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REPORT ON THE  
ENVIRONMENTAL REGULATORY PROCESS  
by the  
Maine Development Foundation  
Environmental Regulatory Task Force

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January 17, 1983

Augusta, Maine

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## EXECUTIVE SUMMARY

### INTRODUCTION

Discussions in the spring of 1982 by the Maine Development Foundation with a variety of business and government leaders confirmed a concern over the business climate in Maine and suggested that one of several elements needing review was the environmental regulatory process.

Following extensive discussion with governmental regulators, various business interests, and environmental groups, a voluntary task force was formed to provide direction and guidance to a project aimed at:

1. Providing a factual basis for considering environmental regulatory process issues.
2. Seeking consensus for improvements in the environmental regulatory process.
3. Assisting in implementation of changes where warranted.

### EVALUATION

In order to provide a sound foundation for the deliberations of the task force, various analyses were completed. Business surveys and interviews were conducted to determine the areas of perceived need for process change. An in-depth case study analysis of twelve recent permit

applications was undertaken to identify elements of "difficult" permits as well as those processed more successfully. In addition, comparisons were made with ten carefully selected states to suggest procedures that have worked well in other circumstances. Previous reports and recent changes in the Department of Environmental Protection also become a part of the background effort of the Task Force. The important findings of each of these efforts is summarized in the body of the report.

#### CONCLUSIONS AND RECOMMENDATIONS

The Task Force, by consensus, developed the following recommendations, which can be grouped into two categories - communications/procedural and decision-making.

##### Communications/Procedural

1. There is a need to continue the activities of an informal advisory task force, generally under the same concept as the present one.
2. Additional joint technical reviews should be implemented to develop improved methods for defining information needs for individual permit types.
3. Communication forums should be initiated for discussion of technical and regulatory issues outside the formal application/regulation process.

4. Joint evaluations should be encouraged to determine additional opportunities for permits by standard, general permits and/or simplified procedures.
5. The variations between Maine and federal procedures should be specifically identified.
6. There should be a continuing external capability to urge improvements in the environmental regulatory process.
7. Improved exit communications and understanding for permit conditions should be developed.
8. The method of involvement of third parties in the environmental regulatory process needs to be clarified.
9. There should be a continuation of the strengthening of the definition of staff responsibility in permit processing.
10. Assistance programs for small business applicants should be improved within the permitting agency.
11. Other state systems that seem to work particularly well, such as Georgia, should continue to be evaluated.

#### Decision-Making

1. There is a clear and compelling need to create a complete, well-defined, timely, fair departmental decision-making process in DEP -

- a) Affirm by statute and remove any legal doubt as to the Commissioner's primary responsibility for permit preparation and recommendations by the Department, with his non-voting Board Chairmanship a secondary and non-conflicting responsibility.
  - b) Develop a written, internal decision-making conflict resolution procedure for the guidance of all personnel.
  - c) Perform administrative functions within the Department, with regulatory policy decisions handled by the Board.
  - d) Conduct management training and reviews of the decision process as an important and continuing departmental activity.
2. There should be a separation of activities with the Commissioner clearly responsible for administration and the Board responsible for regulatory policy.
- a) A revision in the permit procedure should be completed which would:
    1. Delegate routine permit application approvals to the Commissioner.
    2. Require the Commissioner to issue a Draft Order for all other permits to be sent for review and comment to the BEP, Applicant, and interested parties.

3. Allow the Board to make its own determination by majority vote as to which individual permits are of such a policy or precedent-setting nature that the Board should assume jurisdiction.
  4. For those permits not assumed by the Board, the Commissioner would issue a final order, appealable to the Board.
  5. The Board would then, if necessary, affirm, modify, or issue an order.
  6. Traditional reconsideration and court appeal procedures would remain available.
- b) The responsibility for Departmental organizational matters should rest with the Commissioner without Board approval.
3. Additional mechanisms should be initiated to assist in dispute resolution over technical and peripheral issues.
    - a) The Department should initiate, on a trial basis, a voluntary mediation process to resolve technical disputes and issues of fact.
    - b) Additional use should be made of independent, outside analysts for factual evaluations that are repetitive for many permits.



