



EFFECTIVE CITIZEN PARTICIPATION IN ENVIRONMENTAL PERMITTING

State permitting programs which have been approved by the U.S. Environmental Protection Agency (EPA) pursuant to federal environmental laws generally must include the public participation requirements applicable to EPA. These include requirements for public notice,¹ public comments,² and public hearings.³ The public participation requirements of the state permitting program may be somewhat different than the federal requirements and when the state is the permit issuing authority reference to the state requirements is essential. State permitting programs which operate independently of EPA approval tend to follow similar procedures. In order for citizens to effectively utilize these procedures, a basic understanding of the process and guidance on how to develop meaningful comments is needed.

I. Public Notice

Public notice is required to be given whenever a draft permit has been prepared.⁴ Notice is given by mail to persons on a mailing list developed by the agency.⁵ Publication of notice in a daily or weekly newspaper in the local area of the proposed facility is also required.⁶ "Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it" is also required.⁷ This latter requirement has overtones of constitutional due process requirements which may require that persons whom the agency can reasonably identify will be potentially affected by the proposed activity be given personal and individual notice.⁸ The content of a public notice is required to include such things as the applicant's name and address, facility location, who the public may contact for further information, comment and hearing procedures, etc.⁹

¹ 40 C.F.R. §124.10.

² 40 C.F.R. §124.11.

³ 40 C.F.R. §124.12.

⁴ 40 C.F.R. §124.10(a)(1)(ii).

⁵ 40 C.F.R. §124.10(c)(1)(viii). Persons wishing to receive notice of impending permit decisions should write the agency and request to be placed on the appropriate mailing list.

⁶ 40 C.F.R. §124.10(c)(2)(i) and 124.10(c)(2)(ii).

⁷ 40 C.F.R. §124.10(c)(4).

⁸ See Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S.478 (1989); Mennonite Board of Missouri v. Adams, 462 U.S. 791 (1983); Save Our Dunes v. Alabama Dep't of Env'tl. Management, 834 F.2d 984 (11th Cir. 1987); Walker v. Cleary Petroleum Corp., 421 So.2d 85 (Ala. 1982); Ex parte Lauderdale County, 565 So.2d 623 (Ala. 1990).

⁹ 40 C.F.R. §124.10(d).

It is not only imperative that citizens know how to obtain notice, but it is also imperative that they learn how to evaluate a notice for defects. If the content of the notice is incomplete or an individual is known by the agency to be potentially affected by the proposed activity and is not given actual, personal notice, the notice may be defective and the agency may be required to commence the process over. Agencies are notoriously reluctant to undertake greater notice burdens and will likely resist any effort to require additional notice. A lawsuit may be necessary to obtain an appropriate remedy for a defective notice.

To evaluate the content of the notice for defects, compare the agency's rules on content of public notices to the notice itself. If an item was omitted from the notice, include in your comments to the agency a statement that the notice was defective and request that the agency publish a new notice.¹⁰

II. Development and Submission of Comments

A. Comment Period

Immediately following the publication of notice of intended agency action, there is limited time during which the agency will receive comments on the proposed action from the public. The comment period is usually 30 days, although with regard to hazardous waste permits, the period is 45 days. For an individual to learn the regulatory requirements and procedures as well as evaluate permit applications and other relevant publications and documents and develop meaningful comments, a 30 day comment period is completely inadequate. The permitting agencies are not likely to be very helpful explaining the regulatory requirements and procedures to the extent necessary. In fact, all that they are likely to do is make records available for inspection and copying.

Although an extension of time to submit comments may be requested, it is rarely granted. If you do request such an extension, you should support it by indicating the volume of materials to be reviewed and noting the time utilized by experienced agency personnel in developing the draft permit (often several months). Also point out that you have been prompt in requesting information and note any delays you have experienced in receiving information from the agency.

B. Information Collection

A prospective commenter should immediately request the following documents for evaluation:

1. the draft permit;
2. any permit rationale or fact sheet prepared by the agency;
3. the permit application and supporting materials;
4. all studies or evaluations performed by the agency;
5. all rules addressing procedures for the issuance of the permit;

¹⁰ The agency or the courts may insist that the defect somehow have caused you to be prejudiced, *i.e.* that it interfered with your ability to respond to the public notice.

6. all rules addressing qualification for a permit and development of permit conditions;
7. any training manuals which the agency uses to train its permit writers;¹¹
8. all documents relied upon by the agency in establishing permit conditions;
9. all notices of violation, administrative orders and judicial complaints issued to the applicant by the agency.

Also, consider reviewing the agency's permit file. Usually the applicant and the agency have engaged in correspondence concerning proposed permit conditions. You can quickly identify those conditions which the agency proposed, but relaxed after negotiation with the applicant. The basis for the agency's retreat should be evaluated and criticized in comments to the agency if not justified.

