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Coordination of a Large Environmental Permitting Effort

Kenneth T. Kristl and Jennifer T. Nijman

Obtaining an environmental permit for a new facility or expansion of existing operations can be a daunting task. A company may spend significant resources and time developing the technical and economic details of such a permitting effort, only to have it bear no fruit. That is because several states have created an additional hurdle to the completion of the permitting process: to convene a public hearing on the merits of the proposed facility or expansion. Such hearings allow individuals and groups to present opposing views and data to prevent the facility from ever operating as the owners envisioned. Without a careful strategy for approaching a public hearing, facility owners risk losing the hearing or having significant additional restrictions imposed on facility operations.

Our involvement in the successful permitting effort for the Waste Isolation Pilot Plant (WIPP), the nation's first deep geologic repository for mixed radioactive and hazardous waste located in New Mexico, as well as permitting and siting hearings for landfills and waste-to-energy facilities confirms that certain coordination efforts help achieve the desired permit results. Of course, community relations should play a significant role well before the hearing preparations begin, as part of a facility's general management. In addition to the implementation of a community relations plan—a topic worthy of a separate discussion—three important steps are critical to the success of a large environmental permitting effort:

- Developing a legal and technical team that will work together closely and spearhead the permitting effort;
- Developing a strategy for presentation of the facility owners' case, with due consideration for the audience and any likely opposition; and
- Developing a strategy for controlling the proceeding through procedural mechanisms.

This article examines each of these steps in developing a successful permitting strategy.

Developing the Legal/Technical Team

A successful environmental permitting effort requires both technical and legal information and expertise. It is unreasonable and dangerous to expect that the

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attorneys representing the owners will ever obtain the same level of knowledge as the technical staff who have worked with the proposal for months or years. Likewise, a thorough understanding of the legal implications is best provided by attorneys with experience in the legal aspects of environmental permitting. Thus, the first, most important step of any environmental permitting effort is the formation of a team that combines the technical knowledge of staff and outside experts with the legal knowledge of in-house and outside counsel. This team should be formed as early as possible within the process for a number of reasons.

Early team formation has several advantages. It helps to define each team member's role in the team effort. A team member's understanding of all the resources and roles of other team members helps create more efficiency during critical periods when teamwork can make the difference between winning and losing.

Coordination also must occur between in-house and outside legal counsel. A clear understanding of roles and responsibilities in forming and executing legal strategy is critical to the effective function of the legal component of the permitting team. Because it is likely that the legal component will have more experience with the actual permitting process, good coordination between in-house and outside counsel can serve as a model for the coordination necessary between the legal and technical components of the permitting team.

Computer litigation software is one way to coordinate between legal counsel and solidify the team. This software allows immediate, confidential access to hearing preparation material for all parties, regardless of location. In addition to handling a database of documents (which can be imaged into the database), the system contains and coordinates witness testimony outlines, memoranda, and research and provides an internal e-mail capability.

Using workgroup software in permit hearings allows the entire trial team to build an online case notebook for planning strategies, sharing ideas, and reviewing the imaged case materials. The software speeds the acquisition and communication of knowledge among the team members and also helps to better organize case materials, increasing efficiency.

Strategy for Presenting the Case

Once the legal and technical components of the permitting team are determined, the next important step in the permitting effort is to develop a strategy for presenting the case that a permit should be issued. Several important concerns drive strategy development: identifying what must be shown to obtain a permit; identifying and understanding the audience to be convinced; identifying the best means for communicating the case; witness selection and training; and the use of graphics and demonstrative exhibits to illustrate the

case. Each of these concerns can significantly effect the presentation of the case.

Identify the Required Elements. The initial component in developing a strategy for presenting a successful permitting effort is to identify the required elements for permit issuance, which can vary widely from state to state. For the WIPP proceeding, New Mexico's regulations only provide that the permit applicants bear "the burden of proof." N.M. ADMIN. CODE tit. 20 § 4.1.901.E.6. That vague standard was ultimately interpreted to mean that the applicants must establish by a preponderance of the evidence that all regulatory requirements pertaining to the issuance of a permit have been satisfied. In contrast, Illinois law requires a "pollution control facility" to obtain siting approval of the local governmental body with jurisdiction over the facility by demonstrating "compliance" with nine criteria, including need, protection of public health, potential effect on the character and value of surrounding property, and impact on traffic patterns. 415 ILL. COMP. STAT. 5/39.2 (a) (1999).

For example, if you must "demonstrate compliance" with criteria relating to impacts on traffic patterns, you know you must have evidence on traffic patterns and can begin to consider the types of proof (studies, expert testimony, and so forth) that will meet the burden.