4. The DEP should implement a department-wide management information system tracking application schedules.
5. The time period for air emission license renewals for large boilers should be extended for up to five years, similar to smaller boilers.

MEMBERS OF TASK FORCE ON THE REGULATORY PROCESS

Richard Anderson, Commissioner  
Department of Conservation  
Augusta, Maine

Paul D. Merrill, President  
Merrill Industries, Inc.  
Portland, Maine

Nathaniel Bowditch, President  
Maine Development Foundation  
Augusta, Maine

A. J. Moody, Mgr., Env. Ser.  
Diamond International  
Old Town, Maine

Daniel Boxer, Esquire  
Pierce Atwood Scribner Allen  
Portland, Maine

Charles A. Morrison (Chairman)  
City Manager  
Auburn, Maine

Jean Childs  
Westbrook  
Maine

Jon Oxman, Esquire  
Linnell, Choate & Webber  
Auburn, Maine

Alton E. Cianchette, President  
Cianbro Corporation  
Pittsfield, Maine

James Saunders, V.P. Admin. Ser.  
Pioneer Plastics  
Auburn, Maine

Gordon Erikson, Jr., Vice president  
Canal National Bank  
Portland, Maine

Leslie Stevens, Director  
State Development Office  
Augusta, Maine

Robert Gardiner, Executive Director  
Natural Resources Council  
Augusta, Maine

Robert Turner, Public Aff. Mgr.  
St. Regis Paper Company  
Bucksport, Maine

William Ginn, Executive Director  
Maine Audubon Society  
Falmouth, Maine

Warren Turner  
Yarmouth  
Maine

Clifford Goodall, Esquire  
Lund Wilk Scott & Goodall  
Augusta, Maine

Henry Warren, Commissioner  
Dept. of Environmental Protection  
Augusta, Maine

Richard Jalkut, Vice President  
New England Telephone  
Portland, Maine

Samuel Zaitlin  
I. Zaitlin & Sons  
Biddeford, Maine

TASK FORCE STAFF

Project Director

Roger L. Mallar, President  
Mallar Development Services

Case Studies

Nathaniel Bowditch, President  
Maine Development Foundation

State Comparisons

John Melrose, Vice Pres.  
Governmental Affairs  
Mallar Development Services

Economic Development &  
Small Applicant Needs

Steven Weems, Exec. Vice Pres.  
Maine Development Foundation

Loaned Staff Team

John Andrews  
Ronald Colby  
Ginger Davis  
Ronald Howes  
Rupert Neily  
David Peakes  
Ray Pepin  
William Plouffe  
Jeffrey Pidot  
Al Prysunka  
Herbert Scribner  
George Seel

Case Study Interviewers -  
Mallar/Bowditch/Melrose/Weems

## INTRODUCTION

Although relatively new as a governmental function, the environmental regulatory process has been the subject of considerable discussion and evaluation by those most actively involved in the process - Maine manufacturers and municipalities, environmental interest groups, and governmental policy makers. The efforts of the current Task Force originated from discussions held in the spring of 1982 by the Maine Development Foundation with a wide variety of Maine business and government leaders to determine important issues affecting the Maine business climate.

That earlier evaluation resulted in a variety of conclusions including the following:

1. There is a pervasive feeling that its getting tougher to do business in Maine.
2. Many private businesses believe that the business climate needs attention.
3. The Maine Development Foundation should utilize its public/private character and serve as a facilitator for improving the business climate by concentrating on fact-finding and building consensus.
4. The regulatory process in Maine, particularly as it relates to environmental issues, is not working as it should be. The process is perceived as often

characterized by delay, uncertainty and frustration.

## EVALUATION

In order to provide a sound foundation for the deliberations of the task force, various surveys, case studies, comparisons with other selected states, and a review of previous analyses and documents were conducted.

Surveys. From a variety of interviews and survey information made available to the task force, it seems clear that many of those businesses that are active participants in the process perceive Maine's environmental process to be very difficult and in need of substantial change. However, the further removed an observer was from the process, the less apt they were to perceive a serious problem. Strong and consistent responses were received as to the importance of the following changes in state administration of our existing environmental laws:

1. Increasing the certainty for business on information requirements and the time needed to process an application.
2. Increasing efforts to work with business in solving chronic environmental problems.
3. Lessening the adversarial aspects of current procedures.

