

DRAFT REPORT OF JUNE 25, 2001

Public Involvement in Environmental Permits: An Action Plan*

Submitted to:

Office of Solid Waste
Permits and State Programs Division
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted by:

Hazardous and Medical Waste
Services Inc. (HAZMED)
10001 Derekwood Lane, Suite 115
Lanham, MD 20706
www.hazmed.com

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I. INTRODUCTION

A. Agency Deliberations and Consultations: History of the “Guide”

This report stems from work that the U.S. Environmental Protection Agency (EPA) commenced in 1999 to address public participation issues arising under the various permitting programs administered by the agency, in conjunction with various authorized states. The agency drafted a document to clarify the permitting process and document best practices titled *Public Involvement in Environmental Permits-A Reference Guide* (Guide).¹ Specifically, upon its publication, EPA noted that the Guide’s purpose was to:

- ▶ help state and tribal staff enhance their own public participation efforts
- ▶ help the public learn about permits and how to engage in the permitting process
- ▶ provide examples and best practices to help permitted facilities to effectively manage their public participation activities.

In providing an overview of the Guide’s contents, the agency noted that it:

- ▶ summarizes EPA’s major permitting programs (e.g., air, water, and waste)
- ▶ details the public participation requirements for these programs
- ▶ provides best practices for effective public participation; and
- ▶ provides a compendium of additional resources and contacts

The drafting process for the Guide was an agency-wide effort, drawing upon the expertise of a workgroup comprised of all permitting media offices and other key agency staff within the following offices: Office of Water, Office of Air and Radiation, Office of Solid Waste and Emergency Response, Office of Policy, Economics and Innovation, and Office of Enforcement and Compliance Assurance. After the initial draft Guide was completed, comments were made by the EPA Workgroup, and the draft was revised to address the comments. As a next step, an external review panel was assembled, which consisted of four experts

¹For a copy of the Reference Guide see www.epa.gov/permits. The initial work was supported by funding by the U.S. Environmental Protection Agency under Contract No. 68-W7-0001, Work Assignment 43 to HAZMED, Inc.

in the field of public participation and permitting, and members of two key organizations, National Environmental Justice Advisory Council (NEJAC) and Environmental Council of the States (ECOS). Written comments were also obtained from ASTSWMO and an attorney, Richard Lowerre, in conjunction with comments made at public meetings held in Washington, D.C. and Houston Texas. In addition, prior to these meeting, 55 interviews were conducted to obtain insights on the Guide from a range of stakeholders, which included representatives from the following groups²:

1. State, Tribal, and Federal Regulators
2. State Associations
3. Regional Regulators
4. National Trade Associations
5. Individual Industries
6. Citizen's Groups
7. Environmental Groups

After these meetings, the feedback obtained was integrated into the Guide.

B. Disclaimers and Draft Nature of the Report

Due to budgetary and scheduling issues, this reported is being submitted as a ***DRAFT***. The report was not reviewed by any EPA staff or its agency-wide permitting workgroup prior to submission. Therefore, the recommendations set forth below are our own and have not been endorsed by the agency. We also note that we have not conducted a detailed analysis regarding our development of criteria to guide recommended changes, nor provided detailed conclusions or discussions on a number of topics. We realize that feedback from the workgroup would help focus many of the discussions set forth below. Another area that could benefit from agency input is the evaluation of resources to make changes. This is captured under the "feasibility" criteria. HAZMED has tried, however, to raise the salient issues raised during the various interviews and meetings for the EPA workgroup's further consideration. Moreover, as noted below, we do address some of the regulatory/legal impacts connected with making the regulatory changes. We also hope this draft is useful in informing the review of the agency-wide public participation policy. If further analysis is desired, we would be glad to provide additional assistance.

C. Contextual Issues

There are several pieces of background information that will help add context to the discussions that

² See Appendix A for a complete list of persons interviewed and those contacted prior to the Washington, D.C. and Houston, Texas Stakeholder meetings of 2000.

follow. First, the Guide was being drafted while the agency is finalizing its agency-wide policy on public participation; consequently, these recommendation may serve to inform this effort. Second, late in the drafting process there were several executive orders issued in response to a deepening energy crisis; hence, these recommendations have considered the practical implementation issues that need to be factored into the agency's policies and regulations on public participation in permitting matters. Third, these recommendations have been heavily influenced by detailed consultations with industry, permit writers, environmental/citizen's groups.

D. Methodology Used in Drafting Regulatory and Non-regulatory Recommendations

EPA asked HAZMED, Inc. to draft this report providing regulatory and non-regulatory recommendations for consideration by the Deputy Assistant Administrator. We noted to EPA that to determine the amount of resources that implementation of changes would require, we would need to consult with agency workgroup members. These recommendation, informed by our numerous consultations with experts, stakeholders and regulators, are aimed at improving the public participation process in environmental permitting decisions. Our approach to developing recommendations included the following *five* steps:

- 1- Consultation with EPA to review the agency's objectives and goals;
- 2- Consolidation and research regarding the total universe of written and verbal comments expressed from the Guide drafting process;
- 3- Development of criteria that could be consistently be applied to various proposals;
- 4- Application of criteria to proposals; and
- 5- Ascertaining the legal/regulatory impacts of proposals made.³

II. DEVELOPMENT OF CRITERIA TO GUIDE RECOMMENDED CHANGES

After consulting with EPA to review the agency's objectives and goals, we reviewed the total universe of written and verbal comments expressed from the Guide drafting process. These documents included many of the core documents that served as the foundation for drafting the Guide.⁴

³ Due to funding constraints, the task of determining the legal/regulatory impacts of proposals made was not a formal part of this report; hence, while we have attempted to provide our analysis in Appendix B, this is considered a preliminary, draft analysis.

