

PERMITS UNDER ATTACK: DEFENDING YOUR PERMIT FROM ALL CHALLENGERS

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Speaker Introductions



W. Douglas Hall



Joe Fleming



Larry Curtin

Background

Larry Curtin

Seminar Introduction

- The permit you need, whether for air, water, or waste, can be critical to your company's business
- Attacks in courts of law and courts of public opinion are becoming increasingly common
- These challenges threaten to delay, derail, or undo your permitting effort
- This course is designed to help you navigate the intricacies of shielding and defending your permit from such challenges



Types of Permits

- Tremendous Array of Environmental Permits
 - Pollution: Permits that allow the emission of pollutants or contaminants to the air, water, or land
 - Resources: Permits that allow the consumption or use of a resources, such as groundwater or minerals, or the taking of an endangered species
 - Construction: Permits that allow the construction of a new facility or modification of an existing facility

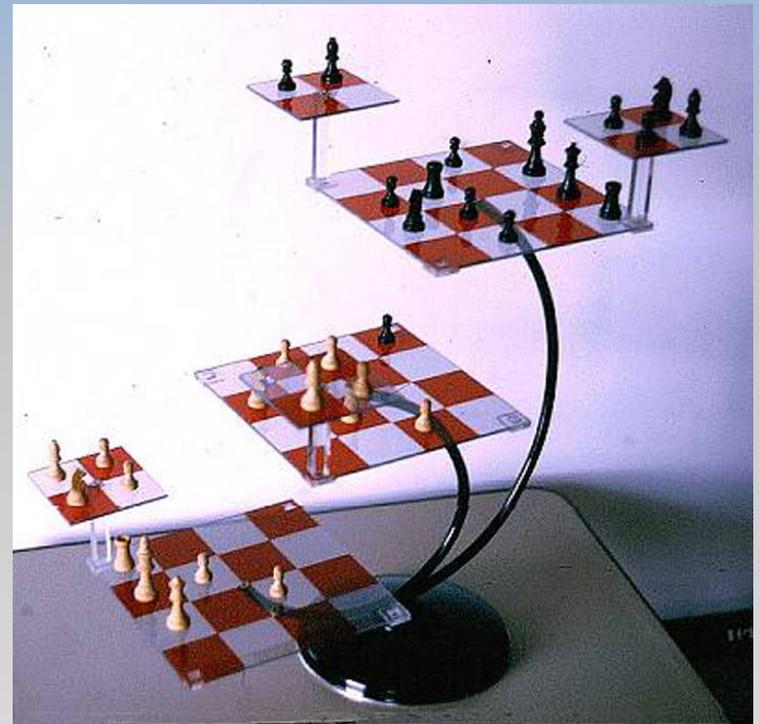


Permit-Like Approvals

- Special cases: permit-like or associated approvals
 - National Environmental Policy Act
 - Endangered Species Act consultations
 - Federal land manager approval
 - Florida Electric Power Siting Act
- These processes can be a roadblock to action on a permit

Permitting Agencies

- Federal, state and local agencies can all require permitting
- Permitting can be overlapping, requiring more than one approval for the same action or conduct, like a 3-D chess game



Types of Permit Challenges

- Direct challenges:
 - Permit challenges/appeals
 - Can be brought by the permittee or interested third parties
 - Generally administrative in the first instance
- Collateral legal challenges:
 - Indirect challenges to permits, necessary approvals (like NEPA, ESA), permitting processes, agency permitting authority (statutes and regulations), and permit implementation and compliance
 - Generally brought by third parties
 - Generally initiated in court
- Nonlegal challenges:
 - Lobbying to change statutes or regulations
 - Public relations campaigns

Early Planning for the Defense: Top 10 Lessons Learned

Larry Curtin

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Not Valuing the Permit

- Where does this permit fit in your company or client's operations?
- Does your company or client depend on it for significant operations?
- Use this information to determine what it is worth to defend the permit on a cost-benefit basis



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Failing to Understand the Risks

- How “exposed” is the permit to changing regulatory values and interest groups?
- What friction do you expect, and what friction is possible even if unexpected?



