



# Chapter 3

## Participating in the Permitting Process

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So why spend all this time wading through the permit and all its supporting documentation? Because you have the power to use what you've learned to protect your watershed!

One beauty of the Clean Water Act is that the drafters provide many opportunities for citizen input in each watershed decision. They handed us a gift we must use. The Act allows citizens to comment on permits, request public hearings, challenge permits and more. You've done your digging and research, now it is time to make it matter.

## 3.1 What Information Can I Gather on a Permit?

The public notice and the permit itself are just the beginning. An enormous amount of additional information is available to interested members of the public. If a fact sheet on a particular permit or discharge is of interest, contact your state agency for more information. See Appendix B for contact information for your state's permit agency.



### On your information request make sure you include:

- ✓ NPDES permit number
- ✓ discharger's name
- ✓ public notice number
- ✓ list of information you are requesting
- ✓ where to send the information

In all cases, you want to make sure you request the proposed permit and the fact sheet. You will probably want to request the previous permits as well, so you can better gauge any changes that have been made.

Do not wait too long to request additional materials, because it can take up to three weeks to receive permit information from the agency. In most states, after a public notice is published you have 30 days to submit written comments to the agency. Some states allow 45 days for public comment.

## ***Here is a checklist for your request:***

*If the agency cannot or does not provide you with this type of information, there is a problem. There is no way they could have done an adequate review of the permit without this data. In the event the agency does not have it, they should compile and evaluate this information before issuing the final permit.*

### **ABSOLUTELY NECESSARY**

- ✓ **PROPOSED, PUBLIC-NOTICED PERMIT** (including the fact sheet) – This is the main document that you need.
- ✓ **PREVIOUS PERMIT** – If applicable, get the old permit so you can compare the new one to it and see if effluent limits are changing.

### **USEFUL FOR THE WHOLE PICTURE**

- ✓ **PERMIT APPLICATION** – An application for a permit must be filed with the agency. The application contains detailed information on the discharger's permit request, the treatment technologies and, for modified and reissued permits, a summary of the facility's past performance. The permit application can be a very lengthy document and may be costly to photocopy and mail. In some cases, you may be required to pay for the service, or you may have to go and copy it yourself.
- ✓ **SUMMARY OF STREAM SURVEYS, WATER QUALITY DATA OR OTHER INFORMATION ON THE RECEIVING WATERS** – There is often a great deal of information available on waters that will be receiving the proposed pollution. Ask the agency to share that information. It may include evaluations of the stream's health and inventories of biological resources. See Chapter 1 for more information.
- ✓ **ANTIDegradation ANALYSIS** – To comply with state and federal antidegradation policies, the agency must conduct an analysis of the permit to see if there is a potential for degradation. Make sure you request a copy of this analysis. Examine it very carefully, and speak out about issues it raises in your mind. State agencies often do not take the time to figure out what the existing uses of a waterbody are, and consequently, how those existing uses could be impacted by a discharge. For example, if you know there is a swimming beach nearby, and they do not mention it in their analysis, then the analysis is likely flawed and the permit is probably wrong, too. See Chapter 4 for more information.
- ✓ **REASONABLE POTENTIAL ANALYSIS** – This memo summarizes the discharger's past performance and includes an analysis of the likelihood the effluent will contribute to or cause a violation of water quality standards. If the analysis shows a likelihood of violations but the permit does not require appropriate effluent limits for these pollutants, make sure you bring this to the agency's attention. If the agency does not perform reasonable potential analyses for all pollutants likely to be discharged, bring this to the agency's attention as well. See Chapter 2 for more information.

### **POTENTIALLY USEFUL FOR MORE DETAILED INVESTIGATION**

- ✓ **ENGINEER'S NOTES** – These documents contain calculations, engineering specifications and other notes that the agency's permit engineer jotted down while reviewing the permit and the permit application.