⁴ The major documents that we reviewed include the following: comment letters submitted by ECOS, NEJAC, ASTSWMO, and other persons in their individual capacity; detailed written critiques by the expert focus

We compiled and summarized these comments. Using this summary in conjunction with the original source documents, we reviewed suggested recommendations. Of the many sources we analyzed, the following, in particular, contained a wealth of recommendations:

- consultations with ECOS and NEJAC
- critical review by expert focus groups
- convening reports, which summarized concerns of various interviewees;
- stakeholder meetings held in Washington D.C. and Houston Texas.

Based on the compiled information, we then decided which factors might best be used to screen out choices. Among the first choices for criteria were those proposals that lacked either merit or broad support by a sufficient range of stakeholders and experts. We found development of criteria was challenging due to the fact that several of the criteria either overlap or are related to each other. We have seek the agency's reaction to this list. Once this list is finalized, though either additions or subtraction to the criteria listed below, the agency may seek to rank these criteria to determine their relative significance to each other.⁵ Set forth below is a list of the eight criteria that we have utilized in our subsequent analysis along with a discussion regarding a rationale for its inclusion.

- 1- Support the comment/statement received-
 - Level of public support/opposition
 - Level of industry support/opposition
 - Level of regulatory support/opposition
 - Level of expert support/opposition
 - Who authored the comment? Expertise, experience, and credibility of author.⁶

Note: Comments and statements were often gathered without attribution (see discussion at the end of "frequency" criteria below).

- 2- Frequency- How frequently the comment/statement arises in our archives or in other venues (e.g., verbally at meetings, see footnote number 6 below). This criteria relates the level of support,

group (Scott Graves, Samara Swanston, Deohn Ferris, and Leslie Wildesen); the pre-meeting convening reports for the D.C. and Houston Stakeholder meetings; the meeting summaries from the D.C. and Houston Stakeholder meetings.

⁵ While this "ranking" was beyond the scope of this report, we feel this exercise may be a helpful endeavor.

⁶As noted above, because the identity of the participants is often not recorded, determining the credibility of any given statement can be impossible.

criteria number one. If different groups supported a proposal, it provides additional evidence of support.

While many written comments received were authored by persons known to the agency (e.g., experts, ECOS, and NEJAC representatives), others spoke in pre-meeting convening interviews or at public meetings. However, to ensure candor of the exchanges, participants in the interviews and public meetings spoke without name attribution and hence, are not identified. Therefore, the convening reports and meeting summaries, while containing valuable insights that are incorporated into this report, reflect the ideas of persons from industry, regulators, and the public who are not identified by name. Therefore, it is often not possible to determine the frequency of any comment made. *These issues are also relevant to the "support" criteria #1 (above) since comments and statements were often gathered without attribution.*

- 3- Level of controversy- Reaction to proposed change by various groups, (e.g., public interest groups, industry groups). While related to criteria numbers 1 and 2 above, a proposal that is viewed as controversial by a certain group of industries/agencies might be viewed less favorably, despite the fact that a majority of stakeholders have supported the idea.
- 4- Feasibility- What is the level of effort in terms of both federal and state time and resources resources required to implement this suggestion? Although EPA needs to evaluate this question, as it is currently beyond the scope of this report, generally, regulatory changes require more time/resources compared to those that do not.
- 5- Scope and impact- Compared to the question of feasibility (criteria #4), this item address the impact on *non-agency* stakeholders. Would this comment have an effect on the local level, state level, regional level, national level or all? What are the range of entities/interests that are likely to be impacted? Is making this comment into a recommendation and ultimately into a policy or regulation change going to have a narrow or wide effect? Another variable is the extent to which it affects other rules and regulations and/or create confusion to regulated entities or the public who seeks to participate.
- 6- Novelty- Does the comment involve something already familiar or being practiced by public participation experts and stakeholders? Is the practice mentioned in the Guide or other pertinent sources used by experts in the field? Unfamiliar or untried practices may be resisted until they are proven and given credibility.
- 7- Benefits - Does the recommendation improves and/or clarify public participation practice? Who would benefit from the changes? At what levels (e.g., local/state/national) would this

recommendation improve public participation? Would the recommendation be adding more layers to an already complicated process? Or would it be working to simplify the process?

- 8- *Preventing delays and resolving disputes-* There are several relevant questions. Does the proposal serve to prevent delays in the permitting process due to community opposition? Does the proposal seek to address the controversial nature of permitting decisions amongst the affected public that have concerns regarding health and environmental impacts of facilities? Will the proposal provide an alternative to litigation and other contentious means of addressing conflict when it arises? Does the proposal acknowledge the need to resolve disputes and issues when they arise?

III. APPLICATION OF CRITERIA TO NON-REGULATORY PROPOSALS

A. Key Proposals Meeting Criteria

There were numerous proposals and suggestions made in the course of drafting the Guide. Proposals offered were analyzed regarding how they addressed or met the criteria described above. After a preliminary screening, the following nine proposals emerged as leading candidates for inclusion in the report:

- 1- *Providing training in public participation for regulators, including how to participate in public meetings;*
- 2- *Encouraging the use of non-traditional networks;*
- 3- *Standardizing the public comment period to 60 days to create uniformity among all programs;*
- 4- *Increasing the use and availability of the TOSC program;*
- 5- *Developing a uniform requirement that all permit applications must demonstrate community involvement upon application;*
- 6- *Requiring sponsor of CAG or CAP to disclose the nature by which the group is affiliated with industry/federal government in the meeting notice and at the beginning of the meeting;*
- 7- *Requiring sponsor or facilitator/mediator of a CAG or CAP or other public meeting to disclose to a participant which issues cannot or will not be addressed through the CAG/CAP or other public meeting;*

- 8- *Creating a training program for the public on involvement options in environmental permitting and/or support existing training to facilitate public education of the process; and*
- 9- *Determining the best practices of conflict resolution by professional third-party neutrals in permitting and other matters and their application to permitting.*

Importantly, of these proposals, five would *not* require regulatory changes, while four would require regulatory changes. A detailed discussion regarding how these proposals meet the criteria is set forth below.

