Policy Study No. 253

SIMPLIFY, SIMPLIFY: ALTERNATIVE PERMITTING AT THE STATE LEVEL

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Executive Summary

Environmental regulation has suffered from a one-size-fits-all mentality, with prescriptive regulations applied across industries. Traditional environmental regulations have two central features. First, they require regulated industries to comply with one-size-fits-all prescriptions aimed at reducing pollution. Second, they require that industries obtain permits demonstrating compliance at each emission source. But permits are no guarantee of actual environmental improvement, for they use a proxy goal rather than tangible environmental improvements as a barometer of success.

States are now exploring alternatives to traditional, often cumbersome permitting practices that include:

- *One-stop permitting:* replaces different permits for different emission and emission sources;
- *Facility-wide permits:* permits apply to an entire facility, not to each piece of equipment;
- *Industry-wide standards:* similar processes across facilities allow for a bar to be set for the entire industry; and
- *Permit streamlining:* the entire permit process is simplified and oriented towards customer service.

Each of these reforms has been instituted in an attempt to circumvent some of the perverse incentives that ordinary command-and-control permits can create, such as high costs, bureaucratic inertia, industry resistance, and stifling of innovation.

Specific application of these reforms has come in many states:

- Mississippi, after previous failed attempts, engineered a “one-stop” permit to facilitate compliance;
- Massachusetts has adopted industry-wide performance standards through their innovative Environmental Results Program;
- New Jersey has experimented with a facility-wide permit, regulating on the basis of what is produced, rather than how; and

- Minnesota's Pollution Control Agency and the Oklahoma Department of Environmental Quality have streamlined their permit processes, fostering a more-cooperative relationship with industry.

While all of these reforms share the goal of easing administrative burdens on the regulators and the regulated, more importantly they seek a way to provide a greater level of environmental protection with less government interference. By utilizing more-efficient institutions and structuring incentives in a manner to involve the private sector, architects of alternative permit schemes explore better ways to protect the environment.

In order to implement successful innovations in permitting, states should follow these guidelines:

- *Insure involvement by affected constituents:* By bringing all parties to the table early, and letting them voice their demands, an atmosphere of inclusion is created.
- *Balance goals:* Involving all parties does not mean that every interested member of the community can have the opportunity to railroad a project.
- *Reorganize environmental departments:* This may help circumvent some of the problems that entrenched interests can cause. Minnesota's restructuring towards a geographic-based unit is a good example of a more efficacious, holistic approach. Avoiding the regulatory shell game means moving more efforts into multimedia programs.
- *Involve the EPA:* EPA will probably become involved at some stage of the innovation process. Some states recommend bringing the EPA on board as quickly as possible, while others recommended a later-stage involvement.

Once these guidelines have been adhered to, the following procedural steps will help facilitate innovation:

- *A "grace period" during implementation:* A form of permit-enforcement immunity, this period should allow companies that wish to improve their processes some leeway and freedom from prosecution for mere procedural (rather than criminal) violations.
- *Concurrent compliance assistance:* Many businesses are violating emissions caps or standards simply because they don't know what the standards are. A form of assistance, coupled with temporary liability immunity for noncriminal violations, will help businesses understand their impact on the environment and allow them to change.
- *Intensive background knowledge:* Permit innovators need to know the industries and the companies they are addressing. Facility-wide permits and industry standards work because of similar processes that lend themselves to simplification.
- *Knowledge of the political climate:* Some states are simply unable to implement this flexibility because of the prevailing political mood at the time.

Following this checklist will not guarantee success of an innovative program, but these criteria will lessen the chances of failure. For, as these states have shown, innovation is experimentation.

Part 1

The Problems with Permits

For the past 25 years, environmental regulation in the United States has been dominated by "end-of-the-pipe" and technology-based measures to control pollution. Early environmental regulations tended to take an ad hoc approach towards pollution, mandating equipment and processes for industries in a one-size-fits-all manner. By controlling the actual production processes, regulators believed they could sizably reduce pollution and protect the environment from degradation.

The U.S. Environmental Protection Agency (EPA) championed this command-and-control approach as a way to limit emissions where both the effects of discharge and the consequences of control were ambiguous. The main tool of this regulatory approach became the permit, a simple way for federal and state bureaucracies to certify equipment, with an expectation of reducing pollution. In terms of environmental protection, the theory behind permitting was simple. It was impossible for an environmental agency to be everywhere at once, making sure that every company was in compliance. Permits took into account the limited resources that regulators faced, allowing them to theoretically focus on the large polluters and easy-to-identify compliance. They were also a way to apply general rules to specific cases, "making the actions of government fair and predictable."[1] Industries or plants that did not follow the permit stipulations were thus subject to prosecution.

The actual performance of permits, however, has been less than impressive in meeting the goal of environmental protection. Permit-based approaches suffer from three major problems:[2]

1. *Focus on Compliance*: Permits control equipment and are merely a proxy for environmental improvement. Often, while businesses are lost in the shuffle of paperwork and worried about compliance, they lose sight of what these regulations actually mean. Narrowly highlighting certain procedures or equipment isolates them from the greater goal of environmental protection and deflects attention away from pollution prevention and environmental innovation. On the agency side, permit-writing and enforcement become ends in themselves, utilized for raising funds for the department or to track the success of a particular agency. Compliance, not performance, becomes the main focus.

2. *Difficulty of Reform*: Permits create constituencies with a vested interest in their continuance, and reform becomes a very difficult exercise. The pressures against reform come from many sides as well, including

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[1] Max Weber, *Economy and Society*, vol. 3, ed. Guenther Roth and Claus Wittich (New York: Bedminster Press, 1968), p. 979.

[2] We focus here only on the procedural problems associated with permits, not the more fundamental challenge of whether a particular environmental standard is appropriate.

environmental protection agencies and the businesses they regulate. In order to implement permits, permit-writers are trained in specific media, focusing their energies on air, water, or waste permits. These people are well acquainted with their work and have standard operating procedures for performing their duties. Any perceived change to these procedures may be strenuously resisted. Businesses that must comply with permits can also prove an obstacle to reform, as they fear being forced to invest more resources in determining their own method of compliance (rather than being told what to do by a regulatory agency) and monitoring results.

3. *Relationships with the Regulated*: The nature of the permitting process, the amount of paperwork that must be collected, and the need to obtain separate permits for each medium or process foster an adversarial relationship between business and government. The first problem with the centralized nature of the permit system (especially in the case of federal regulations) is that the regulated and the regulators have little face-to-face contact. Little allowance is made for local conditions and/or extenuating circumstances, and businesses are forced into the preconceived mold of regulation by a distant agency. Permit writers tend to develop a skewed view of industry as well, seeing them in person only when there has been a violation. Suspicion and mistrust breed in this atmosphere. As the head of Pennsylvania's Department of Environmental Protection, James M. Seif, noted, "[This results in] a criminalization of people in noncompliance, in lieu of actually trying to solve the problem or protect the environment."[3]

With these flaws inherent in the current permitting system, is there a viable alternative? Can the environment be protected in a manner that avoids these distortions while involving the private sector and local authorities in a more cooperative manner?

[3] James M. Seif, Secretary of the Pennsylvania Department of Environmental Protection, roundtable discussion at the Environmental Council of the States annual meeting, October 27, 1998.

Part 2

Reforming the Process

At least at the state level, the answer is a resounding yes. The states are the main implementers of federal statutes, deputized by the EPA to enforce environmental regulations. Responsible for over 85 percent of all enforcement actions taken in the United States, state environmental agencies have historically relied on medium-specific emissions permits to mandate pollution-control technologies.[4] With the major source of pollution shifting to nonpoint sources and a greater variety of small emitters, states are finding that the traditional approach of permitting has been inadequate for the new breed of environmental problems and often inefficient in addressing traditional problems. According to a Government Accounting Office (GAO) report:

> *States have cited such enforcement-related "output measures" as inappropriate indicators of a program's success and as unduly emphasizing punitive measures when technical assistance, incentives, and other, more cooperative strategies are needed to increase compliance by some members of the regulated community.... The states believe that regulators should be held accountable for the results their programs achieve, rather than only for the number of enforcement actions they take.*[5]

States have been a laboratory for alternative permitting procedures, implementing several innovations to address the inadequacies of the current process. While each approach has its own benefits and drawbacks, they all seek to address the concern that a one-size-fits-all mentality is inadequate for environmental progress. Furthermore, these innovations engage the private sector in working towards environmental protection, recognizing that companies must make trade-offs in their day-to-day operations in pursuit of environmental goals. Finally, by bringing the authority of protection to the local and state level, those most closely affected by any changes are better able to introduce their local knowledge to environmental decisions.

The four main innovations in permitting at the state level are:

- One-stop permitting;
- Facility-wide permits;
- Industrial standards; and
- Permit streamlining.

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[4] Environmental Council of the States news release, quoted in Jonathan Adler, "Bean Counting for a Better Earth," *Regulation* (Spring 1998), p. 45.

[5] Peter F. Guerrero, *Environmental Protection—EPA's and States' Efforts to Focus State Enforcement Programs On Results*, General Accounting Office Report Number GAO/RCED-98-113, May 27, 1998.

These innovations, while differing from state to state in their particulars and implementation, generally pursue four broad goals of: [6]

- Achieving environmental performance that is superior to that achievable through compliance with current and reasonably anticipated future regulations;
- Promoting increased operational and administrative flexibility to reduce costs;
- Encouraging greater pollution prevention and other innovation efforts; and
- Facilitating increased local support with involvement of affected constituents in the design and implementation of permits.

These reforms are not mutually exclusive, and many states have instituted a wide range of complementary procedures to overhaul the permitting process. Accompanying many of these initiatives is a new orientation toward a customer-service mentality, with state departments of environmental protection reorganizing their staff and functions in a more user-friendly manner. Hoping to overcome the adversarial relationship that has characterized most business-government environmental interaction, state environment departments are also involving business and industry in the formulation and promulgation of standards. These new approaches to permitting also attempt to devolve authority to producers themselves, utilizing a framework that is locally based and less regulatory.

As the following cases will show, several states are at the cutting edge of reform in environmental protection.

A. One-Stop Permitting

Permits usually focus on one medium (type of emission) at a time, resulting in an unrealistic attempt to regulate each medium—such as air, water, or waste—isolated from others. The organization of state departments of environmental protection encourages this specialization, since they are structured by media with little or no cross-over among those who design permits for one medium and others. This tends to create a regulatory tunnel vision within each department, as permit-writers are unable to focus on the big picture beyond their specific medium. Sometimes, decisions taken by one department lead to increases in emissions through other media–a transfer effect. A medium-specific focus also limits the ability to prioritize risk-reduction activities.

Single-medium permits are also problematic for industries. In attempting to comply with a myriad of regulations, single-medium permits tend to shift pollutants from medium to medium, as businesses look to transfer costs to whatever medium is least-regulated at a given moment (described as a “regulatory shell game”).[7] If all media have the same stringency in requirements, certain small firms may not be able to afford the large volume of permits required (or “one-size-fits-all” regulations) and will be priced out of business. As an example, the New York Department of Environmental Conservation had requirements that oil producers store all the water that comes up with the oil in storage tanks instead of allowing them to dispose

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[6] Peder A. Larson, Minnesota Pollution Control Agency, Testimony Before the U.S. House of Representatives Committee on Commerce, Subcommittee on Oversight and Investigations, November 4, 1997.

[7] Barry Rabe, “Facility-wide Permits and Environmental Regulatory Integration: Lessons from New Jersey,” *National Environmental Enforcement Journal*, April 1997.

of it. "The cost of storing and hauling the water to a special site is too high for small producers," requiring them to utilize a system that may not be appropriate for their activities. [8]

One-stop permitting takes much of the guesswork out of the permit process, allowing companies to submit one form or set of answers for the entire panoply of environmental regulations (a "multimedia" approach). By adopting a more-holistic approach, one-stop permitting avoids the danger of shifting pollutants from medium to medium and also reduces the frustration of having to obtain several (sometimes several hundred) permits. On the administrative side, one-stop permitting helps to minimize redundancy and its resulting costs for businesses.

1. Mississippi's Try, Try Again

A variant of one-stop permitting had already been tried in Mississippi in 1994 in connection with projects that disturbed wetlands. Casino owners had long complained that they faced a much longer processing period than other industries, and they wanted to find a way to expedite the process without vitiating environmental protection. The centerpiece of this strategy was the "general permit," a proposal from the Army Corps of Engineers and the Mississippi Department of Environment Quality (DEQ) and a product of negotiations among casino owners, regulators, and environmental activists that was "designed to cut paperwork and set up automatic approval for relatively minor projects that met certain conditions."[9] The goal was to reduce the time needed to obtain a permit from six months to approximately 60-90 days, with certain qualifying casinos possibly gaining approval in as little as fifteen days.[10] This faster processing pace would have necessarily shortened the time for public comment. The general permit would also have replaced the individual permits needed for each project; under the existing statutes, developers needed to obtain an individual Clean Water Act permit for each project, necessitating a 30-day public-comment period and a certification from state officials that the work wouldn't pollute water.[11]

In exchange for the flexibility afforded by a general permit, the casinos proposed the establishment of a "mitigation bank" to restore wetlands, purchasing 2,300 acres for preservation. This bank was to be one of the largest in the southeastern United States, and its implementation was endorsed by the DEQ, the Army Corps of Engineers, and the Mississippi River Coalition, an environmental group that closely followed the proceedings.

However, this original proposal was not acceptable to the EPA, who claimed that the mitigation bank "promised insufficient environmental paybacks."[12] There were also concerns that elimination of the public-notice period would allow polluters to sneak in through the back door, evading stringent requirements in the name of efficiency. This idea was disputed by Peter Schutt, founder of the Mississippi River Coalition, who said that the mitigation bank idea would be compensating not only for lost uplands but for damage in upland areas. Schutt protested that, "All this is over and above what is called for [by the Clean Water Act]. I don't

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8 John Carlisle (ed.), *1998 National Directory of Environmental and Regulatory Victims*, National Center for Public Policy Research website, http://www.nationalcenter.inter.net/VictimDirectory98.html.

9 Tom Charlier, "Corps Maps Shortcuts for Casino Projects," *The Commercial Appeal*, May 4, 1994, p.1A.

10 Tom Charlier, "Quicker OK on Wetlands Permits for Casinos Passes Test," *The Commercial Appeal*, May 11, 1994, p. 1B.

11 Charlier, "Corps Maps Shortcuts for Casino Projects."

12 Tom Charlier, "EPA Will Bar Casino Plan to Mitigate Mississippi Harm," *The Commercial Appeal*, Sept. 7, 1994, p. 1B.

understand why they can't sign off on that."[13] The EPA refused to approve the concept, however, and Mississippi's first experiment with one-stop permitting fell through.

This initial failure to implement permit simplification did not deter Mississippi from attempting once again to introduce a one-stop program. Rather than attempting to simplify federal requirements on a subject as politically charged as wetlands, in 1997 the state decided to rework its own cumbersome requirements into a more user-friendly method that better utilized the DEQ's resources.

A Problem of Measurement

The Mississippi Department of Environmental Quality had undergone major swings in its funding throughout the 1990s, suffering a drastic budget reduction in 1995. A report by the Office of Pollution Control (OPC) claimed that the 1995 budget shortfall (nearly $1 million) would mean the OPC would have to stop regulating 3,000 smaller wastewater dischargers and be forced to quit regulating smaller air emission sources.[14] This shortfall was fleeting, however, as the very next year, the DEQ received its largest budget increase in agency history.[15]

But the fluctuations in DEQ's resources underlined an important point for environmental protection; the DEQ didn't have an accurate way of measuring how its resources were used. The Mississippi legislature noted that authorizing a budget for the DEQ was a difficult process because the DEQ used "estimates of staff members' time spent in major work activities rather than collecting and using actual work activities data."[16] Without an accurate assessment of how time was spent, it was difficult to evaluate which programs were actually providing the most-efficient environmental protection.

