

2011: TRANSFORMING DEP'S PERMITTING PROCESSES EXECUTIVE SUMMARY

The Citizens Advisory Council (CAC or Council), created by the Department of Environmental Resources¹ enabling legislation², is a politically balanced group of 18 volunteers appointed by the House, Senate and Governor and charged with making recommendations for improving the work of the Department of Environmental Protection (DEP or Department). Since its inception in 1971, the Council has been actively involved in nearly every phase of environmental policy-making. **Council provides credible, non-partisan, quality assessments and advice on environmental matters of concern to Pennsylvania and has historically been recognized as independent and sensitive to the concerns of the public.** Council seeks to enhance public participation in all aspects of the Commonwealth's environmental decision making.

Pennsylvania's Constitution specifically bestows a right to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of the environment. Protecting our environmental quality and abundant natural resources are also critical to attracting and retaining companies and their employees, as well as tourists, and to protecting the well-being of our communities. While economic development is not DEP's mission, DEP's ability to conduct its programs in an efficient and timely manner is clearly linked to economic health. This CAC white paper focuses on DEP's permitting functions and permitting's profound impacts on environmental and community health as well as economic development.

Executive Summary:

A well-managed permitting program is critical to both environmental and economic interests and progress. The challenge for the Department is to provide an efficient process while ensuring adequate protection, transparency, and meaningful, timely public participation. Environmental outcomes should not be forgotten in the attempt to develop an effective process. **Permits should minimize if not eliminate or avoid environmental impacts from the permitted activity and be issued in a timely manner.**

- Rather than relying on anecdotal examples, DEP should evaluate permit review and processing data to document where real barriers and delays exist and whether and where there are inconsistencies among DEP regions. We suggest that DEP utilize the expertise and experience comprised in its various advisory committees to help evaluate permitting processing data and guidance for the relevant program areas. CAC stands ready to assist and advise in defining the parameters of the reviews, as well as with evaluating the result.
- There are inherent tugs-of-war in sharing responsibilities between agencies and between the different levels of government. Clarifying which level of government and which agency(ies) have responsibility and better coordinating permit reviews between them will make these critical relationships more efficient and less divisive in achieving mutual environmental goals, and ensure that environmental policies match the scale of the problems to which they are addressed. There is a need to assess relevant data to identify potential disconnects between reviews and approvals at different levels of government. Such a review may identify opportunities for more timely coordination between review at the local level and state/federal approvals.
- **Through aggressive pollution avoidance there may be opportunities to reduce and even eliminate the need for some permits as well as reduce future permittee liability.**
- A common criticism of DEP is that environmental rules are inconsistently applied and are subject to different interpretations by regional offices and Department bureaus. We recognize the very real need for flexibility in setting site-specific permit conditions. However, once permit conditions are issued, enforcement activity must be predictable and at a level and consistency that provides a

¹ The Department of Environmental Protection's precursor.

² Act 275 of 1970.

deterrent to future non-compliance. Adequate resources need to be provided to ensure a meaningful inspection and enforcement program.

- Funding should be sustainable, dedicated and workload related. This is a clear place where market forces should apply—program fees should reflect the cost of services provided. Program fees should be dedicated directly back to the relevant program (including staffing and training needed to meet the obligations of the program expeditiously) and the resource it protects. The regulated community's mantra that "time is money" and that permit delays are, therefore, costly should translate into support for program fees designed to ensure DEP's ability to conduct its permitting programs in a timely, consistent and efficient manner.

The CAC stands ready to advise and assist in these reviews.

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1. Permitting

The issuing of permits is one of DEP's primary responsibilities, its most direct interaction with the regulated community and its primary tool for ensuring that the Commonwealth's citizens and resources are protected from adverse impacts of regulated activities, such as discharges of pollutants to air and water. Consequently, the permitting process is often a focal point for dissatisfaction and criticism from both the regulated community and the general public.

