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Environmental law:

A litigator's perspective on permitting considerations

Developing a project or facility often presents significant challenges, including those associated with obtaining environmental permits under federal, state and local laws and, in the most challenging cases, defending those permits in litigation. Ideally, a project may have comprehensive advance planning, few regulatory obstacles, and broad and deep government and public support. Under less ideal circumstances, there may be a condensed time frame to obtain a permit, significant legal or regulatory “roadblocks,” vigorous public and political opposition, and litigation. This article does not attempt to dive into the myriad of complex environmental regulations that may entangle a project, rather it offers more general concepts that are important to keep in mind, regardless of the project and regulatory framework. Consideration of these matters may increase the chances of success, not only in obtaining necessary government approvals but also in preventing or defending against litigation.

- *Team composition* – A project permitting team must have expertise in the legal, regulatory, geological, biological, engineering, economic and other technical aspects of a project. At least some team members should have established mutually respectful relationships with relevant regulatory staff at the local, state and federal levels. Depending upon the project and the company, the team may include some combination of company executives, professionals and staff, and outside counsel

and professionals. Individual expertise, capacity, cost and effectiveness should be considered when assembling a team. For all projects — especially those likely to be disputed — team leaders and outside counsel should assess the ability of individual team members to serve as potential witnesses in possible administrative or judicial litigation. Since the team’s work must justify issuance of the required permits to regulators, the public and administrative tribunals and courts, competency, credibility and communication are key.

- *Scoping and planning* – Business priorities drive projects. However, input from environmental permitting experts at the earliest stages of project scoping and planning may help avoid potential set-backs that could frustrate business goals. The old adage “an ounce of prevention is worth a pound of cure” applies here. Alternative locations or configurations for a project should be assessed early in the process and considered in light of regulatory requirements for the company’s preferred alternative. While planning efforts may not identify all potential permitting issues, they should be comprehensive enough to shed light on significant obstacles that could jeopardize project goals.

- *Communications* – Consider managing internal and external communications with the following objectives in mind: (1) establish a robust administra-

tive record in support of permit applications and favorable permitting decisions; (2) address evidentiary matters in relation to potential litigation; and (3) promote favorable public opinions. Legal counsel should consider potential privilege and confidentiality issues, as well as admissibility of documents and testimony, and establish communication guidelines for the permitting team. Procedures for reviewing and editing draft documents should be established to ensure consistency and accuracy. An errant statement in a technical document can cause significant time, expense and risk both in obtaining necessary permits and in later litigation challenging permits after they are issued. It is better to spend time and effort up front to thoughtfully design and scope studies and carefully edit reports than to place the permits and project at risk by submitting reports that are not fully vetted and thus risk publication of avoidable inaccuracies or misstatements.

- *Regulators and regulations* – Government permitting staff are knowledgeable professionals tasked with a difficult job of interpreting, implementing and enforcing applicable regulations. While they have significant knowledge of the rules they enforce, they also may rely on informal agency policies and procedures and “know-how” to carry out their duties. Such informal practices do not always line up with the statutes and regulations that govern. It is beneficial to

work cooperatively with regulatory staff, and while regulators may provide useful input, both formal and informal, and “advice” that should be carefully listened to and considered, the applicant should not rely solely on a regulator’s “say-so.” It is important to comply with the regulations as they are written and formally interpreted by administrative tribunals and judicial courts. While a regulator may exercise discretion to issue a permit based on his or her view of what the regulations require, applicants may challenge unsatisfactory regulatory interpretations, and those in opposition to the project also may initiate litigation to challenge an issued permit. In those circumstances, it is satisfaction of the regulation, rather than the regulator, that will prove decisive — the regulatory agency view, while potentially entitled to deference, does not control a court’s analysis and judgment.

- *Rulemaking, variances, and litigation* – Certain projects depend upon successfully challenging initial regulatory interpretations, obtaining variances where applicable, or even revising rules or statutes through appropriate administrative or legislative processes. Timing, cost, feasibility and risk should be weighed, but under some circumstances, engaging in administrative rulemaking, legislative amendments, obtaining variances, and/or administrative or judicial litigation may all be considered as potentially appropriate means of addressing regulatory interpretations by government permitting staff that would cause a project to fall short of business goals.

- *Permit review* – Receiving a final permit for a preferred project – often after much time, effort and investment – is a welcome occurrence. However, it is important to run through the finish line. Signature and acceptance should wait until all appropriate team members carefully review the complete permit

terms and conditions, including “boilerplate” text, general conditions, and all maps, figures, and materials that may be incorporated by reference. Revisions, technical or otherwise, often may be timely requested and addressed. Appeals should be considered as appropriate. Once all terms and conditions of the permit are determined to be in order, a compliance schedule should be roughed out and assessed to identify potential issues prior to signature and acceptance of a final permit.

- *Compliance and renewal* – It bears repeating: Outline a permit compliance and renewal schedule before accepting a final permit in order to identify potential issues with following all permit terms and conditions. After permit acceptance, the compliance schedule should be fully fleshed out and distributed to appropriate company executives, professionals and facility staff, and perhaps outside consultants or counsel, depending upon the project and a company’s practices, capabilities and expertise. A reporting and record-keeping plan also should be developed and checks established to ensure regulatory and permit compliance as a project is carried out and a facility is operated. Many laws require specific records to be kept and the reporting and record-keeping plan should reflect those requirements. In the event of significant and/or reoccurring compliance issues, permit amendments or variances should be considered along with project changes. Permit renewal efforts should be undertaken well in advance of deadlines in order to ensure that any

potential issues or delays do not impact facility operations.

- *Defending against permit-challenge litigation* – Once permits are obtained, permit-challenge litigation may be brought by those opposing a project. The evermore divisive politics of environmental issues and increasing public mistrust of government has resulted in more frequent litigation of any significant project, regardless of factual and legal circumstances or the merits of the permit or permits challenged. Consideration should be given to proceeding with a project “at-risk” during the course of litigation. Risk, cost, timing, precedent and public relations should all be considered in developing and carrying out appropriate litigation strategies and assessing potential settlement. Just as obtaining the permit or permits requires cooperation with and support of government permitting staff, so too does successfully defending permit-challenge litigation. If fully anticipated, considered and addressed during the project planning and permitting processes, permit-challenge litigation may be prevented, or at least made less risky and less expensive.

SUMMARY

It is important to consider not only the technical scientific, engineering and regulatory context of environmental permitting for a project or facility but also to strategize in light of political, legal and public-relations matters, and in anticipation of potential litigation to challenge government regulatory interpretations and to defend permits once obtained.

ALEX ELKAN is a partner with Brooks Pierce. He serves as lead counsel for environmental permitting and litigation matters throughout North Carolina. Alex enjoys working with clients to foresee and address issues before they become problems, to solve problems when they arise, and to litigate matters through trial and to final appellate judgment when appropriate.