Furthermore, the DEQ was a master of compartmental organization, as "the difficulty in coordinating across organizational boundaries was enormous."[17] Under this system of permits, a typical facility had to deal with at least six or seven permit writers within different media divisions, with an average of four permits required for a facility (normally in the air and stormwater divisions). If public notice was required for the permit, the process may have lasted over 120 days.[18]

Facing the prospect of repeated variations in funding and lacking effective data-gathering, in 1997 the DEQ proclaimed a desire to reinvent itself "as a more responsive, results-oriented organization, driven to provide excellent customer service to all its stakeholders."[19] Towards this end, they enlisted the services of an outside management consultancy to reengineer their method for issuing environmental permits. The one-stop permit was a required component of this reengineering vision, a method to both simplify the permit process for the regulated industries and achieve more efficiency within the department. The permit was designed to have a

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[13] Ibid.

[14] Nita McCann, "Pollution Control Wants $1 Million to Maintain Progress," *Mississippi Business Journal*, April 4, 1996, p. 9.

[15] Nita McCann, "MMA Conference to Focus on Regulatory Change and Compliance," *Mississippi Business Journal*, May 20, 1996, p. 10.

[16] "Review of the Department of Environmental Quality's Use of New Positions and Determination of Staffing Needs," Mississippi Legislature Joint Committee on Performance Evaluation and Expenditure Review, December 30, 1996.

[17] Jerry Cain, Mississippi DEQ, interview with the author, December 2, 1998.

[18] Ibid.

[19] "One Stop Reporting Program 120 Day Plan," Mississippi Department of Environmental Quality Office of Pollution Control, January 15, 1998.

permit manager responsible for all of the permits required by a given facility. The Mississippi DEQ's promotional literature also promised a variety of steps to smooth the permit process. [20]

- A key component was a pre-application communication, in order to provide applicants with guidance on "alternatives to the normal facility specific permits, such as general permits and options for reduced permitting requirements based on implementation of pollution prevention into the facility's design."
- The DEQ and the applicant would sign a nonenforceable agreement that delineated the applicant's responsibilities and the DEQ's commitments to timeliness. The advantage of this agreement was to limit future liability for the applicant.
- "Based on the signed agreement, the Permit Manager would prepare a customized permit application for the applicant. This application would allow the applicant to submit to one person, one time only, all of the information needed for processing all required permits. It would eliminate the need to respond to application questions that were not relevant for the applicant's specific operations."
- The public was informed through a notification process at the time of submission of the customized application, allowing the applicant and the OPC staff to address concerns during the drafting of the permit. The DEQ believed this would allow for "more effective permits and shorter public comment after the permit was drafted."

Such innovations required a large-scale overhaul of the organization of the DEQ, as permit-writers had to be organized by industrial sectors, rather than by medium or types of permits. The DEQ played up this aspect of the permit as well, noting that:

> *This new approach also has advantages for the State. The new approach should help staff develop and maintain a high level of expertise in pollution prevention options and regulatory incentives that can be offered for applicants that agree to build pollution prevention into their permitted activities. In addition, staff will develop expertise in more than one program and environmental medium, allowing for more flexible deployment to address changing needs and priorities.*[21]

This new approach to permitting was not without problems, however. As the Mississippi DEQ noted:

> *Implementation of the new process requires reorganization. Not surprisingly, some people will strenuously resist the changes. Although no one is expected to lose their job as a result of the reorganization, many people will be reassigned to new jobs within OPC, sometimes against their will.*[22]

Jerry Cain, head of the new Environmental Permits Division, summed up the challenges facing the reorganization:

> *As anyone that's ever tried to implement any kind of changes as significant as this is to a pollution agency, the biggest issue is dealing with change, behavioral issues, the people issue of change. You're going to spend six or seven months before you move the first person. Once you start moving people, unless you have a lot of money, you're gonna struggle the first year making sure that the work that's got to get out gets out. We just couldn't go out and write checks for consultants to do that. This doesn't have anything to do with if the process works, it's the realities of institutional change.*[23]

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[20] Ibid.

[21] Ibid.

[22] "Case Study: Mississippi – One-stop Permitting," Environmental Regulatory Innovations Symposium, November 5-7, 1997.

[23] Jerry Cain, Mississippi DEQ, interview with the author, December 2, 1998.

Additionally, the transition process itself was causing a disruption of service:

> *We [the DEQ] have been very successful at ensuring the timely issuance of permits, but we have done so at the expense of full implementation of the new process. We did not have the resources to bring in outside consultants to build the new file system or develop the interim automated system, or perform data clean up or many of the other practical necessities of implementing the process. Therefore, we have had to use existing professional staff, which has delayed the process.*[24]

Not only was the question of technical expertise raised, but the allocation of funding to specific permits was also a problem, as most of the OPC's funding was geared towards media programs.

A large threat to Mississippi's "reinvention" came from the U.S. EPA, reluctant to cede power to Mississippi's DEQ. Mississippi has historically been high on the EPA's Toxic Release Inventory Report, and EPA officials believe that the DEQ is suffering from a lack of enforcement rather than a burdensome permit regime.[25] The DEQ, for its part, has had some concerns about the EPA's handling of the one-stop program:

> *The biggest issue is once we have a fully integrated data management system, how will we transfer data to the EPA? We do not want to have to continue to feed their existing, segregated, single-media system.*[26]

Jerry Cain noted that the EPA itself was of two minds about the one-stop process:

How the EPA feels about this depends on who you talk to. The EPA is of two mindsets: there's the Beltway mindset and the regional mindset. The Beltway mindset, national acceptance has been very good, coming from the office of innovation. Some of the regional folks are having problems understanding how we can be organized different from them. There is acceptance from head of our region, but there is a challenge to show the program people how it will be better. We're not meeting with resistance, don't get me wrong, but there are folks who are going to have to be shown how it works. While the region has encouraged multimedia, they have done it from the perspective of groups rather than a unique individual having the capability to write permits.[27]

Opposition to the one-stop permit has also come from some environmental activists, who are concerned about the perception of Mississippi as being lax on polluters. In 1998, the Earth Justice Legal Defense Club sued in federal court to have the DEQ maintain its water-pollution standards, and, failing that, to have the EPA intervene.[28] Environmental activists have tried such a tactic before: in 1995 EPA Region IV took over the enforcement of industrial and municipal permits and inspection of major permitees from the state.[29] Rather than viewing institution of the "one-stop" permit as an improvement, many Mississippi environmental groups believe that the state has not done enough to regulate as it is, and devolving responsibility to producers will, in their view, only harm the environment further. Jerry Cain believes the environmental activists "don't understand that reducing burden is good, that you can do that and still protect the environment."[30]

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[24] Ibid.

[25] Becky Gillette, "Oink! Oink! Debate Rages in Jackson," *Mississippi Business Journal*, February 2, 1998, p. 1.

[26] Melanie Morris, Mississippi DEQ, correspondence with the author, October 19, 1998.

[27] Jerry Cain, Mississippi DEQ, interview with the author, December 2, 1998.

[28] "Water Water Everywhere," Earth Justice Legal Defense Club website, http://www.earthjustice.org/work/waterhi2.html.

[29] Prepared statement of Todd E. Robins, Environmental Attorney, U.S. Public Interest Research Group, before the Senate Environment and Public Works Committee," June 10, 1997.

[30] Jerry Cain, Mississippi DEQ, interview with the author, December 2, 1998.

It is still too early to assess the impact of these innovations on the environment; by late 1998, the Mississippi DEP was still in the process of filling the positions in its new Environmental Permit Division, and Cain believed that the process would take a good two to three years to fully implement.[31] Yet the flexibility that this program engenders signals a notable move to a system that actually rewards environmental improvements.

B. Facility-wide Permits

While permits may be a convenient administrative tool, current state and federal permit regimes do not foster the atmosphere necessary to achieve the goal of environmental protection. Too often, permits become an end in themselves, with the ultimate goal of environmental protection lost in a maze of regulations. By prescribing every phase of the pollution-control process, down to what equipment should be used to attain emissions reductions, permits have fostered a regulatory morass.

A means to remedy this micromanagement of environmental protection is a facility-wide permit, which simplifies the web of permits and regulations into one seal of approval that covers emission and discharge levels.

1. Tending to the Garden State

A major problem with permits is that the preferences of the regulators may fail to reflect the preferences of both the regulated community and the public, either individually or collectively. The view that the mission of a permitting regime is to punish violators and curtail all emissions, rather than to protect people and ecological systems from potential harm, leads to a confrontational attitude with the regulated industries.

Confrontation typified government-industrial relations in New Jersey. The Garden State was described in the early 1990s as "second only to California on a list of where *not* to manufacture chemicals in the U.S.," with regulations that were forcing companies to relocate to more "business-friendly" areas such as the South or outside of the United States.[32] Manufacturing declined by 30 percent over the previous ten-year period, and the chemical industry alone had lost 1,600 jobs in 1993.[33] Industry leaders publicly lamented the state's bureaucratic morass, with Huntsman Polypropylene's plant manager Tom Bates stating, "New Jersey's regulatory climate when I got here eight years ago was driving companies out. It was punitive. Everyone wanted to run, not walk, to the nearest exit."[34]

The root of the problem lay in the New Jersey Department of Environmental Protection (DEP), an agency that, at its height, had more than 4,000 employees (more than three times the number of employees in the Department of Education and more than half the number in the treasury) and was able to create its own rules

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[31] Ibid.

[32] Rick Mullin, "New Jersey's New Take On Industry," *Chemical Week*, September 10, 1997, p. s3.

[33] Ibid.

[34] Ibid.

and regulations.[35] Described as an "ogre" by the majority of the business community, the DEP presided over a process that involved long delays in issuance of permits, spiraling costs, and uncertainty about the compliance standards.[36] This climate had the exact opposite effect of what was intended, as industry critics charged that the permit-approval process frequently delayed manufacturers from getting pollution-control equipment into service.[37] Even then-Gov. Jim Florio complained that, "the problem isn't the law, it's the Department of Environmental Protection, which has turned the [permit] review process into an 18 month ordeal in which no one in the DEP makes a decision while the small businessperson is strangled with interest charges."[38] Indeed, the entire permit process was once characterized as "Waiting for Godot."[39]

The major problem in the New Jersey DEP, the distorting of incentives, is inherent to some extent in all permit systems. Too often, permits become a means unto themselves, resulting in a fundamental disconnect between the process and the goals. Permits were also the bread and butter of the Department of Environmental Protection, as 51 percent of their budget was dependent on fines and fees, while another 27 percent came from federal grants.[40] Throughout the late 1980s and early 1990s, New Jersey's National Pollutant Discharge Elimination System (NPDES) was funded exclusively through fees, with no money coming from federal funds or a state general fund (contrast this with Pennsylvania, which garners 65 percent of its NPDES funding through a state fund).[41] Thus, the incentive to continue issuing permits (and collecting the resulting fees) was directly related to the vitality of the DEP as an organization.

The connection between permit fees and the continued life of their programs was characterized in the case of DuPont, who saw their water permit fee go from $52,000 in 1988 to $750,000 in 1993.[42] Al Pagano of DuPont explains the New Jersey DEP's way of doing business:

> *New Jersey developed a formula to calculate fees for NPDES that took into account environmental factors, such as the sum of total masses of materials that were discharged over entire year.... Then they changed the slope of a curve so they could fund their program. It was a very complicated formula that very few people could understand…and while they were calculating this, they multiplied masses of material by a toxicity factor, for each parameter used.... Less sensitive issues, like solids, the factor was 10, but you get up to chromium and lead and the factor becomes 100, or 10,000, or 100,000. So you have a plant using a relatively small amount of a chemical, now add to that mass, multiply by 100,000 and then add that, the number gets big. Now, as a way of smoothing out this money, they took the cube root of all of these numbers, when they were done.... DuPont ended up with the highest [fee] in the state at that time.*[43]

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35 "New Jersey State Government Workforce Overview," New Jersey Department of Personnel website, http://www.state.nj.us/personnel/policy/wfpro1c.htm.

36 Rick Mullin, "New Jersey's New Take on Industry."

37 Dennis J. Krumholz, "Changing Direction Without Losing Focus," *New Jersey Law Journal*, June 6, 1994, p.4.

38 Randall Kirkpatrick, "Why New Jersey Doesn't Work," *Business Journal of New Jersey*, vol. 10, no. 6, February 1993, p. 38.

39 James T. Prior, "Whitman to BIA Forum: 'Let's Go the Distance,'" *New Jersey Business* (February 1996), p. 18.

40 James T. Prior, "New Jersey Open for Business and Environment," *New Jersey Business* (March 1995), Sec. 1; pg. 14.

41 Interview with Al Pagano, E.I. DuPont, New Jersey, December 8, 1998.

42 James T. Prior, "New Jersey Open for Business and Environment"; also interview with Maria Angelo, DuPont Chemicals, New Jersey, December 3, 1998.

43 Interview with Al Pagano, December 8, 1998.

This intricate and arbitrary system set a fee for the DuPont facility that was high, but not inordinately so compared to the neighboring states of Delaware, Pennsylvania, and New York. This changed in 1989, however:

> *One of the things that happened is that environmentalists sued the DEP and went to court to force the polluter to pay.... As far as I'm concerned, I agree with that as long as ALL the polluters pay—the home owners, the nonpoint sources, the aggregates. The court case, which was heard around the 1989-1990 period, the judge said "okay, let the polluters pay;" so in succeeding years, the DEP had to eliminate the cube root from its formula, and in the next year or two, use the square root, then go to straight-line numbers. By time you get into 1991-92, the equation is as it was originally developed. Take a parameter, multiply it by a large toxicity factor, without smoothing it out by a cube root.*
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> *Second point of this whole thing was that, if you used the formula as it came from the court, in theory, [DuPont's] annual NPDES could have been $4 million! So the state said, "What we're gonna do is use a cap number, which is 10% of the NPDES budget." So if the budget was $7.5 million dollars, we ended up paying $750,000.*[44]

The operations of the DEP were further hampered by organizational schizophrenia: in addition to environmental regulation, the DEP was also charged with regulation of public utilities. With so many functions lumped together in one organization and so many tasks to take care of, it was difficult to fulfill any one task well.

The DEP, in its quest for compliance and adherence to the rules, lost sight of the original goal of protecting the environment. The maze of regulations and permits was not effectively protecting the environment. But this maze was tying up the DEP's resources and driving businesses away from the Garden State.

2. New Jersey's Innovation

The New Jersey Pollution Prevention Act of 1991 sought to comprehensively change the regulatory process, providing business and government with an opportunity to work in a more-cooperative atmosphere. While the act was substantially flawed in some of its respects (especially in its right-to-know provisions, discussed below), the act allowed for innovation in the chaotic permit process. Following the mandate of this act, Gov. Christine Todd Whitman announced in 1995 that "we can protect the environment without taking years to process a permit," and New Jersey began the long process of streamlining environmental permits.[45] Gov. Whitman first sought to restore to the DEP the singular goal of environmental protection; to this end, she spun off the Board of Public Utilities as its own cabinet post. Having pared the DEP down to 3,566 employees, she reinforced her predecessor's move towards reform by continuing to streamline the permit process for businesses in New Jersey. The method chosen to simplify New Jersey's labyrinth of permits was the facility-wide permit.

The original impetus for the facility-wide permit approach came from DEP Commissioner Robert Shinn, who visited the Netherlands in 1994 and was impressed by the Dutch approach to environmental management. The facility-wide permit allows companies to "make changes to its process equipment and its

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[44] Ibid.