B. Detailed Discussion of How Proposals Address Criteria

Recommendation #1: Provide training in public participation for regulators, including how to participate in public meetings

Criteria #1: Support the comment/statement received- Providing additional training was a popular recommendation that could benefit all of the participants in the permitting process. A majority of focus group experts (experts) maintained that agency staff should be involved in such training sessions. One expert asserted that in identifying public participation requirements it is critical that agency program staff know "what to do, how to do it, and when to do it for each program." Another stated that to facilitate interest in public participation and community involvement, training agency staff is an important means of accomplishing this goal. Moreover, the Guide, it was noted, could benefit from clarifying how to put a public involvement program into place; hence training permitting staff regarding how to participate in meetings and answer questions from the public is a valuable step towards implementing a program. Importantly, participants at the D.C. Stakeholder meeting supported looking into training for both agency personnel and the public.

Criteria #2: Frequency- As mentioned in the discussion of criteria #1 above, training was frequently discussed, and, therefore emerged as a prominent theme in many comments.

Criteria #3: Level of controversy- This proposal was not characterized as controversial nor was it opposed by either industry or the public. Instead, it was supported by all these groups.

Criteria #4: Feasibility- Feasibility depends on the scope of training provided. Scope, in turn, impacts the resources needed to develop and deliver training. A comprehensive training package

would be ideal, but it could certainly be tailored to fit any need and/or budget.

Criteria #5: Scope and impact- Depending on the feasibility decisions, this recommendation could affect regulators at all levels. But it would not appear to affect any current rules or regulations. Instead, it would serve to enhance and promote them.

Criteria #6: Novelty- Training of agency personnel on a wide variety of issues is relatively common, and agencies have committed resources to numerous efforts at the federal and state level. Therefore, this is a not a new idea that would meet resistance.

Criteria #7: Benefits- Based on comments received, additional training benefits not only the agency staff members, but due to increased level of skill in explaining and implementing the permitting and public involvement processes, misunderstanding can be avoided and partnerships leveraged.

Criteria #8: Preventing delays and resolving disputes- While training in itself does not guarantee that delays in the process and potential disputes can be avoided, it is a helpful adjunct to any dispute avoidance and resolution process. For example, there was ample discussion in one of the stakeholder meetings suggesting that many frustrations the public harbors toward agency officials in hearings is due to not being certain an issue (e.g., zoning) can be properly addressed due to the narrow scope of the meeting.⁷ Training that emphasizes this point—among others—could better prepare officials that face this issue in public meetings; hence, where misunderstanding are avoided through education and enhanced through greater communication between the parties, it decreases the likelihood of controversy and resulting delays.

Figure 1: Recommendations Rated Against Criteria

⁷ See Houston Stakeholder Meeting Convening Report of July 28, 2000, pages 8-9.

| <u>Recommendation #1</u> | Rating (1-5), with 5 being highest | |
|---|---|---------------|
| | Criteria | Rating |
| <i>Provide training in public participation for regulators, including how to participation in public meetings</i> <u>Criteria Key:</u> 1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution | 1 | 5 |
| | 2 | 5 |
| | 3 | 5 |
| | 4 | 4 |
| | 5 | 5 |
| | 6 | 5 |
| | 7 | 5 |
| | 8 | 4 |
| | Total | 38 |

Recommendation #2: Encourage the use of non-traditional networks

Criteria #1: Support the comment/statement received- Sending agency outreach staff and field personnel to participate in regular or other collaborative meetings arranged by groups (e.g., churches, synagogues, mosques, civic associations, youth groups) in the affected community can help promote trust-building and long-term ongoing relationships essential to vital community involvement. This technique also builds communication networks. Such networks, according to an expert, are an important means of building partnerships that can impact site-specific issues.

Criteria #2: Frequency- These types of comments were not frequently heard in our comments.

Criteria #3: Level of controversy- This has a low level of controversy. Nobody opposed this concept.

Criteria #4: Feasibility - There are low costs associated with occasional visits by agency personnel to public meetings. Resources used would depend on how systematically—versus ad hoc—such an approach is utilized. Criteria would be needed to decide which meetings would be attended versus those that would not.

Criteria #5: Scope and impact- While this would have a positive impact on agency/stakeholder relations, that impact would depend on how systematically—versus ad hoc— such an approach is utilized. Given agency funding levels (e.g., federal and state), this might not receive the priority that would enhance its effectiveness.

Criteria #6: Novelty- Networks are mentioned in the current Guide. Agency staff often visit public meeting as is. This is not highly novel as to inhibit its value.

Criteria #7: Benefits- Increasing visibility of regulators at public functions improves public trust and adds communication opportunities. By increasing the incidences of public contact, there are more opportunities for information dissemination and exchange. Such opportunities are not, however, as focused as TOSC or other formal training sessions. Moreover, these visits by agency officials may be ad hoc in nature as it is hard to foresee how agencies would decide *which* meetings to attend, lessening their overall value.

Criteria #8: Preventing delays and resolving disputes- As noted above under *benefits*, by increasing the incidences of public contact, there are more opportunities for information dissemination and exchange, as well as partnership building. Given, however, the potential for this type of tool to be used in an ad hoc fashion, its value in preventing and resolving disputes is questionable.

