

DEFENDING YOUR PERMIT AGAINST LEGAL AND OTHER ASSAULTS

Timothy K. Webster
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 2005
(202) 736-8138
twebster@sidley.com

SIDLEY AUSTIN LLP
SIDLEY

Susan L. Stephens
Shareholder
119 South Monroe Street
Suite 300
Tallahassee, Florida 32301
(850) 222-7500
susans@hgslaw.com
www.hgslaw.com

Hopping Green & Sams

Attorneys and Counselors

David B. Weinstein
Greenberg Traurig, P.A.
625 East Twiggs Street, Suite 100
Tampa, FL 33602
813.318.5700
weinsteind@gtlaw.com

Greenberg Traurig LLP

Lawrence Curtin
Holland & Knight
315 South Calhoun Street, Suite 600
Tallahassee FL 32301
Phone 850.425.5678
larry.curtin@hklaw.com
www.hklaw.com

Holland & Knight

Speaker Introductions



Tim Webster



David Weinstein



Susan Stephens



Larry Curtin

Background

Tim Webster

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

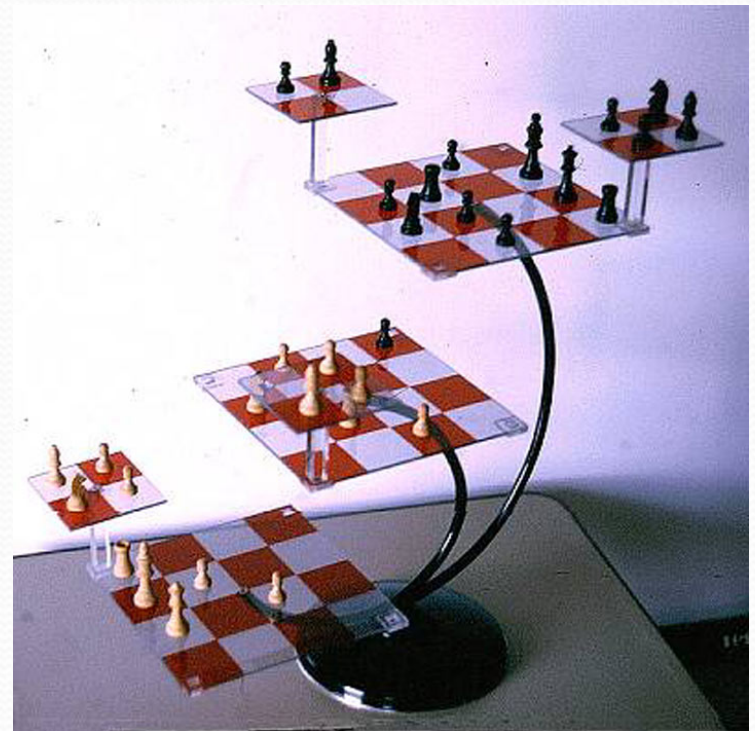


Permit-Like Approvals

- 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

Tim Webster

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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

