

## Cal/EPA: The Streamlined Permitting Process

by Lynne Esselstein

In March of 1992, Governor Wilson, with the assistance of the newly formed California Environmental Protection Agency (Cal/EPA), announced a plan to streamline environmental permitting processes. The Governor's program directed Cal/EPA to begin reforming the labyrinth of California environmental permitting and regulation and to make the process more attractive to business. Wilson stressed, however, that any procedural reforms implemented by Cal/EPA would not come at the expense of California's high environmental enforcement standards.<sup>1</sup>

Predictably, some environmental and consumer groups were skeptical about the goals of the reform program. A major objective of the Governor's plan would be to speed up the time frame for issuing regulatory permits. The concerned groups feared that a hurried process would lead to oversights by the agency and reduced public participation.

In contrast, business was optimistic about the proposed reforms. Business and industry in California must maintain over 255,000 operating permits, and compliance costs are frequently astronomical. One business paid out \$750,000 in California environmental compliance costs before moving operations to Arkansas where it only had to pay \$750.<sup>2</sup> Business interests hoped that the proposed permit reform would lower regulatory compliance costs and simplify operations and applications.

In his January 1993 "State of the State" address, Wilson focused primarily on his plans for curing California's economic woes. Although the rest of the country seems to be pulling out of recession, California's unemployment rate remains the highest in the nation. The Governor highlighted the need for regulatory

cooperation in order to attract new business and jobs to the state. Although Wilson did not single out environmental regulations as the chief culprits in the state's economic downturn, there is little doubt that streamlining remains one of the Governor's top priorities.<sup>3</sup>

Although Cal/EPA has already begun implementing some parts of the proposal, the agency's efforts have not received a great deal of public attention. Perhaps the past election year overshadowed the agency's efforts or perhaps the plan was simply down-played until the political climate cooled off. Wilson's political popularity has waned in recent months.

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With Vice President Gore's proficiency in environmental policy, sweeping changes might have proved politically catastrophic in a state which gave over 50% of its vote to the new administration.

Cal/EPA recently wrapped up public hearings on its action plan for permit reform<sup>4</sup> and will probably issue a summary report within the next month or so. Cal/EPA declined to comment specifically on the hearings' findings until it had finished its own review. However, the agency did say that a preliminary evaluation indicated that many of the original recommendations will have to be substantially modified.<sup>5</sup>

In the meantime, Cal/EPA is already coordinating several regulatory streamlining projects. The agency's first project, the "One-Stop Permit and License Center", was established as part of the Governor's Committee to rebuild South-Central Los

Angeles. The Center oversees a simplified permit application process that reduces the start-up time for new businesses.<sup>6</sup> Another new program, coordinated by the Department of Toxic Substances Control (DTSC), has created a state-level tiered permitting system for industrial hazardous waste management.<sup>7</sup>

The agency's most recent program is still in its development stage. State Senator Marian Bergeson has introduced S.B. 1185 which will initiate legislative discussion on a plan for lead agency permit coordination.<sup>8</sup> Under this program, Cal/EPA will assign a business' application to one agency that will coordinate all of the required permits.

These current efforts provide insight into Cal/EPA's streamlining objectives. This article will give an overview of Wilson's original proposal and examine the agency's recent endeavors to meet those goals. In addition, it will explore the underlying rationale for streamlining and assess whether this effort is realistic and

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necessary.

### THE ORIGINAL PROPOSAL

On March 16, 1992, Cal/EPA announced its Draft Recommendations for Consolidating and Streamlining the Cal/EPA Permit Process (The Draft).<sup>9</sup> As the first step towards solidifying the new vision of California regulation, the document introduced the agency's agenda for reforming permit processes. By January of 1993, Cal/EPA planned to complete a public comment phase and to adopt a final form of permitting regulations.

Cal/EPA Secretary James Strock's

introductory comments to the Draft clearly present the goals of the permit reform: high environmental quality standards coupled with regulatory simplicity. Calling California's quality standards the "jewels in the crown" of the state's environmental policy, Strock insists that Cal/EPA will continue to defend these standards.<sup>10</sup> Strock states that the primary goal of streamlined permitting is to rid the regulatory process of its complexity, so that the agency will have greater freedom to enforce the state's environmental standards. In addition, Strock believes that streamlined permit requirements and application processes should significantly reduce the regulatory burden on business and thereby increase economic development.