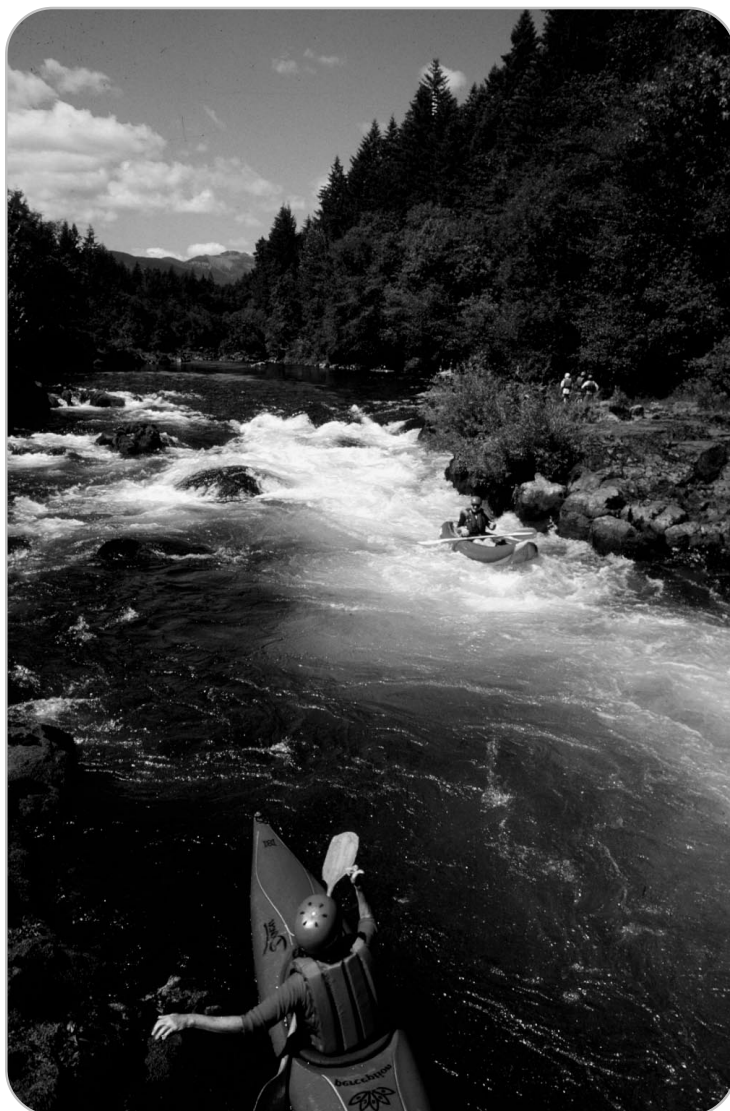
## 3.2 When Can I Comment on a Permit?

The earlier the better. If you find a permit has been applied for, it is perfectly acceptable to contact your state agency, or the discharger, and begin a dialogue before a public comment period even begins. Depending on how your state handles this, it may be productive, or they may refuse to talk to you about the permit. If you can get a dialogue going, this is the best time to be involved. Once the permit is out in draft, it can be hard to change.

At a minimum, you have 30 days to comment on an NPDES permit once it is “public noticed” by your state agency. Get on your state’s public notice list for the quickest “heads up” on draft permits. See Appendix B for contact information for your state agency. During that 30-day period you must:

- ▣ Review the permit and any other relevant permit materials provided by the discharger and the state agency.
- ▣ Assemble any materials you believe are important that are not part of the agency’s record (biological surveys, water quality data, information on recreational uses of the water, etc.) This may be material in your possession, or it may be studies by universities, citizen monitoring groups or other government agencies.
- ▣ File your comments with the state agency.

Thirty days is not much time to get all this information assembled and a comment letter filed, so don’t put it off until the last minute. The more time you have to review information and craft a comment letter, the better.



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### 3.3 Why Bother Writing Comments?

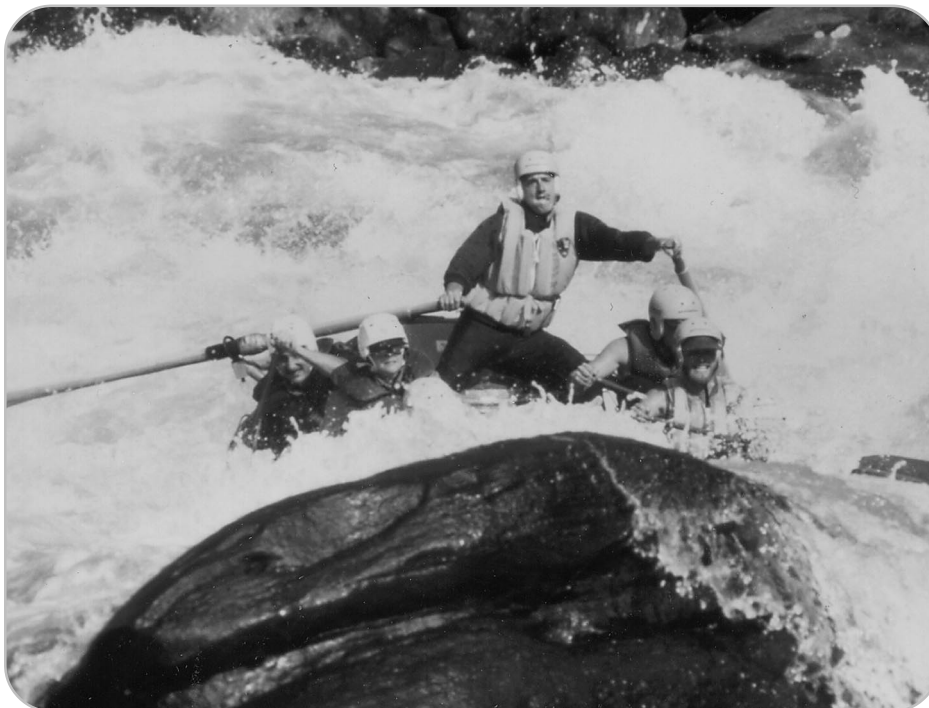
If you are concerned about a discharger receiving a permit, the public comment period may very well be your first opportunity to make your views known. If you do not take advantage of this opportunity, you will not get a second chance.