What's the big deal? It's always worked out before.

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Assuming the Agency will be as Motivated as You

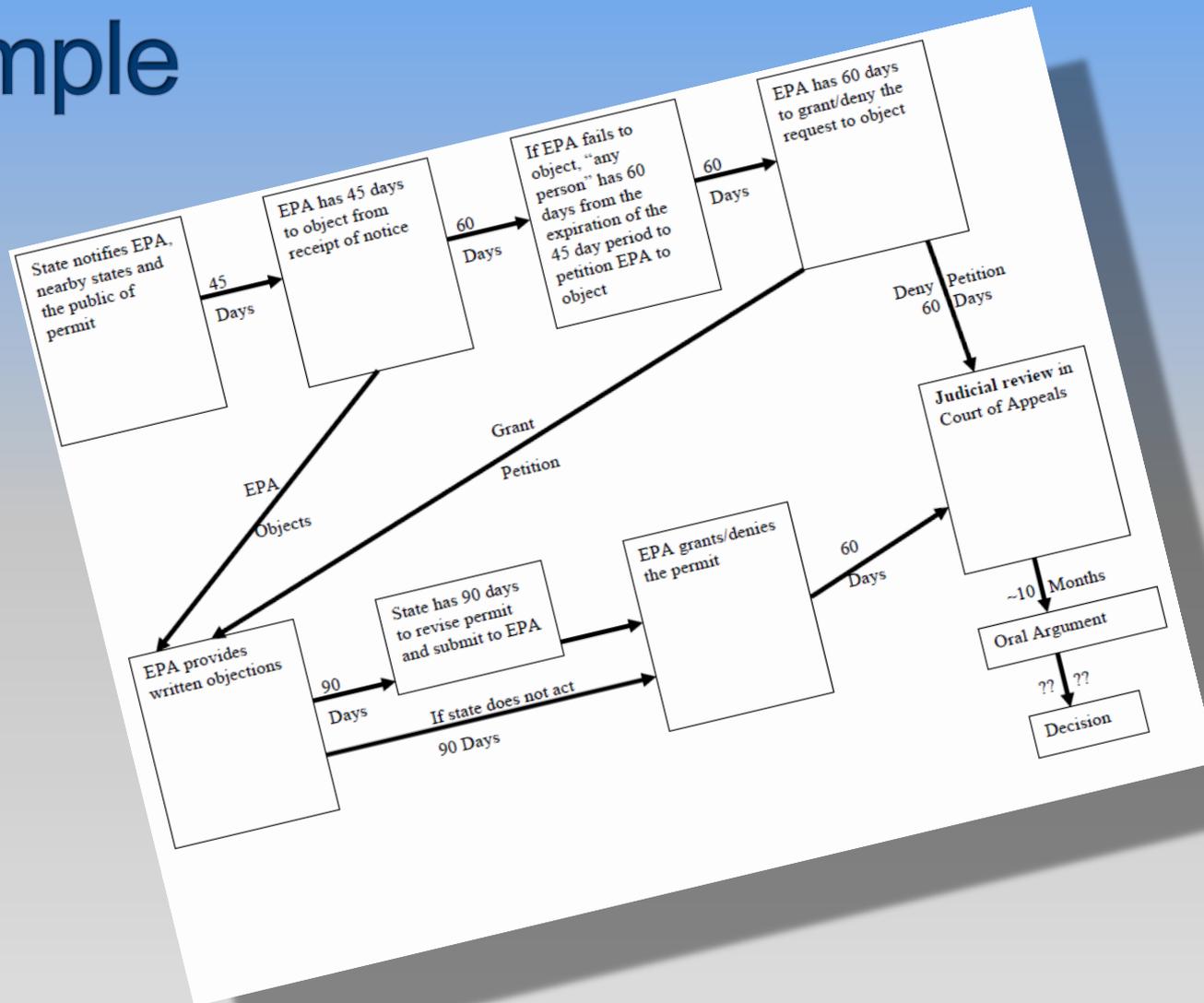
- Permitting agencies are motivated by many factors that are unlikely to line up with your motivations
 - Budgetary issues
 - Policy and/or political issues
 - NGO/citizen group pressures
 - Personnel issues
- Don't make the mistake of assuming “business as usual”
 - Consider a government relations strategy in addition to legal/technical strategies