Seventeen major "Recommendations" comprise the bulk of the Draft. These recommendations provide an outline of future policy decisions, proposed legislation and rulemaking efforts that the agency plans to coordinate. Some of the major recommendations are:

- Clarifying and simplifying Cal/EPA regulations;<sup>11</sup>
- Creating a consolidated permit;<sup>12</sup>
- Providing greater certainty in the permit process;<sup>13</sup>
- Ensuring a timely permit processing;<sup>14</sup>
- Providing a consistent regional agency structure;<sup>15</sup>
- Ensuring coordinated post-permitting activities;<sup>16</sup> and
- Establishing administrative procedures for quality control.<sup>17</sup>

The recommendations provide specific suggestions for achieving these goals.

Some of the recommendations are fairly routine procedural reforms. For example, Recommendation #1 requires the agency to "remove duplication and conflicts in the Cal/EPA statutes and regulations".<sup>18</sup> Overlapping regulations would seem to be an obvious evil, easily remedied by regulatory review. However, agency efforts here may actually overlap with the State's

own Office of Administrative Law. Theoretically, OAL has already approved existing regulations on the basis that they did not duplicate previously enacted regulations.

Recommendation #5, another relatively straightforward procedural reform, proposes steps for creating a uniform permit application.<sup>19</sup> First, the proposal recommends that the agency should convene a working group of business, environmental, local government and USEPA representatives to meet with agency staff. This task force would then list current criteria for permit applications under both local programs and current Cal/EPA programs. Finally, after reviewing the criteria, the task force would devise a single permit application to contain all of the permit applicant's pertinent information. The recommendation predicts that the final permit form will contain two parts: one general section and one section specific to the industry or proposed project (e.g. sewage treatment, landfill etc.).<sup>20</sup>

The single application offers some fairly obvious benefits. Reduced paperwork and processing costs would benefit both the agency and business. The proposal also claims that the single permit application would give the agency "a more complete view of the environmental effects of a proposed project".<sup>21</sup> However, the proposal acknowledges that complete permit uniformity is both unlikely in all situations and undesirable some others. Unfortunately, the agency does not specify the limits of this exception which could conceivably swallow all intended reforms. The Governor has convened two working groups of state and local regulatory interests to study the specifics of streamlining. Their forthcoming reports may provide more insight into application uniformity.

Other recommendations propose much more substantive changes in either the permit criteria or the agency's role. Recommendation #2, for example, proposes

to "Reduce the number of activities requiring individual permits while ensuring adequate compliance."<sup>22</sup> This recommendation appears to be the forerunner of the Department of Toxic Substances Control's tiered permitting program (discussed in greater detail below).

Cal/EPA does not specify in the proposal which activities would be subject to this reform. However, the agency does suggest a number of ways in which permit activities could be scaled back. The agency proposes several alternative compliance methods, including:

- De minimus standards: establishes minimum tolerances for permitting. Businesses whose activities fall beneath the tolerance level will not need to apply for permits.
- Variances: Exempts specific activities from a permit requirement provided that the facility continues to meet established standards and safeguards.
- Permit by rule: sets industry-wide operating and administrative standards.

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Facilities are deemed to have permits upon notifying the agency of intent to comply within established standards and after receiving a compliance certification and approval of the agency.

- General permits: Similar to permit by rule, but permit conditions would be adopted administratively rather than by rule-making;
- Equipment and design certification: pre-certifies use of standard industry equipment; and
- Substitute regulation by other agencies: proposes enforcement subvention to local regulatory programs where local capability exists.<sup>23</sup>

Cal/EPA acknowledges that some of

the compliance methods may entail "enforcement challenges".<sup>24</sup> Self-certification and self-monitoring aspects of some permit compliance methods may make regulatory enforcement more difficult. One proffered solution is to enlist insurance companies as enforcement partners. Cal/EPA suggests that before insurance carriers issue policies, they could inspect an applicant's facilities for themselves in order to check for satisfactory compliance. The agency evidently believes that potential insurance coverage loss will sufficiently motivate businesses to comply with self-certification and self-monitoring requirements.