#### 4. Improving staff coordination on applications.

There were also comments often repeated on the subject of enforcement. Those comments generally conveyed concern over attitudes and blunt notification procedures in instances where the violation was perceived (by the violator) to be unintentional and/or of minimum consequence.

Case Studies. A major element in the evaluation phase of the project was an in-depth review of twelve recent permit applications. These applications covered a good mixture of permit types and included both applications that had encountered difficulties as well as those that were perceived to have been processed successfully.

Initial research on each case study was performed by loaned staff teams with varying backgrounds, followed by confidential interviews with key participants conducted by Task Force staff. The results of the case study reviews were then synthesized with the following summarizing the more important observations:

1. The nature of the communication process can have significant impact on the progress and success of an application. Unsuccessful communications efforts by both the applicant and regulatory staff were apparent. Informal and formal pre-application discussions; identification of a single individual to coordinate communications; written documentation of meetings and discussions; professionals

experienced in Maine representing an applicant all contribute positively to an application process. Inadequately documented applications or those containing information inconsistent with previous applications; lack of regard for established agency procedures; turnover of involved staff; failure to establish or adhere to agreed-upon time deadlines consistently generate process difficulties.

2. Uncertainty of requirements for data to be supplied probably generates the most serious objections from applicants. Regulatory staff requests for new information and data from applicants long into the review process and new information or demands by attorneys, regulatory staff or the applicant injected very late in the permitting process creates considerable concern to process participants. Applicant agreement to provide information they believe unnecessary is often based on the belief that to refuse would jeopardize a relationship with, or invite delay from, a regulatory staff person.

Other factors creating change or uncertainty in the process are often present in "difficult" applications or cause serious delays:

- a) changing regulatory policies (federal and state)
- b) setting of new policy precedents

- c) differing state and federal criteria
- d) shifting responsibilities between the state and federal governments
- e) unexpected or extensive public reaction
- f) new technology
- g) "Best available control technology" judgements

Some projects, by their nature or size, will always require a significant amount of time and receive exceptionally careful public and regulatory scrutiny.

3. When the decision-making process is unclear or misunderstood, problems often arise. The breakdown or lack of a decision-making process between technical staff and management; the uncertainty of decision-making responsibility between staff, managers, and board/commission; multi-permit projects; the lack of adequate dispute resolution mechanisms for technical or peripheral issues between applicant and staff are persistently obvious in evaluating various "unsuccessful" application processes.
4. The method of involving citizen and third party interest in a project can significantly effect the process. When an applicant takes an aggressive approach toward informing third parties and works to develop citizen support, the process often



benefits. Independent staff outreach to third parties can cause unnecessary adverse reaction. There exists considerable lack of agreement as to when and how to involve third party interests in the process.

5. The system of attaching conditions to permits can impose restrictions on a project, but also allows for flexibility in the permitting process. However, if the importance of the conditions is not understood by the applicant and a clear follow-up procedure not developed, such conditions may be ignored and deviated from, resulting in enforcement action, obviously strained applicant/regulator relationships, and can create broader regulator attitude problems that may reflect on later applications and other applicants.

Comparisons With Other States. A factual evaluation of the environmental regulatory process was completed in ten states, selected after consultation with numerous interest groups in Maine, state and federal regulators, and national environmental consulting firms. The basis for selection included several factors, including economic competition, environmental attitudes, similarities in industrial sectors, and/or perceived system efficiencies.

The states selected include:

Georgia	New Hampshire
Louisiana	New York
Massachusetts	North Carolina
Michigan	Oregon
Minnesota	Wisconsin

The following highlights the results of this evaluation:

- Seven states had an organization structure that followed the "umbrella agency" model.
- Eight states had "board" structures with regulatory authority, with six having permit authority.
- Generally, the boards were composed of five to fifteen lay members.
- Four of the boards have authority to appoint the agency head.
- In practically all of the states, staffs have permit approval authority to varying degrees, either through statute or board delegation.
- In eight of the ten states studied, there are separate, full-time hearing examiners.
- Five states had legislation that prohibited state air regulations from exceeding federal requirements, while four of those also had similar requirements for waste water discharges and hazardous waste.
- Most of the states have some form of procedure for permit coordination modeled after the so-called one-stop-shop system where all necessary permits are coordinated from one location. Business generally viewed these systems as inadequate although the North Carolina system was noted as

being particularly successful. A number of comments indicated that the success of the system was heavily dependent upon the quality of the staff assigned to administer the system.