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Not Mapping It All Out

- It is critical to map out the entire permitting process
 - What agencies are involved?
 - What are the statutory or regulatory steps?
 - What is the timeline associated with each step?
- There are many ways to do it, but the process of doing it is important to identify key issues and areas of weakness, and for other planning purposes

Example



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Underestimating the Application Process

- Permitting agencies engage in a permit application “dance” with the applicant:
 - Completeness process may take a long time.
 - Administrative completion of the application often triggers legal consequences, including deadlines
 - Weak or incomplete applications delay the process
 - “Business as usual” can be your enemy
 - The 90/10 Rule

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Neglecting the Legal Analysis

- Every permitting process has potential land mines
- “Custom and practice” can go out the window in the face of challenges
- It is useful to research key issues in advance



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Leaving Counsel Out

- If warranted by the importance of the permit, make counsel part of the “team” early
- Counsel can help:
 - Map out the permit steps
 - Conduct legal analysis
 - Assure legal privileges are appropriately applied (more on that later)
 - Help with overall strategy



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Not Involving the Right Experts

- If you expect a challenge, consider hiring consultants who can help both with the permitting and the challenge
- In situations where testimony is permitted, expert testimony can be determinative
- Even in pure “record review” cases, top notch consultants can help guide the defense



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Missing Opportunities to Help the Agency

- There are many strategic points in the permitting process where the permittee can provide help
 - Meet with or talk to the agency regularly
 - Provide requested information
 - Anticipate key points of friction with third parties and/or other agencies, and address those points
 - Review key comments received by the agency
 - Help the agency with required agency documentation, such as draft language for preambles, responses to comments, and the like
 - Double check the record itself
- The agency may not accept or rely on the help, but at least you will have done all you can

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Failing to Build the Record

- Almost all permit proceedings are based on the administrative law concept of record review
- The reviewing tribunal is limited to reviewing the record of material considered by the decision-maker
- It is critical that the record contain all documents necessary to support the permit
 - Alternatively, if the permit is decided adversely to the permittee, it is also critical that the record support the permittee's view

Defending the Challenge

Doug Hall

Step 1: Pay Attention

- Most direct and collateral permit challenges are filed against the permitting agency, not the permittee
- Put mechanisms in place to make sure that your client or company is timely alerted to any such challenges
 - Ask agency personnel to alert you
 - Search relevant court or agency dockets
 - Pay attention to trade and other press
 - Communicate with your client

Step 2: Get Involved

- Where the permittee is not automatically a party to a challenge, take appropriate action to get involved
- Involvement usually involves some form of intervention
- If your company or client is not a “party,” it may have limited or no legal rights
- But beware: participation comes at a price

Step 3: Coordination

- Coordinate with counsel for the permitting agency to the extent possible
 - Knowing the agency's plans will inform your judgment
 - Rarely it may be possible to proceed jointly
- Agencies are not always willing to cooperate

Step 4: Map Out the Strategy

- Look for jurisdictional or other early grounds for dismissal
- Discovery should be unnecessary in some cases
 - If it is permitted, plan for it
- Look for opportunities to achieve quick summary judgment



Step 5: Dealing with a TRO/PI

- Standard for an Injunction
 - A party seeking a preliminary injunction must demonstrate the following:
 - A substantial likelihood of success on the merits of the case,
 - Likelihood of irreparable damage or injury if the injunction is not granted,
 - That the balance of harms weighs in favor of the party seeking the PI, and
 - That the grant of an injunction would serve the public interest.

