

Dealing with (State and Federal) Regulators

D.R. van der Vaart

Disclaimer:

The following presentation reflects
the personal opinion of the presenter
and does not reflect the official
position of the NC Division of Air
Quality

Who are the Players?

- Companies
 - Corporate level Management
 - In-house environmental staff
 - In-house Counsel
 - Outside Counsel
 - Outside Consultants
- State Regulators
- EPA
- Environmental Groups

Overview

- Industrial Environmentalism = Share price and ignorance
 - general culture and media hype (BP)
- Environmental Management = Job security and ignorance
 - incredible complexity of regulations
 - corporate culture

Key Points



- Cultural differences
 - Corporate Management believes the environment is threatened
 - Larger corporations believe increased regulation tends to hurt little companies worse
 - Regulators are not experienced in manufacturing
 - Corporations believe share price would be adversely affected by policy of adversity

Pre-construction Permitting Process - Facility View

- Company need is identified
 - Engineering work
 - Budget discussions
 - Approval means: *go get the permit!*



General Strategy of the EPA

- Preconstruction Permit Program, realization is that facility *needs* the Permit
- If agency does not want to issue permit, delays are sought
- Generally, the facility caves, in effort to move project forward



FLM Issues

- See me if you have questions

BACT Issues

- The EPA can question BACT preliminary BACT determinations by state
- If state is delegated authority, it *must* take objections seriously
- If state is approved authority, it can usually be made to believe it must take objections seriously
- Title V Veto Authority Threatens BACT

The EPA Rule-making process

- Environmentalists sue often, with small budget and have led to sensitivity within the agency
 - Over \$4 Billion was paid in attorney fees by EPA over last 5 years
 - More recently, these Env'lists have now joined the EPA
- Industry groups use only “finest” lawyers that have become synonymous with compromises and costly litigation (many want to get along with EPA)

Big Litigation

- Leads to many small rules going forward
- Allows the EPA to encourage States to try things first to see if it will fly (under BL radar)

Politicalization of Environmental Management

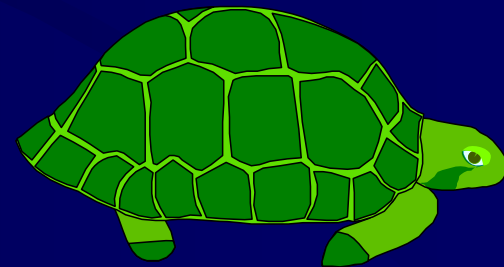
A Vice President of Con Edison (NY) wrote to Carol Browner of the EPA regarding the NO_x SIP call:

“I urge you to support federal action which would eliminate marketplace distortions associated with unequal pollution standards for generators of electricity.”

“[past environmental measures] have caused Con Edison’s cost of generation to be uncompetitive in price compared to electricity produced by high-polluting coal-fired utilities”

The EPA

- Activist Position
- Enormously increased budget
- Purveyors of regulatory creep and compliance terrorism
 - Lack of SIP approval for NSR rule – “build at your own risk
 - Similarly for 112(j)
 - “Construction Ban”



Awards to Supporting Roles: Consultants

- bottom line oriented: more work more time
- are often hired based on results (*i.e.*, the permit)
 - this means addressing agency concerns (*e.g.*, submitting extreme BACTs)
 - using overly conservative emission calculations
 - Accepting EPA guidance at face value



Awards for Supporting Roles: State Regulators

- Typically less competitive candidates
- Very often lack industrial experience
- Young, representing a more recent product of current universities



Awards for Supporting Roles: Corporate CEOs and Senior Management

- Lost sight of bottom line
- Prefer to let manufacturing sites function as cost centers (with regulatory responsibility)
- With focus on share price (options?), detrimental press regarding environmental issues is considered an anathema



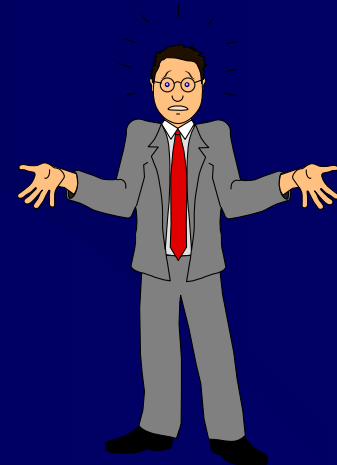
Awards for Supporting Roles: Outside Counsel

- Bottom line oriented: more work, more time
- Also hired to achieve results (*i.e.*, get the permit) and keep GC out of trouble
- While some lawyers do understand the difference between guidance and rules, most do not = acceptance of EPA guidance
- When lawyers *do* suggest resisting, clients question litigious nature, billing, *etc.*



Awards for Supporting Roles: In-house Lawyers

- Very few are experts in individual fields, they are often expected to be the “environmental” expert, or even less specialized
- All are risk-averse: there is no advantage to being otherwise:
 - results oriented (*i.e.*, get the permit)
 - have no link to bottom line
 - are told to “keep us out of trouble”



Awards for Supporting Roles: Universities and Law Schools

- Very few environmental professionals have actually worked in industry
- Even fewer Professors have
- General belief permeates law schools and environmental programs that industry is the problem



Industry Strategy

- Corporate Environmental Management should be:
 - Expert, to establish credibility
 - Hard-nose
 - advantage is detached involvement with state personalities
- Facility Env. Management should be:
 - Benevolent and self-deprecatory

Corporate Obligations

- Should estimate the cost of environmental compliance
 - *Very* rarely done because of difficulty
 - Includes much more than annualized cost of control devices
- Should build *real* expertise
- Should be given corporate vision (too often now: make your bottom line but roll over for regulators)

Industry Strategy

- Submit many more applications than actually needed
- Submit applications for more capacity than actually needed
- “Give” surplus away during inevitable negotiations

Real Life

- Corporate, in a perceived concern for PR (share price), gives everything away (often the EPA gives prizes to companies that do it first)
- Facility management, as cost center, is left to making it work (Strains relationships between regulators and facility)

Real Life

- Corporate is generally in contact with EPA directly (rather than State) and could, indeed harbor similar intentions (typically those w/o facility experience)
- Facility is generally peopled by less-politic individuals who can end up in “trouble”

Summarizing Permitting Pitfalls

- EPA strategy
 - time
- Industry strategy
 - time
- Role of state regulators
 - precedent

GHG/SO₂ Rules or Stop Solid Fuel Combustion

- Stop burning fuels
 - Boiler MACT and SO₂ standard
 - Will force non-EGUs into NG
 - EGUs will go under CATR or Cap and Trade
 - Will force EGUs into NG
 - GHG rule will force anyone else into NG
 - Biofuels combustion is straw- man

Tailoring Rule

- Simply to defray opposition by transitioning
 - 250 tpy is not 75,000 tpy
 - Absurdity? Try GACT for boilers
- Third stage is already forecast
- Changes in BACT

Changes in BACT

- Re-definition of Source
 - Design *vs.* Purpose
 - NG instead of wood
- Re-Definition of facility
 - Can bring in non-affected sources

Pop Quiz

- How much do you know about:
 - Regional Haze?
 - Environmental Justice?
 - AQMP?
- How often have you:
 - FOIA'd your State regulators?
 - FOIA'd your AG's office?
 - Made comments on projects that are not yours?