• There were numerous comments from business and environmental interests that personalities were a key ingredient to their state's success or lack of success. Further, there appeared to be a correlation between states that relied upon informal communications and states that were perceived to run well. Often the states with good informal communications had a statewide business interest group working aggressively to guide applicants through the process, to sponsor educational programs for businesses and regulators on emerging technology, and to encourage joint ventures for studying chronic environmental problems.

• Several states through formal procedures or through the board's delegation agreement with staff classify permits into two categories. One category includes cases involving significant environmental impact or cases that are contested while the other category is without contest, is not controversial and has insignificant impact. Permits falling in the latter category receive a more expeditious review. Maine has had this type of system for several years.

DEP Progress. A current evaluation of the environmental regulatory process would be incomplete without commenting on

the activities of the Department of Environmental Protection over the last several months to respond to regulatory process concerns and previous recommendations as well as the willingness of the DEP Commissioner and staff to consider and participate in further improvement efforts. Just a few examples of those activities are listed below:

- The Department has formed a Division of Public Assistance to provide assistance to applicants, the public and others; to coordinate multi-permit applications; and to carry on a variety of communication and hearing responsibilities.
- There has been increased use of informal workshops and joint review efforts.
- Application tracking systems have been implemented in the Land and Water Bureaus; the project manager concept is being utilized; and a time management system is being implemented.
- A Departmental staff task force has reviewed the application process and suggested a variety of procedural improvements. The results of this effort are planned to be implemented within the next six months.
- Some progress has been made in "general permitting" and "permit by standard" concepts.
- The Commissioner and staff have actively, positively

participated in the activities of the Maine Development Foundation Environmental Regulatory Task Force.

### CONCLUSIONS AND RECOMMENDATIONS

Since the Task Force activities have been largely privately-initiated, voluntary efforts, the thrust of the members discussions and objectives has been to develop a consensus for change that will help to assure the potential for implementation of its conclusions. Given this aspect of the Task Force endeavors, there are obviously process changes that individual members believe should be pursued that are not included in the overall recommendations. Likewise, there are conclusions reached that not every member of the group necessarily agrees with fully.

Based upon the analysis effort previously described, the input of the loaned staff, and the experiences and knowledge of individual task force members, the following steps are recommended for implementation. The recommendations can generally be grouped into two categories - communications/procedural and decision-making.

#### Communications/Procedural

1. There is a need to continue the activities of an informal advisory task force, generally under the same concept as the present Task Force. The importance of

the opportunity for this group to serve as a communications forum for business, regulators, and environmental interests cannot be overstated. Three basic functions can be provided by this group: to serve as a communications opportunity for policy makers from the business, regulatory and environmental communities; policy guidance and review to assure appropriate implementation of the recommendations in this report; and to provide a broad advisory role to and for the Commissioner of DEP. In addition to a policy level task force, the means to create ad hoc professional/technical level advisory groups to complete specific tasks should be recognized.

Task Force membership should be reviewed to assure appropriate representation and willingness to participate, and the Commissioner of DEP should be provided a clear opportunity for increased involvement and initiative in urging priorities for the advisory function. The Task Force should continue to include a blend of key individuals representing business, environmental, and regulatory interests.

2. Additional joint technical reviews should be implemented. The Task Force, at the request of DEP, has formed an ad hoc committee to suggest improved methods for defining the information needs and procedures for air emission permits to improve the certainties of this

process. Similar efforts should be initiated in the near future in other functional areas where uncertainty in data needs or repeated additional requests for data occur throughout the permit process.