Figure 2: Recommendations Rated Against Criteria

| <u>Recommendation #2</u> | <u>Rating (1-5), with 5 being highest</u> | |
|---|--|----------------------|
| | <u>Criteria</u> | <u>Rating</u> |
| <p><i>Encourage the use of non-traditional networks</i></p> <p><u>Criteria Key:</u> 1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution</p> | 1 | 4 |
| | 2 | 2 |
| | 3 | 5 |
| | 4 | 3 |
| | 5 | 4 |
| | 6 | 5 |
| | 7 | 3 |
| | 8 | 2 |
| | <i>Total</i> | 28 |

Recommendation #3: *Standardize the public comment period to 60 days to create uniformity among all programs- (For discussion see section IV., Application of Criteria to Regulatory Proposals)*

Recommendation #4: *Increase use and availability of the TOSC program*

Criteria #1: *Support the comment/statement received-* Given the complex, technical nature of the permitting programs, it is not surprising to find a high level of public and agency support for increasing the use of grants to the public under the existing Technical Outreach Services to Communities (TOSC) program. This recommendation was expressed by experts, stakeholders, and the EPA workgroup. An expert noted that partnerships with academic institutions in the community “can provide educational and technical support to build community capacity” to participate in decision-making. Community-University Partnership Grants (CUPs) and Technical Assistance Grants (TAGs)--widely used in the Superfund program--have been successful in informing stakeholders about technical and process issues. There was no industry opposition to this recommendation. In fact, there were *no* negative comments made about the need for TOSC and related grants throughout the universe of written and verbal comments contained in the archives.

Criteria #2: *Frequency-* The recommendation came up very frequently. It was raised in both the D.C. Stakeholder convening report and meeting. Specifically, at the D.C. meeting, after a long

discussion on the need for additional technical assistance resources, an EPA official summarized the issue by noting the sense of the group top research “*funding available for technical experts and what programs are available to help the public effectively participate in permitting processes (e.g., TOSC and Ombudsman programs)*.”⁸ Furthermore, at the stakeholder meeting in Region VI, an EPA representative noted that the support for increased use of TOSC grants convinced him of the merits in recommending its increased use to EPA management.⁹

Criteria #3: Level of controversy- This recommendation was highly supported; therefore, there is an extremely low level of controversy regarding this issue.

Criteria #4: Feasibility- Making this recommendation is highly feasible. It consists of adding additional resources to a current program. Availability of resources will, however, impact use of such grants by the public. Since TOSC is already an active program, any effects that help predict feasibility will already be known by federal, state, and local agencies.

Criteria #5: Scope and impact- Implementing this recommendation would have a visible effect at the local and state levels; this impact would be magnified through strong national leadership. For instance, an expert suggested that agencies hold educational workshops on the environmental statutes and permitting.

Criteria #6: Novelty- The use and existence of TOSC is mentioned in the Guide. In addition, its use is widely known to interested members of the public, agencies, and industry. Therefore, there is unlikely to be resistance based on its novelty.

Criteria #7: Benefits- First, capacity or funding of community groups to foster effective citizen participation is a major issue according to many. One party characterized this as the “most serious issue facing communities.” The lack of technical and process expertise among citizens’ groups was cited as a major impediment to their effective participation. Because permitting processes are highly technical, additional resources are needed to bridge this gap in capacity amongst the stakeholders. Second, providing the public more knowledge and greater access to information and resources is beneficial to public participation. From the public’s point of view, increasing the TOSC program will clarify public participation requirements and additional non-required tools.

⁸ D.C. Stakeholder meeting summary at page 7.

⁹ Houston, TX Convening Report at page 9

Criteria #8: Preventing delays and resolving disputes- One meeting representative stated that conflicts with industry and the public often lead to litigation. For this reason, the public should be provided with legal assistance/resources in addition to technical resources. Another individual noted that pro bono clinics exist as resources, and EPA should provide a list of legal resources, along with any other local information, at meetings. A party suggested that a strengthened TOSC program could mitigate perceived shortcomings with community advisory groups (CAGs).

Figure 4: Recommendations Rated Against Criteria

| <i>Recommendation #4</i> | Rating (1-5), with 5 being highest | |
|---|---|---------------|
| | Criteria | Rating |
| <i>Increase use and availability of the TOSC program</i> <i>Criteria Key:</i> 1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution | 1 | 5 |
| | 2 | 5 |
| | 3 | 4 |
| | 4 | 5 |
| | 5 | 5 |
| | 6 | 5 |
| | 7 | 4 |
| | 8 | 5 |
| | <i>Total</i> | 38 |

Recommendation #5- Make a uniform requirement that all permit applications must demonstrate community involvement upon application (For discussion see section IV., Application of Criteria to Regulatory Proposals)

Recommendation #6- Requiring sponsor of CAG or CAP to disclose the nature by which the group is affiliated with industry/federal government in the meeting notice and at the beginning of the meeting (For discussion see section IV., Application of Criteria to Regulatory Proposals)

Recommendation #7: *Requiring sponsor or facilitator/mediator of a CAG or CAP or other public meeting to disclose to a participant which issues cannot or will not be addressed through the CAG/CAP or other public meeting (For discussion see section IV., Application of Criteria to Regulatory Proposals)*

Recommendation #8: *Creating a training program for the public on involvement options in environmental permitting and/or support existing trainings to facilitate public education of the process*

As the Guide was being completed, EPA noted that ECOS had announced its intent to take the lead in the drafting of a separate Guide for the public. Therefore, as a practical matter, the issue of EPA taking the lead in drafting such a Guide is mute. As an alternative, however, we recommend that the EPA consider utilizing targeted training on permitting issues for the public and interested citizens' groups. Therefore, after discussing the information needs expressed by numerous stakeholders, we have recommended EPA meet these needs that could have been accomplished through the Guide through a series of targeted trainings.

