue brought to the attention of the Commission by a number of commenters dealt with the difference between State and Federal environmental rules, regulations, and compliance requirements. Additionally some thought that the substantive Department of Environmental Protection legislative mandates should be evaluated to determine program priorities. While some Commission members felt that both of these issues should be the source of positive recommendations, and while all members recognized the importance of these issues and other policy questions, the majority believed that these issues were beyond the scope of the present study and more appropriately dealt with by the Governor and the Legislature.



## CONCLUSION

While many specific issues were considered by the Citizens' Commission to Evaluate the Department of Environmental Protection, the focus of its evaluation and recommendations fall into three categories. These include the permit decision-making apparatus, the organization and management of the Department, and application review procedures.

First, the Commission examined the decision-making apparatus for environmental regulation. The present structure of the Board of Environmental Protection was found to be inadequate for its increasingly complex task. The Commission recommends that the size of the Board be reduced and that the Board's function be limited to hearing appeals of decisions made by the Commissioner. The concept of a lay board should be retained but the process for nomination and confirming members should be modified to assure more extensive consideration of qualifications.

Second, the Commission examined the organization and management of the Department of Environmental Protection. The Commission found that there is a need to strengthen the management, organization, technical training and competence of the staff. The Commission recommends that an internal management team be created for the Department consisting of a new Deputy Commissioner for Administration, a new Director of Public Assistance, and a new Director of Policy Analysis. Along with the suggested removal of the Commissioner from the Board, the Commission believes these changes will provide the opportunity for aggressive staff management. In addition to this internal management team, the Commission calls for more intense management of permitting decisions through the creation of an on-going Applications Task Force composed of the Commissioner and representatives of the Air, Land, Water, and Hazardous Waste Bureaus. The Task Force would coordinate processing of all major applications. All other applications would be handled by the new Director of Public Assistance. The Commission recommends that seven members of the Department's top management staff be unclassified.

The three new positions and modification of the Board structure will increase the Department's annual budget by about \$79,000. However, there is another even larger fiscal need facing the Department. Federal funds which support more than half of the Department's activities are in the process of being reduced drastically. Because the precise effects are not clear at this time, the Commission urges the Governor and the Legislature to study alternative sources of funding.

Finally, the Commission examined the Departmental procedures, particularly licensing. It found serious delays, lack of coordination, decisions being made without the involvement of the Commissioner, and

other inadequacies, especially in processing certain Air and Land Bureau applications. The Commission recommends reducing the time period for licensing to 120 days and providing flexibility to act even more swiftly on most non-controversial applications.

The Commission has attempted to set forth the outlines of a new structure for environmental licensing and regulation in the State of Maine. The essence of this program is to expedite the process by granting trained professionals the authority to issue all licenses and permits. With this new authority, however, there must be guarantees that applicants will be fairly treated. Given the Commission's new recommended departmental structure, a major change in the operation of the Department will be required. Staff members will now act as a resource for the Commissioner who will, along with his management team, work closely with applicants and the public to assure a smooth and efficient process.

If the proposed system works, there should be less need to impose major technical decisions and disputes on the persons who have dedicated so much time and effort to the Board of Environmental Protection over the years. Because the Board has, however, provided an important final protection against inappropriate Departmental action, the Commission believes that it is necessary to provide an ultimate safeguard through the recommendation that five members of the general public continue to serve as an appeals board.

Because the legislative and administrative recommendations in this report are interrelated and dependent upon each other for the success of the whole program, care will have to be taken to provide proper timing and monitoring of the progress of the Commission's recommendations. The Citizens' Commission to Evaluate the Department of Environmental Protection appreciates the opportunity to make positive recommendations to improve the effectiveness of the Department in carrying out its statutory charge to protect Maine's environmental quality.

