

Testimony of Joseph M. Manko, Esquire
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Before the Senate Majority Policy Committee
Regarding Department of Environmental Protection ("DEP") Permitting

It is my pleasure today to appear before your Committee at the request of your Chairman, Senator Edwin B. Erickson, to share with you my thoughts on DEP's permitting. I speak from the vantage point of having served as regional general counsel to the United States Environmental Protection Agency (although prior to Senator Erickson's service as EPA regional counsel), serving as the Governor's designee to chair the Pennsylvania Infrastructure Investment Authority ("Pennvest"), and 27 years as a member of the Board of Commissioners of Lower Merion Township. More significantly, as a practicing environmental lawyer since 1975, I have appeared before and interacted with regional offices and headquarters of DEP for the past 35 years, and am pleased to share with you my thoughts on its permitting program.

In general, my remarks are focused on how DEP can continue its function as a protector of the Commonwealth's environment, while at the same time being responsive to permit applicants and the business community.

1. Consistency Between DEP Programs and Regions

Although I am very much in favor of maintaining the Department's six regional offices, as compared with a centralized DEP as is found in New Jersey, there are times when because of the decentralization, decisions are made by DEP representatives on permit applications that vary from region to region, and at times from person to person within the same region. To correct this problem, I believe that DEP representatives should be encouraged, on occasions when it would be appropriate, to seek guidance from headquarters with respect to permitting matters involving policy and regulatory interpretations and determinations. This would be advantageous to the agency, the regulated community, and the general public. If done properly, this would neither hamstring the regions nor overwhelm headquarters in having to make consistency determinations.

2. Responsiveness and Timeliness

Permit applicants from the regulated community whom I represent want the DEP to respond to permit applications and questions in a timely manner so they can make appropriate business decisions. Not knowing the position of DEP on a particular permit application or submission within a reasonable period of time is unacceptable.

One way to deal with this problem could be to empower qualified professionals from outside DEP to either prepare submissions that only receive a cursory review by

DEP, or review submissions for DEP. Other states, such as New Jersey, Connecticut and Massachusetts, have adopted licensed professional programs whereby licensed environmental consultants review submissions under remediation programs such as Pennsylvania's Act 2, and make a determination subject to an up or down decision on the professional's determination by the state agency. In order to fund these programs, the applicant is required to make payment at the time of application submission in an amount that would cover the cost of review and processing. In my experience, applicants would be more than happy to pay this cost since it would usually expedite the timing of the review, as well as reduce DEP's staff time (and cost).

3. Regulations vs. "Policy" and "Guidance"

There are numerous DEP permit programs, for example the NPDES program for stormwater discharges and the Uniform Environmental Covenants Act, where there is a significant time interval between the enactment or amendment of a statute and the promulgation of accompanying regulations. During that time, there are sometimes written, but in many instances unwritten and internal, guidance or policy that are implemented by DEP and imposed upon permit applications in the same manner as properly promulgated regulations. Permit applicants only know about these policies when they are confronted with them during the application review process itself.

Since there are not that many environmental statutes passed each year, it would be helpful for DEP to get a "running head start" by drafting policies and guidances reflecting the legislative intent and history of the enactment (or amendment) of such legislation so that they can be turned into proposed regulations for submission to the Environmental Quality Board to promulgate at an earlier date.

4. Budget Cuts and Salary Limitations from Region to Region

Although DEP's programs continue to expand, its workforce continues to be impacted by budget cuts, the most recent of which caused the layoff of many DEP employees, as well as the shift of employees from programs with which they were experienced to new programs where they had little or any prior experience. In many cases, the people that were laid off tended to be the newest people that were hired, thereby losing the advantage of fresh young minds. I recognize that these are stressful economic times but making the DEP less able (personnel-wise) to respond timely winds up delaying the recovery of the regulated industry in the long run.

A second problem is that the uniform salary and benefit limitations in the six regions work against particularly the southeast and southwest regions, where the cost of living in Philadelphia and Pittsburgh and their environs is significantly higher than in the other regions. I would recommend that there be differences in limitations and benefits that take into account cost of living variances among the regions.

5. Miscellaneous Suggestions

In addition to privatization of permit application reviews mentioned above, I believe that (1) the use of general permits should be increased, thereby avoiding detailed application review; (2) applicants should be encouraged to have pre-submission meetings with the DEP personnel who will be handling the application; (3) certain applications could be submitted electronically so that completeness reviews can be performed quickly; and (4) where there are various permits required for complex projects, one DEP representative should be designated as an ombudsman both to serve as a point of contact for the applicant as well as organize the Department's staff. A good example of this last point has been the Brownfield Action Team.

In sum, the regulated community is seeking uniformity, consistency and responsiveness in DEP's permitting actions, which are achievable goals in the administration of the various Commonwealth environmental programs.

I would be happy to entertain any questions, and again I indicate that these are my own personal observations, not those of the firm nor my position as the Acting Chair of Pennvest.