Criteria #1: Support the comment/statement received- The majority of parties stated strong support for EPA taking the lead in converting the Reference Guide into separate guide for the general public. The support came from the experts, who were confused about who the "audience" was in the early draft of the Guide. An expert stated that a separate guide should be developed for communities that forthrightly states what roles they may be able to play, what kinds of success communities or community groups have had in public participation processes and what kinds of assistance communities can expect. Communities should be told "what the statutory duties of regulatory agencies are as well what they have the option to do." Strong support also came from community/environmental groups.

These comments suggest that there is a strong need for agencies to more effectively communicate and educate the public on process and technical issues regarding public participation. As an alternative to a public Guide, there was strong support for additional training that could augment TOSC and related site-specific support. For example, many members of the public spoke highly on EPA's public training on Title V on the Clean Air Act. No agency or industry representatives opposed further public training initiatives.

Criteria #2: Frequency- Support for a public Guide was frequently made throughout the Guide drafting process by all parties from experts, industry, regulators, and the public. It was also discussed in both convening reports and at both public meetings.

Criteria #3: Level of controversy- There were, a range of views regarding what such a document should attempt to accomplish and who should author it. The two main themes suggested for such a guide were (1) a procedural outline of requirements and (2) a “how to” guide for citizens to illustrate how they can effectively be involved and influence an agency. Many regulators acknowledged that a “how to” guide was appropriate, though some differed on the amount of practical information that should be included versus information concerning how the programs are structured and operated. Several parties mentioned that a practical “how to” public guide could include tips regarding how to analyze a pending permit application and effectively draft technical and legal comments. One problem widely reported by state and federal permit writers was that the public often makes comments about issues that the agency has no authority to control (e.g., noise or odor). A party suggested that at a minimum, the public guide should make it clear regarding what issues *cannot* be addressed through a permitting agency. One party noted that both procedural and “how to” considerations were important components to a public guide. This party questioned how many state-specific requirements should be included to enable the public to participate effectively without overwhelming the average citizen. A state permit writer also stated that one challenge of a “how to” public guide is providing enough information but avoiding getting bogged down in technical details.¹⁰

Criteria #4: Feasibility- This recommendation is highly feasible. It consists of adding additional resources to current public training programs. Availability of resources will, however, impact the amount of effort the agency can expend on such an effort.

Criteria #5: Scope and impact- Implementing this recommendation would have a visible effect at the local and state levels; this impact would be magnified through strong national leadership. For instance, educational workshops that clarify participation opportunities and clarify the process will go beyond site-specific benefits to creating a understanding by the public on a national scale. This clearly addresses a pressing public need expressed through the Guide drafting process.

Criteria #6: Novelty- Given the plethora of public meetings and training sponsored the agency (e.g., Title V) this is not a novel undertaking that will inhibit its use.

Criteria #7: Benefits- Additional training benefits not only the agency staff members due to their being less need to communicate/clarify basic program issues, but due to increased level of public knowledge, misunderstanding among public participants can be avoided and partnerships leveraged.

¹⁰ A detailed discussion of these issues is contained in the Houston Stakeholder Meeting Convening Report on page 4.

Criteria #8: Preventing delays and resolving disputes- As noted in the TOSC discussion above, many frustrations the public harbors toward agency officials in hearings is due to not being certain an issue (e.g., zoning) can be addressed at a meeting. Training that emphasizes the process, tools, and option can decrease the likelihood for misunderstanding and enhance communication between the parties; hence, such outcomes decreases the likelihood of controversy and resulting delays.

Figure 8: Recommendations Rated Against Criteria

| <u>Recommendation #8</u> | Rating (1-5), with 5 being highest | |
|---|---|---------------|
| | Criteria | Rating |
| <p><i>Creating a training program for the public on involvement options in environmental permitting and/or support existing trainings to facilitate public education of the process</i></p> <p><u>Criteria Key:</u> 1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution</p> | 1 | 5 |
| | 2 | 5 |
| | 3 | 4 |
| | 4 | 5 |
| | 5 | 5 |
| | 6 | 5 |
| | 7 | 4 |
| | 8 | 5 |
| | <i>Total</i> | 38 |

Recommendation #9: Determine the best practices of conflict resolution by professional third-party neutrals in permitting and other matters and their application to permitting

Criteria #1: Support the comment/statement received- Two of the experts noted that many of dispute resolution tools are not fully explained in the Guide. One expert noted that mediation and dispute resolution tools may be useful in highly contentious situations. As a result, short summaries of techniques, examples of their proper use, and additional resources should be added. Another party clarified that most useful dispute resolution and prevention techniques (e.g., meeting

and open houses) can allow for a give-and-take among parties, and could be further emphasized in the Guide.

Criteria #2: Frequency- Several parties mentioned dispute resolution as an important tool.

Criteria #3: Level of controversy- This does not appear to be highly controversial since it requires study, not any regulatory change or requirement.

Criteria #4: Feasibility- EPA and state agencies have substantial experience with site-specific and policy-related dispute resolution processes, as opposed to public involvement. Additional study of these tools and their application to permitting could be done cost effectively.

Criteria #5: Scope and impact- Determining best practices was never directly discussed at the public meetings, though many discussed this during the convening interviews. States and public interest representatives acknowledged that many permitting matters had become explosive disputes (e.g., *Shintech* matter in Louisiana); hence many noted that there were lessons learned in such matters where dispute resolution were either not used or used, but only late in the process and after the parties had already become entrenched in their positions.

Criteria #6: Novelty- Such techniques are familiar with some parties, but not with others. While dialogues are commonplace to many, the use of third-party facilitators/mediators--either at the convening stage to assess conflict or to help develop agendas and conduct meetings-- are less known to most.