---

APPENDICES A - F

	<u>Page</u>
A. Members of Commission-----	37
B. Executive Order-----	38
C. Table of Permit Review Time-----	41
D. Salary Comparison-----	42
E. Air Licensing Fees-----	45
F. Department Organization Chart-----	47





APPENDIX A

MEMBERSHIP OF CITIZENS' COMMISSION  
TO EVALUATE THE DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

Senator Barbara M. Trafton  
Rt. 3, Box 353  
Auburn, ME. 04210

Mr. Robert Gardiner, Executive Director  
Natural Resources Council of Maine  
271 State Street  
Augusta, ME. 04330

Mr. John Melrose, Vice President  
Mallar Development Services, Inc.  
Whitten Road  
Augusta, ME. 04330

Mr. Daniel Boxer  
Pierce, Atwood, Scribner, Allen, Smith  
& Lancaster  
One Monument Square  
Portland, ME. 04101

Mr. James Vamvakias, President  
E.C. Jordan Co.  
Portland, ME. 04101



APPENDIX B



OFFICE OF  
THE GOVERNOR

NO. 10FY 80/81  
DATE April 8, 1981

GOVERNOR'S CITIZEN COMMISSION TO EVALUATE THE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

WHEREAS, the environment of the State of Maine is one of the State's foremost attractions and substantially contributes to the quality of life for Maine people; and

WHEREAS, the Department of Environmental Protection has been established by the Legislature to regulate development activities in this State so as to preserve the quality of our environment; and

WHEREAS, the volume and complexity of the work for which the Department of Environmental Protection's responsibility has increased substantially during its existence;

NOW, THEREFORE, I, JOSEPH E. BRENNAN, hereby establish a Citizen Commission to examine and evaluate the administration of the laws for which the Department of Environmental Protection is responsible, in accordance with the following provisions:

Sec. 1. Name. The Commission shall be known as the Governor's Citizen Commission to Evaluate the Department of Environmental Protection.

Sec. 2. Membership. The Commission shall be chaired by Senator Barbara Trafton of Auburn.

Its membership shall consist of Maine citizens representing business, environmental, municipal, legal and public concerns.

Sec. 3. Scope of Work. The Commission is requested to evaluate the performance of the Department in the following areas, and to make recommendations with respect to legislation and executive action to the Governor as it deems appropriate:

(1) Objectives

- a. Definition of the objectives of the Department.
- b. Evaluation of the extent to which the present operation of the Department fulfills those objectives.

(2) Commissioner

- a. Definition of the role of the Commissioner.
- b. Evaluation of any additional steps the Commissioner may be able to take to best fulfill that role.
- c. Recommendation as to the relationship which ought to exist between the Commissioner and the Board of Environmental Protection.

(3) Staff

- a. Definition of the role of the staff.
- b. Evaluation of the extent to which the staff is performing that role adequately.
- c. Evaluation of the size of the staff.
- d. Evaluation of the pay levels for the staff.
- e. Evaluation of the appropriateness of the skill and educational levels of the staff for the tasks assigned.
- f. Evaluation of the accountability of the staff.
- g. Recommendation as to whether all or a part of the staff ought to be split off to fill an autonomous "public advocate" role.

(4) Board of Environmental Protection

- a. Definition of the role of the Board of Environmental Protection.
- b. Evaluation of the extent to which the present operation of the Board fulfills those objectives.
- c. Recommendations as to what improvements might be instituted, including, specifically, evaluation of:
  - what functions shall be delegated by the Board, and to whom;
  - the optimum size and organization of the Board;
  - the most appropriate method for selecting members;
  - the number of members which constitutes a quorum.

(5) Funding

- a. Evaluation of the adequacy of the current funding level.
- b. Evaluation of expectations for federal funding changes.
- c. Recommendation as to whether the present mix between user fees and General Fund revenues is most appropriate.
- d. Recommendations as to whether funding mechanisms can be employed to improve processing of applications.