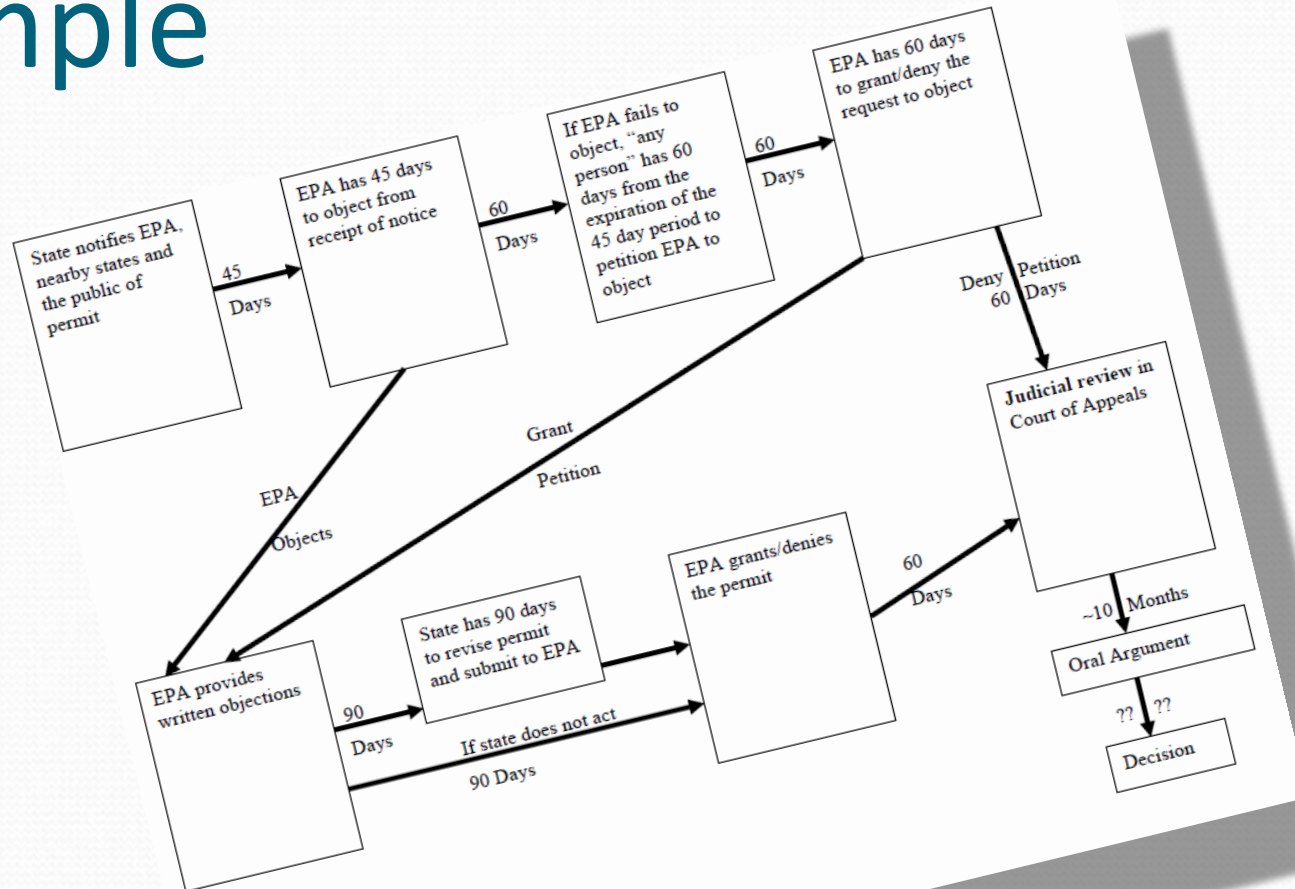
- Permitting agencies are motivated by many factors that are unlikely to line up with your motivations
 - Budgetary issues
 - Policy and/or political issues
 - NGO/citizen group pressures
 - Personnel issues
- Don't make the mistake of assuming "business as usual"
 - Consider a government relations strategy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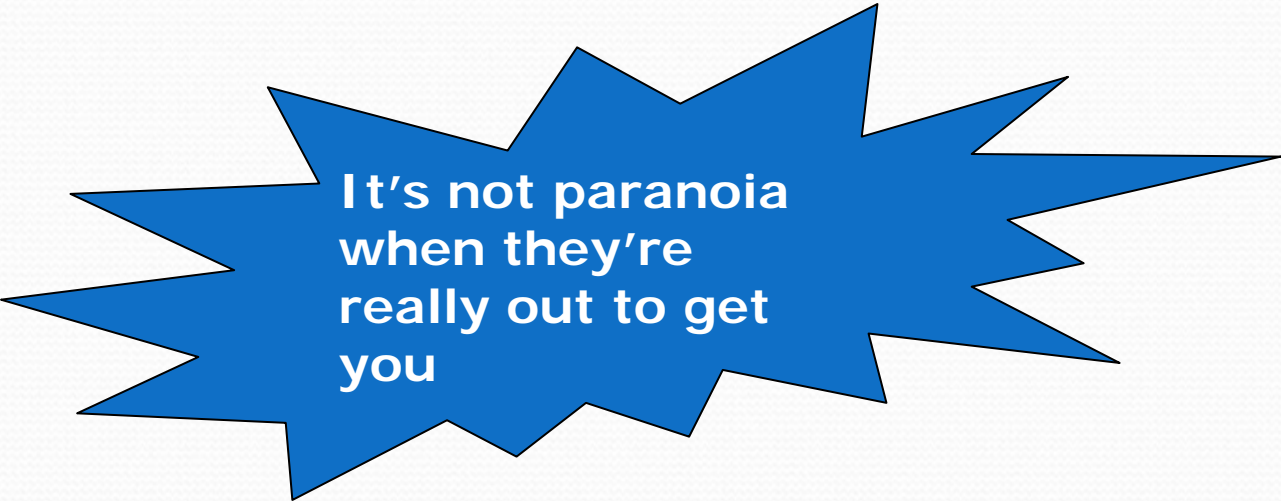
Underestimating the Application Process