Criteria #7: Benefits- There are many lessons to be learned applicable to permitting processes to understanding how these processes have been used in permitting and other site-specific disputes. EPA, in *Engaging the American People*, has acknowledged the benefit of trained neutral third-parties "to assist in dispute resolution and early involvement facilitation through an existing contract."¹¹ An industry representative suggested that the agency revisit lessons learned from EPA's Project XL, which applied sound stakeholder involvement techniques. Yet EPA's *Common Sense Initiative*, while employing an innovative sector-based approach, was viewed by environmental groups and industry as having several flaws regarding its public participation provisions.¹² Essential principles, such as the role and definition of *consensus* were ignored,

¹¹ See *Engaging the American People: A Review of EPA's Public Participation Policy and Regulations With Recommendation for Action (Engaging the American People)*, EPA Public Participation Policy Review Workgroup, December 2000 (EPA 240-R-00-005) at page 26.

¹²See *Review of the Common Sense Initiative*, The Scientific Consulting Group, Gaithersburg, MD February 19, 1997.

leading to unnecessary delays and confusion. While some of these flaws have been addressed, many stakeholder groups refuse to participate in such collaborative approaches. Such issues can be avoided by through an examination of proven processes used by dispute resolution professionals that have been successfully employed by the agency.¹³

Some of the issues that need to be examined include: (1) how dispute resolution experts can help an agency tailor a process to a given situation in a balanced manner to avoid process “overkill”; (2) what communications are subject to a guarantee of confidentiality?; and (3) how does a dispute resolution expert’s use of neutrality help to bring about closure to situation?

Criteria #8: Preventing delays and resolving disputes- As noted above, examining best practices in this area and targeted application could result in a significant decrease in litigation, delays, and disputes in permitting activities.

| <i>Recommendation #9</i> | Rating (1-5), with 5 being highest | |
|---|---|---------------|
| | Criteria | Rating |
| <i>Determine the best practices of conflict resolution by professional third-party neutrals in permitting and other matters and their application to permitting</i> | 1 | 4 |
| | 2 | 4 |
| | 3 | 5 |
| | 4 | 5 |
| | 5 | 5 |
| | 6 | 5 |
| | 7 | 5 |
| | 8 | 5 |
| | <i>Total</i> | 38 |

Criteria Key:

1. Support Received
2. Frequency
3. Level of Controversy
4. Feasibility
5. Scope and Impact
6. Novelty
7. Benefits
8. Preventing Delays and Dispute Resolution

¹³ In *Engaging the American People*, EPA mentions Negotiated Rulemaking (5 USC secs. 581-590) as the first in a number of innovative stakeholder approaches successfully employed by the agency. *Id.* at page 13. Despite the policy setting of such negotiations, there are significant lessons learned that can be applied to site-specific matters about working with numerous stakeholders on complex, technical issues where scientific uncertainty is common.

IV. APPLICATION OF CRITERIA TO REGULATORY PROPOSALS

A. Key Proposals Meeting Criteria

Four proposals met the criteria and are discussed below.

- *Recommendation #3: Standardize the public comment period to 60 days to create uniformity among all programs*
- *Recommendation #5- Make a uniform requirement that all permit applications must demonstrate community involvement upon application*
- *Recommendation #6- Requiring sponsor of CAG or CAP to disclose the nature by which the group is affiliated with industry/federal government in the meeting notice and at the beginning of the meeting*
- *Recommendation #7: Requiring sponsor or facilitator/mediator of a CAG or CAP or other public meeting to disclose to a participant which issues cannot or will not be addressed through the CAG/CAP or other public meeting*

B. Detailed Discussion of How Proposals Address Criteria

Recommendation #3: Standardize the public comment period to 60 days to create uniformity among all programs

Criteria #1: Support the comment/statement received- Duration of the public comment period can affect the public and communities by hindering or facilitating capability to respond to the matters posed. This is particularly true where a community has limited capacity to participate. Although the statutes usually provide extensions to the routine 30-day turnaround on public comment, even extended periods (45-90 days) may be insufficient to get the public informed, educated and prepared to participate in complex and/or highly controversial permitting decisions. A way to address this issue is through extension of the 30-day comment periods. Moreover, given that there are different comment periods (e.g., RCRA versus CAA), several public participants suggested harmonizing these periods to avoid public confusion. Because this comment was made by separate individuals and not at the public meetings, industry and state representatives did not get the opportunity to react to it.

Criteria #2: Frequency- This comment was heard relatively frequently. Most often, it was stated in the context of their being a general lack of time in comment periods, as opposed to the “harmonization” issue.

Criteria #3: Level of controversy- As noted above, this comment was not publically discussed during the course of the public meetings. However, based on the potential legal impacts (discussed in detail in “Appendix B,” attached to this report), there could be significant controversy among certain states if they must implement these changes. This is especially true given the recent call for shorter comment periods, partially due to the developing energy crisis (see “Appendix B”). In addition, industry--depending on the sector-- may have reservations about such regulations as well.

Criteria #4: Feasibility- As noted in “Appendix B”, the feasibility is linked to two variables: (1) the level of effort and time required for EPA to promulgate a rule and for states to similarly adapt theirs accordingly; and (2) the time associated with handling additional comments that may be generated due to a longer time period. One component of feasibility from a state’s perspective is whether they have a consolidated or unconsolidated regulatory scheme (see “Appendix B”).