(6) The Application Process

- a. Definition of the objectives of the application process.
- b. Evaluation of the extent to which the present process fulfills those objectives.
- c. Evaluation of the adequacy of the present hearings process.
- d. Evaluation of the adequacy of the written decisions of the Board.
- e. Recommendations as to the appropriate time frame for the application process.
- f. Recommendations as to the appropriate appeals process following a decision by the Board.

(7) Rules and Regulations

- a. Evaluation of the adequacy of the present rule-making process.
- b. Recommendations as to changes in that process.

(8) Other Issues

Evaluation and recommendation on such other issues as the Commission may deem appropriate upon consultation with the Governor.

Sec. 4. Hearings

The Commission may hold such hearings and meetings anywhere in the State as it deems appropriate to learning the views of individuals and organizations interested in its proceedings.

Sec. 5. Cooperation of the Department

The Commissioner, staff and Board of the Department of Environmental Protection, and all other department heads, are requested to provide the Commission with any assistance and cooperation it may require in carrying out its responsibilities.

Sec. 6. Liaison with the Governor

The Governor's Office will maintain liaison to and assist the Commission for the Administration during its operation.

Sec. 7. Report

The Commission is requested to file a report containing its evaluations and recommendations no later than November 15, 1981, together with any draft legislation appropriate for consideration by the Governor for submission to the Legislature.

  
JOSEPH E. BRENNAN  
Governor



# APPENDIX C

## PERMIT REVIEW TIMES 1978 - 1981

	<u>Less Than 30 Days</u>	<u>30-90 Days</u>	<u>90-180 Days</u>	<u>More Than 180 Days</u>
Air Bureau				
License Renewals	0	91 20%	255 57%	100 22%
New Applications	0	23 36%	27 43%	13 21%
Land Bureau	1084 40%	1300 48%	240 9%	86 3%
Water Bureau <sup>1</sup>				
Major Discharge Permits	5 28%	11 61%	2 11%	0

<sup>1</sup>1980 Only





# APPENDIX D

## Comparison of Salary Ranges

### WEEKLY RATES

#### (1) ANALYST PROGRAMMER I

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$279.60	\$318.40	\$364.00	M.S. Computer Sc. or 2 years experience
Private	\$347.00	\$433.50	\$470.50	

#### (2) ANALYST PROGRAMMER II

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$322.00	\$368.00	\$421.00	2 years as API
Private	\$367.00	\$458.00	\$482.00	

#### (3) ASSIST ENGR (CIVIL)

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$279.60	\$318.40	\$364.00	E.I.T. Non Grad or B.S.
Private	\$304.80	\$356.73	\$414.42	B.S. No Experience

#### (4) BIOLOGIST I

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$267.60	\$304.00	\$347.20	B.S. & 2 years
Private	\$301.92		\$336.46	B.S. & M.S.

#### (5) CHEMIST I

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$246.80	\$279.20	\$317.60	B.S.
Private	\$278.84		\$334.61	B.S.

#### (6) CHEMIST II

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$292.40	\$334.00	\$382.40	B.S. & M.S. or 2 years
Private	\$330.00		\$413.46	M.S.

(7) CHEMIST III

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$322.00	\$368.00	\$421.20	
Private		\$331.23		

(8) CIVIL ENGR I

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$306.80	\$350.00	\$401.20	P.E.
Private	\$367.30	\$448.07	\$542.30	4 years since B.S.

(9) CIVIL ENGR II

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$354.80	\$406.00	\$465.60	P.E. & 2 years
Private	\$392.30	\$487.50	\$597.11	6 years since B.S.

(10) CIVIL ENGR III

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$382.80	\$438.00	\$502.00	P.E. & 4
Private	\$412.50	\$520.19	\$642.30	8 years since B.S.

(11) GEOLOGIST TECH

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$220.80	\$249.20	\$281.20	B.S.
Private	\$288.84		\$336.53	B.S.

(12) GEOLOGIST

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$267.60	\$304.00	\$347.20	B.S. & 2 years
Private	\$320.76		\$396.63	B.S. & M.S.