- Permitting agencies engage in a permit application “dance” with the applicant:
 - Often several iterations of the application are required before the permitting agency will deem the application administratively complete
 - 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

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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



It's not paranoia
when they're
really out to get
you

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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

Planning Considerations to Minimize Risk

Susan Stephens

Initial Considerations

- Type of operation for the site
 - Is the activity permittable?
 - What project design suits your needs?
- Economic value of the location, the activity
 - Proximity to infrastructure, customers
 - How much is the project worth to you?
- Ecosystem challenges & impact on project design
 - Wetland/stream impacts
 - Water and air impacts
 - Wildlife

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Initial Considerations (continued)

- Identification of/Proximity to neighbors
 - Noise, dust, light and other impacts
- Impact avoidance considerations
 - High quality or rare wetland or waters consideration
 - Special habitat considerations
 - Practicability considerations
- Impact mitigation
 - Determination of amount /type required
 - Reasonable assurance of mitigation success (opinions vary)

Pre-Activity Studies: Building the Record

- Assemble your team (team will vary):
 - Engineering
 - Environmental/Ecological
 - Planning/Local Land Use
 - Legal
- Start early for more complex projects
- Baseline data is important

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Key Components of Pre-Activity Studies

- Existing Land Use
- Soils/Topography
- Streams and Jurisdictional Wetlands/Waters
 - Water quality and quantity
- Hydrology (Surface and Ground)
- Wildlife
- Archeological Concerns
- Socioeconomic Concerns
- Adjacent Land Use Considerations
- Downstream Land Use Considerations

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Post-Activity Design

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- Impact mitigation requirements
 - Mitigation area construction requirements
 - Monitoring requirements
 - Maintenance requirements
 - Success demonstration requirements
 - Long term Management /Perpetual Protection
- Long term management/maintenance of project
- Interaction of site with surrounding land uses
- Final land disposition considerations

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Evolving Agency Expectations and Interaction

- County
 - Public hearing process
 - Local economic considerations
 - Local community concerns
- State
 - FDEP ERP, NPDES
 - FFWCC Concerns
- Federal
 - ACOE
 - EPA
 - USFWS
- Meetings / site visits with reviewers, staff

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Interact with NGOs, the Community

- NGO concerns
 - Early outreach
 - Regular discussions
- Community concerns
 - Know/invest 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!

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COMMUNICATION IS CRITICAL!

Keep your eyes open!

- Pay attention during the process:
 - Is there any mention in the press or online?
 - Is anyone commenting to the permitting agencies?
 - Make sure you get notified (you might not be!)
- Respond to issues raised
- Respond to those raising the issues: Dialogue is key

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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 (if they'll let you!)
- Agencies are not always willing to cooperate (and counsel are not usually kept in the loop until a challenge occurs)