The propriety of this assumption seems questionable. Observers should ask themselves how appropriate it is for Cal/EPA to be considering a proposal that would require the agency to delegate or share its enforcement power with a private

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insurer. In addition, the agency's proposal would only satisfy initial compliance concerns. The agency does not address how this solution would handle enforcement problems that may arise after permits have been issued.

Cal/EPA proposes another major reform program in Draft Recommendation #5.<sup>25</sup> Under this recommendation, the agency will explore a multi-media permit concept based on a New Jersey trial program. The multi-media facility permit would address the needs of large, complex industrial operations by consolidating requirements from individual unit or operations permits and applying them to the facility as a whole. Once again, the agency frankly acknowledges that aspects of the program may present concerns for enforcement.

In addition, the agency anticipates that the approval process for these permits may be rather involved. However, Cal/EPA believes that the savings in reporting information and the greater flexibility provided to the facilities operations justifies the initial burden. Cal/EPA also plans to explore a general permit more suitable for the needs of small and medium size businesses.

The remainder of the recommendations address long-standing complaints about regulatory compliance costs,<sup>26</sup> agency jurisdiction<sup>27</sup> and information access.<sup>28</sup> The Draft also provides a list of permits currently required by Cal/EPA departments, an overview of streamlining activity in other states, and a proposed timeline for implementing legislation and public hearings.<sup>29</sup>

## RECENT DEVELOPMENTS

Cal/EPA's first foray into regulatory streamlining arose from exceptional circumstances. In May of 1992, South Central Los Angeles experienced severe civil unrest as local residents reacted to the jury verdict exonerating the police officers accused of beating Rodney King. When the riots finally subsided, the city surveyed the damage and discovered that entire neighborhoods and businesses had been destroyed by fire and looting. Thus, one of the first remedial measures proposed by both local and state government was the economic rebuilding of the devastated areas.

In order to facilitate business re-entry into the South Central Area, Cal/EPA established a "One-Stop Permit and License Center".<sup>30</sup> Through the center, the agency would provide advice to "existing, expanding, and new businesses" on a variety of environmental permit and application requirements. The center would also provide application materials and technical advice as well as initiate permit processing procedures.

In order to avoid a lengthy legislative

authorization process, Governor Wilson issued an Executive Order<sup>31</sup> establishing the center under the general management of the Commissioner for Corporations, the chair of the Governor's L.A. Recovery Cabinet Coordinating Committee.<sup>32</sup> Nineteen State agencies signed a Memorandum of Agreement establishing basic operating procedures for instituting a consolidated and coordinated State environmental permitting process.<sup>33</sup> In addition, Cal/EPA encouraged local and regional regulators to come up with their own versions of streamlined permit programs for the L.A. area.

However, even the agency admits that the one-stop program has had very limited success. Because of budget cuts, Cal/EPA has not been able to adequately staff the center or administer its services. Lack of publicity about the center has also contributed to its underutilization. Understandably, the agency is probably reluctant to publicize services it is not prepared to provide.

Local sentiment toward the center is guarded. The South Central area is one of the poorer areas in Los Angeles and has a largely unskilled workforce. Most businesses located in South Central are either small retail businesses or industrial services. In the latter category, many firms utilize a fairly high degree of toxic materials and processes in their work. After the riots, many residents believed that economic revitalization presented a golden opportunity to solicit other, less environmentally risky operations. Neighborhood coalitions such as Concerned Citizens of South Central L.A. worried that streamlined permitting would eliminate public hearing opportunities and weaken regulatory oversight.<sup>34</sup> Some groups perceived that the function of the center was to break down barriers for business without necessarily considering what might be beneficial to the community.<sup>35</sup>

For practical purposes, the center's

low profile has left these concerns unresolved. To date, only one business, a recycling center, has successfully completed the "one-stop" program.<sup>36</sup> Cal/EPA has no plans to abandon the center, however. The agency hopes to complete staffing the center in the very near future and has plans to move it to a more central location.

