



Department of Energy
Washington, DC 20585

September 3, 1996

RCRA Information Center
U.S. Environmental Protection Agency (5035W)
401 M Street S.W.
Washington, D.C. 20460

Docket Number F-96-PT2A-FFFFF

Re: 61 FR 37744 and 61 FR 41252, "Notice of Availability of Permits Improvement Team Concept Paper on Environmental Permitting and Task Force Recommendations"

Dear Sir or Madam:

On July 19, 1996, the Environmental Protection Agency (EPA) announced the availability of the document entitled Concept Paper on Environmental Permitting and Task Force Recommendations and requested stakeholder comments by September 3, 1996. The full text of the concept paper and recommendations was published in the Federal Register on August 7, 1996. EPA intends to use the concept paper as an overall guide for reforms to permit programs, where appropriate. The individual recommendations contained in the document will be considered by program and regional offices as they develop specific plans in response to the concepts discussed in the permits improvement team (PIT) recommendations. These plans will include providing assistance to states and tribes that choose to consider and implement appropriate permit reform.

The Department of Energy (DOE) appreciates this opportunity to comment on EPA's permits improvement plans and commends EPA for continuing to pursue permit reform efforts that will lessen the regulatory compliance burden without compromising protection of human health and the environment. DOE's enclosed comments consist of general comments, comments on the concept paper on environmental permitting, and comments on the recommendations of each environmental permitting task force.

Overall, the Concept Paper on Environmental Permitting and Task Force Recommendations presents many sound ideas and strategies for permitting reform. Most of these ideas and strategies have been raised in previous regulatory reform initiatives; DOE requests that EPA move forward to implement several of these ideas and strategies.

In the attached comments, DOE encourages EPA to develop baseline information on the functioning of permit programs. Having baseline data is critical to evaluate which reform strategies appear to be most worthwhile and to measure improvement after new

strategies are implemented. DOE also urges EPA to define performance goals more carefully and choose methods of measuring performance that can be interpreted uniformly and precisely.

DOE has commented on most of the specific recommendations made by each of the permits improvement task forces. In some cases, however, EPA has to provide additional explanation of recommendations (e.g., see DOE's comments on the recommendations of the performance-based permitting task force) before DOE can comment further. Additionally, the Department requests that the recommendations of the National Performance Review Team for Permit Streamlining be adopted instead of those put forward by the training task force because the National Performance Review Team's recommendations, in the Department's view, further the goals and objectives of the Environmental Permitting PIT.

If you have any questions regarding DOE's enclosed comments, feel free to contact Katherine Nakata of my staff at 202-586-0801.

Sincerely,

A handwritten signature in black ink, appearing to read 'Raymond F. Pelletier', written over a horizontal line.

Raymond F. Pelletier
Director
Office of Environmental Policy
and Assistance

Enclosures

DOE Comments on the July 1996
Final Draft Permits Improvement Team Concept Paper
on Environmental Permitting and Task Force Recommendations

In the July 19, 1996 Federal Register, the Environmental Protection Agency (EPA) announced the availability of the document entitled Concept Paper on Environmental Permitting and Task Force Recommendations and requested stakeholder comment (61 FR 37744). The comments below have been prepared by the Department of Energy (DOE) in response to EPA's request.

DOE also submitted comments to the Permits Improvement Team on June 9, 1995 in response to an earlier draft concept paper and task force recommendations. A copy of these earlier comments (hard-copy only) is attached for EPA's convenience. This comment package consists of general comments, comments on the concept paper on environmental permitting, and comments on the recommendations of each environmental permitting task force.

General Comments

1. DOE commends EPA's continuing efforts to reform and streamline environmental permitting.
2. The concept paper and task force recommendations tend to discuss environmental permitting programs in general. (The task force recommendations on alternatives to individual permits are an exception.) DOE believes that it would be useful, even at this stage, for EPA to summarize the changes proposed in the concept paper and by the task forces on a program-by-program basis for each of the following permit programs.
 - National Pollutant Discharge Elimination System (NPDES) - Stormwater
 - NPDES - Process Wastewater
 - Safe Drinking Water Act Underground Injection Control (UIC)
 - Toxic Substances Control Act (TSCA)
 - Resource Conservation and Recovery Act (RCRA)
 - Clean Air Act - New Source Review
 - Clean Air Act - Title V

EPA should list the primary problems with each of these seven permit programs, proposed reforms, and statutory amendments that would be required to accomplish reforms. This information should be provided in a table (or in some other type of tabular format). Having such information would assist the regulated community and the public in

understanding the overall implications of EPA's proposed changes to environmental permitting programs.