Permitting is not just a paperwork exercise, with an obligation to grant a permit on request. A permit is the Commonwealth's permission, after careful review, to allow a minimal impact to the environment from an activity due to that activity's overall benefit to the Commonwealth. It is assumed that compliance with permit requirements will generate benefits that exceed the allowed environmental impact.

Correspondingly, paying a permit application fee does not in and of itself entitle the applicant to a permit; permit fees are part of the cost of doing business, not a risk-free guarantee that the application will be approved. However, paying the fee does create an expectation that the Department will act in a timely manner.

A well-managed permitting program is critical to both environmental and economic interests and progress. The challenge for the Department is to provide an efficient process while ensuring adequate protection, transparency, and meaningful, timely public participation. Environmental outcomes should not be forgotten in the attempt to develop an effective process. **Permits should minimize if not eliminate or avoid environmental impacts from the permitted activity and be issued in a timely manner.**

a. Document and evaluate

- Rather than relying on anecdotal examples, DEP should evaluate permit review and processing data to document where real barriers and delays exist and whether and where there are inconsistencies among DEP regions. Proposed changes should ensure

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⁴ Act 275 of 1970.

environmental protection and appropriate public participation as well as increased efficiency and simplicity (where appropriate).

- We suggest that DEP utilize the expertise and experience comprised in its various advisory committees to help evaluate permitting processing data and guidance for the relevant program areas. CAC stands ready to assist and advise in defining the parameters of the reviews, as well as with evaluating the results. The reviews should address parameters such as:
 - Departmental and applicant workload;
 - Clarity and simplicity of guidance;
 - Environmental outcomes achieved;
 - Opportunities for pollution prevention and enhancing sustainability;
 - Environmental justice concerns.
- The Bureau of Oil and Gas publishes weekly reports on the number of permits received, reviewed and acted upon, as well as inspections conducted and violations identified. This accountability should be mirrored by each of the permitting programs.
 - Develop standardized reports for e-Facts that would allow DEP to track the overall status of permits and associated processing times.
- Update, as needed, the follow-up survey distributed to all permit recipients and encourage responses. An updated survey could be useful in gathering feedback on external experiences and identifying areas for future review and consideration.

b. Identify opportunities for improving response times

- The Department asserts that some delays are caused by submission of inadequate permit applications, with the expectation that the Department will identify the problem areas and needed corrections at no cost or risk to the consultant but at the cost of increased workload on the Department and delays to the applicant. In addition to increasing the Department's efficiency, there may be a need to hold applicants accountable for their part in any delays. For example, higher fees create a higher business risk, which should encourage applicants to submit quality and complete applications rather than risk loss of the fee.
- Implement electronic permitting in all relevant programs.
- There are inherent tugs-of-war in sharing responsibilities between agencies and between the different levels of government. Clarifying which level of government and which agency(ies) have responsibility and better coordinating permit reviews between them will make these critical relationships more efficient and less divisive in achieving mutual environmental goals, and ensure that environmental policies match the scale of the problems to which they are addressed.

We hear continuing reports about delays caused by the back and forth required to obtain both local and state/federal approvals.

- Rather than relying on anecdotal examples, we suggest that there is a need to assess relevant data to identify potential disconnects between reviews and approvals at different levels of government. Such a review may identify opportunities for more timely coordination between review at the local level and state/federal approvals.

- Pre-permit meetings should be held for both simple and complex projects. These meetings should be coordinated by the Assistant Regional Directors (ARD) and include appropriate staff support and participation by other relevant parties.
- DEP's relationship with Conservation Districts has been strained in recent years due to miscommunications and discrepancies about delegation of responsibilities and authorities between districts and DEP. The districts are valuable partners and arms of the Department. DEP needs to resolve outstanding issues and clarify delegation of responsibilities and authorities.
- The Departments of Community and Economic Development, Agriculture, Transportation and other agencies should enhance coordination with DEP to better integrate environment as a factor in their decision-making.

In addition, DEP and other relevant agencies should identify, stress the value of and, where appropriate, formalize opportunities for joint agency communication, coordination and support. Executive staff from each agency should meet, discuss and identify areas where resources could be jointly targeted to maximize achievements (for example, coordinated grant-making to support common priorities).