A project more in line with the recommendations of the Draft Proposal is the Department of Toxic Substances Control (DTSC) "permit by rule" (PBR) program (also known as "tiered permitting"). Cal/EPA did not oversee this program's creation, but cites it as an example of successful regulatory reform.<sup>37</sup> Drafted by legislators in a negotiated bill,<sup>38</sup> PBR enables DTS to provide different levels of regulatory treatment to match defined levels of hazardous waste management activity.

PBR allows businesses engaged in hazardous waste management to apply for

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classification in one of the programs several regulatory tiers. Each tier combines a specified level of risk, a waste stream or offsite activity classification and pertinent procedural requirements. Permit fees and compliance costs are then applied on a basis commensurate with the risk level of the applicant's operation. In theory, PBR should provide more equitable treatment among businesses which generate different levels of hazardous waste. DTSC also hopes that the program will encourage businesses to invest in lower risk technology that will facilitate waste reduction and ultimately qualify their operations for less burdensome and expensive permits.

The practical effects of PBR will not be known for awhile. April 1st was the

deadline for application to the program, and DTSC will probably have to spend several months sorting through all the paperwork. However, both industry and environmental groups have already voiced reservations about the program's ultimate effectiveness. One industry source commented that PBR was just another regulation and surmised that because of the application process, many people who had never been treated as treatment facilities may find themselves reclassified and contributing to a newly expanded DTSC fee base. Environmentalists have also expressed concerns that the program may be ill-suited to the needs of small businesses who should be the primary beneficiaries of the program. Because of

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the haste in which the bill was negotiated last year, some environmentalists fear that big industry concerns may have received more attention and were allowed to override the best interests of smaller businesses.

This year, Cal/EPA is focusing its legislative and administrative efforts on devising a lead agency system for permit application and issuance procedures (Recommendation #3 of the Draft). State Senator Marian Bergeson has introduced legislation (SB 1185) on behalf of the agency, and Cal/EPA hopes this bill will provide an opportunity for concerned parties to sit down and discuss the proposal. Thus far, Cal/EPA has only generally mapped out the idea of lead agency permitting, leaving legislators and regulatory interests to fill in the specifics.

Under the most basic profile of the lead agency permitting program, a new business, or an industry expanding operations to a new site, would make a general application to Cal/EPA. Cal/EPA would then evaluate the business' operations

and assign it to one agency which would oversee all of the business' permit requirements, including those permits that would normally be issued by other agencies. In this way, the business would usually only have to fill out one detailed report, leaving the lead agency to analyze the information and coordinate all applicable permits.

Cal/EPA acknowledges that many of the regulatory agencies are resisting the proposal. Cal/EPA does not believe that lead agency permitting would necessarily create imbalances in the agencies' political powers. However, Cal/EPA must certainly recognize that any proposal to shift agencies' permitting responsibilities to other agencies is bound to create conflicts. In addition, not all of the state's environmental regulatory agencies are currently under the stewardship of Cal/EPA. These organizations are likely to be even more resistant to any proposal to limit their current independence.

Legislative staff is also worried about the lack of concrete definitions in the current plan. As yet, there are no criteria for selecting and assigning lead agencies to applicants. Cal/EPA maintains that the current legislation had to be purposefully vague in order to encourage all interested parties to participate in legislative discussions. The agency believes that expansive reforms, such as lead agency permitting, have much better chances for long term success if interested parties can define the program themselves.

However, industry and environmental groups also have concerns about the program's ability to adequately address their interests. Industrial interests maintain that the primary goal of regulatory reform should be to reduce the amount of time that firms must spend in the permit process. Industry believes that Cal/EPA has not yet demonstrated that a lead agency system would effectively reduce permitting time frames.

Environmentalists, on the other hand,

are equally concerned that industry may be using bad economic times to run roughshod over regulatory standards. They worry that business interests will promise legislators unrealistic economic gains (or losses) in order to ratchet down substantive compliance levels. Environmentalists also believe that lead agency permitting may threaten regulatory standards by vesting the lead agency with permitting responsibility in an area in which it has no expertise.