3. Many EPA and private industry initiatives have focused on issues related to the improvement of environmental permitting, environmental regulation, and environmental compliance. These initiatives include EPA's Common Sense Initiative, Project XL, the Environmental Leadership Program, Incentives for Environmental Auditing and Self-Policing, the Small Business Policy, the Incentives for Small Communities Policy, the Environmental Technology Initiative and the National Environmental Performance Partnership System (NEPPS). All of these initiatives are mentioned in the concept paper and task force recommendations.

DOE requests that EPA link the findings and results of these initiatives more specifically to the Permits Improvement Team (PIT) initiatives. For example, implementation of the concept paper and task force recommendations will depend on whether States, Tribes, and local governments will incorporate these recommendations in their programs. Does EPA's information from the NEPPS initiative suggest that this effort will be successful?

4. Many of the environmental compliance activities performed by DOE facilities are dictated by the requirements of federal facility compliance agreements. How do the permitting principles expressed in the PIT concept paper and the task force recommendations relate to federal facilities operating under such agreements in addition to their permits?

Concept Paper on Environmental Permitting

The concept paper promotes a revised approach to environmental permitting. This approach, "public performance-based permitting," incorporates two concepts: establishing a defined level of performance to be achieved by the permittee, and providing the public with the necessary information to monitor the permitting process and the compliance of permitted facilities. While DOE generally supports the intent of these two concepts, the Department nevertheless has important concerns associated with them.

Performance-Based Permitting

EPA's performance-based permitting initiative focuses on measuring three different types of environmental performance: environmental results, facility compliance, and EPA performance. Specifically, environmental results would monitor how permitted activities are actually affecting the environment, facility compliance would measure how well permitted facilities are complying with their permits over time, and agency performance would determine how well EPA and other environmental agencies are doing.

To monitor how permitted activities are actually affecting the environment, EPA proposes to increase ambient environmental monitoring in selected permits, while comparatively reducing

other emissions and reporting requirements. DOE agrees with this general proposal, but would like to know where (i.e., in which types of permits) EPA proposes to increase ambient environmental monitoring requirements, and reduce other requirements. DOE's concern arises because ambient monitoring can be a costly endeavor. Consequently, DOE believes that increased ambient monitoring requirements should be focused on those facilities that have poor compliance records or that have a demonstrated potential to significantly impact the environment.

In developing additional ambient monitoring requirements, DOE recommends that EPA design such requirements to consider possible cross-media impacts. For example, air contaminants can impact nearby water quality and particulates in air may become entrained in soil as a result of deposition. Consequently, ambient monitoring requirements should be designed to gather information on facility impacts to all affected media and monitoring information should be shared with all affected permitting programs.

To improve facility compliance records, EPA proposes to establish reporting requirements based on a facility's level of compliance and potential to impact the environment, level of pollution prevention and technological innovation, and good-faith compliance efforts. EPA further recommends that compliance data be put in understandable terms and made available to the public. While DOE does not disagree with these recommendations, the Department is concerned that a facility's level of compliance, implementation of pollution prevention measures and innovative technologies, and good-faith compliance efforts will be difficult to interpret uniformly or precisely. The regulators' (EPA, States, Tribes, and local governments) use of these measures could result in arbitrary judgments about a particular facility's compliance record. (DOE's comments on increased public involvement in permitting and compliance monitoring are reported below.)

To determine if EPA and other environmental permitting agencies are doing a good job, EPA recommends that methods be developed to measure the performance of permitting systems and to continually improve these systems based on performance data received. DOE agrees with this concept and believes that EPA's ability to improve environmental permitting rests on the Agency's ability to document and analyze current performance (baseline) and to determine how performance changes as these new concepts are implemented.