Understanding the required elements allows the permitting team to begin assembling the evidence necessary to gain approval. In determining the required elements, it is important to consider *all* steps in the process leading to final approval, and not merely the permit hearing. For example, in seeking siting approval for a landfill expansion in Illinois, a client was required to show that "the facility is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILL. COMP. STAT. 5/39.2(a)(I) (1999). This element might be satisfied by showing that other, more distant landfills would be inconvenient or more costly alternatives. However, because the client's expansion could effect low-grade wetlands, a Section 404(b) permit from the Army Corps of Engineers was required. The regulations governing such a permit require a showing that there is no "practicable alternative" to the wetlands filling, 40 C.F.R. § 230.10(a), which would not be satisfied by a showing of mere inconvenience. Knowing that a wetlands permit was required strengthened the evidence on the siting element showing that the landfill expansion was necessary because there was no practicable alternative. In that case, awareness of the wetlands permit requirement allowed the needed evidence to serve two purposes and avoid a potential evidentiary conflict later.

Identify the Audience To Be Convinced. Once the required elements are identified, the next important consideration in developing a strategy for presenting a successful permitting case is to identify the audience that must be convinced by that case. Often, the regulations dictate the actual decisionmaker to grant the per-

mit, such as a hearing officer, administrative judge, or a particular deliberative body. For example, it is common for a siting hearing in Illinois to take place before the county board or city council acting as the "judge" for the siting decision. The nature of the decisionmaker will have a direct impact on the types of evidence or other materials used to present your case. An administrative judge or hearing officer with extensive experience in similar matters will likely bring a significant technical and regulatory expertise into the proceeding, while a county commissioner or city council member who has no technical background may need additional assistance in understanding the technical justification for the permit.

While a statute or regulation may specify a particular decisionmaker, it is also possible that a wider audience must be convinced for the permitting effort to succeed. For example, in the siting of a landfill or waste transfer station, there may be significant community concern about the impact of the proposed operations on the surrounding community. A facility operator seeking approval for such operations is well advised to be sensitive to issues raised by the community; if such concerns are ignored, the facility operator risks objections or other efforts that could complicate or prevent the permitting effort. This is especially true when the decisionmaker is an elected official. It is unwise to believe that an elected official cannot or will not be affected by the concerns of constituents.

An essential part of understanding the audience is the recognition of and appreciation for the opponent's position. The permit team should analyze the historical positions advocated by those opposed to the permit effort in order to understand and anticipate likely arguments and presentations that will occur during the hearing. Preparing a database of articles or other statements by such opponents can be an important tool in the permitting process. Developing responses and rebuttal positions to these opposition positions allows the permit team to structure the initial case presentation to address these concerns in a manner that casts the issues in a light most favorable to the applicant. Thus, while the opponents are not part of the audience to be convinced, they are an essential component to formulation of a strategy that has the highest likelihood of giving the decisionmaker the necessary facts and arguments to justify issuance of the permit.

Identifying the Best Means for Communicating the Case. Another important component to a successful permitting effort is understanding and selecting the best means available for communicating your case. For example, while an experienced litigator may wish to have an extensive presentation through oral testimony of witnesses, such a presentation may in fact be detrimental. The permitting team must seek an optimum balance between oral testimony and other methods of introducing important information into the record.

These methods can include the submission of written testimony or declarations and affidavits, stipulations as to fact, or other issues not in serious dispute, and judicious editing of oral testimony. In connection with the public hearing for the WIPP, for example, the New Mexico regulations specifically recognized that oral testimony and written comment were entitled to the same weight. We thus shortened the oral presentation, and instead submitted to the hearing board significant amounts of critical information in writing.

The use of nontestimonial methods for presenting information provides an additional bonus: avoiding cross-examination of testifying witnesses. Under the New Mexico regulations, for example, both parties and the public were entitled to cross-examine all witnesses in the public hearing. Thus, opponents and other interested persons had additional opportunities to cross-examine witnesses, which could significantly extend the public hearing as well as present opportunities for opponents to benefit from witness testimony. Minimizing the opportunities for cross-examination while assuring that all relevant factual information is made available to the decisionmaker is the balancing act that the permitting team must perform in determining how their case will be presented.

Witness Selection and Training. As with most litigated matters, who tells the story and how it is told can dramatically affect the outcome of the case. The typical nonenvironmental case may have several fact witnesses and one or two experts. These experts are usually retained, in part, because they are experienced in providing testimony. In the environmental permitting hearings, however, almost *all* the witnesses are technical "experts" who may have little or no experience in providing testimony or in dealing with the legal process. The technical witnesses know their facility and view the permit process as exclusively technical. The goal for the permitting team, therefore, is to obtain "buy-in" to the legal process from all potential witnesses while narrowing the field of witnesses testifying at the hearing. Witness training sessions help meet this goal.

Getting Buy-In: Initial Witness Preparation. To complete the team that will handle the permit proceeding, counsel must conduct a preliminary witness training session. The initial training session should be overinclusive so that all potential witnesses are in attendance. In this way, the entire technical staff has the same information and each person feels like a valuable member of the team. This is the case even though you have limited the scope of your oral presentation at the hearing. An outside witness training or communication consultant can be helpful with this process.