3. Communication forums should be initiated to provide an opportunity for discussion of technical and regulatory issues outside of the formal application/regulation process by representatives of business, environmental interests and regulatory staff. Informal workshop type discussion forums should be developed allowing: a) technical personnel to discuss changing and evolving technology and specific process issues; b) managers an opportunity to consider broader procedural and policy issues; and c) opportunities for managers and technical staff to share perspectives.
4. Joint evaluations should be encouraged to determine additional opportunities for permits by standard, general permits, and/or simplified procedures. As the standards, impact, and technology in any specific permit area become increasingly clear, opportunities for simplified permit procedures likewise increase. Joint efforts to identify, develop and test such procedures should be beneficial to all participants. These procedures increase the need to assure reasonable compliance and may require some demonstration of ability to meet the standards.

5. The variation between Maine and federal procedures and standards should be specifically identified both in terms of differences of substance and process. Those who apply for permits in Maine who may be familiar with federal standards but who have not participated in Maine's environmental regulatory process should have all such differences clearly defined for them early in the process. In addition, this definition would allow for joint evaluation of changes in procedures that may be beneficial to the process, without significantly impacting Maine's environmental protection effort.
  
6. There should be a continuing external capability to urge improvements in the environmental regulatory process. While various organizations participate in legislative activities, rulemaking procedures, or individual permits there is no continuing external presence with a focus on initiating, encouraging or monitoring overall improvements in the procedures of environmental regulation. Given the interest and opportunities for process changes and the need to follow through on the implementation of the recommendations in this report, the Task Force suggests that a staff person be made available at the Maine Development Foundation for a one year period. The principal responsibility of that person would be to assure the implementation of the recommendations of this report, to provide staff assistance to the Task Force, and also to provide



assistance to small business permit applicants as requested. That individual should have sufficient background to understand the basic technical issues involved but, even more importantly, the capability to work with various interests and individuals to effect change. During and following the completion of this responsibility, the Task Force assumes that existing organizations would continue to advocate their individual interests in legislative, rule-making and other areas.

7. There should be developed improved exit communications and understanding. There are numerous examples where special permit conditions have been misunderstood, only partially fulfilled, or overlooked. The process of attaching conditions to permits allows for some flexibility in the system, but specific conditions must be adhered to if that procedure is to be effective. Failure to adhere to conditions can also create long-term process difficulties for both the involved applicant and other applicants in the system. Therefore, improved understanding of the importance of various conditions should be developed through increased exit communications and improved applicant compliance.

In addition, a review of specific communication examples in the enforcement area and the absolute requirement for monetary penalties in the DEP consent

decree policy should be evaluated by the DEP or the Attorney General's office to determine if alternatives would be beneficial.

8. The method of involvement of third parties in the environmental regulatory process needs to be clarified, particularly in pre-application phases. Both lack of understanding on the part of the business community of the public nature of the permit process and aggressive involvement on the part of some regulatory staff members as to how third parties are brought into the process has created unnecessary process problems. Therefore, a clear definition for participants as to the appropriate means of involvement of third parties should be jointly developed in the near future.
9. There should be a continuation of the strengthening of the definition of staff responsibility in permit processing. The efforts by DEP to assign bureau project managers for individual permit applications and project coordinators in the public assistance division for multi-permit applications should be completed and assured. There should also be clarification of staff responsibility for "recommendations" as opposed to "decisions" unless final decision-making responsibility has been specifically delegated to that individual.
10. Improve assistance programs for small business applicants. The complexity of environmental laws and

regulations can create serious and discouraging problems for small businesses unfamiliar with the requirements. Several business and government organizations are willing and interested in providing guidance and assistance to such applicants, but only seldom do such applicants find their way to these opportunities. All seriously interested applicants must eventually contact the agency responsible for issuing the actual permit. The Task Force believes that a well-defined and "advertised" responsibility to perform this function should exist within the permitting agency. This role should include both guidance and "ombudsman" activities but should not extend to assistance in actual application preparation, where the agency should only provide general information and reference services to the private sector.

11. Continue the evaluation of other state systems that seem to work particularly well. Much can often be learned from the successes of others. Both the Georgia environmental regulatory system in general and the one-stop procedure in North Carolina are widely held in high regard. Further evaluation of techniques utilized in those states for applicability to Maine should be completed. Staff interchanges with Georgia should be considered.