[45] Gary A. Greene, "Governor Whitman Fosters a Pro-Business Change in Environmental Laws and Regulations," *The Metropolitan Corporate Counsel* (November 1995), p. 57.

use of raw materials, without the State's prior approval, provided process 'caps' are not exceeded."[46] Developed in conjunction with industry and environmental leaders, the facility-wide permit took the place of the plethora of permits that a company needed (sometimes as many as 80 to 100 per facility). More importantly, the facility-wide permit devolved authority to the producers themselves, reducing oversight of minor air permits and "allowing the DEP to concentrate its efforts on the 10 percent of industry permits that release nearly 90 percent of the emissions."[47] In exchange for improved environmental performance, industries were offered flexibility in compliance measures.

In terms of organizational capacity, a new office was created to handle the administration of facility-wide permits. The Office of Pollution Control was composed of individuals cross-trained in a wide variety of competencies, including environmental media, inspections, and materials accounting.[48] By housing the innovation in a new office, it was isolated from the old mindset of the DEP and was better able to experiment with new approaches in environmental management. The budget of the OPC was generated through the state's existing right-to-know legislation and federal pollution-prevention grants, thus encouraging cooperation among agencies (as no one's budget was going to be transferred or slashed because of the new office).[49]

Gov. Whitman took steps to shape the environment in which the DEP operated. One of her first steps in reforming New Jersey's environmental regulation was to designate the secretary of state as the business ombudsman: "[The office is] a counter-weight to the Department of Environmental Protection. It would lobby against actions by the state government that were perceived to be out of sync with the business-friendly agenda."[50]

Thus, the spirit of competition and accountability was introduced to the political process, as DEP initiatives were soon under the scrutiny of other branches of government. Was this permit really necessary? Were those regulations crucial? These questions would be on the mind of DEP officials every time they assessed their options.

Beyond administrative details, the most-important innovation in the development of the facility-wide permit was its targeting of process levels and not source levels; rather than using "end-of-the-pipe" counts and technology-based, source-focused standards, the facility-wide permit allowed a facility to "install new equipment without having to undergo the sometimes lengthy preconstruction review process. This allowed the facility greater operational flexibility in formulating and marketing new products." [51] Contrary to what some critics charged, environmental protection was not going to be sacrificed for convenience or efficiency.

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[46] "Case Study: New Jersey—Facility-wide Permitting Program," Environmental Regulatory Innovations Symposium, November 5-7, 1997, published on the Minnesota Pollution Control Agency's Website http://www.pca.state.mn.us/hot/es-nj.html.

[47] "Governor Whitman Signs Overhaul of Air Pollution Law," *The Metropolitan Corporate Counsel* (October 1995), p. 52.

[48] Dan Beardsley, Terry Davies, and Robert Hersh, "Improving Environmental Management: What Works, What Doesn't," *Environment*, vol. 39 no. 7 (September 1997), p. 6.

[49] Barry G. Rabe, "Facility-wide Permits an Environmental Regulatory Integration: Lessons from New Jersey," *National Environmental Enforcement Journal* (April 1997).

[50] Lewis Goldshore, and Marsha Wolf, "Will Whitman's Pro-Business Stance Hold in '97 Election?" *New Jersey Law Journal*, August 26, 1997, p. 27.

[51] "Case Study: New Jersey Facility-wide Permitting Program," Environmental Regulatory Innovations Symposium, November 5-7, 1997.

Indeed, permits already granted to some companies had "sliding" emissions scales put into place (keyed to pound-per-product baselines) that made any future production increase contingent on emission decreases.

The actual implementation of facility-wide permitting was described by the DEP:

> *The development of a Facility-wide permit begins with the preparation of a Pollution Prevention Plan. First, each "production process" in the facility is delineated. Most facilities have a number of processes, each composed of dozens or even hundreds of individual pieces of process "equipment." This is followed by a process-level materials accounting. This means the use, generation and release of hazardous substances and non-hazardous pollutants are determined for each production process in the facility. These initial steps are significant because the facility-wide permit is organized around these production processes and based upon the materials accounting data. In the next step in the pollution prevention planning process, the facility identifies a range of pollution prevention opportunities and selects the strategies it chooses to pursue, and sets five year pollution prevention goals. The facility has broad discretion to select these strategies and set its goals. Once a Pollution Prevention Plan is completed, the Department develops process-level limits and other conditions for all air, water and hazardous waste releases (emissions, discharges, etc.), based upon the process-level materials accounting data*.[52]

This description of the facility-wide permit exposes the paradoxical nature of New Jersey's innovation. While the permit itself promised flexibility and an important step away from command-and-control mechanics, it was couched in the materials-accounting process, which restricts flexibility and focuses on regulating materials use rather than harms.[53]

Actually beginning facility-wide permitting was not as easy as the government synopsis promised. As Frank Gorski, Environmental Health and Safety Manager of Huntsman Polypropylene, noted, "New Jersey regulators…have a very strong enforcement mentality, so it takes a lot of commitment to go into the State of New Jersey and be willing to work through this process with them."[54]

Yet Huntsman Polypropylene was willing to give the facility-wide permit a chance, as they were undergoing the process of retrofitting their Woodbury plant. According to Gorski:

> *The plant was going to be rebuilt to accommodate modernization of the catalyst, approximately 80 air pollution stacks and 300 sources ranging from new permits to grandfathered sources were going to be required. One prior permit renewal took 2½ years, and the state would not approve a compressor, which cost us an 18 month delay and $3.5 million. With the 80 stacks and 300 sources being affected by modernization and needing to be re-permitted, we needed a streamlined regulatory process. It was critical for New Jersey to work with us to do this in a process manner, versus an individual point-by-point, source-by-source permit.*[55]

3. The Results

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[52] Ibid.

[53] See especially Alexander Volokh, Kenneth Green, and Lynn Scarlett, *Environmental Information: The Toxics Release Inventory, Stakeholder Participation, and the Right to Know*, Policy Study No. 246, Washington D.C.: Reason Public Policy Institute, November 1998.

[54] Frank Gorski, Environmental Health and Safety Manager, Huntsman Polypropylene Plant, Woodbury, New Jersey, at National Advisory Council for Environmental Policy & Technology Information Impacts Committee Meeting, September 10-11, 1996.

[55] Ibid.

The DEP has engaged in extensive quantitative research into the effectiveness of the planning process for the facility-wide permit, finding that: [56]

- The average cost to a facility of preparing a plan was $26,000;
- The average estimated time a company spent in putting together a plan for the facility-wide permit was 60.7 days;
- 69 percent of the companies using a plan predicted net cost savings because of the process;
- The average net benefit to the facilities was $6.3 million per year;
- For every dollar spent in the process, there was a net savings of $5 to $8.

In addition, the permit reforms also led to improvements in efficiency. The speed of environmental permit processing increased dramatically with these reforms, as some permits are processed in as little as 90 days after being submitted, with the average time being two months (far below the 18-month average observed just a few years earlier). To give a typical example, Huntsman Polypropylene was the first South Jersey company (and the third in the state) to receive a facility-wide permit, taking the place of 80 permits. A few years before, Huntsman "was threatening to leave New Jersey, citing the burdensome regulatory process at DEP as the main reason," but under the facility-wide permit ten thick binders' worth of paperwork was reduced to a 1.5 inch packet.[57] Not only was the regulatory burden reduced; the evaluation that Huntsman experienced resulted in the elimination of 8.5 million pounds of emissions per year, and the flexibility that the facility-wide permit program engendered allowed Huntsman to modernize their plant, eliminating 107 out of the plant's 350 pieces of equipment.

As with all new programs, however, the introduction of a new system brings concomitant costs. The Schering-Plough facility, the first to receive the facility-wide permit, invested $1.5 million and 5,000 staff hours to "carry out the pollution prevention evaluation, cover the engineering and equipment costs, and work with the state to repackage the information from our existing permits into the new permit format."[58] However, the president of Schering-Plough estimated a savings of $300,000 per year due to reduction of costs for waste disposal, with a further savings accruing through elimination of "the need to go back to the DEP with every minor change [avoiding] the need to assemble masses of…paperwork for individual permit renewal."[59]

The facility-wide permit program has helped stem the tide of industries departing New Jersey, as the more-efficient regulatory atmosphere is convincing many companies to remain in the Garden State. The greatest benefit of the facility-wide permit program is that it appears to work. Rather than just keeping business in New Jersey or better directing agency funds, the facility-wide permit has resulted in reduction of emissions by its subscribers. The facility-wide permit was created as part of legislation that defined the environmental goal as a 50 percent statewide reduction over five years in the use and generation of hazardous waste. As of 1997, the DEP estimated that New Jersey facilities use approximately 24 million pounds less hazardous materials per year (out of an annual usage of 4 to 5 billion pounds) than before the permit reforms were put in place.[60]

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[56] Beardsley, *et al.*, , "Improving Environmental Management: What Works, What Doesn't,". p 6.

[57] Diane Mastrull, "An In-Your-Face Tactic for Economic Development," *Philadelphia Business Journal*, Vol. 14 No. 45 (January 5, 1996), p. 18; also Peter Silverberg, "Huntsman Polypropylene Corporation Receives Facility-wide Permit," *Chemical Engineering*, vol. 103, no. 1 (January 1996), p. 45.

[58] Richard J. Kogan, "With Change Comes Opportunity," *Chemical Week*, April 26, 1995, p. 48.

[59] Ibid.

[60] Beardsley, *et al.*, , "Improving Environmental Management: What Works, What Doesn't."

4. Panacea or Problematic?

The facility-wide permit itself is a sound idea that allows for compliance flexibility, places control in the hands of those with knowledge (the industries themselves), and encourages innovation. New Jersey's facility-wide permit, however, is tainted by association with federal right-to-know legislation. The assumption behind the right-to-know legislation is that chemical use is bad per se; rather than delving deeper to quantify risks to human and ecological systems and the acceptable trade-offs that industries may make, this viewpoint reinforces the idea that any reduction in chemicals must be better for the environment. This materials-accounting approach stifles innovation and delinks pollution-control requirements from measures of harm.

The right-to-know mandate has been implemented under New Jersey's Pollution Prevention Act of 1991. Under this act, New Jersey businesses prepare mandatory pollution-prevention plan and progress reports, with the facility-wide permit an option of flexibility under this statute.[61]

> *New Jersey's DEP facility-wide permit program is an integral part of the state's Pollution Prevention Act, signed into law by Governor Jim Florio in August 1991. The Act requires approximately 840 priority industrial facilities to prepare pollution prevention plans and annually report their progress. Priority industrial facilities are those that are regulated under the federal right-to-know program (formally the Emergency Planning and Community Right-to-Know Act). Chemicals that must be included in a facility's pollution prevention program are also the same as those covered by the federal program.*[62]

While the facility-wide permit has apparently been a success for New Jersey, and the concept of the permit avoids the negative incentives that traditional permits engender, data on the statewide reduction of emissions should be taken with a grain of salt. The data for the reduction of chemical use are problematic in that it is difficult to disentangle the effect of the facility-wide permit from other factors. With a stated goal of reducing emissions by 50 percent across the state, the New Jersey DEP has touted the effectiveness of the pollution-prevention plan and the facility-wide permit in reaching this goal. Much of the reduction in emissions has resulted from plant closures and process shutdowns than from a movement towards less inputs.[63] One such study examined a DuPont factory in New Jersey:

> *Over the 1991-94 period, the DuPont Deepwater facility reported on 66 TRI* [Toxic Release Inventory]*-listed chemicals. Of that total, 23 showed increases in total use; 43 showed declines.... In no case was a reduction the result of New Jersey's materials accounting data submissions, New Jersey's required pollution prevention planning, or source reduction efforts.*[64]

The facility-wide permit itself has not been without its detractors. Critics of the program have alleged that the permit will provide a lower level of environmental protection. A coalition of 20 environmental groups

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[61] New Jersey Department of Environmental Protection, "Basic Requirements of the New Jersey Pollution Prevention Act and Regulations," p.5.

[62] Steven and Jeanne Herb Anderson, "Building Pollution Prevention into Facility-wide Permitting," *Pollution Prevention Review* (Autumn 1992), p. 423.

[63] Chemical Manufacturers Association (CMA), *New Jersey and Massachusetts: Toxic Use Reduction Successes? Models For National Programs?*, November 1997.

[64] Ibid.

gave Gov. Whitman a "C-minus" for her environmental efforts, with the cutting back of enforcement programs (a direct result of the facility-wide permit) as the main impetus for this rating.[65] Pete McDonough, a spokesman for Gov. Whitman, responded to this claim by saying:

> *The best thing to look at is environmental indicators. All the indicators, whatever they are, are all up. How do you measure a commitment to the environment, by the number of bureaucrats or by the environmental indicators? I say you measure it by indicators.*[66]

Furthermore, many environmental activists have claimed that the DEP is getting too cozy with industry, acting as another arm of the chamber of commerce rather than as a regulator. In a vitriolic, yet award-winning, series, *The Bergen Record*, a northern New Jersey newspaper, savaged the facility-wide permit approach and the office of the business ombudsman as being "used solely by polluters to do an end run around the DEP's normal permits and enforcement process."[67] New Jersey Public Interest Research Group lobbyist Curtis Fisher went even further, stating, "Governor Whitman's policies are designed to try to cozy up to companies and weaken standards and extend the periods for compliance."[68]

Opponents of the facility-wide permit have also attempted to shore up its provisions, calling for an amendment that would mandate "measurable and binding net reductions" in emissions.

The facility-wide permit has even been attacked by those who believed the Netherlands example was a model of environmental consciousness. While applauding the approach the Netherlands took towards environmental management, some have charged that New Jersey's facility-wide permit:

> *…allows companies to emit more pollution in some categories…[and while] the Dutch are investing heavily to pay for a clean environment.... Whitman has cut the DEP's budget.... The Dutch plan gives businesses flexibility in how they meet environmental standards, which is a selling point Whitman stresses for the facility-wide permit program. But Dutch businesses are not allowed to negotiate what those standards will be, as they are under Whitman's facility-wide permit program.*[69]

The future of the facility-wide program may have some problems as well, though not because of the charges critics have leveled against it. The difference between batch-manufacturing plants, industries that produce a discrete amount of products, and continuous-process manufacturing plants has caused something of a headache for New Jersey regulators, as the DEP must evaluate much more at a batch-manufacturing plant (due to the ever-shifting nature of the processes utilized). This increased work has slowed the permit process for batch industries: for example, Sybron Chemical applied for a facility-wide permit in 1991 and has seen other plants such as Huntsman obtain their facility-wide permit while they still await an outcome.[70] The DEP has attempted to remedy these problems, most notably by working on a "Flexible Track for Good Environmental Performers" targeted at the batch industry. Issues remain to be ironed out, presenting the facility-wide permit with another important obstacle to surmount.

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65 Bruno Tedeschi, "Environmentalists Lukewarm to Both Whitman, McGreevey," *The Bergen Record*, October 6, 1997, p. A1.

66 Ibid.

67 Joseph E. Gonzalez Jr., "Industry Group Responds to Open For Business," *The Bergen Record*, August 19, 1996, p. A11.

68 Kelly Richmond and Dunstan McNichol, "A Valuable Ally: Ombudsman Aids Businesses," *The Bergen Record*, July 2, 1996, p. A1.

69 Kelly Richmond, and Dunstan McNichol, "Following the Dutch Example, To a Point; N.J. Process Lacks That Nation's Rigors," *The Bergen Record*, June 23, 1996, p. A11.

70 Rick Mullin, "Producers Are Frustrated With Pace of Change," *Chemical Week*, September 8, 1998, p. S4.

5. Lessons from New Jersey

The traditional view of the permit as a compliance tool is wedded to a larger vision of environmentalism, a vision that portrays enforcement and punishment as the keys to environmental improvements. The criticism hurled at the facility-wide permit by New Jersey environmental activists reflects this viewpoint, as the opponents of the permit point to the flexibility of the program as a negative aspect, rather than a positive one.

The experiment in permitting that New Jersey has instituted combines both the old and new vision of environmentalism. While remaining part of the 1991 Pollution Prevention Act, with its focus on materials-use rather than harms, the facility-wide permit brings increased flexibility to regulated industries and some devolution of goals to a more local setting. It is this innovation that should be encouraged at the state level.