The initial training should include education about the hearing process to make the witnesses comfortable with the set up, parties, and adversarial nature of the proceeding. Next, training should review the unique communication situation and explain the importance of

nonverbal behavior. The training can then educate witnesses about how to listen, respond, and give nondefensive responses. Because environmental matters are very emotional, witnesses should receive specific training in dealing with emotional questions and the public. Witnesses should be asked at this initial training to write down questions or issues they hope never to face. Finally, witness training should include a description of cognitive strategies for stress management and anxiety reduction, as well as time for questions and answers.

In addition, the attorneys should conduct short (half-hour) direct and cross-examination practice sessions for each witness in the witness' technical area of expertise. We find most witnesses enjoy this brief session, are able to practice some of the communication skills addressed, and begin to feel part of the process. It can be helpful to videotape these sessions and review them with the witness. A detailed evaluation and follow up should occur for each witness to help attorneys establish rapport while narrowing the number of witnesses and determining which witnesses need more specific training.

The Mock Hearing. The second aspect of training is the mock hearing. Preparing for and conducting the mock hearing provides valuable insight to changes needed in the presentation of your case. The preparation should include a short (half day) refresher course on the issues addressed in the initial training. Witnesses also will be reminded to stay in their areas of expertise, to avoid answering legal questions, to refer back to the "themes" in facing tough questions, and to say, "I don't know" when appropriate.

The format of the mock hearing should mirror the actual hearing with regard to room set up, rules of procedure, opening statements, evidence from both sides, and closing arguments (if permitted). Unlike a typical mock trial with the focus on decision making by a judge or jury, the focus here is on strategy development and dress rehearsal, assessing how key themes play in the context of the real witnesses, and evidence. The mock hearing is also an opportunity to work with witness panels, which often are allowed in environmental permitting cases, and demonstrative exhibits. Attorneys on the team can conduct cross-examinations, though the attorneys who plan to present the witness at the hearing should not cross-examine that same witness—the rapport with the witness could be affected. The mock hearing should be videotaped so that counsel and witnesses alike can review and alter their performances.

An outside, nontechnical observer or consultant should be present to provide feedback. If possible, the observer chosen should have similar characteristics or background as your hearing officer. Unfortunately, in many hearings you may have little advance information about the hearing officer. Thus, the consultant's contribution will more likely be the overall presentation, understandability, and credibility of material and witnesses.

In preparing for the WIPP hearing, the mock hearing led us to revise the opening statement, strengthen the demonstratives, change witnesses for one technical topic, and refocus certain technical issues. The witnesses and attorneys usually find the practice essential.

Use of Graphics. Visual aids are a key part of nonverbal communication. The graphics, however, must be persuasive and must give the right message. Visuals can be used effectively to define terms, show risk assessment comparisons, and educate the hearing officer and audience on the intricacies of the regulatory scheme and facility operations. Again, the aid of an outside consultant is essential. Though the attorneys know what they want to say in a demonstrative, specialists are trained in communication and visual effects. They are able to take complicated technical data and present it in an understandable form. Moreover, the consultant has access to technology that will make the demonstrative exhibit come alive. Of course, the amount of technology used must be carefully considered. The public, or a county board, can be offended by what they perceive as high-priced, "over the top" demonstratives. Similarly, one must weigh the number of demonstratives and only use them to stress a particular point. Relying on demonstratives for your entire case will lose your audience and appear overdone.

Controlling the Proceeding Through Procedural Mechanisms

In environmental permit cases, there are often many parties, many competing interests, and little guidance on the rules for the proceeding. Unlike most litigation matters where the federal or state civil rules of procedure apply, rules for hearings can be quite general and often silent on many issues. In the WIPP hearing, in addition to the Department of Energy and the New Mexico Environmental Department (NMED), there were twelve other parties involved in the hearing. NMED unilaterally issued procedural rules for the hearing in a "Legal Notice," resulting in a unique process. For instance, the legal notice adopted certain New Mexico regulations that had not yet been finalized for RCRA hearings. Further, the public not only had an opportunity to submit comments, as expected, but was permitted to cross-examine *any* witness.

All of these factors point to a need to control the process. Counsel should move, as early as possible, for adoption of a "hearing management order" aimed at filling the gaps in the applicable rules and regulations and giving structure to the hearing. The order might include a description of the "party" and the obligations of parties, time limits on openings, closings or cross-examinations, order of testimony and presentation, whether a rebuttal case will be allowed, times for public participation, procedures for prehearing submittals, and notice to opposing parties. If possible, agreement should be reached with opposing parties on as many issues as possible be-

fore presenting the motion to the hearing officer.

As with all litigation-type matters, flexibility is key. The hearing officer is apt to allow questionable evidence into the record, to allow any person to testify, and to let any question be asked. Counsel must be able to give a measured response and be willing to approach the effort in a unique fashion. How counsel develops the trial team, the case presentation, and the use of procedural mechanisms can positively effect the outcome of the hearing.