Step 5: Cont.

- Opposing an Injunction
 - Legal
 - Identify, research, and brief the key legal issues
 - Ensure that you preserve error and make a solid record for appeal
 - Factual
 - Investigate and document the important facts on which
 - Your opponent(s) likely will rely, and
 - Your defenses will be based
 - Ensure that your factual proofs are in admissible form (live witnesses, declarations/affidavits, documents)
 - Do not underestimate the time and effort, particularly as to third parties

Step 6: Motions and Trial

- Preparation, preparation, and more preparation
- Appropriately balance law, facts, and scientific and other technical issues
- Retain well-qualified experts with trial experience
- Stay focused on the determinative (and not ancillary) issues and keep them as simple and understandable as possible (e.g., the judge is not a PhD)
- Always remember that an appellate court is limited to the record and cannot consider arguments not raised below
 - Ensure that everything you want to argue above is properly in the record below

Step 6: Cont.

- Prepare yourself and your client for a war and not a battle
- An acceptable and timely settlement is sometimes preferable to an ultimate, but longer term, victory on the merits
 - Keep the lines of communication open and “keep talking”
 - Enlist the assistance of third-parties as appropriate
 - Understand your opponent’s wants and, more importantly, needs
 - “Win-win” scenarios are difficult but not impossible

Step 7: Appeals

- Some cases are destined to be appealed (and others are appealed anyway)
- Make sure to build a record for appeal



Permits Gone Bad: When the Permittee Challenges the Permit

- Permittee may challenge its own permit to address significant issues with restrictions or limitations imposed by the agency
- Slight strategy shift from defense to offense, but many similarities

Attorney-Client Privilege

- What is it?
 - #1: A communication;
 - #2: Made between a client and an attorney;
 - #3: In confidence; and
 - #4: For the purpose of seeking, obtaining, or providing legal assistance to the client



Just stamping a document
“privileged” is not enough

Privilege, Pt. II

- Definitions

- An attorney is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation
- A client is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer for the purpose of obtaining legal services, or who is rendered legal services by an attorney

Work Product Doctrine

- The *attorney-client privilege* applies to communications that an attorney has with a client. In contrast, the *work product doctrine* applies to documents and other tangible things, such as reports or electronic data of an attorney or a party, prepared in anticipation of litigation regardless of whether they pertain to confidential communications with a client

Work Product, Pt. II

- Two types of work product: fact work product and opinion work product
 - Fact work product: facts, documents, statements or other information gathered by the attorney in preparation for or in anticipation of litigation
 - Opinion work product: an attorney's mental impressions, conclusions, opinions, or theories concerning the case

Work Product, Pt. III

- Fact work product: A limited protection – information may be subject to production if the opposing party can demonstrate: 1) need for the materials to prepare the party's case; and 2) that, without undue hardship, the party is unable to obtain the substantial equivalent of the materials by other means (see Florida Rule of Civil Procedure 1.280(b)(4))
- Opinion work product: Almost always protected from disclosure

Work Product, Pt. IV

- Application: Courts have held that the work product doctrine potentially applies to witness statements, notes made by a client at the attorney's direction, research reports assembled to assist in the defense of a case, insurance claim files, and investigative photographs

Planning Considerations to Minimize Risk

Joe Fleming

Initial Considerations

Type of operation for the site

- Is the activity permissible?
- What project design suits your needs?
- What, if any, modifications may be considered acceptable?

Initial Considerations (cont'd.)

Economic value of the location, the activity

- Proximity to infrastructure, customers—Now?
Later?
- How much is the project worth to you—Now?
Later? If modified?

Initial Considerations (cont'd.)