Part 3

Cleaner, Cheaper, Smarter, Faster:
The Minnesota Pollution Control Agency, 3M, and Flexible Permits

At the beginning of the 1990s, Minnesota's Pollution Control Agency (MPCA), the state agency responsible for environmental regulation, was looking for a better way to regulate. Then Director of the MPCA, Peder Larson, noted that, "the environmental problems we're facing now are different than the ones that existed 25 years ago, and we really need to change how we approach them."[71]

The MPCA was concerned that the traditional methods of regulation were not providing the incentives needed to protect the environment and may actually have been discouraging environmental protection. While command-and-control methods had helped reduce pollution from easily identifiable sources, the threat to the environment in Minnesota had shifted, requiring the MPCA to adapt. Larson underscores that:

> *There is no question that the greatest threats to the quality of our air, water and land come not from a manageable number of large sources but rather from the cumulative impact of an overwhelming number of small sources.*[72]

Furthermore, much as in New Jersey, the permitting process in Minnesota heavily taxed these smaller businesses and industries, providing "a significant deterrent to their economic survival."[73] Quoting the MPCA's 1996 Self-Assessment:

> *As the MPCA addresses the problems of pollution from nonpoint sources, it is likely that some environmental solutions will be costly for those who can least afford them. The agency needs to be innovative helping small business owners, rural cities, homeowners, and farmers find affordable solutions by providing technical assistance and identifying funding sources.*[74]

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[71] Dave Price, "New Leader Plots Course of MPCA," *Minneapolis-St. Paul CityBusiness*, August 23, 1996, p.14.

[72] Peder A. Larson, testimony before the U.S. House of Representatives Committee on Commerce, Subcommittee on Oversight and Investigations, November 4, 1997.

[73] Ibid.

[74] Minnesota Pollution Control Agency, "Program Self-Assessment: Message from the Commissioner," December 17, 1996.

Saddled with an antiquated regulatory structure, the MPCA engaged in efforts to make the state's regulation more efficient, more responsive to the regulated, user friendly, and less costly for the agency and the taxpayers. The goal for the MPCA was "cleaner, cheaper, smarter, and faster." [75]

Coincidentally, as Minnesota was attempting to reform its environmental regulatory structure, Project XL (standing for eXcellence and Leadership) was being formulated in Washington, D.C. by the U.S. EPA. Project XL was "one of the hallmarks of the administration's plan to streamline regulation…aimed at relaxing burdensome federal, state, and local regs in exchange for environmental performance that exceeds compliance."[76]

Ostensibly, one of the major components of the Project XL ethos was greater flexibility for industry, as was a multimedia permit that MPCA was contemplating for 3M. The paths of these two initiatives would prove to be intertwined farther down the road.

A. On the Road to Reform

The first steps in reforming the MPCA were approved by the Minnesota legislature, which stated that:

> *Environmental protection could be further enhanced by authorizing innovative advances in environmental regulatory methods. It is the policy of the legislature that Minnesota should…encourage facility owners and operators to innovate, set measurable and verifiable goals, and implement the most effective pollution prevention, source reduction, or other pollution reduction strategies for their particular facilities....*[77]

The MPCA seized upon these goals, instituting a wide range of reforms in its environmental oversight. The goal of "cleaner, cheaper, smarter, faster" required organizational change at the MPCA, as well as involvement of business leaders and environmental groups. Starting with the people who worked at the MPCA, Larson noted:

> *We have to encourage a culture of innovation, helping staff members react quickly as they learn new ways of doing business.... It's important to give MPCA the opportunity to try new procedures and occasionally even watch those attempts fail.*[78]

The opportunity to try new procedures presented itself almost immediately, as the MPCA embarked upon several new ground-breaking ideas. For example, the Rahr Malting Company was allowed to trade its pollutants with other producers, breaking the traditional opposition to pollution credits in order to achieve a lower pollutant load on the Minnesota River. The MPCA also initiated the Environmental Improvement Act, to encourage companies to uncover and correct their violations of state environmental regulations.

Having scored some success with these early innovations, permit reform was the next topic on the MPCA's list. The pilot project for the permit reform was 3M Hutchinson, a company that had a sticky-tape production

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[75] Ibid.

[76] Paul Harris, "Project XL Begins to Crumble As Some Firms Say, 'No Thanks'," *Environmental Management Today*, vol. 7 no. 4 (Sept.-Oct. 1996), p. 1.

[77] Environmental Regulatory Innovations Act, Legislature of Minnesota, Minneapolis-St. Paul, S.F. No. 1956 .

[78] Price, "New Leader Plots Course of MPCA."

plant in St. Paul. In the early 1990s, 3M set a goal of achieving 30 percent of their annual sales from new products; the main obstacle to this goal was the laborious permit process that would have hindered 3M's ability to change equipment. [79] The promised speed of the new permit was the paramount reason for 3M coming on board:

> *3M's success hinged on bringing out countless new products at a rapid rate. The company had a compelling need to get these products to market quickly. However, doing so often entailed a slow process of receiving permits from MPCA before it could proceed. The company was looking for operational flexibility.*[80]

And 3M believed that it had earned the right to request some leeway. It had spent about $175 million over the previous seven years (1989-96) for pollution-control equipment beyond what the state required. [81] Indeed, 3M was known throughout the environmental world as "one of the squeakiest-clean companies in the nation."[82]

Minnesota's Pollution Control Agency and 3M had a long history of cooperation in the environmental sphere. Beginning in 1993, MPCA pre-authorized a flexible air permit at the tape-producing facility in Hutchinson, "with the condition that air emissions remained below 50 percent of 1991 emissions."[83] Results from that pilot project had been "dramatic," as the company said it saved the equivalent of one person working for a whole year (1,530 hours) that otherwise would have been spent on filling out permit applications. On the agency's side, the MPCA saved about 700 hours in permit modifications that were subsumed under the flexible air permit.[84]

Based on this early success, 3M and MPCA began negotiations regarding a new flexible permit that would work on a multimedia level. While working on developing this permit, the MPCA decided to submit the new MPCA-3M agreement to the EPA's Project XL. The proposed agreement between the MPCA and 3M submitted to the XL process included a number of innovative features that deviated from the traditional command-and-control approach. By agreeing to guarantee that its performance was "well beyond" what current regulations required, 3M was granted flexibility in its choice of pollution-abatement equipment and was given some leeway in managing its emissions.

One of the tangible demonstrations of this flexibility was a reduction in both the number of permits and the time needed for their completion. Under the MPCA/XL agreement, 3M's permit load was reduced from over 22 permits and 300-plus pages to one ten-page permit.[85] The streamlined permit was multimedia based, covering air, water, and waste pollution. Not only would this new permit simplify company reporting and paperwork, the permit's simpler nature made it more understandable to the general public.

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79 Kriz, Margaret, "A New Shade of Green," *National Journal*, vol. 27 no. 11 (March 18, 1995), p. 661.

80 Dr. Donald A. Geffen and Professor Alfred A. Marcus, "Environmental Regulation for Sustainable Development," University of Minnesota Strategic Management Research Center Draft Paper, June 30, 1997.

81 Price, "New Leader Plots Course of MPCA."

82 Margaret Kriz, "Feuding with the Feds," *National Journal*, vol. 29, no. 32 (August 9, 1997), p. 1598.

83 Benno Groeneveld, "Trust But Verify," *Chemistry & Industry*, no. 1, January 1, 1996, p.10, http://ci.mond.org/9601/960111.html.

84 Ibid.

85 "State Environmental Innovations," Environmental Council of the States 1997 Annual Meeting Report.

Public involvement was also increased by the new permit system, as some individual citizens participated in the development of the permit itself. Minnesota state law called for a public comment period of at least 30 days and required that participants be involved in every step of the permit process.[86] In the 3M case, the MPCA worked with local Hutchinson officials to analyze the potential risks of the emissions caps that were proposed, weighing what risks were acceptable to both the plant and local officials.[87] A second group, the Pilot Project Committee (PPC), formed from an earlier symposium entitled the Minnesota Pollution Prevention Dialogue (in which 3M was heavily involved), was also involved to advise the MPCA on its design of the Project XL programs.

3M preferred this public scrutiny to alternative methods of regulation, some of which may have divulged trade secrets. 3M's Tom Zosel commented that, "Confidentiality should not be an obstacle. Revealing a facility's total environmental emissions does not pose a commercial threat whereas reporting details on individual processes might."[88]

While many disparate groups were brought into the permit and verification process, none of them singularly held a veto power over decisions reached. Together, however, the MPCA could have revoked the permit if 3M "failed to satisfactorily address a substantive issue raised by a majority of members of the stakeholder group."[89] Moreover, the public was to be kept in the process through internet posting of daily emissions in a user-friendly graphical format.

Beyond the purely technical aspects of the permit itself, the beauty of it was its flexible approach to environmental improvement. An emissions cap was negotiated between the MPCA and 3M, but whatever method the plant chose to achieve this limit was entirely up to 3M. The MPCA agreed that 3M had earned this flexibility:

> *Going into the development of this pilot project, the 3M Hutchinson facility had an excellent environmental track record. Based on our knowledge of 3M's corporate policies and performance at the Hutchinson plant, the MPCA assumed that 3M would continue making good environmental decisions. A simple emission cap was structured...well below what law required. Underneath this cap, 3M had a great amount of flexibility to grow, change, and test pollution prevention formulations.*[90]

Alongside these sweeping permit reforms came an overhaul of the information systems used to gather data. As part of this proposal, 3M agreed to test a detailed Environmental Management System for their facility that:

> *…minimized or eliminated overlap between records, reports or procedures required by regulations and those required in operating the facility, [and] that made it easier for plant management and staff to identify and understand the facility's requirements for environmental performance, set by both government regulations and corporate policy (which includes ambitious goals for future environmental performance including pollution prevention).*[91]

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[86] Environmental Regulatory Innovations Act, Minnesota Legislature S.F. No. 1956, Section 5, Paragraph 8.10-8.9.23.

[87] "Inflexibility? EPA Clings to Command and Control; 3M Shelves Project XL Proposal," *Environmental Remediation Technology*, vol. 4 no. 19 (September 18, 1996).

[88] Tom Zosel, manager of environmental initiatives at 3M, quoted in Groeneveld, "Trust But Verify."

[89] Geffen and Marcus, "Environmental Regulation for Sustainable Development."

[90] Larson Testimony, 1997.

[91] Ibid.

All of these facets of the agreement marked a dramatic change from the command-and-control mentality that had marked the MPCA's previous work in permitting. But this did not mean that 3M was given free rein to pollute; there were trade-offs to be made in exchange for the new malleability of the rules. In addition to the increased public involvement and accountability, "companies…have to provide the regulator with more extensive monitoring data" and would be subject to more-rigorous inspections.[92]

Environmental groups, while wary of the changes, expressed their desire to be involved in the process. Brett Smith, chair of the conservation committee of the Minnesota Chapter of the Sierra Club, said at the time:

> *We are not committed to just staying with the old command and control style of environmental regulation. We want to see if there are ways to encourage companies to go beyond compliance. But at the same time, the environmental community wants to make sure that, as we try out new forms of regulation, we maintain high standards of accountability, encourage pollution prevention, and facilitate community involvement.*[93]

Even with these qualms, Smith admitted that the 3M agreement was worth trying because it called for a more-extensive system of monitoring than had been used previously and had the potential to significantly reduce emissions. In fact, 3M and the MPCA were required to complete reviews of the compliance with state and federal laws in 1998, 2001, and 2005, in order to establish facility-wide emission requirements.

With environmental activists mostly receptive to this specific project, and with an agreement between 3M and the MPCA solidified, the only obstacle to implementation was the prospect of federal liability. For some of the facility-wide and flexible permits, and in order to allow 3M to carry out some of its plans, certain federal requirements had to be waived. All the MPCA required was the same flexibility from the U.S. EPA that it had already guaranteed at the state level.

B. Federal Obstacles

As noted above, the MPCA's reinvention program was proceeding concurrently with the Project XL program from the U.S. EPA. Hoping to garner some advantage from participating in this new initiative, and believing that the stated goal of XL was much in line with the new philosophy of the MPCA, Minnesota's Pollution Control Agency became the only state agency to initially apply for Project XL. Permit reform, and specifically the 3M Hutchinson agreement, was to be a part of this project, relaxing some of the command-and-control tools that the MPCA had relied on for so long. But the conflicting philosophies of the EPA and the MPCA soon led to tension between the agencies. The MPCA thought that the ideas (and more importantly, the implementation) of the federal project, while admirable, were problematic:

> *From Minnesota's perspective…EPA's reinvention efforts can best be described as "promises unfulfilled." Much EPA effort has been focused on describing reinvention goals and running numerous reinvention efforts.... Few, however, would say that effort has significantly impacted America's environmental protection system. In fact, it is difficult to conclude that effort has contributed*

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92 Groeneveld, "Trust But Verify."

93 Ibid.

> *substantially to building a foundation that prepares the EPA well to face the challenges of today and tomorrow.* [94]

In fact, as Peder Larson went on to explain, the EPA had talked the talk but was unwilling to walk the walk:

> *My harsh assessment of EPA's progress exhibits a disappointment in EPA.... My assessment results from the high expectations Minnesota has of the federal environmental protection system. We are committed to working closely with the agency now and into the future. We believe that a strong, productive EPA must exist. We are frustrated, however, that while Minnesota and many other states are making progress to reinvent ourselves, the EPA's commitment to true cultural change is questionable.*[95]

After the 3M agreement was submitted to Washington, EPA informed the MPCA that the project would be required to guarantee that "environmental performance was superior to what would have been achieved outside of Project XL."[96] It was this definition of environmental performance that ultimately led to the downfall of the program: 3M wanted their baseline for performance to take into account the previous improvements that the company had already undertaken, while the EPA wanted a guarantee of demonstrable improvements from the current baseline (not giving credit for the previous work). Thirteen months of negotiation collapsed under the weight of a few carefully chosen words:

> *In the end, the MPCA and its stakeholders had ideas diametrically opposed to EPA ideas for what superior environmental performance under Project XL should be. The MPCA and stakeholders took the approach that part of the meaning of experimenting in new approaches meant environmental performance, as long as the level was protective and beyond current law, would not be guaranteed up front. The EPA approach was to guarantee environmental performance up front, thereby removing the experimental nature of Project XL, all risk associated with the project, and the incentives to "real" innovation. Minnesota's Attorney General and Congressional delegation all expressed strong support for the draft permit and opposed EPA's concerns.*[97]

More problems were encountered beyond the conceptual playing field, when the regulators tried to grapple with the actual emissions caps that the permit would have allowed. The upper limit for volatile organic compound (VOC) emissions that the permit envisioned was well below the limit that current law allowed, but it was larger than 3M's emissions at the time the permit would take effect. EPA was concerned that it would be sanctioning an increase in emissions, even though 3M didn't necessarily have to move up to a higher level. In fact, from 1989 to 1995, 3M plants had reduced their emissions of VOCs 68 percent, while increasing production 60 to 70 percent.[98]

3M was careful to place the blame on the federal regulatory structure and not the people at the MPCA. David Sonstegard, 3M's vice-president for environmental technologies and safety services, noted that:

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[94] Ibid.

[95] Ibid.

[96] Larson testimony, 1997.

[97] Ibid.

[98] Geffen and Marcus, "Environmental Regulation for Sustainable Development."