coordination

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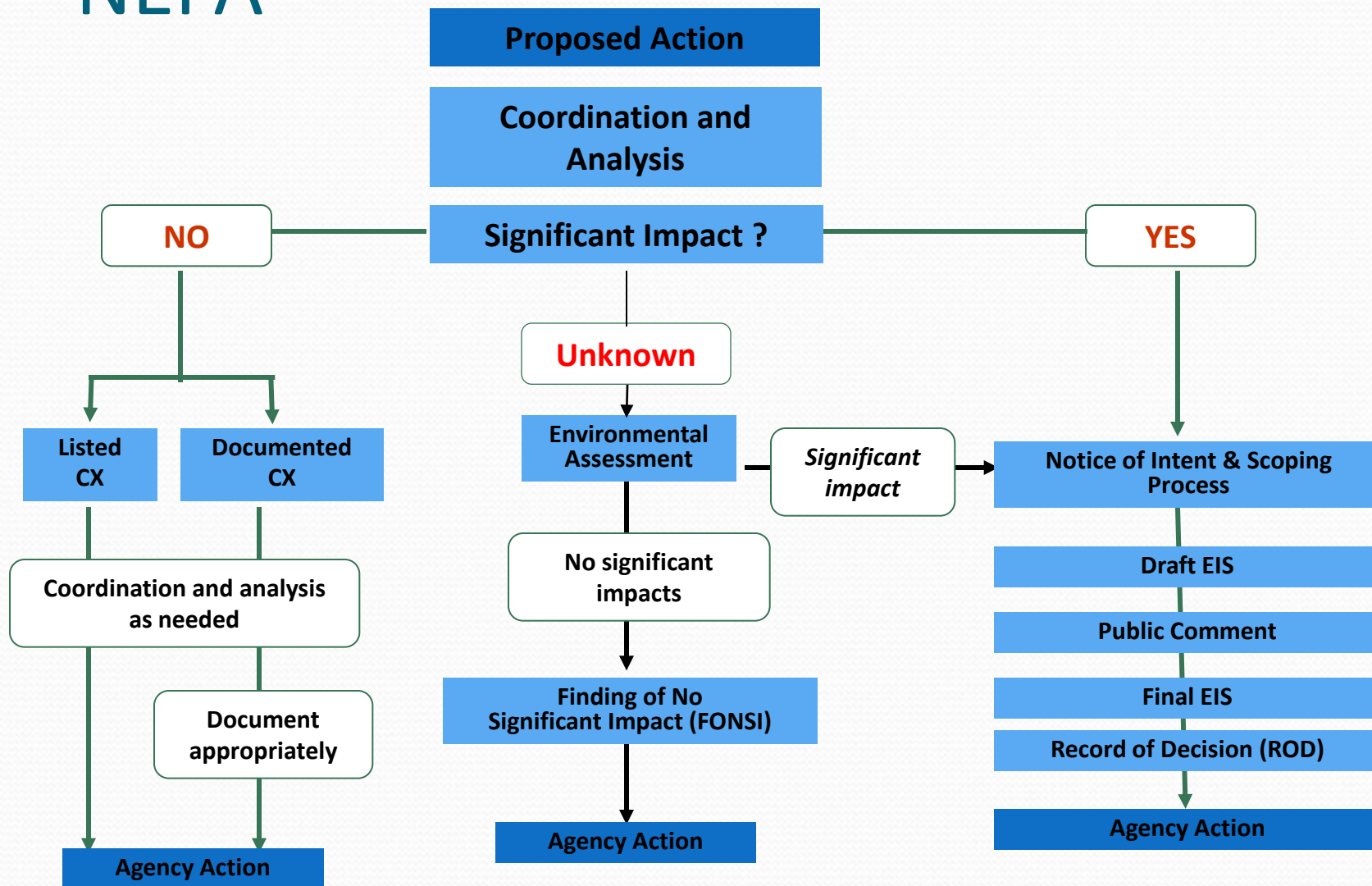
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The (lengthy) dramatic pause...