Ecosystem challenges and impact on project design

- Wetland/stream impacts
- Water
- Air
- Wildlife
- Geology
- Climate change/rising tides

Initial Considerations (cont'd.)

Identification of/proximity to neighbors

- Noise, light and other impacts
- Dust
- Light
- Historic preservation
- View corridors
- Construction
- Design uses

Initial Considerations (cont'd.)

Impact avoidance considerations

- High quality or rare wetland or waters consideration
- Air consideration
- Special habitat consideration
- Historic preservation consideration
- Predictability considerations

Initial Considerations (cont'd.)

Impact mitigation

- Determination of amount/type required
- Reasonable assurance of mitigation success (opinions vary)
- Restoration
- New potential benefits

Pre-Activity Studies: Building the Record

Assemble your team (team will vary)

- Engineering
- Environmental/ecological/historic preservation
- Planning/Local land use
- Representatives for community (PR, media/risk control consultants)
- Legal

Pre-Activity Considerations (cont'd.)

Start early for more complex projects

Baseline data is important

Consider options/alternatives

Determine problems/advantages/
resources projects

Key Components of Pre-Activity Studies

Existing land use

Soils/topography

Streams and jurisdictional wetlands/
waters

- Water quality and quantity
- Manageability issues

Key Components of Pre-Activity Studies (cont'd.)

Hydrology (surface and ground)

Geology

Wildlife

Archaeological concerns

Historic preservation

Key Components of Pre-Activity Studies (cont'd.)

Socioeconomic concerns

Adjacent land use considerations

Downstream land use considerations

Urban

- Gentrification
- New thematic resource

Post-Activity Design

Impact mitigation requirements

- Mitigation area construction requirements
- Restoration
- Modification of resources
- Monitoring requirements
- Maintenance requirements
- Success demonstration requirements
- Long term management/perpetual protection

Post-Activity Design(cont'd.)

Long term management/ maintenance of project

Interaction of site with surrounding land uses

Final land disposition considerations

Evolving Agency Expectations and Interaction

County

- Public hearing process
- Local economic considerations
- Local community concerns
- Historic preservation

State

- FDEP, ERP, NPDES
- FFWCC concerns
- State Historic Preservation Office

Evolving Agency Expectations and Interaction (cont'd.)

Federal

- ACOE
- EPA
- USFWS
- Historic preservation
- Department of the Interior
- Other agencies

Meetings/site visits with reviewers, staff

Interact with NGOs, the Community

NGO concerns

- Early outreach
- Regular discussion

Community concerns

- Know/invest in your local customer base
- Contact your neighbors/know their issues
- Work with community and interest groups
- Reach out to local reps within the proper legal framework
- Get involved in the local community

COMMUNICATION IS CRITICAL!

Keep Your Eyes Open!

Pay attention during the process:

- Is there any mention in the press or online?
- Are community, NGO, interest groups involved?
- Is anyone commenting to the permitting agencies?
- What are governmental/agency interests?
- Make sure you get notified (you might not be!)

Respond to issues raised

Respond to those raising the issues: dialogue is key

Stay Coordinated!

Coordinate different levels of permitting staff with each other and with counsel for the permitting agencies to the extent possible

Coordinate agencies with each other

Agencies are not always willing to cooperate (and counsel are not usually kept in the loop until a challenge occurs)

Where Can the Risks Come From?

- Neighbors, local interest groups, environmental organizations, natural interest groups, and NGOs
- Local governments
- Quasi-governmental organizations
- Agencies
- Issues can be real or imagined
- Challenges on record, procedure, science, media coverage, policy or perception

Avoiding the Pitfalls

- Put together your team EARLY—don't wait for challenges or suits
- ENGAGE regulatory agencies early and often
- Be transparent and COMMUNICATE
- DOCUMENT your communications (make a record)
- PAY ATTENTION to chatter about you/your project (gossip, media, etc.)
- Increase your community OUTREACH/
involvement

Avoiding the Pitfalls (cont'd.)