> *MPCA staff…doggedly kept Project XL from falling prey to bureaucratic infighting...And the cooperation that 3M and the MPCA have forged should carry over to other environmental efforts, regardless of how the dispute with the EPA concludes.*[99]

Minnesota's own environmental agency was deeply disappointed by the failure of the XL negotiations, as Minnesota regulators knew a flexible permit system could be achieved. Andrew Ronchak, the MPCA's XL coordinator, expressed his disgust: "It [Project XL] was a big disappointment. XL is a narrow project that may help some companies if you catch them at a point where they are ready to improve. It will help the dirty facilities and penalize the good ones."[100]

3M was a bit more polite in its characterization of what went wrong, but it too was disappointed: "We simply ran out of time. We decided to go with traditional permits to be sure we could get our products out on time."[101]

One of the problems that confronted the Minnesota agency was that the U.S. EPA hadn't really considered all possible problems that could confront the XL system before it was put into place. Lack of legislation protecting companies from citizen suits made industry wary of entering into the agreement, and the EPA's shifting definition of "superior environmental standards" hindered negotiations. As Beth S. Ginsberg, an attorney for one of the companies that applied for XL status, put it, Project XL:

> *…is reform around the edges. I think the model is theoretically a sound one, but it will only actually materialize in regulatory benefits if and when it's accompanied by legislation that supports it. Without legislation, it's a hollow gesture.*[102]

Project XL companies across the nation have protested just this point, clamoring for legislation that will allow them protection against citizen suits or other legal challenges; some form of "audit privilege" protection or grace period that would afford some protection in the transition to an innovation. Many companies have also argued for legislation that will give the EPA "greater authority to bend the rules" if necessary.[103]

As in all consensus-building exercises, there was also a high transaction cost in gathering together all the interested parties and requiring unanimous consent before an agreement was finalized. While achieving a consensus among decisionmaking participants was a notable accomplishment, the disparity between what the MPCA wanted to achieve, the means that 3M wanted in order to achieve their goals, and what the EPA was willing to allow was too great to effect meaningful reform.

Of course, EPA was not the only interest that criticized the 3M program or the MPCA's orientation away from command and control. Environmental activists in Minnesota were very concerned that the new customer-service mentality would lead to less enforcement, less compliance, and ultimately environmental degradation. Worried about the MPCA becoming too cozy with the agency that was supposedly regulating them, Brian Bates, chair of the North Star chapter of the Sierra Club, stressed that "they're [the MPCA] not

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[99] David Price, "Pace of Project XL Causes Frustration," *Minneapolis-St. Paul CityBusiness,* vol. 14, no. 12 (August 23, 1996), p. 19.

[100] Jeffrey P. Cohn, "Clearing the Air," *Government Executive* (September 1997), p. 45.

[101] Rick Renner, spokesman for 3M, quoted in William H. Miller , "Washington Wreck," *Industry Week,* August 18, 1997, p. 116.

[102] Marianne Lavelle, "Bending the Rules," *National Law Journal,* June 10, 1996, p. A1.

[103] Ibid.

supposed to be the Chamber of Commerce. They ought to be playing the role that the Legislature designed for them."[104]

The environmental lobby in Minnesota had been criticizing the MPCA's reorganization for some time, lambasting many of the MPCA's individual initiatives. An ethanol plant that was under construction near Preston came under fire for its potential for waste and pollution, leading concerned environmental leaders to charge that:

> *What they're saying is it's better to ask forgiveness then permission. [The plant's builders will say] 'We build this and put millions of dollars into this plant and then we'll say who in the state legislature, who in the governor's office has the guts to stop us, now we've put all this money into it.'*[105]

However, not all environmental activists were opposed to the cooperative approach, especially when they were involved in the process. The groups that were brought on board in the 3M negotiations were disappointed in its failure. As Carol Wiessner, a staff attorney for the Minnesota Center for Environmental Advocacy, said:

> *The current regulatory system is not user-friendly. We've got to try new ways of doing things. As long as we feel confident that public health and environmental quality will be protected, that's what we're most concerned about.*[106]

She went on to add that 3M had "demonstrated leadership in pollution reduction and was one of the best candidates in the nation to try out" such an innovation.[107]

C. Problems from Within

As the example of 3M and the Minnesota Pollution Control Agency shows, not every permitting innovation meets with a happy ending. Facing a lingering command-and-control philosophy at the federal level, the MPCA was not given enough leeway to experiment. Unclear communication among the interested parties, coupled with the EPA's unwillingness to cede authority to the MPCA, doomed the facility-wide permit experiment to failure.

The 3M experience also highlights the susceptibility of innovation to external constraints. Innovations do not only fall prey to federal reluctance or EPA resistance—other factors can stymie the innovative process. The MPCA's attempts to innovate have experienced a rocky road, as intrastate pressures, the prevailing political winds, and a persistent belief that permits mean results have limited the extent of Minnesota's experimentation.

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[104] Price, "New Leader Plots Course of MPCA."

[105] Elliot Olson, Chairman of Trout Unlimited, quoted in Mary Losure, "The New MPCA Philosophy and Its Impact," Minnesota Public Radio Website, http://news.mpr.org/features/199805/15_losurem_impact-m.

[106] Tom Meersman, "MPCA Suspends Experimental Environment-Protection Program; Common-Sense Regulation Project Fails Despite 3M, State Efforts," *Minneapolis Star-Tribune*, August 28, 1996, p. 1D.

[107] Ibid.

The case of the Koch refinery in Rosemount, Minnesota, exemplifies the problematic interplay of politics, public perceptions, and environmental policy. A media flap over an environmental misstep led to the curtailing of a promising experiment in alternative permitting at Koch Refining Company.

Minnesota's environmental officials and media were first sensitized to the activities of the Koch Refining Co. in 1989, when the company was fined $2 million by the MPCA for alleged waste discharges into the Mississippi River.[108] Though the company went forward to establish a good reputation in the eyes of the MPCA (winning several awards for environmental stewardship), problems materialized again in April 1997 when two disgruntled employees brought a series of allegations about the refinery's environmental activities to the MPCA, triggering a year-long investigation of the plant and a media frenzy.[109]

According to the *Minneapolis Star-Tribune*, which published a series of critical articles about the Koch situation, transcripts of interviews with Koch employees asserted that the refinery, "flushed millions of gallons of water containing high levels of toxic ammonia through its fire-hydrant system onto company land."[110] They also alleged that equipment that was supposed to remove pollutants also had not lived up to its initial promise, resulting in overflows in their sewer system.[111] More serious charges were levied that those within the plant who brought the violations to the attention of higher-ups were systematically harassed or dismissed.[112]

Koch Industries responded to the criticism, claiming that, "A fair-minded review of our record will demonstrate that Koch Industries has a well-documented commitment to environmental excellence in all aspects of our operations."[113] Indeed, a press release from the company, while admitting wrong-doing, admonished stone-throwers to remember the positive impact that Koch had over the years:

> *An environmentally excellent company has the integrity to acknowledge mistakes when they are made. We did have occasions where our air emissions briefly exceeded our permitted levels. We had a tank that leaked a large quantity of gasoline into the ground. We have a sewer system that needs to be upgraded to handle, without fail, the operations of this large refining facility.*
>
> *It's important to remember that we have had tremendous successes in improving environmental quality at this facility. For instance, since 1990, with an investment of $200 million, we've drastically reduced the refinery's emissions of sulfur dioxide (down 40 percent), particulate matter (cut in half), and gasoline vapors (down 85 percent).*
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> *However, in order to build on these successes and tackle additional environmental challenges, we have to acknowledge shortcomings.*[114]

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[108] "Hot Topics: Koch Refinery," Minnesota Pollution Control Agency website,, http://www.pca.state.mn.us/hot/koch/penalties.pdf.

[109] Ibid.

[110] Tom Meersman, "Documents Reveal Details of Violations at Refinery," *Minneapolis Star-Tribune*, October 29, 1998, p. 1A.

[111] Ibid.

[112] Chris Ison, "Koch Refinery Requests Delay in Whistle-Blower Lawsuit," *Minneapolis Star-Tribune*, August 6, 1998, p. 3B.

[113] Joe Rigert, "Oil Spills Bring Second Koch Probe," *Minneapolis Star-Tribune*, May 3, 1998, p. 1A.

[114] Koch Industries Press Release, "How Does an Excellent Company Meet Adversity?" May 1998, on Koch web site: http://www.kochenvironment.com/articles/howdoesanexcellentcompanymeetadversity.htm.

The MPCA reached a penalty agreement with the refinery in May 1998, assessing a $6.9 million civil fine, the largest ever issued in Minnesota for environmental violations.[115]

But the public-relations damage was done, and the negative press continued, leading MPCA to back away from further experiments with reform. Further measures for flexibility in Koch's permitting were put on hold, such as approval of a new air-quality permit that would put a cap on certain emissions (but allow the refinery to expand its production so long as it remained under the cap).[116]

The Koch example shows how the ideas of "flexibility" can be tossed out the window when public perceptions shift. Cries from environmental advocates and from the media charged that the MPCA had grown too lax in its enforcement of violators, and they claimed the Koch case was proof that a less adversarial approach did not effectively protect the environment. In a plea that basically clamored for a return to command-and-control days, someone wrote to the *Minneapolis Star-Tribune*:

> *I've given up on the Minnesota Pollution Control Agency. They are a bunch of gutless wonders. Most of my friends fondly refer to the MPCA as the MPPA (Minnesota Pollution Permitting Agency).*[117]

This sentiment was echoed by many environmental activists in Minnesota who felt that there was no legitimate trade-off between levels of pollution and levels of risk: rather, all forms of emissions were simply evil. Like the criticism that accompanied the New Jersey facility-wide program, this traditional vision of the environment focused on punishment as the measure of success and stymied promising innovation.

D. The Future of Innovation in Minnesota

Despite these disheartening episodes, the MPCA remains a bastion of innovative environmental thinking. The experiments in alternate permitting began in Minnesota before the XL conflict or the Koch controversy, and they will continue in the form of the Plant-wide Applicability Limit (PAL). More importantly, however, the MPCA has continued to devolve environmental regulations, bringing local knowledge to bear on local environmental problems.

Beginning in the summer of 1998, the MPCA underwent a reorganization that shifted its administrative grouping from medium-specific departments to geographic units. This geographic orientation was part of the industry's restructuring under its "Goal 21" plan, a blueprint that claims to "better position the agency for the future."[118] Peder Larson expounded on the MPCA's reorganization:

> *[The] new structure is designed to help us design and implement new pollution-prevention strategies and to measure outcomes, not processes. The vast majority of our environmental work will not be done in three geographic divisions. Permitting, enforcement, inspection, and other traditional tasks will be*

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[115] Minnesota Pollution Control Agency Press Release, "MPCA and Koch Refinery Sign Settlement on Environmental Violations," May 19, 1998.

[116] Tom Meersman, "Long Permit Delay Likely for Koch," *Minneapolis Star-Tribune*, June 19, 1998, p. 1B.

[117] Jeanne French, Letter to the Editor, *Minneapolis Star-Tribune*, January 23, 1998.

[118] "State Environmental Innovations," Environmental Council of the States 1998 Annual Meeting Report.

done through those divisions. Over time, they'll shift resources towards solving the most important environmental problems for their parts of the state.[119]

Subsuming the media programs into a three-district (Metro, North, and South) arrangement, the new-look MPCA promises many advantages: [120]

- [The M]PCA's staff familiarity with local industries and people is expected to make the agency more sensitive to the impact of regulations on these industries and people;
- Partnerships with local industry aimed at prevention and cooperation are expected to be enhanced;
- Empowering agency staff to make appropriate decisions at the regional level is seen as a plus;
- Being involved with more and different types of people is expected to bring new perspectives into the decision-making process; and
- Less turnover in field enforcement staff may result.

This reorganization faces a few obstacles as well. Employees at the MPCA expressed concerns about the change, including concerns that the regional divisions don't "necessarily match those of other geographical areas, such as watersheds or other agencies' regional structures."[121] There also exists a question of flexibility in the geographical designations: are the boundaries immutable, or can they be changed as needed without damage to the agency structure? Finally, with the dispersal of power among so many units, will there remain consistency in enforcement? As one interested contractor noted, "I have concerns about inconsistency within the… model, such as with permitting. Each district is its own little agency."[122]

Given these problems, and with a timetable of five to ten years for the agency to complete its restructuring, it will be difficult to assess the progress of the program any time soon. But the stated goals of the reorganization shift away from a centralized, command-and-control philosophy and signal Minnesota's commitment to results.

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[119] Peder Larsen, "From Media to Region: Minnesota Reorganizes Pollution Control Focus," *The Reinvention Report*, vol. 1, no. 3, October 23, 1998, p. 30.

[120] In April and May 1998, the Management Analysis Division of the Minnesota Department of Administration conducted a series of meetings with stakeholders inside and outside of the MPCA to assess the coming reorganization. These positives are taken from their summary report, *Minnesota Pollution Control Agency: Data Collection on Goal 21 Reorganization Plan*, Management Analysis Division, Minnesota Department of Administration (June 1998), p.4.

[121] Ibid.

[122] Ibid.

Part 4

Industry-wide Standards

New Jersey and Minnesota's experiences with the facility-wide permit show the promise and pitfalls of innovations in permitting. The key component of their innovations was a willingness to be flexible, allowing flexibility in the rules and letting the states be a laboratory for environmental experiments. As Peder Larson of the MPCA said, an important aspect of experimentation is the iterative process: some things will fail, while others will succeed.[123] But only experimentation, a "discovery" process, will allow us to find workable systems.

Flexibility in permitting has been pursued in other ways as well. Rather than merely simplifying the permit process on a case-by-case, plant-by-plant basis, as the facility-wide permit does, some states have attempted to innovate on the basis of entire industries. This method may allow some measure of equity in dealings with particular plants, as all factories in the same industry will be held to the same standard. This approach also allows for more flexibility in the regulatory process, granting leeway in exchange for actual environmental results.

A. Focus on Results

For 25 years, environmental protection in Massachusetts followed a command-and-control philosophy patterned after the U.S. EPA model. Environmental regulation in Massachusetts used the stringent assumption that "the government can best regulate what goes into the air, water, and land by telling business and industry not only how they must limit pollutants but also precisely how to do it."[124] This approach led to a pervasive view among industry leaders in Massachusetts at the beginning of the 1990s that the state was "anti-business."[125] A large part of the blame was placed on the maze of regulations that companies had to navigate, with seven layers of bureaucracy needed to get a permit.[126]

This system presented a host of problems for the individual businesses that were regulated. Permits were required for each piece of equipment within a plant or factory, and a new permit had to be issued if there was to be a change in the equipment. This laborious process often took over a year to complete (a major problem for companies who changed their line production frequently) and was blamed by companies for a loss of competitiveness.[127]

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[123] Peder Larson, Minnesota Pollution Control Agency, plenary session meeting at Environmental Council of the States Annual Conference, October 28, 1998.

[124] Commonwealth of Massachusetts, Executive Office of Environmental Affairs and Department of Environmental Protection, "The Environmental Results Program," November 1997.

[125] Charles Stein, "As Massachusetts Miracle Fades, Candidates Offer Fiscal Fixes," *The Boston Globe*, July 1, 1990, p. 1.

[126] Ibid.

[127] Ibid.

This concern for minutiae strained the already-scarce resources of the Massachusetts Department of Environmental Protection (DEP), which found that regulating 10,000 companies through 16,000 individual permits was not feasible given the agency's resources.[128] Worse still, the huge number of permits appeared to be nothing more than a bureaucratic exercise. The actual goal of environmental protection was not attained, as "all but one of [Massachusetts'] 6,000 Superfund sites were formerly permitted facilities."[129] Additionally, the complex labyrinth of codes and regulations was hard to navigate, meaning that a large number of small and medium-sized businesses were unwittingly out of compliance. These sectors represented "a disproportionate amount of time spent by staff writing permits relative to their environmental risk. For example DEP…spent significant resources issuing air permits to 4,400 facilities, of which two-thirds are small and medium-sized firms that together generate less than five percent of the state's total air pollution."[130]

B. The Innovation

"This frustrating reality prompted DEP staff in 1995 to begin looking at regulation from a radically new perspective: Why not take many of the requirements embedded in individual permits and convert them to comprehensive industry-wide performance standards with which all facilities in a given industry sector or process can comply?"[131] Under the EPA's Project XL, which was created to give interested entities some measure of autonomy in the process of environmental regulation, the Massachusetts DEP began a pilot project known as the Environmental Results Program (ERP).