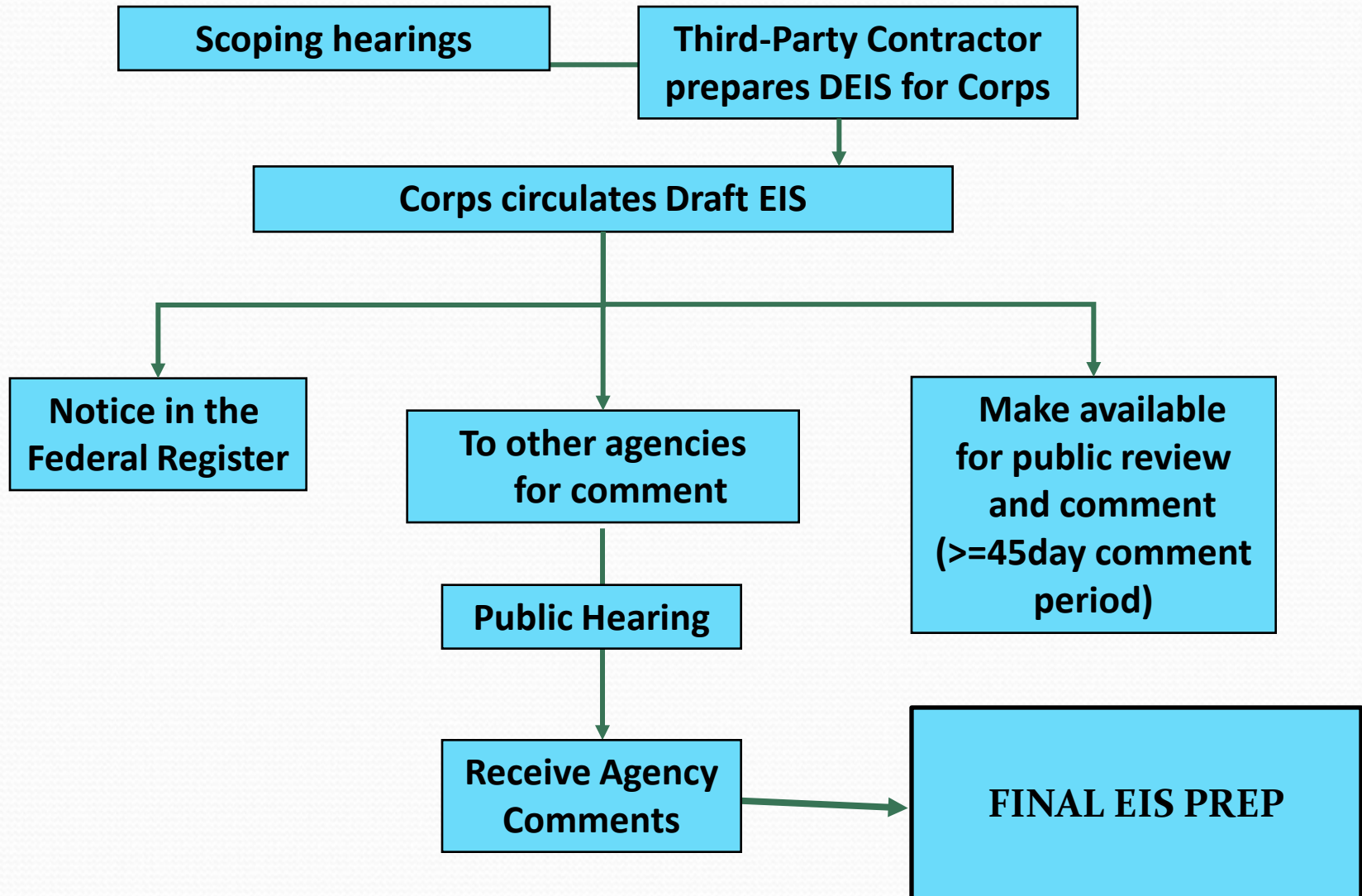
- National Environmental Policy Act (NEPA) requires environmental analysis of all “Major Federal action” with the potential of significantly affecting the quality of the human environment
- Clean Water Act s. 404 Permit can be considered “Major Federal Action” triggering either an Environmental Impact Study (EIS) or Environmental Assessment (with a corollary Finding of No Significant Impact)