While DOE favors the concept of performance-based permitting, DOE urges EPA to define performance goals and indicators to measure progress in achieving these goals more rigorously. For example, one of DOE's particular concerns with the concept of performance-based permitting as this concept has been applied by EPA in the past stems from the potential difficulties associated with compliance monitoring when certain radioactive waste streams are involved. In this context, EPA has tended to equate the concept of setting concentration-based standards with the concept of setting performance-based standards. These two concepts are not equivalent.

As DOE has explained to EPA in the earlier set of comments on the Task Force recommendations and in numerous comment packages on land disposal restrictions (LDR) rulemakings, meeting

concentration-based LDR standards generally requires sampling and analysis to document compliance. Both of these activities pose radiological dose and human health concerns when dealing with certain radioactive wastes. For these wastes, requiring specific procedures or technologies in a permit may be the more appropriate manner in which to achieve the statutory performance goal to protect human health and the environment.

In this case, a performance-based system based on the performance goal of environmental results, defined by DOE as maximum protection of human health and the environment, would require EPA to allow either concentration-based limitations or specific procedures or technologies. The choice would depend on which types of limitations/procedures would enable particular facilities to best achieve the performance goal.

With regard to measuring achievement of performance goals, DOE observes that ideal units of measure should:

- reflect the needs of all parties to the permitting process,
- provide an agreed upon basis for decisionmaking,
- be understandable,
- apply broadly,
- be interpreted uniformly,
- be compatible with existing units of measurement,
- be precise in interpretation, and
- be economical to apply.

The major problem with the performance measures relating to a facility's level of compliance, implementation of pollution prevention techniques and innovative technologies, and good faith compliance efforts (as these performance measures are described in the PIT concept paper) is that such measures cannot be interpreted uniformly or precisely.

For additional information on defining performance goals and measures, DOE invites EPA to make use of the DOE handbook entitled *How to Measure Performance, A Handbook of Techniques and Tools*. This handbook was developed by the Special Projects group of the Office of Defense Programs (DP-31) and the Office of Operating Experience, Analysis and Feedback of the Office of Environment, Safety and Health (EH-33). It is available on the Internet at: <http://www.llnl.gov/PBM/handbook>.

Increased Public Involvement in Permitting and Compliance Monitoring

EPA's concept paper advocates providing the public with opportunities for earlier and more meaningful participation. EPA believes that increased public awareness of facility operations can serve as a powerful incentive for facilities to reduce their toxic emissions. EPA also intends to investigate ways to publicize facilities' compliance records.

In commenting on increased public involvement in permitting and compliance monitoring, DOE first wants to make important distinctions between:

- public participation in the permitting process,
- public access to compliance monitoring data, and
- public access to data on enforcement actions.

Public Participation in the Permitting Process

DOE supports EPA's goal of fostering increased public involvement in environmental permitting. However, DOE does not believe that increased public involvement in permitting should be achieved at the expense of regulator involvement. In other words, the public cannot substitute for the regulator in the permitting arena. No matter what changes EPA makes to the permitting process, it will of necessity continue to be focused on technical issues and these issues will continue to remain beyond the grasp and interest of most members of the general public. This is as it should be. For this reason, the public will have to continue to depend on experienced and concerned regulators to represent their interests. To achieve increased public participation, regulators will be even more in demand as they will have to devote more time to public participation/education activities.

In comments in the proposed RCRA public participation rule, DOE wholeheartedly supported EPA's efforts to involve the public earlier in RCRA permitting activities (59 FR 28680). However, DOE also cautioned that increased public participation activities should be accompanied by efforts to streamline the permitting process. Otherwise, increased public involvement can lead to a longer and even higher cost permitting process.

Public Access to Compliance Monitoring Data

DOE believes that the public has successfully aided regulatory agencies in evaluating compliance monitoring data under National Pollutant Discharge Elimination System (NPDES) permit programs. DOE believes that NPDES and other environmental compliance monitoring data are already available to the public, but agrees with EPA that such data could be made more available in user-friendly data bases and publications.

Public Access to Data on Enforcement Actions

DOE cautions EPA that data or information about enforcement actions cannot be made available to the public until there is a final resolution of these actions. Similarly, EPA needs to be cautious about proposals to publicize annual compliance reports developed by permitting authorities or third-party auditors. EPA would first have to develop procedures to ensure that facilities are given the opportunity to review and comment on such reports. In addition, EPA would have to develop a procedure to resolve disputes regarding the contents of such reports.