### THE FUTURE OF PERMIT STREAMLINING

Everyone associated with the regulatory process agrees that permit streamlining, at least in theory, is a good idea. But so far, the Draft Proposal has not lived up to its promise. Existing programs have not yet proven that they are reducing the regulatory burden. In fact, Cal/EPA's own efforts to organize and oversee these proposals may be just as bureaucratic and cumbersome as the regulatory system that the agency is trying to reform.

One of the major weaknesses of streamlining is that Cal/EPA does not have the political muscle to force other regulatory agencies to participate in the proposals. Only five departments are housed under the Cal/EPA umbrella. Moreover, since the agency's inception, legislators and other agency heads have resisted any move by Governor Wilson to consolidate power in Cal/EPA. Thus, the agency's role has largely been relegated to "policy development and coordination." As one observer put it, "The agency has no bite."

Another major problem with streamlining programs is that no one quite seems to know what they are supposed to accomplish. Industry claims that the primary goal should be reducing the amount of time firms must spend getting the proper permits. Environmentalists agree with this evaluation in theory, but are wary of time-saving procedural reforms that would eliminate opportunities for public input.

Industry also believes that streamlining should focus on reducing rampant duplication and contradiction in environmental regulatory requirements. Both Cal/EPA and environmental interests claim to support this interpretation of regulatory streamlining, but they are concerned that much of industry's evidence is anecdotal. Both say they are interested in addressing regulatory duplication if business will demonstrate where specific conflicts exist.

The legislature is also unclear on what regulatory streamlining should mean. One phrase everyone will hear frequently in the coming months is "total quality management" (TQM). State Senator Charles Calderon recently introduced spot-bill 1082 which directs Cal/EPA and the departments under the agency's direction to begin earnest regulatory reform in order to achieve a state of total quality management. Unfortunately, 1082 does not yet define this goal or the programs necessary to implement it. Whether permit streamlining will be a positive contribution to TQM also remains to be seen.

Cal/EPA is not fighting the reform battle alone. As the Draft notes, Governor Wilson has directed a range of government resources at solving the permitting problem.<sup>39</sup> Significantly, the Secretary for Environmental Protection is to work closely with the Secretary for Business, Transportation and Housing on permit consolidation. Wilson's own Growth Management Council and Office of Planning and Research will address the interagency streamlining issues.<sup>40</sup> In addition, Cal/EPA has encouraged local and regional regulatory agencies to contemplate their own streamlining plans, independent of the state's efforts.<sup>41</sup>

In the meantime, Cal/EPA will continue to cultivate its own brand of "regulatory assistance". The agency says it plans to continue working in a coordinative function, presumably facilitating legislative

and administrative efforts to implement streamlining proposals. This year, the agency will devote most of its permit reform resources to overseeing the development of the lead agency system. Next year, Cal/EPA plans to explore tiered permitting projects for solid waste and water quality regulations. The agency also hopes to convene industry-oriented task forces to elicit specific suggestions for eliminating duplicative or conflicting regulations.

## CONCLUSION

In spite of all the criticism levied at the streamlining proposals, California's current economic troubles will probably continue to focus attention on the environmental regulatory system. Even some environmentalists agree that many of California's regulatory laws are largely the results of ad hoc efforts by the legislature to address the state's most recent

environmental "disaster".<sup>42</sup> To the extent that the state can modify existing systems to encourage business development, everyone involved with environmental regulatory reform anticipates more proposals along the lines of streamlining. Moreover, no one believes that some measure of reform is unworkable.

In his opening comments to the draft proposal, James Strock suggests that the Draft is the first step toward creating an entrepreneurial Cal/EPA, where regulatory process easily adapts to rapidly changing social, economic and technological demands.

Stock promises that permit streamlining will be a "win-win" solution for everyone involved in environmental regulation and protection. Even with the agency's current efforts, however, it seems that Cal/EPA is still a long way off from accomplishing its vision of a streamlined regulatory process.