## Decision-Making Process

1. There is a clear and compelling need to create a complete, well-defined, timely, fair departmental decision-making process in DEP. The lack of such a process creates formidable problems for applicants, staff, third parties, and management personnel; compounds process adversity; and invites political intervention. There are a variety of steps that should be taken to create this management environment:
  - a) Perhaps the foremost step in improving decision-making clarity would be to remove by statute any legal doubt and to affirm the Commissioner's primary responsibility for permit preparation and recommendations by the Department, with his non-voting Board Chairmanship a secondary and non-conflicting responsibility. After the changes in Department/Board roles recommended in this report have been in effect for two years, the Commissioner's role as Board Chairman should be re-evaluated.
  - b) There should be developed a written, internal, decision making/conflict resolution procedure for the guidance of all staff and management personnel. This document should clearly define all delegated responsibilities, staff/management/board communication responsibility and a clear decision tree developed.

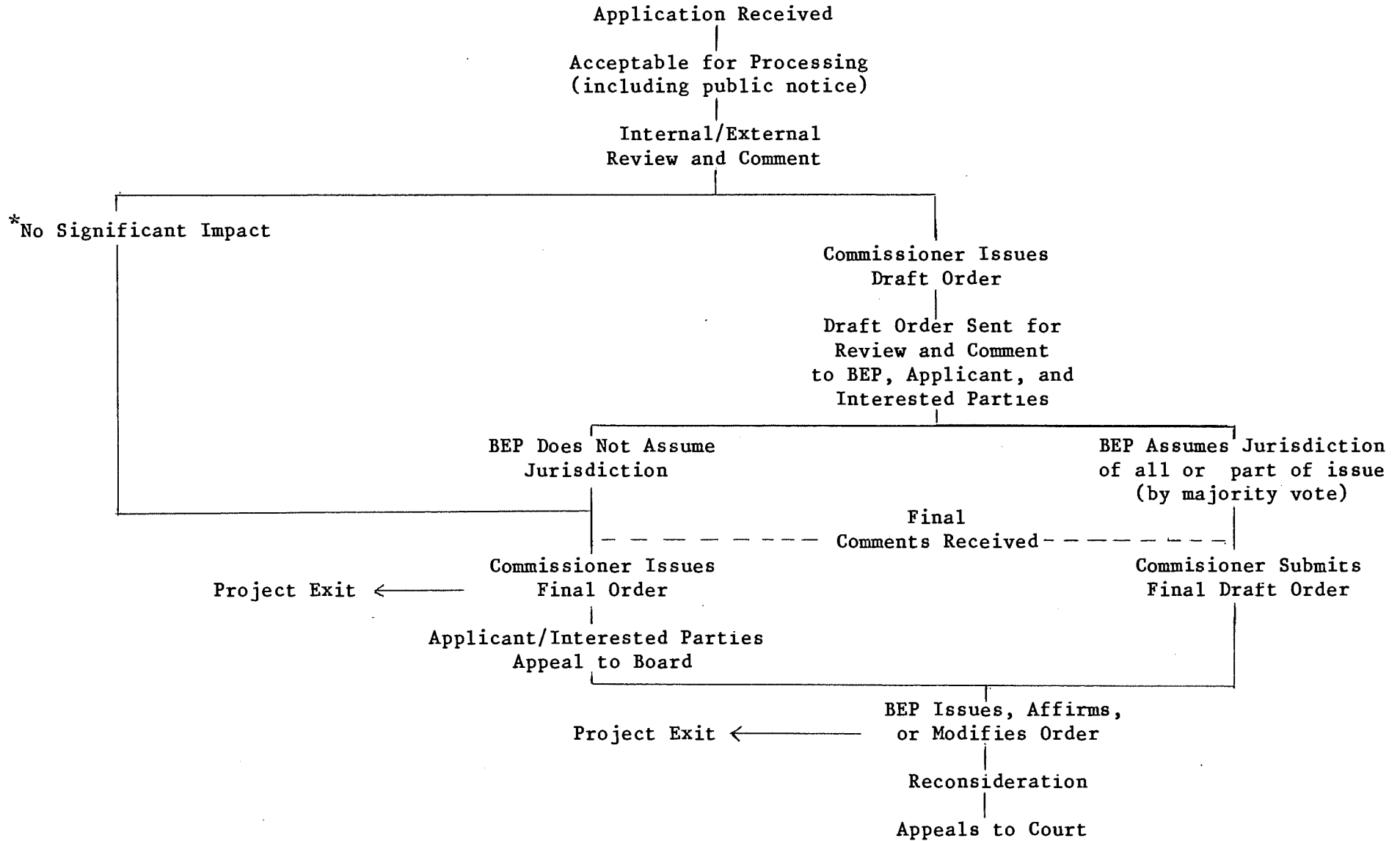
c) Administrative functions should be performed by the Department, with regulatory policy decisions handled by the Board. This process is further described below.