Administrative Streamlining Task Force Recommendations

The first recommendation of the administrative streamlining task force is to create a predictable and user-friendly federal permit process. The task force proposes to achieve this goal by developing a unified standard timeline model to apply to all federal permitting programs. The model could then serve as guidance for State, tribal and local permitting authorities.

DOE agrees with this recommendation and notes that the most frustrating aspect of the current permitting system is the length of time required to go through the process. The majority of the time required to obtain a permit passes while the proposed permit is at the permitting agency undergoing review. By the time the review is completed (several years in the case of RCRA treatment or disposal permits), modifications are required in almost every application because phone numbers, names, and even the best available technologies often change.

However, DOE doubts whether a unified standard timeline model can be applied to environmental permitting anytime soon. First, the entire permitting process has to be overhauled for seven programs, fewer permits have to be issued, permit writers have to be given better training and support services, and permitting procedures have to become more standardized.

In DOE's experience, one primary reason that environmental permitting takes such a long time is that there are too few permit writers considering the volume of permits that have to be processed. Also, many permit writers are inexperienced. Once permit writers become experienced, they tend to move into advanced positions in government service and the private sector. DOE fears that imposing timelines on permit writers in the absence of other streamlining changes would make the personnel turnover problem even worse.

Before acting on the recommendation to develop a unified standard timeline model, DOE suggests that EPA gather information from permit writers and permittees on the actual length of time it takes to obtain different types of permits. EPA should also compare the length of time it takes to receive similar types of permits in different States. With this type of information in hand, EPA will be in a better position to determine the reasons for lengthy permit processes, address the causes of long delays, and develop a unified standard timeline model.

The permit process timelines attached to the administrative streamlining task force

recommendations are not helpful. Attachment I (Federal Permit Programs Current Timetables) does not show how long permitting takes in different environmental programs. Attachment II (Authorized and Delegated Permit Programs: Proposed Uniform Permitting Process) cannot be interpreted without further explanation. For example, according to footnote 2, the procedure applies to all programs, except siting. However, siting is not a program. If EPA means to say that it does not apply to permits for new facilities or processes, it would appear to have very limited applicability.

Also, there are different timelines and procedures for "major" and "minor" projects. The public would be accorded "full public participation opportunity" for major projects while minor projects would receive internal review only. EPA has not provided examples of major and minor projects. The only criteria used by EPA to distinguish between them is the likelihood of significant environmental impact, that is minor projects are less likely than major projects to have significant environmental impacts. DOE believes that EPA should establish more specific criteria to distinguish between major and minor projects. Otherwise, it will be difficult for the regulated community and the public to evaluate the proposed uniform permitting process.

Implementation of this task force's second recommendation, to establish a single point of contact to ensure cross-program permit coordination for facilities with multiple permits, could possibly benefit small and medium-sized facilities. Large federal facilities, however, generally have different facility personnel handling air, water, and waste (RCRA, TSCA) permits and thus are used to dealing with a number of different regulators on cross-media issues.

The Task Force also notes that in cases where state/tribal/local/federal permits are being issued to the same facility, permit coordination is needed among the permitting agencies. DOE totally agrees. However, unless one permitting agency is designated as the lead agency, DOE believes coordination will be difficult to achieve and enforce. DOE recommends that EPA establish procedures to designate a lead agency in cases where state/tribal/local/federal permits are being issued to the same facility.

The administrative streamlining task force also recommends encouraging state, local and tribal permitting authorities to tier their permitting programs to put the most emphasis on those facilities having the greatest potential for an environmental impact. This would allow agencies to redirect their manpower away from facilities that clearly have limited potential for significant environmental impacts. The task force provides several excellent recommendations for implementing a tiered approach that include increasing thresholds for small emitters, exploring the use of impartial third-party certification systems, increasing the list of activities that are exempt from permitting processes, and expediting the review process for low tier permits.

DOE also supports all of the efforts recommended by the task force for facilitating permit writing, reporting, training, etc., which included providing hardware, software, and data base support to state, local, and tribal permitting agencies. DOE notes, however, that additional hardware and software support to permit writers will not be effective unless permit writers are trained to take

advantage of these materials.