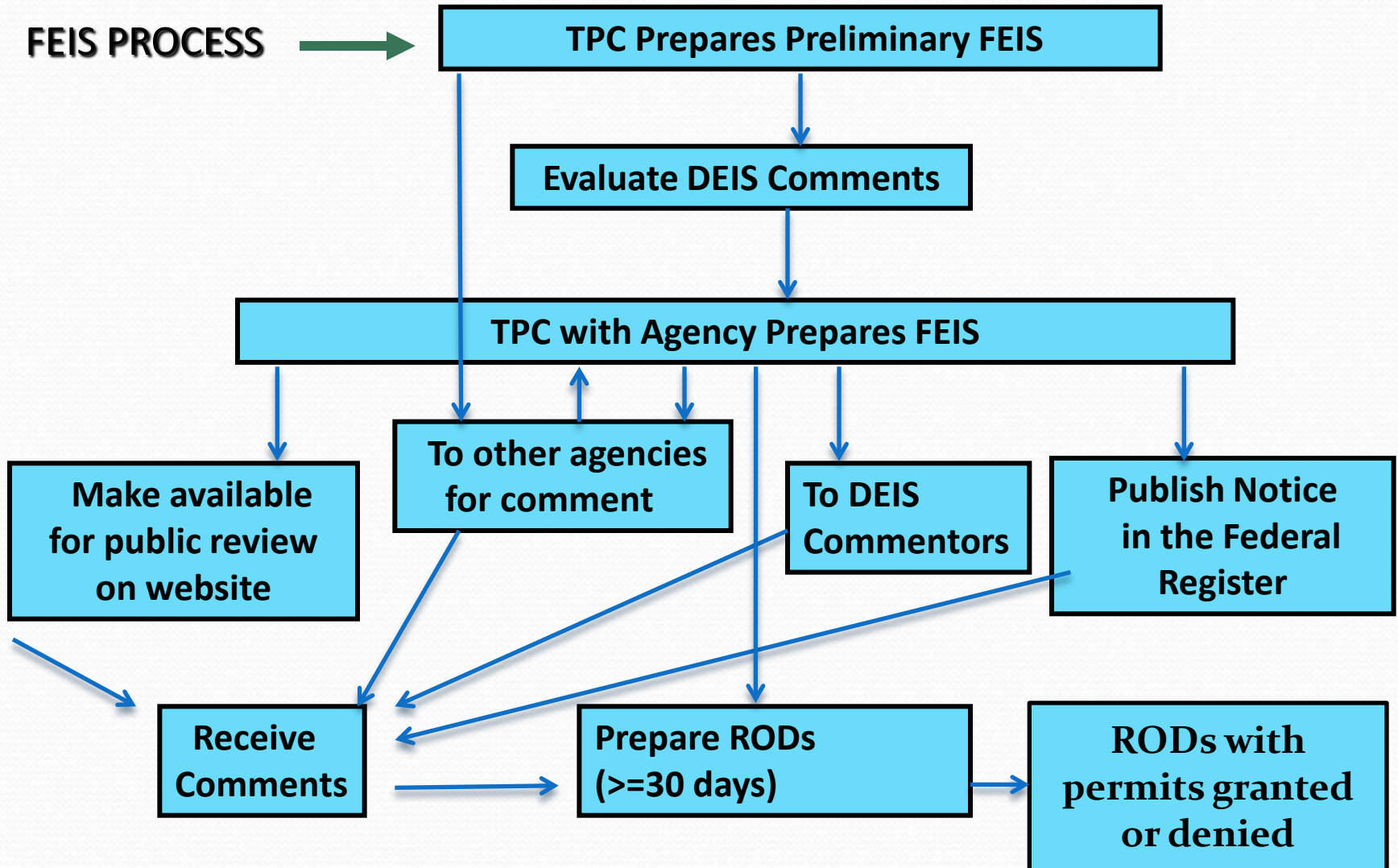
NEPA



EIS TIMELINE



FEIS PROCESS



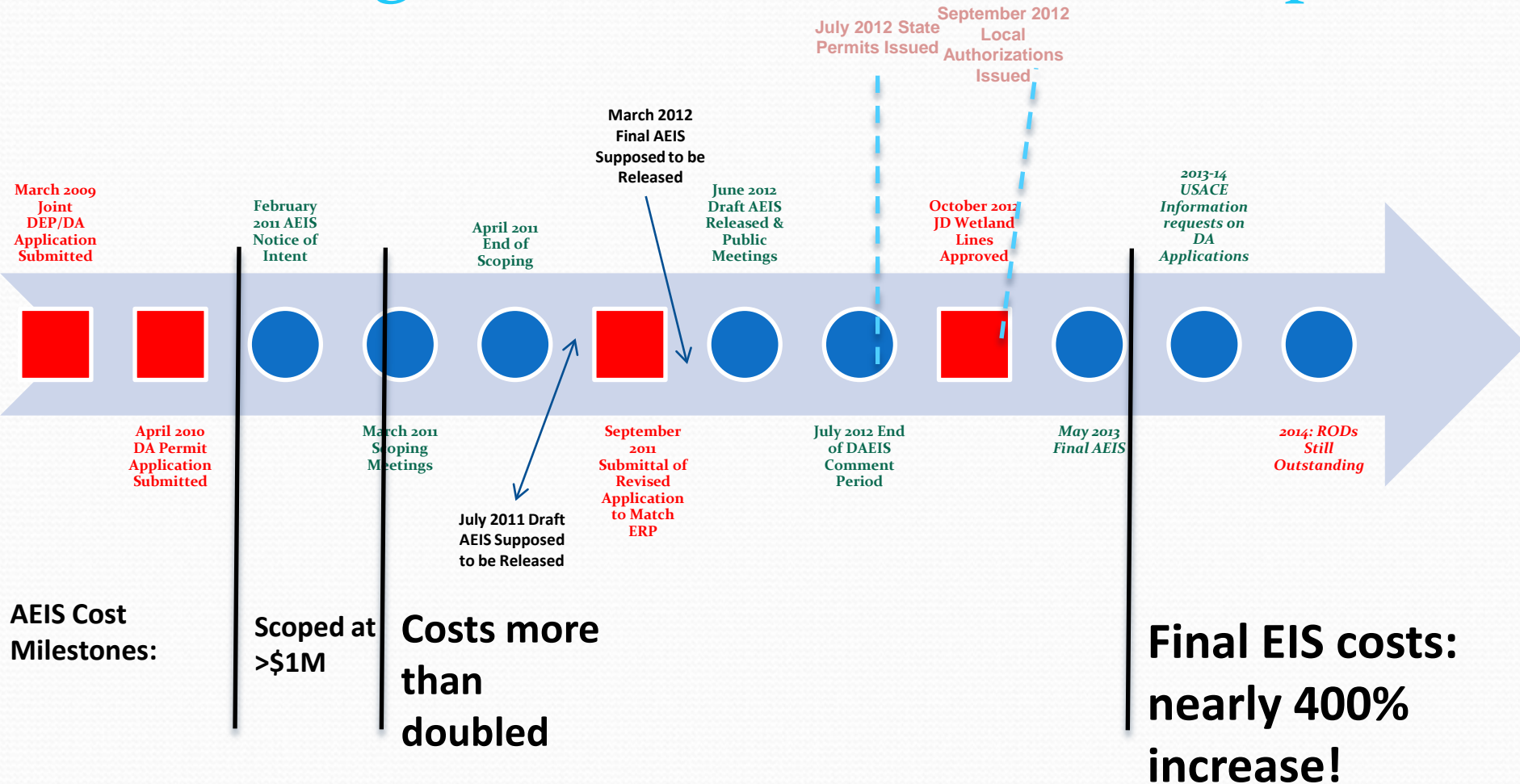
Contentious NEPA Issues

- “Significant impacts” vs. Corps program impacts
- Corps mitigation & need for EIS (“mitigated FONSI”)
- Scope/Goal of Review: Managing Expectations
- Purpose and Need
- Scope of Affected Environment
- Cumulative impacts: “reasonably foreseeable”
- Coordinating other agency involvement
- Practicable (reasonable) alternatives
- Threat of litigation as driver of the issues, scope

Contentious NEPA Issues, cont'd

- Public perceptions of adverse impacts
- Balance of Environmental Considerations against Economic Considerations
- Timing issues: Multi-year project delays, carrying costs of land, vs. value of the project to the applicant
- The project you want vs. the project third parties/agencies/NGOs want you to have
- Results: Managing public/agency expectations
- Results: Managing neighbor/local concerns

NEPA and Effect on Permitting Timelines/Cost: An Example



NEPA take-aways

- Expect heightened scrutiny
- Even EA/FONSI will be substantial NEPA analysis documents
- Potential for EIS or EA scope creep
- Anticipate EIS Process adding years and \$\$ to permitting process
- Expect litigation and prepare for it
- Early and frequent public and other agency participation/outreach are critical

So where can the risks come from?