*Lynne Esselstein is a 2L at King Hall.*

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## ENDNOTES

1. State of California, Secretary of Environmental Protection, Draft Recommendations for Consolidating and Streamlining the Cal/EPA Permit Processes (hereafter, Draft Proposal) 5 (Mar. 16, 1992); see also Sheryl Schaffner Freeman, California Competitiveness and Environmental Regulation: Up Close with James Strock, Environs, May 1992, at 71-78.
2. Retaining Industrials Motivates California Utility Support for Permit Streamlining, Industrial Energy Bulletin, May 22, 1992, at 15.
3. State of the State Address, January 1993. In response to the Governor's mandate, Cal/EPA and the California Trade and Commerce Agency established the California Environmental Technology Partnership (CEPT). Secretaries Strock and Wright Announce Details of Governor's Environmental Technology Partnership to Spur Job Growth, PR Newswire, Jan. 14, 1993.
4. Telephone Interview with Paul Blais, Special Assistant to the Secretary at Cal/EPA.
5. *Id.*
6. State One Stop Permit and License Center Los Angeles Revitalization Zone, Cal/EPA Fact Sheet (1992).
7. See Health & Safety Code §§ 25200.3, 25201.5 (a), 25201.5 (c); Tiered Permitting Factsheet Permitting Factsheet: Conditional Exemption for Small Quantity Treatment, Department of Toxic Substances Control 1-6 (Jan. 1993); Tiered Permitting Factsheet Permitting Factsheet: Conditional Exemption for Specified Waste Streams, Department of Toxic Substances Control 1-6 (Jan. 1993); Tiered Permitting Factsheet Permitting Factsheet: Conditional Authorization Tier, Department of Toxic Substances Control 1-6 (Jan. 1993).
8. SB 1185, 1993-94 Reg. Sess., (1993). Last year, Bergeson introduced SB 2039 on behalf of Cal/EPA. This bill would have authorized the agency to "institute new, efficient procedures [to] assist businesses and public agencies in complying with environmental protections laws in an expedited fashion. . ." SB 2039, 1991-92 Reg. Sess., (1992). The bill died in committee.
9. See Draft, *supra* note 1.
10. *Id.* at 1-3.
11. *Id.* at 22.
12. *Id.* at 26.
13. *Id.* at 30.
14. *Id.* at 32.
15. *Id.* at 35.
16. *Id.* at 42.
17. *Id.* at 44.
18. *Id.* at 22-24.
19. See Draft, *supra* note 1, at 30-31.
20. *Id.* at 31.
21. *Id.*



22. Id. at 24-26
23. Id.
24. Id.
25. Id. at 29.
26. See, e.g., Recommendation 6 of the Draft. Id. at 31-32. This recommendation would provide a partial refund of the permit application fee for businesses that provide adequate information for the agency to complete their permits on the first time through. Id. at 31. Recommendation 9 proposes an expediting system for business that want to reduce approval time. Id. at 34-35. By paying an additional fee, these businesses can step to the front of the approval process. Id. at 34.
27. See, e.g., Recommendations 11, 12 of the Draft. Id. at 35-42. These recommendations would redraw regional boundaries for permit program administration and establish coordination programs with air districts.
28. See, e.g., Recommendations 16, 17 of the Draft. Id. at 45-46. These recommendations would initiate a cross program training for staff and provide for a new "customer" feedback form. Id. See also Recommendation 7 which provides for improved permit information materials. Id. at 32.
29. Id. at 49 - C-9.
30. Cal/EPA, Introduction of One Stop Permitting Center (PR Sheet).
31. Exec. Order 35-92 (Sept. 18, 1992).
32. Id.
33. Id.
34. Robin Cannon, President of Concerned Citizens of South Central L.A., Speaker at UC Davis Environmental Law Society Conference on Race, Poverty and the Environment (Fall 1992).
35. Id.
36. See supra note 4.
37. Id.
38. AB 1772, Reg. Sess. 1991-92, (1992) (Wright, Polanco, Lempert).
39. See supra note 1 at 6.
40. Id.
41. See supra note 4.
42. See, e.g., Sheryl Schaffner Freeman, California Legislative Update, Environ 71 (Jan. 1992) (listing reform bills introduced after Southern Pacific train wreck in Dunsmuir, CA).