Criteria #5: Scope and impact- From a public perspective, this would enhance the permitting process in a comprehensive way by addressing a major resource issue which is triggered by comment periods that are perceived as short in light of the complex and sometimes controversial issues at stake. For instance, one public interest representative noted that the public comment period is not extended for citizen’s challenges, including Confidential Business Information (CBI) challenges, thereby precluding the public from commenting on certain issues. This practice, in their opinion, is unfair and leads to public mistrust towards both EPA and industry. In terms of impacts on industry, they would be widespread and national in scope due to the need for all states to conform to the changes. There may be a greater number of challenges to permits as well.

Criteria #6: Novelty- Comment periods are major milestones known to all stakeholders involved in permitting. They are also discussed in detail in the Guide. While harmonizing the comment periods may be novel to some, it is not highly unusual.

Criteria #7: Benefits- This recommendation would certainly work to clarify public participation. By standardizing the comment period EPA will eliminate a major area of uncertainty. In addition, providing additional time would enhance public understanding of the process. Moreover, such a proposal may dovetail with additional use of TOSC.

Criteria #8: Preventing delays and resolving disputes- The impacts of uniform comments

periods are difficult to generalize about. Their impact will likely depend of the facts and circumstances of each permitting matter. Generally, however, because longer comment periods for media now only requiring a 30 days (e.g., CAA) can enable the public to become more educated on the technical merits of a permit, it may lead to less “knee-jerk” attempts to thwart a permittee by protesting the permitting process.

Figure 3: Recommendations Rated Against Criteria

| <i>Recommendation #3</i> | Rating (1-5), with 5 being highest | |
|--|---|------------------|
| | Criteria | Rating |
| <p><i>Standardize the public comment period to 60 days to create uniformity among all programs</i></p> <p><i>Criteria Key:</i> 1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution</p> | 1 | 4 |
| | 2 | 4 |
| | 3 | 3 |
| | 4 | 4 |
| | 5 | 3 |
| | 6 | 4 |
| | 7 | 5 |
| | 8 | 4 |
| | <i>Total</i> | <i>31</i> |

Recommendation #5- Make a uniform requirement that all permit applications must demonstrate community involvement upon application

Criteria #1: Support the comment/statement received- This idea received support from public interest groups. One party noted that the Guide could go further to encourage early public involvement in the permitting process. NEJAC has consistently made this recommendation.¹⁴ Their recommendation calls for involvement during the application process; that is, the public should

¹⁴ See NEJAC’s *Model Plan for Public Participation*

be notified that an application has been received by the agency. No industry parties commented on this. While states did not explicitly comment on this, certain comments made suggest they may have questions about the proposal(see *feasibility* criteria below).

Criteria #2: Frequency- This theme was raised fairly frequently throughout the Guide drafting process, including in the convening reports and at the public meetings.

Criteria #3: Level of controversy- This is likely to be fairly controversial based on practical, implementation issues noted under the feasibility section below.

Criteria #4: Feasibility- First, EPA is likely to expend a great deal of effort in drafting a new regulation in this area due to the difficulty defining what constitutes meaningful community involvement. For example, ECOS has expressed concern over the lack of clear characteristics to determine whether there is a high degree of public concern and interest regarding a particular facility. These judgements in practice may be made not by EPA but by state officials. Still, if regulations were crafted, they would have to make certain distinctions and clarification now missing in EPA regulations, guidance, and in the Guide. Moreover, given the somewhat political nature of public participation, what constitutes adequate or meaningful public participation depends on whether one advocates or opposes a certain site-specific result. Such regulations would be difficult to draft and, unless they addressed ECOS' concern, quite difficult to enforce. In addition, communities might also seek to challenge the adequacy of a plan. Second, this proposal would have a large effect on regulators who review the permits, in terms of workload once such a regulation is implemented. Additional training of federal and state regulators would be needed to ensure they could properly evaluate the adequacy of a community involvement plan upon application.

Criteria #5: Scope and impact- This would alter the permit application process thus requiring more training for applicants. The scope of this change would be national.

Criteria #6: Novelty- This concept of early public involvement has been expressed for at least ten years in various forums.

Criteria #7: Benefits- The earlier the public is involved, the greater effect public participation has. This idea has been expressed throughout the drafting of the Guide. The benefit of this approach may not be additional clarity, but it will certainly improve the outcome of public participation.

Criteria #8: Preventing delays and resolving disputes- Since consultation will occur early in the process, this will maximize the opportunities for information exchange and communication

between the parties. In turn, this can enable parties to engage in a constructive dialogue or other consultative processes prior to an escalation of tensions. Resources can be focused upon avoiding delays and disputes as opposed to attempting to resolving disputes.

Figure 5: Recommendations Rated Against Criteria

| <i>Recommendation #5</i> | Rating (1-5), with 5 being highest | |
|---|---|------------------|
| | Criteria | Rating |
| <p><i>Create a uniform requirement that all permit applications must demonstrate community involvement upon application</i></p> <p><i>Criteria Key:</i></p> <p>1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution</p> | 1 | 4 |
| | 2 | 4 |
| | 3 | 3 |
| | 4 | 2 |
| | 5 | 2 |
| | 6 | 5 |
| | 7 | 5 |
| | 8 | 4 |
| | <i>Total</i> | <i>29</i> |

Recommendation #6- Requiring sponsor of CAG or CAP to disclose the nature by which the group is affiliated with industry/federal government in the meeting notice and at the beginning of the meeting

Criteria #1: Support the comment/statement received- Community groups and members of the public strongly support clarifying the role of such informal advisory groups. For example, the following concerns were raised: “Discussion of Community Advisory Groups CAGs or Citizen Action Panels (CAP) should be deleted from the Guide. CAGs are often mistrusted by the public

since they are sometimes established by industry and have been used to appease the public rather than engage them. In addition, various associations and church groups are important resources and may not be part of established CAGs. Therefore it is important for the EPA to recognize and include these groups rather than circumvent them. Even if the groups are not biased, community groups are at a distinct disadvantage due to the lack of resources or capacity to participate effectively.” One state representative was surprised that CAGs had been viewed negatively since they had been strongly supported by some states, as opposed to industry, which has ensured that there was robust community representation on such groups.