Alternatives to Individual Permits Task Force Recommendations

The alternatives to individual permits task force recommends issuing individual permits only where there is a high degree of environmental concern and where it is necessary to apply tailored or site-specific requirements. In all other cases, the task force recommends that alternatives to individual permits be explored. These alternatives include permits-by-rule, class permits, and general permits.

DOE agrees with this recommendation and believes that if it is followed, the number of traditional environmental permits could decline. DOE also agrees with the program-specific recommendations developed by this task force. In particular, DOE supports: (1) that generator storage time frames under RCRA should be increased for laboratories from 90 to 270 days (thus eliminating the need for many storage permits); and (2) that for hazardous waste combustion facilities, the facility's air permit should address both air combustion and emission requirements.

DOE is also pleased that the Task Force withdrew its initial recommendation that PCB disposal requirements be consolidated into RCRA requirements. As DOE stated in the earlier June 9, 1995 comments, waste treatment, disposal and remediation activities are currently proceeding more rapidly under the TSCA program than under the RCRA program. Until revisions are enacted which improve the timeliness of RCRA permitting and the RCRA corrective action process, the activities of these two programs should remain separate.

In the air program, the PIT recommendations have already been proposed in two EPA "White Papers" that addressed reform in the Title V permitting program. DOE agrees with the PIT recommendations for the air program and with the earlier recommendations in the two EPA "White Papers" on:

- allowing facilities to consider inherent operating limitations when determining their potential to emit;
- simplifying the permit renewal process; and
- promoting the use of a "general permit" program for facilities that have low actual emission levels.

Enhanced Public Participation Task Force Recommendations

The enhanced public participation task force recommends:

- developing an "easy reference" guidance for public participation,
- utilizing the environmental justice public participation checklist as guidance to the extent appropriate and feasible,
- developing an inventory of mechanisms that promote access to environmental information, and
- possibly developing and using comprehensive multi-media Community Involvement Plans.

DOE believes that all of these recommendations are good ideas. However, DOE also urges EPA to evaluate the public participation measures that are already being used at the Federal and State levels to determine which ones are most effective. For example, DOE would be interested in knowing the answers to the following types of questions before new public participation initiatives are implemented.

1. How often does the public request a public hearing on a permit?
2. How many people comment on or attend public hearings on permits?
3. What factors seem to determine the level of public interest/concern in permitting?
4. In cases where the public believes that they were uninformed about permitting decisions, or that their concerns were overlooked, are there any procedures or measures that could have avoided the problem?
5. What types of public participation activities are most effective?

In the event that EPA decides to collect data on these and related issues, DOE would be happy to cooperate.

Performance Measures Task Force Recommendations

The performance measures task force recommends implementing performance and tracking measures to evaluate how a permitting program is doing. Performance and tracking measures would be evaluated in the following categories: process, results, and customer service. They would be pilot tested in an EPA region that is still issuing a significant number of permits and then provided to State, local and tribal permitting agencies.

DOE believes that EPA should gather data on the baseline functioning of permit programs before EPA begins tracking performance. Having baseline data will enable EPA to define the problems in these programs and to evaluate progress in addressing these problems. DOE's comments on the administrative streamlining and enhanced public participation task force recommendations

make a similar point. (Lengthy permitting delays will be easier to address if the causes of these delays are better defined and it will be easier to enhance public participation if EPA has information on the types of public participation activities that are most effective.)

DOE also believes that it is more important for EPA to study the performance of State permitting programs than programs in EPA regions because the overwhelming majority of environmental permits are State-issued. Also, in DOE's experience, permitting problems vary considerably from State to State.

DOE wants to discourage EPA from tracking the number and percentage of permits issued by regional offices that include innovative technology or pollution prevention conditions to achieve compliance. EPA has not defined these terms and DOE believes that it would be extremely difficult to do so. To a large extent, the degree to which a particular technology is innovative or prevents pollution would depend on the engineering judgment of the person collecting the data. Consequently, DOE believes that tracking the number of permits with innovative technology or pollution prevention conditions would be an extremely arbitrary measure of permitting performance and consequently would not be meaningful.