- DEP should encourage and promote partnerships with local government associations (e.g., PSATS) and NGO's to provide training, education and delivery of those services that are not the primary responsibility of the agency.

c. Reduce the need for permits by promoting pollution prevention

Traditional environmental regulation focuses on controlling release, treatment and disposal of generated pollutants. Unfortunately, these technologies sometimes merely transfer pollutants from one form or medium to another. Even applying the best available planning, management and technology does not guarantee foolproof results; accidental discharges can still occur, potentially resulting in significant liability and cleanup costs.

A logical and efficient way to achieve environmental protection is to avoid, to the greatest extent possible, impacting the environment in the first place. Pollution prevention, or reducing pollution generation at the source, concurrently cuts raw material use, end-of-pipe control technology costs, long term environmental liability and risks to worker and public health and safety. **Through aggressive pollution avoidance there may be opportunities to reduce and even eliminate the need for some permits as well as reduce future permittee liability.**

- Institutionalize consideration of pollution prevention as a condition of (or precursor to) permitting.
 - Re-invigorate the pollution prevention office.
 - Institute training to instill in staff at all levels the need to better integrate pollution prevention and sustainability in daily decision making.

- Place prevention/source reduction atop a recommended hierarchy of pollution minimization, recycling, treatment and disposal/release as a last resort. Incentivize this hierarchy through market approaches, market adjustments⁵ and regulation.
- Move the market towards products that are less toxic and less persistent.

d. Communication: consistency, clarity and simplicity

A common criticism of DEP is that environmental rules are inconsistently applied and are subject to different interpretations by regional offices and Department bureaus. We recognize the very real need for flexibility in setting site-specific permit conditions. However, once permit conditions are issued, enforcement activity must be predictable and at a level and consistency that provides a deterrent to future non-compliance. Adequate resources need to be provided to ensure a meaningful inspection and enforcement program (see next section).

- DEP’s management system should ensure that procedurally, activities are conducted in the most consistent manner across all of the regional and district offices, to ensure that the regulated community and the general public are treated in a fair and equal way across the Commonwealth. Consistency of process (not necessarily outcomes) will ensure that all sectors are being dealt with equitably. Regularly review (and revise where needed) technical guidance and policies and procedure documents to be sure they are up-to-date, comprehensive and address the needs of the regional offices to most effectively and consistently perform their duties. Where appropriate and without compromising environmental protection, reduce unnecessary paperwork, simplify processes, reduce the use of technical and legal jargon, and coordinate multi-agency responsibilities. Input from affected parties, including the general public, should be solicited for this effort.
- Regularly evaluate communication effectiveness between central office and the regions, as well as among the regions, in order to enhance consistency of message and operation.
- Central Office should develop and provide permit training to ensure consistency, encourage networking between regional staff, and eliminate ‘silos’.
- Reach out to the regulated community and advisory committees regarding new or changing requirements and technology.
 - DEP needs to provide necessary outreach to enhance compliance of the regulated community through appropriate means such as trade associations, environmental groups and others.
 - Advisory committees have expertise and experience that can guide and complement staff development and capabilities and fill gaps in institutional memory.

e. Provide necessary resources

- Funding should be sustainable, dedicated and workload related. This is a clear place where market forces should apply—program fees should reflect the cost of services provided. Program fees should be dedicated directly back to the relevant program (including staffing and training needed to meet the obligations of the program expeditiously) and the resource it protects. The regulated community’s mantra that “time is money” and that permit delays are,

⁵ Pollution is an economic externality—it has impacts which are not borne by the producer, but which are imposed on others. Unless government acts to internalize such harms—requiring polluters to control their emissions or pay for the harm they cause—market failure and diminished welfare will result.

therefore, costly should translate into support for program fees designed to ensure DEP's ability to conduct its permitting programs in a timely, consistent and efficient manner.