Criteria #2: Frequency- A request to clarify issues surrounding CAGs and CAPs came from numerous stakeholders and the expert reviewers.

Criteria #3: Level of controversy- This proposal should not be very controversial among industry or states as it simply makes the sponsor of the CAG/CAP readily identifiable.

Criteria #4: Feasibility- Clarifying the identity of the sponsor would be quite simple to implement, both from a rulemaking standpoint and from an agency resource perspective. (See model language for this proposed change in Appendix B).

Criteria #5: Scope and impact- The impact of this change would be national in scope, as it would impact all *public meetings*.

Criteria #6: Novelty- Because the concept of public distrust over sponsors is discussed in the Guide, this is not a new concept that would be resisted.

Criteria #7: Benefits- Such a regulatory change would positively change the perceptions of community/environmental representatives toward the agencies. In addition, it would probably improve community/industry relations as well as public expectations for a meeting could be tempered depending upon the sponsor.

Criteria #8: Preventing delays and resolving disputes- Properly supported through TOSC and related grants, CAGs have the ability to work with regulators and industry to craft innovative site-specific solutions. The foundation for all such dialogues is trust between the participants. This simple provision clarifies the sponsors and can prevent minor misunderstandings from becoming distorted, resulting in delays and increased tensions among the parties.

Figure 6: Recommendations Rated Against Criteria

| <u>Recommendation #6</u> | Rating (1-5), with 5 being highest | |
|--|---|---------------|
| | Criteria | Rating |
| <p><i>Requiring sponsor of CAG or CAP to disclose the nature by which the group is affiliated with industry/federal government in the meeting notice and at the beginning of the meeting</i></p> <p><u>Criteria Key:</u> 1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution</p> | 1 | 5 |
| | 2 | 4 |
| | 3 | 5 |
| | 4 | 5 |
| | 5 | 4 |
| | 6 | 5 |
| | 7 | 5 |
| | 8 | 5 |
| | Total | 38 |

Recommendation #7: *Requiring sponsor or facilitator/mediator of a CAG or CAP or other public meeting to disclose to participants which issues cannot or will not be addressed through the CAG/CAP or other public meeting*

Criteria #1: *Support the comment/statement received-* It was suggested that the Guide

delineate the limitations of EPA or State agencies at such meetings. For example, agencies generally have no control over zoning, odor, fugitive dust, and other nuisance issues. Agencies need to more effectively communicate this to the public, possibly in fact sheets. Another individual stated that EPA should state in the beginning of public meetings what they can assist the public with given their jurisdiction. In addition, the public should be encouraged to attend other meetings that might deal more directly with issues that are not under EPA's control (e.g., zoning, nuisance).¹⁵

Criteria #2: Frequency- A request to clarify CAGs and CAPs came from numerous stakeholders and the expert reviewers.

Criteria #3: Level of controversy- This proposal should not be very controversial among industry or states as it simply clarifies the proper scope of issues.

Criteria #4: Feasibility- Clarifying the scope of a meeting would be quite simple to implement, both from a rulemaking standpoint, and from an agency resource perspective. (See model language for this proposed change in Appendix B).

Criteria #5: Scope and impact- The impact of this change would be national in scope, as it would impact all *public meetings*.

Criteria #6: Novelty- Because the concept of public distrust over sponsors is discussed in the Guide, this is not a new concept that would be resisted.

Criteria #7: Benefits- Many expressed frustration that stakeholders expectations were being bolstered by agencies that failed to directly acknowledge that issues being raised would not be addressed in a given meeting. Clarifying this process issue would create more realistic expectations, improve the agencies' relationships with affected stakeholders, and improve community/industry relations.

Criteria #8: Preventing delays and resolving disputes- Given that many of these groups are comprised of volunteers, which often (without TOSC support) do not possess sufficient resources or knowledge to negotiate with industry experts, there is a perception that CAGs are designed to appease stakeholders and divert their resources from hearings and other forums that can help impact the ultimate decision. Consequently, in such situations the public can be frustrated and tensions can be high. Because hearings tend to be adversarial in nature and the scope of issues to be considered is narrow, these forums are not often productive venues to explore these issues.

¹⁵ See Houston Stakeholder meeting at pages 8-9.

CAGs, properly used, can forge innovative partnerships between communities, regulators, and industry to craft innovative site-specific solutions. The foundation for all such dialogues is trust; knowing the scope of any given meeting will assure a community member their time is being spent productively.

Figure 7: Recommendations Rated Against Criteria

| <i>Recommendation #7</i> | Rating (1-5), with 5 being highest | |
|---|---|---------------|
| | Criteria | Rating |
| <p><i>Requiring sponsor or facilitator/mediator of a CAG or CAP or other public meeting to disclose to a participant which issues cannot or will not be addressed through the CAG/CAP or other public meeting</i></p> <p><i>Criteria Key:</i> 1. Support Received 2. Frequency 3. Level of Controversy 4. Feasibility 5. Scope and Impact 6. Novelty 7. Benefits 8. Preventing Delays and Dispute Resolution</p> | 1 | 5 |
| | 2 | 4 |
| | 3 | 5 |
| | 4 | 5 |
| | 5 | 4 |
| | 6 | 5 |
| | 7 | 5 |
| | 8 | 5 |
| | <i>Total</i> | 38 |

Respectfully submitted,

Alan W. Strasser, Esq., MA.
Senior Policy Analyst/Facilitator