(13) GEOLOGIST II

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$279.60	\$318.40	\$364.00	B.S. & 3 years
Private	\$356.07		\$468.75	M.S. & Ph.D

(14) GEOLOGIST III

	<u>MIN</u>	<u>MID</u>	<u>MAX</u>	<u>REQUIREMENTS</u>
State	\$322.00	\$380.80	\$421.20	B.S. & 3 years
Private		\$361.88		B.S. & 5 years

### Sources

State Positions - Maine Department of Personnel

Private Positions

Classifications 3, 8, 9, 10: American Association of Engineering Societies, 1980, Salary Survey, Non-supervisory Positions

Classifications 4, 5, 6, 7, 11, 12, 13, 14: Dietrich Associates, Inc., Scientific Salary Survey, 1980. Hiring Rates.

All Other: U.S. Department of Labor. Area Wage Survey, Portland, Maine, December 1980



APPENDIX E  
AIR LICENSING FEES

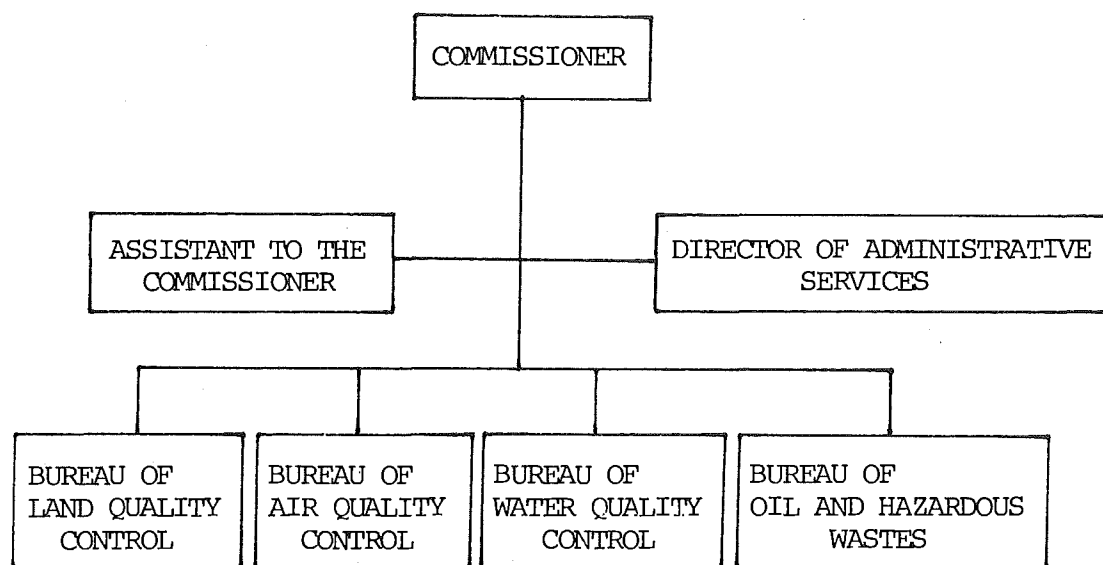
<u>State</u>	<u>Authority to collect fees</u>	<u>Annual fee system implemented</u>	<u>Range of fees</u>	<u>Collection and disposition</u>
Alabama	yes	no		
Alaska	no			
Arizona	yes	yes		\$70,000 to G.F.
Arkansas	pending			
California	yes	yes	*50-6000	
Colorado	yes	yes		
Connecticut	no			
Delaware	yes	yes		
D.C.	yes	pending		
Florida	yes	yes	\$20.	
Georgia	yes	no		
Hawaii	yes	yes		
Illinois	yes	pending		
Indiana	yes	yes		
Idaho	no			
Iowa	no			
Kansas	no			
Kentucky	yes	no		
Louisiana	yes	pending		
Maine	yes	yes		
Maryland	pending			
Massachusetts	no			
Michigan	yes	yes	\$25 - 8,000	\$2.6 M to agency
Minnesota	pending			
Mississippi	no			
Missouri	yes	yes		
Montana	yes	no		
Nebraska	yes	yes		
Nevada	yes	yes		
New Hampshire	yes	yes		
New Jersey	yes	yes		\$200,000 to agency
New Mexico	yes	pending		
New York	yes	yes		
North Carolina	yes	no		
North Dakota	yes	yes		
Ohio	yes	yes		
Oklahoma	pending			
Oregon	yes	yes	**\$50-1000	\$560,000 to agency

