

INSIGHTS

## Bracewell Environmental Law Seminar – Fall 2016: Highlights on Strategic Permitting

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By: [\*\*Matt Paulson\*\*](#)

On November 15, 2016, Bracewell's Environmental Strategies Group hosted its third biannual Environmental Law Seminar in Houston. The seminar was attended by nearly 100 industry representatives and featured five guest speakers, including Senator Kay Bailey Hutchison, CSB Board Member Rick Engler, Center for Global Energy Policy Fellow Ronald Minsk, Windward Strategies President and CEO Eric Washburn, and Spirit Environmental Program Manager Johnny Vermillion.

This is the first in a series of posts highlighting learnings from the seminar.

### **Strategic Permitting: From Project Planning to First Fire**

**Johnny Vermillion, P.E.**

Program Manager, Spirit Environmental, former Technical Specialist, Project Team Leader, Air Permits Section, Texas Commission on Environmental Quality

**Matt Paulson**

Partner, Bracewell Environmental Strategies Group

What are the key elements and main substantive areas that should be considered when scoping the permits necessary to authorize a new facility or the major expansion of an existing facility? How can you effectively navigate the constantly shifting landscape of government agencies responsible for the myriad permits, licenses and other authorizations that are required? What are some recurring challenges that often arise in air permitting? These are just a few of the issues discussed during the Strategic Permitting panel.

### **Bigger Picture – Strategic Permitting in Focus**

The successful permitting of any major new facility or major expansion of an existing facility requires the development of a comprehensive and effective multimedia permitting strategy that leverages legal, regulatory, policy, business, technical, public relations and political assets to timely meet project milestones, providing investors and other stakeholders with confidence in project viability from the earliest stages of project planning to start of operations. Key

elements of any successful permitting strategy include:

- Scoping required authorizations across all media and disciplines
- Developing integrated, comprehensive timelines to align the business plan with the permitting process
- Managing internal stakeholder expectations, while pushing the “authorization envelope” to meet business objectives
- Developing an effective strategy to address potential project opposition
- Reacting quickly to unanticipated project changes
- Developing a strategic communications plan to proactively engage external stakeholders and drive project support

Against this backdrop, panel members stressed the following points:

*Site Selection:* A critical component for many reasons, but especially with regard to modeling air impacts – seemingly small changes can undermine the modeling analysis and result in significant project delays.

*Responding Timely to Agency Requests:* Agency staff are usually very cognizant of timing issues, provided you maintain regular communications. It is not uncommon for notices of deficiency to remain unresolved, however, because of confusion on the applicant’s end over who within the company is responsible for developing the response.

*Saving Your Powder:* Agency staff are generally good about working with the applicant to address roadblocks or other challenges that arise. However, not every development is a crisis and applicants should limit the number of times they “go up the ladder” at an agency.

*Imposing Document Controls:* Especially where a permit challenge is likely, imposing controls on document creation is critical. Drafts of permit applications and other materials created by third-party consultants can become discoverable in administrative challenges.

### **Deeper Dive – Air Permitting**

Often considered the “gating” permit due in part to interrelated technical and legal considerations, as well as frequent targeting by environmental NGOs, the air permit can present unique and difficult challenges that require creative solutions. Issues addressed by the panel included:

*Project Aggregation:* The timing and relationship between what may be presented as two or more separate projects can involve significant challenges where inconsistent statements by the applicant surface – i.e., where the projects are presented in stockholder reports or trade publications as part of one overall project to increase capacity.

*Shared Facilities:* The more integrated operations are, the more challenging it can be to separate permits. Where separately authorized operations have emissions that are routed to a common control device, the issue of which entity the enforcement authority should look to can become complicated and frustrating for agency staff.

*Inter-Pollutant Credit Use:* Driven by a tight market for VOC credits in the HGB nonattainment area, obtaining authorization to satisfy offset obligations through inter-pollutant credit use can be the difference between a project going forward or not. However, approval requires complex photochemical modeling and both TCEQ and EPA approval, based on inconsistent agency concerns and approaches. The higher the ratio sought, the more timing uncertainty.

*Phased Construction:* Pursuing formal phased construction versus maintaining a continuous construction program can be an important decision for construction projects that span a period of years. Retroactive BACT may also be implicated.

*“As Built” Changes:* Changes to any project are inevitable and can often be addressed through post-permit issuance amendments, depending on how significant the change is and where the project was in the permitting process when the need for the change became clear.

*BACT Challenges:* No control can be BACT, but it must still be supported by a BACT analysis. Whether a particular control technology is considered available for a given process, or specific application of the process, and therefore whether it should even be considered, can be as important to the overall analysis as technical feasibility and economic impacts.

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A copy of the panel’s slide deck is available [\*\*here\*\*](#).