The ERP revolutionary approach scrapped the entire permit system, moving instead to an industry benchmark for compliance. Deputy Commissioner Allan Bedwell concluded that Massachusetts had to shift its environmental protection focus toward industry-wide performance standards that would apply to all applicable processes at all company facilities within a given sector:

> *So what we decided to do was take a three-pronged approach: The first problem was picking our environmental protection priorities…figuring out from a risk-based standpoint what our highest-priority risks were in the state, in terms of risks to human health and the environment. Second, once we had those priorities, we had to focus our regulatory efforts toward those priorities, using/developing a feedback system of environmental indicators that had to be assessed. Not the usual bean-counters, of "so many enforcement cases" but rather, how the environment will improve as a result of the regulatory program. Finally, we really had to look at our regulations themselves, and eliminate regulations that were outdated, no longer needed, or getting in our way in working toward effective protection. This gave us a way to really target our efforts, to choose those things we should be protecting, but letting go of those sort of third-tier things that would be nice to protect if we had infinite resources, which we don't.*[132]

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[128] Ibid.

[129] Interview with Allan Bedwell, Deputy Commissioner, Massachusetts Department of Environmental Protection, March 1998. Unless noted, all other quotes in this section come from this interview.

[130] Ibid.

[131] "Environmental Results Program."

[132] Interview with Allan Bedwell.

By shifting the focus of the DEP to auditing and enforcement and transferring the burden of compliance to businesses themselves, the ERP hoped to gain from the comparative advantages of both the public and private sector. As DEP Commissioner David Struhs testified before the House Oversight Committee, "DEP will be able to refocus its efforts on what government does best: setting health based standards and aggressively enforcing them."[133]

In 1996, the DEP invited 18 companies to participate in the pilot project for the ERP. The invited companies ran the gamut of operations, from plastic-bucket manufacturing to dry cleaning, to photo-processors, to prefabricated storage-building manufacturers. In 1997, the program was rolled out to the dry cleaners and photo-processors with strong support from the state's political leaders.

Touted as "the death of command-and-control regulations, and the birth of common sense environmental protection," the Environmental Results Program kicked off with substantial fanfare.[134] At a media event to announce the ERP, Massachusetts Gov. William Weld said:

> *For too long, government has been telling companies how to meet standards of environmental protection. Instead of telling companies how to meet those standards, our Department of Environmental Protection is going to leave it up to companies like Komtek to find the most cost-effective approaches to get the job done.*[135]

Environmental Affairs Secretary Trudy Coxe was equally enthusiastic:

> *This [ERP] creates a real opportunity for innovation by companies in the area of environmental protection. There is no question the old permit system hampered business flexibility when it came to adopting new, more effective pollution prevention strategies.*[136]

And David Struhs, Commissioner of the Massachusetts Department of Environmental Protection, was also on board:

> *No longer will rigid and complex permits be viewed as a sign of a well-protected environment. Instead, we will judge our progress by actual environmental results. Our ultimate goal is to eliminate the need for thousands of small and medium-sized companies in Massachusetts to obtain, modify, or renew environmental permits. This will in turn make DEP more efficient and effective in its efforts to ensure a clean, healthy, and safe environment.*[137]

Program administrators cited strong support for the program from the upper levels of government as being critical to its success.

The ERP pilot was a success on many levels. First, the program was popular with those in the regulated community: unlike most regulatory programs in Massachusetts which usually receive a 30–35 percent positive response rate, the ERP received an 85 percent response rate for certification—virtually unheard of in

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[133] Prepared Testimony of David B. Struhs, Commissioner, Massachusetts DEP, before the House Commerce Committee Oversight and Investigations Subcommittee, November 4, 1997.

[134] Ibid.

[135] Press Release, Massachusetts Department of Environmental Protection (DEP), April 30, 1996.

[136] Ibid.

[137] DEP News, Massachusetts Department of Environmental Protection, November 13, 1997.

Massachusetts regulatory history.[138] And 80 percent of all received applications were accurate, which also set a record. Usually, the accuracy rate of applications for new programs or permits, such as the Massachusetts toxic use reduction program, was only half that high.[139]

Struhs observed that the program was popular for good reason: it offered the regulated community a chance for a long-desired streamlining of their environmental compliance efforts. One firm, Struhs noted, took actions during the pilot project and saved the company 60 hours of staff time, a $3,700 application fee, and a "lengthy" wait for permit approval.[140] It was one of those rare win-win situations. Said Struhs, "The company was still required to meet strict performance standards, so environmental protection was not compromised, and eliminating the permit review also resulted in a time savings for us."[141]

Additional results of the pilot project were:[142]

- 12 out of 18 companies reported changes to environmental-management structures;
- nine reported enhancement to environmental policies and procedures;
- four reported increases in environmental staffing;
- three reported increased access of environmental managers to formal business decision making;
- two reported increases in environmental training;
- two reported increased budgets for environmental-management activities;
- 19 firms said the certification process helped in identification of, and compliance with, applicable rules;
- 12 firms said that ERP would have a positive impact on their ability to implement pollution prevention (five firms were neutral on this question, and one firm was mixed); and
- seven companies reported "insignificant costs," others spent less than $15,000 and/or 200 hours of staff time to comply.

Businesses involved in the ERP were generally satisfied with the flexibility it offered, noting that their own internal work complemented the DEP's focus:

> *We can't dictate environmental work from a desk in an office, we need a working relationship on the floor, transmitting what we need to the employees. I think the ERP is similar to this, the same "handshake" from the DEP side down to us. We still need to have a proper attitude…some look at the program as a burden, but I see it as a polite reminder to know with what I'm supposed to comply.*[143]

The program also provided good compliance rates. Under the ERP, the overall compliance rate of participating firms rose from 33 percent in spring 1996, to 78 percent in spring 1997.[144]

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[138] DEP News, Massachusetts Department of Environmental Protection, November 13, 1997.

[139] Ibid.

[140] Ibid.

[141] Ibid.

[142] Commonwealth of Massachusetts, Executive Office of Environmental Affairs, and Department of Environmental Protection, "Evaluation of the Environmental Results Program Demonstration Project," November 13, 1997.

[143] Bob Fife, Komtek Industries, Worcester, Massachusetts, interview with the author, December 3, 1998.

[144] Ibid.

Environmental protection, not regulatory compliance, is the stated goal of the Environmental Results Program, and there have been demonstrable results from the pilot program. There was a 43 percent reduction in fugitive emissions of the carcinogen PERC (perchloroethylene) from the drycleaners enrolled in the program, and a 99 percent reduction of discharges of silver from photoprocessors.[145] Some businesses were able to cut usage of chemicals that were superfluous:

> *As part of ERP, we have a relatively detailed checklist, we are aware of these things. That's helped in where we stand. A lot of substances that we used, we wondered "why are we using these things? Why do we need these materials?" In one case, it was because the department manager said "That's the way I learned at this other company." We didn't have financial gains from this program, but we did identify hazardous materials that were being used for no logical reason, other than someone didn't know any better.*[146]

Despite the political support and early indicators of success, however, program implementation faced some obstacles. As the other program examples have shown, innovative programs tend to draw opposition from various groups. Some agency personnel viewed the ERP as an attack on people's commitment and professional dedication to protecting the environment. They viewed the ERP as an attempt to vitiate command-and-control regulations of the last 20 years, an approach often supported in the environmental advocacy community and within environmental agencies. Though the ERP is really an evolution of environmental regulation, the program was viewed with suspicion, especially since it was proposed by a largely conservative administration.

Unionists and agency staff viewed the ERP as an attempt to eliminate jobs in a heavily unionized state. Environmental advocacy groups assumed that, as an initiative of the first Republican commissioner of the Department of Environmental Protection in state history, the ERP would actually eviscerate environmental protection in the state. Finally, agency staff had been caught by surprise: Trudy Coxe, Secretary of Environmental Affairs, had proclaimed the ERP's inception to the media before the staff had been briefed.

According to Bedwell, the EPA also resisted the program. Massachusetts was given a very short leash by the federal government in implementing changes to its programs. Indeed, Bedwell characterized the federal-state relationship as "a parent-child relationship…Not only are we being told to clean up our rooms, but we're being told how to clean them up."[147] The EPA was concerned that it would lose this authority. Under the ERP, firms would not have to seek and gain approval for individual pieces of equipment, nor furnish detailed information about the equipment they use, or the processes they employ—information that EPA had long collected, though rarely used.

The EPA was also recalcitrant about the waiving of some regulations that were necessary to insure the operation of the program and avoid putting corporations in double jeopardy. One of the keystones of the Environmental Results Program was its flexibility, the latitude it gave to work around existing rules and regulations and "replace traditional bean-counting exercises of the past, not simply layer[ing] on top of what

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[145] Prepared Testimony of David B. Struhs, Commissioner, Massachusetts DEP, before the House Commerce Committee Oversight and Investigations Subcommittee, Boston, Massachusetts, November 4, 1997.

[146] Bob Fife, Komtek Industries, Worcester, Massachusetts, interview with the author, December 3, 1998.

[147] Margaret Kriz, "Feuding with the Feds," *The National Journal*, vol. 29, no. 32, August 9, 1997, p. 1598.

is already required."[148] The EPA was simply not willing to sign off on the program entirely, fearing that waiving some requirements would establish a precedent for polluters. By late 1998, Massachusetts still did not have a final agreement negotiated with the EPA. As David Struhs summarized it, the need for an EPA agreement:

> *…is to gain expedited approvals for federal flexibility as we encounter regulatory "speedbumps" along the way, where existing federal requirements are not easily accommodated into our new system of annual self-certifications. If we sign a final project agreement with EPA that does nothing more than offer the existing cumbersome, slow and unpredictable case-by-case approach to gaining such flexibility, then we have to ask ourselves if it is worth the effort, and just how supportive will EPA's enforcement be of the whole Massachusetts ERP enterprise?*[149]

Even without the formal acknowledgement of an EPA agreement, the Massachusetts DEP has made some assurances that were "not technically allowed."[150] In the pilot program dealing with dry cleaners, the DEP offered a two-year reduction in the standard five-year window during which dry cleaners must retain records of perchloroethylene utilization. The EPA took issue with this, and the Massachusetts DEP claims EPA threatened to "withhold the delegation of certain federal air pollution control authorities to the state and the disbursement of some federal grants that have helped in the implementation of the ERP."[151]

Surprisingly, even some of the beneficiaries of the ERP were skeptical of the plan. Rather than celebrating over the prospect of less paperwork and more flexibility, corporations were also, to a lesser extent, resistant to change.[152] In early meetings with 30 executives from business, skepticism and resistance to change were significant. The executives were anxious about the speed of the program, despite a history of taking the DEP to task for excessively slow regulatory processes, and they were anxious about letting go of their permits. In many cases, these permits were mainly just a pledge not to pollute, carrying a low probability of audited enforcement. The new industry standards embodied a change for participating companies that included a commitment not to pollute and a pledge to make an annual declaration of what has been done to insure compliance, in a publicly available report signed by a high-ranking officer of the company. They viewed these requirements as a vast increase in liability for a company, a loss of the security that they had with permits. Executives were worried about the uncertainty that such a shift in liability posed for shareholders and how it would affect their financing.

Other complaints heard from the industry side came from businesses that had grown familiar with the command-and-control system. The old way limited their need for independent knowledge of environmental issues, "provided easy answers regarding what equipment was needed," and "did not require companies to expend resources on determining such things as their emission rates."[153]

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[148] Prepared Testimony of David B. Struhs, Commissioner, Massachusetts DEP, before the U.S. House of Representatives Committee on Commerce, June 23, 1998.

[149] Ibid.

[150] Bedwell interview.

[151] "Massachusetts Nears Deal with USEPA to Expand Permit Alternatives," *State Environmental Monitor*, vol. 3, no. 1, January 12, 1998, p. 4.

[152] John J. Monahan, "Weld Unveils Deregulation of Pollution," *Worcester Telegram & Gazette*, May 1, 1996, p. E1.

[153] "Environmental Community Says 'Jury Still Out' On Mass. ERP," *State Environmental Monitor*, vol. 3, no. 1, January 12, 1998, p. 4.

DEP's Bedwell admits that bringing people into the process could have been done better.[154] Too little formal dialogue occurred between staff and agency management to explain why the ERP was necessary, seek their buy-in and input, and reassure them that the ERP wasn't a jobs-cutting measure. Still, during the coalition-building process, the ERP planners did talk to many outside participants in both agency management and staff on an informal basis. They also consulted agency opinion leaders who'd been there for many years, giving them responsibility to implement the ERP. Though Bedwell was "instantly suspect" because of his experience in the business sector, some agency personnel, tired of "bean counting," strongly supported the ERP and rose to the challenge of the ambitious timelines and goals that had come from the commissioner.[155]

On the other hand, some vested interests in the department itself were threatened by the radical change that the ERP would have provoked. The permit writers had the most to be concerned about, as they faced conversion from permit-writing to inspections:

> *What government does best is setting standards, and enforcing those standards, not getting into a company's business down to the minutiae, and telling them how to run their operations. We felt very strongly that you could come up with a performance-based system, with mass or performance-based standards (pounds of pollutants) and leave it up to the businesses to figure out how to prove and show compliance with the standard. Many of the staff were reluctant to let go of what they were comfortable with, the details of a process, the specifications for the exact type of equipment, or engineering processes, etc.*[156]

As noted in the case of New Jersey, standard-operating procedures had developed over a number of years, and it was difficult to swiftly instill a new sense of mission into employees of the DEP.

The process of bringing together disparate groups behind the ERP involved give-and-take for everyone—industry, the agency, and environmental activists. Not surprisingly, environmental activists were often the most reluctant to compromise, since they suspected the motivations of the administration. They perceived the ERP's main goal as reducing regulation, not heightening enforcement. Paul Donohue, president of the Massachusetts Organization of State Engineers and Scientists, fretted that the plan would give too much discretion to companies who generate hazardous wastes, thereby "compromis[ing] 25 years of environmental progress."[157] Likewise, Rob Sargeant of the Massachusetts Public Interest Research Group noted that:

> *This is the barn door opening. I don't think we want big chemical facilities self-certifying their compliance with environmental standards. I'm on the design group and we have had some reservations about this all along, especially not knowing all the details. There are no solid answers.*[158]

In this case, however, the suspicion of the environmental groups may have helped the process by ensuring the accountability of the firms involved and projecting a watchdog stance. The environmental groups also "represented" environmental interests throughout the process, pushing for more-stringent enforcement methods.

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[154] Bedwell interview.

[155] Ibid.

[156] Ibid.

[157] Monahan, "Weld Unveils Deregulation of Pollution."

[158] Ibid.

The environmental groups have also applauded some of the ERP's work in ferreting out those companies in the program who were not in compliance. In 1998, Walgreen and CVS, two photo-processors, were fined a total of $55,000 for not properly documenting their disposal of silver.[159] Jim Gomes, president of the Environmental League of Massachusetts, chimed, "Thanks to the DEP, the enforcement picture is becoming very clear: photoprocessors that don't take care of the environment expose themselves to fines. This is a very positive development, a true Kodak moment."[160]

C. Lessons from Massachusetts

Like Minnesota, Massachusetts ran into problems with federal regulators who were concerned about granting greater autonomy to the states. Like New Jersey and Mississippi, the DEP was criticized by some environmental groups for weakening its mission of environmental protection. Like all of the states discussed above, Massachusetts showed a commitment to flexibility that was previously absent in environmental protection programs. And Massachusetts's willingness to experiment was paying off in environmental improvement for small business owners.

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[159] "CVS, Walgreens Chains Fined for Polluting," *New Bedford Standard-Times* On-line, June 26, 1998, http://www.s-t.com/daily/06-98/06-26-98/b06bu103.htm.