- MANAGE perceptions/expectations
- IDENTIFY critical issues and address them proactively
- PREPARE for litigation in advance
- DON'T RELY on the agency to do any of this for you!
- Assume agencies may oppose the project (both directly and indirectly)
- Pay attention to project design, construction

Avoiding the Pitfalls (cont'd.)

- Pay attention to data collection
- Pay attention to maintenance and monitoring plans
- **Make sure the science is solid**
- **Make sure you're followed procedures**
- **Make sure you've hit the key issues**
- **Paper the record**
- Make your own record and submit/file it with applications and submissions to opposition groups and agencies

Dealing with Communications, Documents and Non-lawyer Participants in Administrative Hearings

Larry Curtin

WRITTEN AND ORAL COMMUNICATIONS

- Establish a protocol early in the process.
- Identify participants from the client, consultants, agencies and potential opponents.
- Identify privileges that may apply and requirements for applicability.
 - Who is entitled to the privilege?
 - Who can access documents?
 - How are documents to be maintained?
- Establish schedule for periodic communications by conference call or in person.

USE OF E-MAIL

- An area that always creates problems.
- Difficult to retrieve.
- Editorial comments are a problem.
- Too many "fingers in the pie".
- Creates discovery problems.

USE OF SOCIAL MEDIA

- Facebook-avoid.
- Twitter-avoid.
- Text messages-recognize that these are discoverable.

COMPANY OR CLIENT EMPLOYEES

- Identify participants.
- Identify areas of responsibility.
- Stay in your own lane.
- Avoid extraneous communications.

CONSULTANTS

- Identify potential testifying and non-testifying participants.
- Ensure that all understand requirements for privileges.
- Avoid "off the grid" communications.

AGENCIES

- Identify key agency personnel.
- Establish communications protocol for dealing with agency personnel.
- Ensure everyone understands these communications are discoverable.

POTENTIAL OPPONENTS

- Identification of potential opponents.
- Identification of issues.
- Establish how to communicate with potential opponents.

DOCUMENTS

- Permitting cases today involve lots of documents.
- Getting document review process under control early is essential.
- Determine if client has a document retention policy.
- Many document retention policies address what to do with draft documents.
- Similar to the communications issues, establish a protocol for handling documents.

DOCUMENTS

- Today, many of these documents are forwarded electronically.
 - This can create discovery problems.
 - Restrictions on forwarding are helpful.
 - Keep the documents among the primary team members.
- Notes on draft documents are discoverable generally, absent a privilege.
 - This can be counterproductive to the main case.
 - Establish a procedure for dealing with this issue.
 - Document retention policy, if one exists, must be adhered to.

DOCUMENTS

- Drafts shared with agency personnel may become public record.
- New procedures for establishing “prima facie case” rely on documents. Section 120.569(2)(p).
 - Some questions remain about the use of this procedure.
 - There may be hearsay issues.
 - Process, however, can be very useful.

OPPONENTS WITHOUT ATTORNEY REPRESENTATION

- Project opponents occasionally appear on behalf of themselves in administrative hearings.
- This type of representation can raise some sensitive issues.
 - They may not be completely familiar with procedures and deadlines.
 - Frequently missed deadlines.
 - May not understand discovery process.
 - Usually requires some kind of accommodation.

OPPONENTS WITHOUT ATTORNEY REPRESENTATION

- This type of opponent can evoke sympathy.
 - Care is needed to ensure they are not perceived as being bullied by the applicant.
 - If they also want to testify, cross examination can be delicate.
 - Exhibits are normally a problem for them.
- How best to handle this often depends upon the forum.
 - ALJs will normally just rely on the evidence.
 - Likewise, final orders going to agencies should not be a significant problem.
 - May be a different story with Governor and Cabinet.
 - Best approach may be to be accommodating.

QUESTIONS?

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