Instead of tracking the numbers and percentages of permits with innovative or pollution prevention technologies to achieve compliance, DOE suggests that EPA:

- collect and publicize information on the use of innovative and pollution prevention technologies, and
- establish a method of assisting permittees who are having difficulty getting innovative or pollution prevention technologies approved by State, Tribal, or local government regulatory authorities.

The most recent issue of Initiatives in Environmental Technology Investment (August 1996) published by the Waste Policy Institute, contains an article with an example of DOE's first suggestion. The article concerns the efforts of the Western Governors' Association's Committee to Develop On-Site Innovative Technologies. The committee's mission is to seek ways to encourage state environmental regulatory agencies to cooperate in permitting innovative technologies. The committee is achieving their mission to encourage State regulatory agencies to cooperate in permitting innovative technologies by publishing case studies on successful in situ bioremediation projects. The committee believes that sharing this information will encourage other states to affect the legislative, regulatory, organizational, and policy changes necessary to encourage the development of innovative technologies.

Pollution Prevention Incentives Task Force Recommendations

The pollution prevention incentive task force recommends:

- performance-based permitting,
- creating industry-sector inventories of regulatory thresholds for permitting,
- exploring alternative emissions tracking in exchange for using pollution prevention practices,
- sharing pollution prevention data with permit applicants and affected communities, and giving basic pollution prevention training to permit writers,
- developing permit conditions to accommodate the possibility that innovative pollution prevention technologies may not perform as expected, and
- including language in general permits and permits-by-rule that explains the preference for using pollution prevention approaches and the potential economic benefits of pollution prevention.

DOE's comments on performance-based permitting are provided above in the section on the concept paper on environmental permitting.

DOE requests that EPA provide better explanations of creating industry-sector inventories of regulatory thresholds for permitting and of exploring alternative emissions tracking in exchange for using pollution prevention practices. For example, how will industry-sector thresholds for permitting be developed if permit requirements are based on the presence of specific processes or chemicals? Why has EPA linked the concept of alternative emissions tracking to the use of third-party auditors or International Standards Organization (ISO) 14000 efforts?

DOE is in favor of:

- sharing pollution prevention data with permit applicants and affected communities,
- giving basic pollution prevention training to permit writers, and
- allowing the use of permit conditions that would accommodate the possibility that innovative pollution prevention technologies may not perform as expected.

DOE does not favor including language that explains the preference for using pollution prevention approaches and the potential economic benefits of pollution prevention in general permits and permits-by-rule. Such permits should be as generic and simple as possible.

Training Task Force Recommendations

DOE is disappointed in the PIT's Training Task Force recommendations. In the Background

section to the recommendations, the training task force explains that the National Performance Review Team for Permit Streamlining identified training for permit professionals as a priority. Specific recommendations of the National Performance Review Team included the following suggestions: establish an EPA Permits Institute, require State/Federal permit professionals to complete a core curriculum, review permit organizational staffing for appropriate skills mix, and provide financial/other incentives and awards to permit professionals.

Instead of endorsing or following up on these excellent recommendations, the PIT training task force chose to address training broadly to include the regulated community, the public, and permit professionals. DOE is in favor of providing additional compliance assistance to the regulated community and permitting information to the public. However, DOE would not characterize such efforts as training.

DOE also believes that permit writers with access to only the core skills and knowledge examples suggested by the PIT training task force would not be always be equipped to protect human health and environment. The PIT training task force provides the following examples of core skills and knowledge needed by permit writers: the need and purpose of permits, applicable parts of the environmental statutes, when a permit application is complete, pollution prevention and innovative technology, waste management hierarchy, development of permit conditions, public speaking and communicating with different audiences, technical writing, sensitivity, holistic view of permitting, and the new permitting approach (if adopted).

DOE believes that in cases where individual permits continue to be needed (e.g., for hazardous waste combustion, open burning/open detonation), permit writers must be skilled in technical disciplines such as engineering, geology, biology, human health and ecological risk assessment, legal analysis, policy/regulatory analysis, air modeling, etc., or have convenient access to professionals who are skilled in these disciplines. DOE notes that if permit writers are to assess innovative technologies, suggest pollution prevention techniques, and develop performance-based permits, they need to be more skilled in technical disciplines than if they are just expected to assess conventional end-of-pipe technologies using generic checklists.