[160] Press Release, Massachusetts Department of Environmental Protection (DEP), June 25, 1998.

Part 5

Permit Streamlining

As Massachusetts's experience has shown, the permit process confronts obstacles to change, coming from both the regulated industries and from the regulators themselves. Implementing any permitting innovations will require addressing these constituencies and crafting their incentives in a new and effective manner.

Consensus building is not always an easy task, however. Companies that have invested their time and energy in acquiring the requisite permits and equipment, sometimes hiring specialists to help guide them through the process, look unfavorably on changes that will require more expenditures. As in the Minnesota case, there are high transaction costs with getting groups of people together and meeting continuously with federal and state regulators. For the most part, regulated companies have already been forced through one regulatory hoop, and they are not thrilled at the prospect of altering their processes again. And, as with Massachusetts, changing the rules of the game may leave some companies worried about new obligations and the potential for liability.

From the standpoint of the regulator as well, changing permit procedures is difficult because of the constituency that permits create within an agency. Because an output like environmental protection can be difficult to measure, the procedures followed in the name of protection become the benchmark for the success of the agency. As political scientist James Q. Wilson noted about procedural offices like environmental protection agencies, "how operators go about their jobs is more important than whether doing those jobs produces the desired outcomes."[161] From this perspective, there is no better means of evaluation than observing the number of permits issued or denied, a measure that will probably have a direct bearing on an agency's budget. Permits thus tend to multiply exponentially, without regard for the actual need or impact on the environment. In fact, by placing so much faith in permits, the regulatory agency may actually be wasting valuable resources that could protect the environment in better ways elsewhere. As David Struhs, Commissioner of the Massachusetts Department of Environmental Protection (DEP), noted, "DEP officials are so busy writing permits they often don't have time to see if companies follow them."[162]

Permit streamlining attempts to simplify the process for businesses by working within the current system, utilizing a gradual approach rather than the "shock therapy" of industry-wide standards or facility-wide permits. By focusing on simplifying the permit process, rather than the actual instrument, some states hope to bring more companies and industry into compliance while sparing the permit writers the shock of rapid

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[161] James Q. Wilson, *Bureaucracy*, New York: Basic Books 1998, p. 164.

[162] Scott Allen, "Firms Break Antipollution Honor Pledge," *Boston Globe*, May 27, 1996, Metro Section p. 1.

reorganization. While these innovations don't fundamentally alter the environmental policy context, they do offer opportunities for reducing some costs of permit-centered programs.

A. Where the Wind Comes Sweeping Down the Plains…

Environmental regulation in Oklahoma was a nightmare for industry at the beginning of the 1990s. Spread across a multitude of entities, the permit process was cumbersome. State Environmental Secretary Patricia Eaton bluntly stated that, "the situation frustrated people, hindered industrial development, and hampered state efforts to assume the federal government's role in processing industry requests for permits for making certain discharges."[163]

In order to remedy the confused permit structure, the Oklahoma state legislature created the Department of Environmental Quality (DEQ) in 1993 to "help provide comprehensive environmental protection and management programs for its citizens."[164] The key word for the DEQ is comprehensive: until this point, the function of environmental regulation in Oklahoma was dispersed among eight separate agencies. The DEQ assumed duties related to clean air and water, wastewater, emergency response, solid and hazardous waste, and programs concerning groundwater and Superfund from the health department, while also taking on industrial wastewater permitting from the Oklahoma Water Resources Board. [165]

The DEQ also focuses on customer service, bringing environmental protection, in the words of Sen. Kevin Easley, "closer to the citizens than any agency we had before."[166] Similar to Minnesota's makeover of its Pollution Control Agency, the state DEQ was to be refashioned to make it more responsive to customer's needs.

> *We do want compliance but we want it to be voluntary so that they [industries] will continue to follow the guidelines willingly. By showing them profitable ways to achieve compliance, we are proving what is good for the state and good for the environment are not mutually exclusive.*[167]

Indeed, viewing regulated industries as "customers" was the first step towards a shift in management techniques for the environmental planners. Under a section entitled "YOU are our customers," the DEQ promotional literature tout,

> *New and existing business and industry are faced with complex environmental regulations at state and federal levels. We offer technical and regulatory assistance for permit programs that will affect your facility.... In addition, we have resources to help you incorporate pollution prevention and other waste reduction measures that will reduce your facility's impact on the environment and save money at the same time.*[168]

Rarely had a state's department of environmental protection promised to help businesses "save money."

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[163] Bob Vandewater, "Agency Taking Environmental Reins," *The Sunday Oklahoman*, May 2, 1993, Business and Real Estate Section p. 1.

[164] "Environmental Agency Created," *The Daily Oklahoman*, June 28, 1993, p. 4.

[165] Bob Vandewater, "State Unveils New Environment Department," *The Daily Oklahoman*, July 7,1993, p. 17.

[166] Vandewater, "Agency Taking Environmental Reins," p. 1.

[167] Dianne Wilkins, Environmental Engineer at the Oklahoma DEQ, interview with the author, September 1998.

[168] Oklahoma DEQ webpage, www.deq.state.ok.us/capnew.htm.

B. You Need to Fill Out These Forms

The problems facing the permit process in Oklahoma were best summed up in the words of the director of the Department of Environmental Quality, Mark Coleman:

> *Permit processes have evolved not only as a result of state statutory requirements but to a great extent due to federal regulations. Those requirements were legislated at different times, to address different issues and under different public pressures. The result is a hodgepodge of requirements, particularly for those requiring significant or multiple permits.*[169]

To remedy this "hodgepodge," the Oklahoma DEQ undertook a series of reforms aimed at streamlining the permit process and allowing for more stakeholder input at every stage. These reforms went under the blanket heading of SUPER and consisted of innovations in permitting, inspection and reporting, enforcement, and public information. As Judith Duncan, director of the Customer Services Division, noted, the difference between Oklahoma's reforms and those of Minnesota or Massachusetts was that "the SUPER program is not really a specific thing that a company can apply for. Rather it is a series of initiatives that DEQ has undertaken to make the process of environmental permitting simpler and more understandable."[170]

With this new mindset and a hope of reforming the confusing permitting process, the Oklahoma DEQ instituted a wide range of reforms. These include creation of a uniform permit process, customer involvement, better use of technology, permit tracking, permitting tiers, simplification, and better oversight processes.

C. Uniform Permit Process

Oklahoma was interested in implementing a "one-stop" procedure, as did Mississippi. The DEQ was disheartened by the hodgepodge of environmental requirements and permits that industries needed, however, and came to the conclusion that "Oklahoma could not have a true 'one-stop-shop' for permits without a uniform permitting process."[171]

The first stage in simplifying the permit process was to reduce the sheer number of contacts that businesses had to deal with, making each applicant follow the same procedure. The purpose was to "reduce the confusion applicants faced when working with more than one division or program area, [making] it easier for interested parties to track permits and become aware of when opportunities for input are available."[172]

The uniform process established a three-tier process for permitting, based on each permit's complexity or procedures. The first tier requires no specific action to solicit public comments and basically involves interaction between only the DEQ and the applicant. The second and third tiers require greater public

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[169] Oklahoma DEQ, *Annual Report of the Department of Environmental Quality*, July 1993-June 1994, p. 15.

[170] Judith A. Duncan, Director, Customer Services Division, Oklahoma DEQ, correspondence with the author, July 1998.

[171] "Uniform Permitting Has One-Stop-Shop Appeal," *A Clear View*, Newsletter of the Oklahoma DEQ (January 1996), p. 6.

[172] *Annual Report 1996*, Oklahoma Department of Environmental Quality, p. 25.

involvement, culminating in the opportunity for the public to request an administrative hearing on a proposed permit. The uniform permit process reduced the amount of red tape and variation among sections of the DEQ, leading to an application procedure that is truly uniform. The reform did not cover federal applications, however, and "applicants were still subject to any federal permitting procedures."[173]

D. Involving the Customers

The uniform permit's tier system institutionalizes the idea of public involvement in the permit process, with the public's say in the process depending on the perceived complexity of the permit itself. The regulated companies themselves were also brought into the loop by the DEQ, as they are given the chance to vent their concerns at a preapplication meeting. The preapplication process calls for the applicant and the DEQ to discuss the level of information necessary for a permit and the time frames that could be expected for the permit to be finished. By integrating the permit applicants into the process right from the beginning, the Oklahoma DEQ sought to reduce the confusion that can sometimes arise from misunderstanding.

Small-business assistance became a hallmark of the SUPER program, as many small manufacturers were found to be "ignorant of the need to comply with environmental rules."[174] To remedy this situation, the DEQ created the Customer Services Section, which houses the Small Business Advisory Council as well as the Customer Assistance Program (CAP). Relying on a program they termed "targeted outreach," the Oklahoma DEQ (in conjunction with the U.S. EPA's Region 6) tried to transform traditional enforcement into a teaching exercise:

> *The EPA had been scheduled to conduct about ten inspections in Oklahoma at targeted foundries when the DEQ Waste Management Division suggested that they first try to educate the industry about the Resource Conservation and Recovery Act (RCRA). What began as an EPA driven-enforcement sweep soon became a multi-media targeted outreach workshop. The DEQ's CAP recruited technical people from the DEQ's Air, Waste, and Water divisions to design the workshop specifically for Oklahoma foundry and metal casting.*[175]

The targeted outreach also provides some measure of protection from liability, an "audit privilege:"

> *This concept provided a special problem in that the CAP needed to protect their customers from the perceived retribution by inspection.... Many facility owners feared that attendance at a government-sponsored workshop would cause their facility to be inspected by either the EPA or the DEQ. The obvious solution was for the two sides to get together and share information without fear of reprisal.*[176]

This "obvious solution" was implemented only with the agreement of all the participants:

> *EPA and the DEQ agreed to give it a try, and the result was a compliance achievement program in which participating facilities would be given a six month correction period during which EPA and DEQ would not conduct compliance inspections. In exchange, each facility would complete a survey and*

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[173] Ibid.

[174] "Targeted Outreach with SUPER Prompts Voluntary Compliance," *A Clear View*, Newsletter of the Oklahoma DEQ (January 1996), p. 6.

[175] Ibid.

[176] Ibid.

perform a comprehensive self-audit. Any non-compliance activities identified in the self-audit would then be corrected by the facility before the end of the program.[177]

This emphasis on business cooperation may have worried more than one environmentalist, but the DEQ sought to insure a broad range of participation from many sectors. Not only were the regulated industries themselves involved in the permitting process; other interested parties, such as citizens and public-interest groups, were also involved.

[They were] more involved than ever in the development of regulations and the issuance of permits. We provide access to the DEQ through Customer Assistance so that we can understand and address citizen concerns about public health and the protection of the environment. We have a group of people ready to help people learn about how the DEQ protects the community.[178]

E. Better Use of Technology

The Oklahoma DEQ's attempt to simplify permitting also sought to tap into the convenience that computers and the Internet offer.

[The "Automated Permitting System" (APS) sought to initiate] major reduction in the workload of both the regulated community and the agency. The APS seeks to utilize current computer technologies to automate and integrate the permit application process, the permit issuance process, the agency fee billing system, and the compliance inspection process.[179]

Furthermore, this new system would help those plants or facilities that differ only in size or location, acting much like the industry-wide standards instituted by Massachusetts in their Environmental Results Program. Utilizing an application that "reflects all of the possible permitting scenarios available under the operating conditions of the facility," the DEQ would filter the application through its permitting-conditions software to come up with an engineered permit.[180] The software would also "develop the fee billing, generate a site specific inspection sheet, and make a final entry into the agency's master permit list."[181]

F. Permit Tracking

"It is a simple fact of life that what gets measured gets done."[182] Unfortunately, the converse is often also true. Much like what happened in Mississippi, this simple fact was overlooked for far too long at the DEQ. Before introducing the SUPER program, there was no way to let applicants know the status of the application. In fact, it often took three days just to find out where a specific permit application was.[183] The

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[177] Ibid.

[178] Judith Duncan, quoted in Earl H. Roberts, "The Oklahoma Department of Environmental Quality," Oklahoma Showcase website, http://www. talewins.com/OK/DEQ.htm.

[179] "State Environmental Innovations," Environmental Council of the States, 1996 Annual Meeting Report.

[180] Ibid.

[181] Ibid.

[182] *Annual Report 1997,* Oklahoma Department of Environmental Quality, p. 28.

[183] Alexander Volokh, Lynn Scarlett, and Scott Bush, *Race to the Top: The Innovative Face of State Environmental Management*, Reason Public Policy Institute Policy Study No. 239, February 1998, p. 13.

SUPER overhaul sought to change all this, starting with the introduction of the Weekly Permit Status Report in 1994. The status reports, published by the *Oklahoma Business News*, include information on the facility name, location, target date, and status of every permit being processed.

The weekly status report was the first step in instituting a state-wide system for tracking permits. The next item on the DEQ's agenda was to speed up the process of permit resolution, working through the backlog of permit applications and setting a timetable for new applicants. Through this process, the DEQ realized that what is measured is just as important as how:

> *In May 1995, having succeeded in eliminating the backlog of very old applications, we changed the focus of our efforts….This point we realized we were focusing on the wrong dates. Our customers were really more interested in how long a permit application had been in our hands rather than how long it has been since we started looking at it.*[184]

This self-realization led the DEQ to set a target of 90 days from actual application (not the start of technical review) for completion of the permit process.[185] While the number of permits processed by the DEQ has remained fairly constant, there has been a substantial improvement in the speed of processing. At the beginning of 1997, 687 permits were in process and 332 were in technical review; at the end of 1997, 698 were in process and the number in review was reduced to 225.[186]

G. Permit Continuum

Possibly one of the most innovative of Oklahoma's new environmental programs, its permit continuum classification system, identifies four levels of risk categories that call for different levels of effort in the permit process. These are:

- *De minimis*: those facilities that are of such insignificant risk that no permitting should be required;
- *Permit by rule*: those facilities that are of significant enough risk that a rule requiring simple registration and potentially simple one-time reporting should be required;
- *General permits*: facilities with similar processes that would require authorization under a single rule and periodic reporting; and
- *Individual permits*: the higher levels of risk with permitting based on individual review of each facility.[187]

The most progress along this continuum has been made in Oklahoma's Air Quality Division, which, in the past, had issued more permits to oil and gas stations than any other industry yet processed each application individually. By utilizing the continuum, some of the oil and gas group is handled by a rule permit, while others are handled through a general permit.

H. General Simplification

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[184] "State Environmental Innovations."

[185] *Annual Report 1997,* Oklahoma Department of Environmental Quality, p. 28.

[186] Ibid.

[187] Ibid.

Rather than having the permits written in bureaucratese, the Oklahoma DEQ has sought to make the process more accessible and in plain English. Judith Duncan noted that the process had been abstruse.

> *[The DEQ was] enamored of the mystique of our own complexity. Environmental rules were usually written to address the most complex situation. They may have been changed over the years but only by addition and seldom by deletion. It is difficult to get staff to look at the rules and determine where they can be made simpler and more understandable.*[188]

A survey taken among industry of permit satisfaction in 1997, after simplification, had no respondents rating their understanding of permit requirements, conditions, or limitations in the "fair" or "poor" categories.[189]

I. Voluntarism

The DEQ's experimentation was not just limited to the formal regulatory and permitting process. In a trial run that was similar to that of the ERP in Massachusetts, the Oklahoma DEQ partnered with 23 companies in a voluntary program to reduce chemical emissions. Titled "Target '98," the program sought to reduce industry releases of 15 chemicals by 50 percent by 1998.[190] The emissions of these chemicals, which totaled 31 million pounds in 1991, was cut to 15.7 million pounds by 1994, well in advance of the target date.