- The "money back guarantee" policy should be reevaluated in light of limited staff resources, budget constraints and the increasing volume and complexity of permit applications. This approach was instituted well over a decade ago and may need to be realigned to ensure accountability on both sides of the permitting process (i.e., timely decisions by DEP as well as quality applications).
- Consideration should be given to possible funding mechanisms that discourage creation of future environmental liabilities by encouraging pollution prevention (e.g., disposal fees that encourage waste reduction, remining, etc.).
- Significant increases in demand on existing core programs (e.g., Marcellus) should be met with a commensurate increase in oversight capability supported with adequate resources.
- In addition to providing the resources needed for DEP to operate its programs efficiently and in a timely fashion, we also need to provide necessary (and sometimes mandated) support and assistance (technical and financial) when program authority is delegated to partner organizations such as conservation districts and local governments.

2. Inspections and enforcement

Once a permit is issued, adequate resources need to be provided to ensure a meaningful inspection, compliance and enforcement program.

- Lines of responsibility and authority must be clearly delineated (e.g., between conservation districts and DEP).
- Compliance and enforcement activity must be predictable and at a level and consistency that deters future non-compliance.
- DEP's management system should ensure that procedurally, permitting, inspection and enforcement activities are conducted in the most consistent manner across all of the regional and district offices.

Limited resources are trending DEP towards a more reactive/complaint driven mode in many areas (e.g., outdoor wood burner regulations). This allocates resources to responding to and remediating incidents after they occur rather than preventing them. **While some lower risk activities/issues may be appropriate for complaint driven enforcement, programs and activities that have the potential for serious impacts need to be prevention oriented, not remediation oriented.** The Department should always evaluate whether the activity is best managed at the state, county or local level.

3. Other operational improvements

Analyze how DEP does business and identify improved and more efficient ways of meeting mandates and providing for timely decisions without compromising environmental protection or opportunities for public participation.

- Agency staff needs to be focused on **both** environmental outcomes and process improvements, not just easily counted administrative measures. Since what gets measured gets addressed, actual measurement of environmental quality changes would daylight both accomplishments and shortcomings. Such measurements could then be used to develop a report card on the Commonwealth's environmental health. A **place based environmental report card** that

documents each locale's overall environmental and community health will help identify, address and prevent disparate impacts.

- Require applicants to demonstrate how they will protect environmental and community health. Reinstating a proactive pollution prevention office and integrate pollution prevention into the permitting process.
- Implement integrated, place-based, multi-media program review, planning and coordination, and assessment to ensure that programs are implemented within the context of the complete landscape of environmental law and regulation. This could reconnect "silos", streamline access through one-stop-shops, and better protect community health.
- Define an appropriate role for market mechanisms in managing environmental and public health issues. **Such mechanisms must demonstrate that they improve environmental outcomes, not just market success.**
- **Address the need for adequate and on-going training and for competitive salaries to retain personnel.**

4. Conclusion/summary/recommendations

Permitting, inspections, compliance and enforcement are core responsibilities of the Department and the primary vehicles for protecting the environment and public health from the adverse effects of pollution. Permitting is a required component of many economic development activities and, as such, needs to be a well-managed, timely and efficient process. Any revisions to the permitting process must ensure that all these needs are met and be based on an objective analysis of permitting review and processing data rather than anecdotal complaints. Equally important is the management of effective inspection, compliance assistance and enforcement programs that ensure activities are conducted in conformance with the approved permits.

DEP's ability to conduct its programs in an efficient and timely manner is clearly linked to economic health; supporting DEP's ability to efficiently and effectively meet its mandated responsibilities fosters our desire for Pennsylvania to be seen as a place with a high quality of life, where people want to live, work and recreate. Necessary resources must be provided to the Department so that it can conduct its programs and meet its mandates in a timely, effective and efficient fashion.

Even in difficult economic times, we must recognize that a healthy environment, a dynamic economy and the well being of our communities are directly linked. To make progress in one area, Pennsylvania must strive for simultaneous excellence in all and integrate environmental protection as an essential part of all Commonwealth decision making, not in isolation from economic and social goals.