d) Management training and reviews of the decision process should be an important and continuing departmental activity.

2. There should be a separation of administrative activities from policy making activities with the Commissioner clearly responsible for administration and the Board responsible for regulatory policy. The overall evaluation process carried on by the Task Force does not suggest a need for any change in the basic organizational structure of the Board, but does repeatedly suggest revisions in Department and/or Board roles. The Board should continue to make all decisions concerning rule-making and regulation-setting activities and should have the capability to assume responsibility for any permit action which could cause significant policy change or establish precedent.

a) A suggested permit procedure is described on the following chart.

PROPOSED DEP/BEP PERMIT APPROVAL PROCESS



\*"No Significant Impact" includes decisions involving applications which the BEP presently has authority to delegate to the Commissioner, permit or license renewals which essentially reenact existing conditions with no new significant issues raised and permits following procedures described as general permitting, permit by rule, or simplified procedures.

The delegation of routine permit decisions to the Commissioner seems to be a logical process of simplifying procedures that is rather consistently followed in other states reviewed. Delegation would also occur for those permits deemed by the Board to not require their further involvement after reviewing the draft order.

The advantages of the proposed system would be to clearly place the initial (and in some instances - final) permit decision at the Department level helping to reinforce the concept of a logical decision process while still allowing recourse to the Board by either applicants or interested parties. This concept allows for priority assignment of Department and Board time and resources to appropriately reflect the relative importance of various permits and policy needs. The concept allows the Board to consider only those permits it deems appropriate and therefore determine its own needs. This will allow the Board to allocate priorities and to maximize the time spent on establishing rules and regulations and on the more important policy issues. To be successful, the process must assure opportunity

for the public to be informed and participate.

b) The responsibility for Departmental organizational matters should rest with the Commissioner and traditional executive/legislative procedures. The current Board approval authority clouds the jurisdiction of the Commissioner for management related decisions.

3. Additional mechanisms should be initiated to assist in dispute resolution over technical and peripheral issues. The applicant and staff often spend considerable and valuable process time differing over highly technical matters or factual issues that should more logically be resolved once for use in evaluating many applications. The Task Force suggests two procedures that should be considered in these areas:

a) The Department, with applicant concurrence, should initiate on a trial basis in several different areas, a mediation process to resolve technical disputes and issues of fact. The Maine Development Foundation staff should assist the Department in arranging for this procedure.

b) Additional use should be made of joint evaluations or independent, outside analysts for factual appraisals that are repetitive. There are issues involved in the permit process that require judgements that supercede an individual



application. Future energy costs, standard financial analysis assumptions and other similar issues should be consistently available for various permits and developed and updated on a joint basis and/or through the use of outside independant analysts with credibility among regulators and applicants.

4. The Department of Environmental Protection should implement a department wide management information system. This system should be capable of reporting, by exception, on all permit applications so that managers can become aware of applications that are not on schedule before agreed upon time frames or statutory deadlines are reached and resolve delays on an informed, priority basis.
5. The time limit for air emission license renewals for large boilers should be extended. Currently large boilers may be permitted for only two years. The staff workload and priorities are such that renewals are delayed long beyond the permitted period. While this apparently does not create a legal problem for the individual applicant, the uncertainties and perceived delays create an unnecessary image for the Department. It would seem appropriate to allow for these boilers to be licensed and/or renewed for up to five years, similar to smaller boilers.