C. Permit Application

Review the permit application to determine if it contains all the information required by the agency's rules and the application form itself. If it does not satisfy all requirements, your comments should assert that the application is incomplete or deficient and should not be processed or granted until it is complete and sufficient. You should also demand that the comment period be extended or re-opened after receipt of an amended application. Because agency personnel place little importance on formalities and technical requirements, it is not unusual to find an incomplete or deficient application. Such a find can result in the suspension of further processing of the application until the application is made complete and a new notice and comment period is provided. This can buy valuable time in which to continue the process of self-education.

D. Prohibitions

Next, identify those agency rules which establish prohibitions. Such prohibitions may appear straightforward, (*e.g.*, no landfills may be located in a wetland), while others may not (*e.g.*, no permit may be issued which will result in violation of applicable water quality standards). Prohibitions may also be stated as affirmative obligations (*e.g.*, the agency shall issue a permit unless the landfill site is in a wetland). Once the prohibitions have been identified, the major task of evaluating the applicability of the prohibitions to the proposed activity must be undertaken. This often requires some contact with "science." For example: Does the land where the landfill is to be located have the characteristics of a wetland? Will the discharge be toxic to aquatic animals and plants?

E. Permit Conditions

Next, identify the agency rules which specify what must be contained in a permit and evaluate whether the draft permit contains all of the required conditions. Again, some rules require that the conditions simply be transferred verbatim into the draft permit, while other rules require an interim step to be performed. For example, a rule which requires that a permit contain a limitation on pollutant discharges

¹¹ For example, "NPDES Permit Writer's Manual," EPA 1996.

adequate to maintain water quality standards requires an identification of the water quality standards and an evaluation of the impact of the discharge on each of those water quality standards.

F. Compliance History

Next, examine the compliance history of the applicant. Agencies are traditionally reluctant to deny permits to applicants for any reason. Doing so appears harsh because it has the very real effect of causing economic hardship to the applicant. The agencies also feel that they have other mechanisms to punish a violator which are adequate and that further punishment by permit denial is excessive. Permit denial is not punishment for past acts; it is prevention of future wrong doings by those who have already demonstrated disregard for their compliance obligations. In any case, the agency should be encouraged to deny a permit to any applicant which is presently in violation or has a history of violations sufficient to make the applicant a poor risk as the operator of a facility which has the potential to harm the environment or people.

III. Public Hearing

At anytime during the public comment period, a public hearing may be requested.¹² Usually, all that is required to have a public hearing scheduled is a demonstration of a "significant degree of public interest in a draft permit(s)."¹³ This may be accomplished by having many individuals request a hearing or by the submission of petitions. Alternatively, a public hearing may be scheduled if a hearing might help "clarify one or more issues involved in the permit decision."¹⁴ Suggest to the agency that a hearing will help you or others clarify particular issues.

One should not risk deferring the submission of written comments during the public comment period because a public hearing has been requested. A hearing may be denied and the opportunity to submit comments may by then have expired. The agencies will tell you that only substantive comments directed at whether the agency's analyses and determinations were correct under the applicable rules is all that they will consider. This may or may not be so. The presence of a large and hostile crowd at a public hearing can't help but cause the agency to be more careful in its evaluation. And if the agency finds a flaw in the application or its analyses or determinations, the expression of public sentiment may be the decisive factor in its final decision. Citizens should also consider using a public hearing as an opportunity to reach the public through the news media. Public criticism of the proposed activity may also discourage the applicant sufficiently to withdraw his application.

¹² For permits which are obviously going to be controversial, the agency may announce a public hearing at the same time it gives notice of its intended action. This procedure speeds the agency's ability to reach a decision on the application.

¹³ 40 C.F.R. §124.12(a)(1).

¹⁴ 40 C.F.R. §124.12(a)(2).

IV. Administrative Review

Assuming that the agency has issued a permit despite opposition, administrative appeals are available to have legal and factual issues reviewed again. Such appeals are costly and difficult to win. The decision to pursue an appeal should include consideration of the likelihood of success on each of the particular issues to be reviewed. Often, this will require evaluation by a competent attorney. The agencies will likely prevail if the evidence is contradicted and their legal interpretations are reasonable.

V. Judicial Review

Following administrative appeal, there is opportunity for judicial review. If you lost on your administrative appeal, the chances of success on judicial review are even smaller. Nevertheless, parties have succeeded in reversing the outcome of administrative appeals.

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Legal Environmental Assistance Foundation, Inc. (LEAF)
1114 Thomasville Rd., Suite E, Tallahassee, Florida 32303-6290
Phone: (850) 681-2591; Fax: (850) 224-1275
leaf@leaflaw.org (Email); www.leaflaw.org