- Neighbors, Local Interest Groups, Environmental Organizations, Local Governments, Quasi-Governmental Organizations
- Issues can be real or imagined
- Challenges on record, procedure, science, policy or perception

Avoiding the pitfalls

- Put together your team EARLY—don't wait for suit.
- ENGAGE regulatory agencies early and often.
- Be transparent and COMMUNICATE.
- DOCUMENT your communications.
- PAY ATTENTION to chatter about you/your project.
- Increase your community OUTREACH/involvement.'
- 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!

Avoiding the pitfalls, cont'd

- Pay attention to project design, construction;
- Pay attention to data collection;
- Pay attention to maintenance and monitoring plans;
- MAKE SURE THE SCIENCE IS SOLID
- MAKE SURE YOU'VE FOLLOWED PROCEDURES
- MAKE SURE YOU'VE HIT THE KEY ISSUES
- PAPER THE RECORD!!!

Defending the Challenge

David Weinstein

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

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 most cases
 - If it is permitted, plan for it
- Look for opportunities to achieve quick summary judgment



Step 5: Dealing with a TRO/PI

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* **Before *or after* beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.**

(b) Temporary Restraining Order.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order ***without written or oral notice to the adverse party or its attorney*** only if:

(A) specific facts in an affidavit or a verified complaint clearly show that **immediate and irreparable injury**, loss, or damage will result to the movant **before** the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—**not to exceed 14 days**—that the court sets, ***unless*** before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction ***must*** be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a [PI or TRO] only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The [US], its officers, and its agencies are not required to give security **[nor, ordinarily, are NGOs]**.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) *Contents.* Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive ***actual notice*** of it by personal service or otherwise: (A) the parties; (B) [their] officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with [them].

Step 5: Cont.

- 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**.
 - The "balance of harms" refers to the threatened injury to the party seeking the preliminary injunction as compared to the harm that the other party may suffer from the injunction.

Step 5: Cont.

- Opposing an Injunction
 - Legal
 - Identify, research, and brief the key legal issues
 - Pay close attention to similar, prior challenges, and
 - Comments from opponents (e.g., in the administrative record) and intelligence from interaction with NGOs and others
 - Ensure that you preserve error and make a solid record for appeal (cf., the administrative record)
 - Factual
 - Investigate and document the important facts on which
 - Your opponent(s) likely will rely, and
 - Your defenses will be based
 - Be thorough as to injunction factors, including balancing of harms and public interest
 - 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 5: Cont.

- The court of public opinion
 - Do not underestimate the value of public/community relations
 - Enlist the assistance of professionals, either “in-house,” outside, or both
- Operational
 - Ensure that operations and all related business functions are properly prepared for any outcome
 - Continued operations
 - Short-term disruption (months)
 - Longer disruptions (one or more years)(the wheels of justice turn slowly)

Step 6: Motions and Trial

- Largely dependent on the type of challenge, the facts, and the circumstances
 - Preparation, preparation, and more preparation
 - Appropriately balance law, facts, and scientific and other technical issues
- Retain the best, “battle-tested experts” and “empty your cup”
- 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)
- Be wary of Rule 65(a)(2)
- Always remember that an appellate court is limited to the record and, therefore, largely precluded from considering arguments not raised below
 - Ensure that everything you want to argue above is properly in the record below (e.g., the harm to your client if enjoined and why an injunction is contrary to the public interest)

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
 - Don’t be afraid to think “outside the box”
 - “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 second record: a record for appeal



Permits Gone Bad: When the Permittee Challenges the Permit

- Two main circumstances for the permittee to challenge its own permit
 - Significant issues with restrictions or limitations imposed by the agency
 - Cross-claim needed to counter-balance third party attack
- Slight strategy shift from defense to offense, but many similarities



**TIMEOUT
FOR
PRIVILEGES**

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)(3))
- 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

Work Product, Pt. VI

- Organizations should proactively develop guidelines for in-house counsel to follow in dealing with employees before legal issues arise
- When hiring consultants or conducting internal audits, organizations would be wise to seek the advice of outside counsel in developing a strategy to ensure that documents remain protected by the attorney-client privilege or work product doctrine

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?

Timothy K. Webster
Sidley Austin LLP
1501 K Street, NW.
Washington, D.C. 20005
(202) 736-8138
twebster@sidley.com

David B. Weinstein
Greenberg Traurig, P.A.
625 East Twiggs Street, Suite 100
Tampa, FL 33602
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