Program implementation also relied on the new mentality of the DEQ, as the Pollution Prevention Unit performed facility audits for participating members, pointing out areas that needed improvements and raising the level of awareness through seminars. Monty Elder, the state's risk-communication supervisor, summed up the benefit of the Target '98 program:

> *For years, industry has told us "We know our processes better than regulators do, if you would just give us some flexibility." I wanted the companies to figure out what was best and right in their situation, and it seems to have worked very well.*[191]

Elder went on to state that the program's success relied on the fact that it was "open-ended and without strict guidelines. The state didn't tell the businesses how much to reduce emissions or how to accomplish it."[192] This point was crucial to the success of the program; earlier command-and-control methods had mandated certain processes or equipment for Oklahoma industries, stifling innovation in pollution prevention.

The Target '98 program was not based on pure altruism, however. It appealed to the interests of the industries themselves. Elder commented that facilities were getting involved in the program because it was economical for them ("companies lose money when they lose waste"); because it was good public relations

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[188] "Case Study: Oklahoma's Simplified Uniform Programs for Environmental Regulation," Environmental Regulatory Innovations Symposium, November 5-7, 1997, published on the Minnesota Pollution Control Agency's Website http://www.pca.state.mn.us/hot/es-ok.html.

[189] *Annual Report 1997*, Oklahoma Department of Environmental Quality, p. 28.

[190] The 15 chemicals were ammonia, ammonium nitrate, sulfuric acid, hydrochloric acid, toluene, dichloromethane, methyl ethyl ketone, xylene, lead, chromium, two types of trichloroethane, tetrachloroethylene, nitric acid and styrene. Any Oklahoma company using at least one of the designated chemicals was eligible to participate in the program.

[191] Quoted in Laura Summers, "Firms Cut Emissions Voluntarily," *Tulsa World*, May 14, 1996, p. E6.

[192] Ibid.

for them to tell the community they have reduced emissions; and because most firms genuinely want to do a good job and use less-toxic substances.[193]

J. Checking the Path of Progress

It is difficult to reform an agency overnight, if at all. While the Oklahoma DEQ had the advantage of being a new agency without much of a tradition of enforcement, it did have many of the same employees from other departments who had worked on permits previously. As Judith Duncan put it, "[a major barrier to the success of the program was] overcoming inertia to change the culture of an environmental agency. Environmental agencies are comfortable with the regulator role and there is a resistance to change. It takes 'time away from your real job' to develop new ideas and implement them."[194]

The organization of the Oklahoma DEQ was partly to blame for the slow permitting process. There was no intra-agency way to facilitate cooperation among different sectors:

> *[There was a] lack of a place within the organization to work on multi-media solutions. Traditional environmental agencies are organized along media specific lines. It is difficult to identify good ideas in one area that could be used in others because there is no place within the agency for programs to work together on process development and problem solving.*[195]

The Customer Services Division has slowly evolved to the point where this coordination is possible. Specifically, in the Customer Assistance Program, a new office in the DEQ that has functions that did not exist in the DEQ's predecessors, agency-permitting processes can be coordinated in a cross-media fashion. In terms of actual personnel, Mark Coleman indicated there was no problem in "learning the ropes" for the Customer Service Division:

> *Organizational change probably helped, rather than harmed, the smooth implementation of the SUPER program. Most of the people worked for me already. The SUPER program encompasses many ideas, and the mix of people we had gave SUPER an impetus.*[196]

However, external constraints have also impeded implementation of some aspects of permit reform. The Oklahoma DEQ and the EPA had an uneasy history of cooperation, marked by increasing friction during the 1990s. This was typified by the imbroglio over the EPA's air standards in 1997, when members of the Oklahoma City Council threatened to take the EPA to court. Mark Coleman of the DEQ chastised the EPA's continuing centralized mentality:

> *This is not some minor issue in a war of gullibility. The costs of meeting these new standards are staggering. The benefits are far from certain, much less clear. The timing at best has the appearance of being an attempt to negate the environmental and economic edge gained by portions of the country that have achieved the current standards.*[197]

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[193] Ibid.

[194] "Case Study: Oklahoma's Simplified Uniform Programs for Environmental Regulation."

[195] Ibid.

[196] Mark S. Coleman, Director, Oklahoma DEQ, interview with the author, October 28, 1998.

[197] Jack Money, "City Vows to Fight EPA's Tough New Air Standards," *The Daily Oklahoman*, July 23, 1997, p. 10.

This conflict over goals, or basic standards, raises an issue that state environmental innovations, in general, do not (and cannot) tackle, as these lie at the heart of current federal law. While the SUPER program on the whole was "written to avoid conflicts" with federal regulations (and Tier II of the permit process included all federal regulations),[198] Judith Duncan said of the uniform permitting:

> *The complexity of the federal permitting process does not allow the structuring of a true uniform system. While the Department is undertaking cross-program permitting within media (e.g. one permit for both solid and hazardous waste achievable at a facility), the ultimate goal of the one facility-one permit will not be achievable until adjustments are made in the prescriptive federal process.*[199]

While DEQ brought in the regional office of the EPA for consultations in the successful "targeted outreach" program, the federal EPA has shown little interest in allowing the flexibility of limited liability to be enshrined in legislation. According to EPA Assistant Administrator Steve Herman,

> *EPA supports environmental auditing and other forms of self-policing and has an effective policy in place to encourage such conduct [but] audit privilege and immunity legislation is not only unnecessary.... It is unwise because it undermines law enforcement, impairs protection of human health and the environment, and interferes with the public's right to know of potential and existing environmental hazards.*[200]

In fact, recognizing the problems inherent in getting the EPA to cooperate, Mark Coleman suggested a different strategy for the SUPER program: "It's easier to argue the argument. I don't follow the other processes like some other states. It's easier just to go ahead with the program and then fight the EPA afterwards."[201]

Environmental activists in Oklahoma have been conspicuously silent on the SUPER program, preferring to insure that the DEQ continues to spend its funding on environmental programs and initiatives that protect the environment. DEQ head Mark Coleman noted that there's been "no adverse reaction from the environmentalists"; while some of the DEQ's other programs have been criticized for "lacking public input" (most notably, the brownfield redevelopment plan), SUPER's extensive stakeholder involvement has quelled any major complaints like those seen in New Jersey or Mississippi.[202] The Sierra Club, in particular, has been on the front-line of the DEQ's public-involvement programs and has lauded the pollution-prevention aspect of the SUPER program.[203]

The most-vociferous detractors of the DEQ have been local governments in Oklahoma, which have proclaimed their opposition to any more "unfunded mandates" emanating from the capital. There has been much friction between the DEQ and the municipal leaders, conflict typified by Weatherford Mayor Gary

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[198] Steve Thompson, Deputy Director Oklahoma DEQ, Environmental Council of the States (ECOS)/National Environmental Policy Institute (NEPI) *Survey on State Innovations*, Washington, D.C., February 2, 1996.

[199] Judith Duncan, ECOS/NEPI *Survey on State Innovations*, February 2, 1996.

[200] Prepared statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency, before the Senate Environment and Public Works Committee, October 30, 1997.

[201] Mark S. Coleman, Director of Oklahoma DEQ, interview with the author, October 28, 1998.

[202] Mark S. Coleman, interview with the author, October 28, 1998: also Joe Sellars, "DEQ Researching Public Concerns Over Reform," *The O'Colly Online*, December 10, 1996, http://www.ocolly.okstate.edu/issues/1996_Fall/961210/stories/DEQ.html.

[203] "Oklahoma: State Sierra Club Gives Legislature Poor Review," *Greenwire*, August 5, 1994.

Rader's "revolt" against the DEQ's solid-waste fees.[204] In fact, the greatest concern the municipalities have is a worry that the new SUPER program will end up costing them even more. The devolution of authority from the EPA to the DEQ has resulted in the DEQ shouldering additional costs, such as the administrative costs of the program and the effort to get municipalities into compliance with federal regulations:

> *The central Oklahoma city of [Shawnee] is one of many municipalities across the state in line to see permit fees for its wastewater treatment plants skyrocket. According to the latest schedule of proposed permit fee increases, costs would balloon from $800 currently paid to $11,000 if Oklahoma is successful in assuming the National Pollutant Discharge Elimination System program from EPA, Mayor Taron explained. He said similar increases are anticipated in the area of air quality and sanitary waste disposal as councils established under the DEQ develop revised permit fee and fine structures.*[205]

K. Lessons from Oklahoma

Oklahoma's programs are still in a nascent phase, and as such it is difficult to gauge their actual effect on the environment. Using bureaucratic timeliness as a barometer for success would suggest that the SUPER program is effective, but focusing merely on the improvements in bureaucracy leads to the same regulatory mindset that now pervades environmental protection. The efficacy of the Oklahoma program will be demonstrated in tangible environmental improvements, criteria that are too early to evaluate. However, the simplification of the process, coupled with the DEQ's willingness to involve those affected by the regulations, should result in a fairer system of environmental regulation.

Some early numbers seem to indicate that the Oklahoma DEQ's system is on track. There was a 55 percent decrease in air and water pollution in Oklahoma between 1988 and 1996, and the EPA acknowledged that waste-producing facilities had reduced pollution by 12.4 percent.[206] As noted above, the Target '98 program had a large hand in reducing emissions, leading Monty Elder, the DEQ's risk-communication supervisor, to proclaim that "Oklahoma is one of the few states that the total amount of produced waste is declining."[207] Again, it is difficult to disentangle environmental improvements from other factors, but the SUPER program appears to be a step in the right direction.

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[204] Anthony Thorton, "Waste Fee Irks Mayor Into Revolt," *The Daily Oklahoman*, February 6, 1995, p. 1.

[205] "Oklahoma Official Fight Mandates," *Nation's Cities Weekly*, vol. 18 no. 22, May 29, 1995, p. 1.

[206] "Air, Water Pollution in Oklahoma Down 55 Percent," Associated Press File, August 9, 1998, AM Cycle.

[207] Ibid.

Part 6

Conclusions and Recommendations

These state environmental programs focus on institutional innovations that emphasize flexibility and encourage private stewardship. As the Massachusetts DEP observes, the strength of government is on monitoring and enforcement, rather than in permit minutiae, technology prescriptions, and business mandates. Moving the permitting process towards greater industry flexibility allows the government to concentrate on crafting incentives for environmental protection, rather than acting as a detailed plant manager and mandating certain types of equipment or processes.

As these cases have shown, greater flexibility may represent a diminution of government micromanagement of environmental protection, but it does not mean an absence of regulation altogether—environmental agencies are reluctant to cede significant authority. Still, some in the business community find that acceptable, so long as government sticks to doing what it arguably does best—enforcing agreements and punishing those who commit environmental harms. Rick Renner, an environmental communications manager for 3M, stated that in these programs, "You still have to have government oversight. You need them setting the standards and having companies meet them."[208]

Assuming that the comparative advantage of government is enforcement against public harms, the strength of the private sector is its resilience and adaptability, qualities crucial to solving environmental problems. Each of the state programs examined here is based in some part on this division of labor, recognizing where markets can make a difference. As the Dutch government realized in the early 1990s:

> *Environmental problems cannot be solved simply through obligations imposed unilaterally by government. It is necessary to seek other instruments which are more in line with the concept of individual responsibility for ensuring a clean environment.*[209]

This process of selecting the "right mix of instruments" is not an easy one. Each of the states that has implemented or tried to implement permit innovations has confronted a series of obstacles, some from expected quarters and some unforeseen. Environmental groups are frequently opposed to any perceived weakening of enforcement and compliance, while federal regulators are concerned that their authority will be less effective if the states are allowed to go their own way. Business leaders are worried about their possible liability if they participate in new programs and are often not willing to invest new resources in a plan that may not come to fruition or may leave them open to enforcement actions by "outsiders." Finally, management in state agencies attempting to reorient their departments may face opposition from their own

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[208] Dave Price, "New Leader Plots Course of MPCA", *Minneapolis-St. Paul CityBusiness*, August 23, 1996, p.14.

[209] Jit Peters, quoted in Daniel Beardsley, *Incentives for Environmental Improvement: An Assessment of Selected Innovative Programs in the States and Europe*, Global Environmental Management Initiative, September 1996, p. 27.

employees, who have a standard operating procedure and are likely not always receptive to the prospect of sudden change.

The shift to alternative permitting regimes has exposed the deeper demarcation between the traditional view of environmental regulation and a new approach. The traditional view, like the traditional permitting structures, focused on punishment as the measure of success. Compliance rates were the goal, rather than tangible environmental improvement. Thus, opponents of the New Jersey facility-wide permit could accept the permit in practice, but only if it had more onerous restrictions (thus negating what it actually attempted to achieve).

The new approaches to permitting, typified in the states examined in this study, rely on a model that focuses on performance measures, rather than procedural measures. Massachusetts's experiment succinctly summed it up in its title: the Environmental Results Program. These results must be attained from a bottom-up determination of goals, involving those directly affected by those choices, and not from an "obligation imposed unilaterally by the government."

Despite the numerous obstacles that exist and will continue to exist, several states have been able to simplify and reform the permit process, injecting greater flexibility while continuing to protect the environment. In many cases, the greater ease of the process, coupled with a less-adversarial relationship between government and industry, can improve environmental protection in a way not possible under the old permits.

For states that wish to institute their own innovations and implement flexibility into their permitting practices, how can they go about this change? What lessons can be learned from the cases presented above?

In order to implement a successful innovation in permitting, states should take care to follow these guidelines:

- *Insure involvement by affected constituents:* By bringing all parties to the table early, and letting them voice their concerns, an atmosphere of inclusion is created. Rather than springing changes on the community, as the Massachusetts ERP did, allowing all groups to have their say will increase the chances for acceptance of changes.
- *Balance goals:* Involving all parties does not mean that every interested member of the community can have the opportunity to derail a project.
- *Reorganize environmental departments:* This may help circumvent some of the problems that entrenched interests can cause. Minnesota's restructuring towards geographic-based unit is a good example of a more efficacious, holistic approach. Avoiding the regulatory shell game means moving more efforts into multimedia programs. As a regulator at the MPCA noted, "The world hasn't changed, we have. The day of the single-media expert is gone. If you don't understand linkages between your area of expertise and others, you won't be successful."[210]
- *Involve the EPA:* EPA will probably become involved at some stage of the innovation process. Some states recommend bringing the EPA on board as quickly as possible, while others recommend a later-stage involvement.

Once these guidelines have been adhered to, the following elements will help facilitate innovation:

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[210] Quoted in Minnesota's Department of Administration "Data Collection on Goal 21" report.

- *A "grace period" during implementation:* A form of liability immunity for procedural and noncriminal permit violations, this period should allow companies that wish to improve their processes some leeway and freedom from prosecution. This type of amnesty should follow the lines of Massachusetts's ERP, which waived provisions for photoprocessors that would have impeded the ERP's successful completion. Of course, this will also involve the EPA at the bargaining table if federal statutes are to be debated.
- *Concurrent compliance assistance:* Many businesses are violating emissions caps or standards simply because they don't know what the standards are. A form of assistance, much like the Oklahoma DEQ's targeted outreach program, coupled with temporary liability immunity for noncriminal permit violations, will help businesses understand their impact on the environment and allow them to change.
- *Intensive background knowledge:* Permit innovators need to know the industries and the companies they are addressing. Facility-wide permits and industry standards work because of similar processes that lend themselves to simplification. Companies need to be in compliance before they can go beyond compliance. If they ignore the terms of the agreement, however, the state regulatory body should be able to enforce and (if necessary) penalize.
- *Finally, knowledge of the political climate:* Some states are simply unable to implement this flexibility because of the prevailing political mood at the time. Christine Todd Whitman was able to implement the facility-wide permit in large part because of bipartisan support for the program (including her predecessor, Jim Florio). Minnesota has been famous for its flexibility in politics (remember, Ross Perot received 24 percent of the vote there in 1992), and thus had a more conducive climate for reform. But even Minnesota's experience with innovation has been tempered by public reaction.

Following this checklist will not guarantee success of an innovative program, but these criteria will lessen the chances of failure. For, as these states have shown, innovation is experimentation.

About the Author

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