Pennsylvania	yes	yes
Puerto Rico	yes	yes
Rhode Island	no	
South Carolina	no	
South Dakota	pending	
Tennessee	yes	no
Texas	yes	pending
Utah	pending	
Vermont	no	
Virgin Islands	no	
Virginia	yes	no
Washington	pending	
West Virginia	no	
Wisconsin	yes	pending
Wyoming	no	

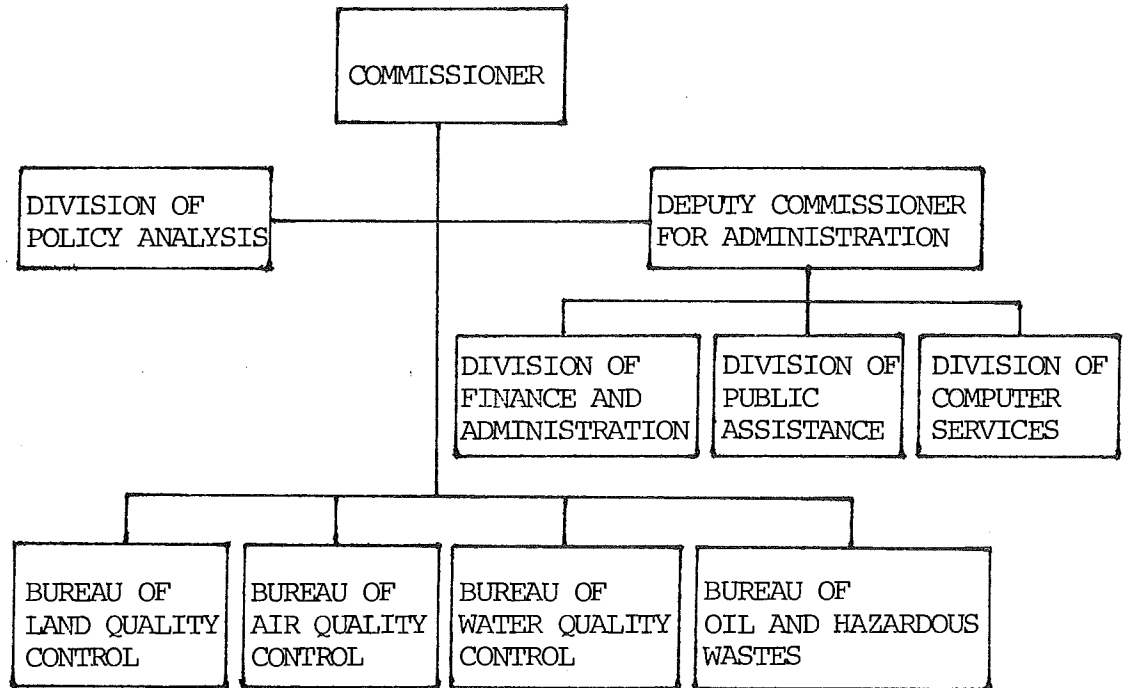
\* plus annual fee based on commissions

\*\* plus annual compliance monitoring fees of \$85-2520/year

APPENDIX F. PRESENT ORGANIZATION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION



PROPOSED ORGANIZATION OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION



LAW & LEGISLATIVE REFERENCE LIBRARY