If no comment letters are submitted, the permit will most assuredly be issued in its draft form. Once issued, it is very difficult to get a permit changed. You may have information about the stream, watershed or

biology of the region your state agency has overlooked. If it is pointed out during the comment period, they may be convinced to make a change. As a result, your comment may have a significant impact on what the final permit looks like.

In addition, by commenting on a permit, you begin a process that can change how water pollution is controlled, keep a new source of pollution from being sited in your watershed or help ensure recreational uses or aquatic species are protected.

Filing your comment letter may lead to other actions down the road. By filing a public comment, you can request and be granted a public hearing, which will open the issue to public debate and a much broader constituency. If the permit is issued over your objections, you may find it necessary to appeal the permit to get your problems solved. If the permit is later violated, and the violation relates to a concern you raised in the draft permit, your comment letter may become an important piece of evidence in a citizen's suit. In short, commenting on a permit can help preserve your rights for future actions.



PETER LAVIGNE

#### ***Standing***

*Every state has its own laws on “standing” that dictate whether the plaintiff has the right to sue about a violation or not. Your standing in a case will usually be evaluated before the merits of your complaint. Look into these requirements for your state.*

## 3.4 Writing Your Comments

Once you have completed your review of a permit and the supporting documents, it's time to put your findings into writing and file a comment letter. Your public comments may be the first official communication you have with the agency that describes your concerns, flaws you have found in the permit and recommended courses of action.

Writing public comments is not just about writing a letter. You must carefully consider how you will frame your issues. It's essential that you *concisely* communicate your concerns, your findings and any suggestions you have for improving the permit.

Remember, you are asking the agency to change its initial decision regarding the permit. Agency staff will be under pressure from the discharger not to do this; staff typically receive comment letters from dischargers asking for draft permits to be weakened. You must have convincing arguments and good supporting evidence to win changes to the permit. It is to your advantage to share as much information as possible. The agency will have to have a compelling reason to alter a permit. It's your job to give them that reason.

After you have reviewed the permit materials, go through your notes and make a list of problems you have identified. Keep in mind, you also want to comment on things your state agency did well in the permit. For instance, if they gave a discharger a more stringent water quality-based effluent limit than in the previous permit, you should acknowledge your appreciation of that action.

### Potential Problems in Permits

- ✓ Mistakes made in calculations
- ✓ Improper effluent limits
- ✓ Increased loadings or concentrations of pollutants to an impaired waterbody
- ✓ Incorrect antidegradation analysis

You can then use this list to create an outline for your comment letter. Each issue can be a heading, with your arguments and supporting facts beneath.

Once you have inventoried your issues and concerns, think about what you want to say about each one. It's essential your comments be focused and forceful.



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Characteristics of a well-written comment letter:

- ❑ WELL ORGANIZED: Concerns are laid out in an easy-to-read and easy-to-follow fashion.
- ❑ HEADINGS: Each issue raised in the comment letter is covered under its own subject heading, making it easy for the reviewer to find your concerns and understand them.
- ❑ CONCISE: The specific concern is described in as few words as possible and tells the reviewer exactly what you do or don't like about the permit.

When putting your written comments together, try to organize them in a fashion that follows the elements of the permit. Agency staff will go through the permit page by page, and your comments will be easier to understand and accept if they parallel the permit itself. This is not always possible, however, since you may comment on issues that are not in the permit or on details presented in supporting documentation, such as the engineer's notes or the antidegradation analysis.

For each issue you raise, write a header. Go back to your initial list of concerns and your outline for structure. This helps the reviewer know exactly what you are talking about, and it helps them find it later if they need to refer back to your letter.

Under each heading, start your first paragraph with a single sentence that clearly states the issue and what you want done about it (if anything). For instance, "The effluent limits for cyanide are too high and should be lowered," or "The antidegradation analysis failed to consider impacts to endangered species known to exist in the area, so the permit should be denied."

After you have clearly laid out your concerns with the permit and stated the course of action that you think is appropriate, build your argument for why the permit is flawed in each identified area and why your recommended course of action is appropriate. For example, cite specific studies that show endangered species exist, identify specific state and federal regulations that prohibit the activity you object to, present water quality data that was not examined or refer to information that otherwise makes your point. Everything following your first sentence should support your argument.

**When submitting public comments, you must supply the following information:**

- ✓ *Your name and address*
- ✓ *Organization's name (if you are representing one)*
- ✓ *Your interest in the permit (why it is important to you or why it affects you)*
- ✓ *Permit number and public notice number on each page of the comments (in case pages become separated)*



The shorter your comments, the better. It's important not to bog the reviewer down in long, difficult-to-read sentences. Your views are most effective if you communicate them concisely.

Where possible, avoid asking questions since they are generally not effective in a comment letter. The purpose of a comment letter on an NPDES permit is to convince the agency to take a specific course of action — usually to deny or modify the permit. Asking questions may only produce answers you cannot act upon. If possible, make a question into a statement.

For example, do not ask, “Did the agency consider the water quality impacts of upstream discharges when it calculated effluent limits?” Instead, simply state, “The agency did not consider the water quality impacts of upstream discharges when it calculated effluent limits.”

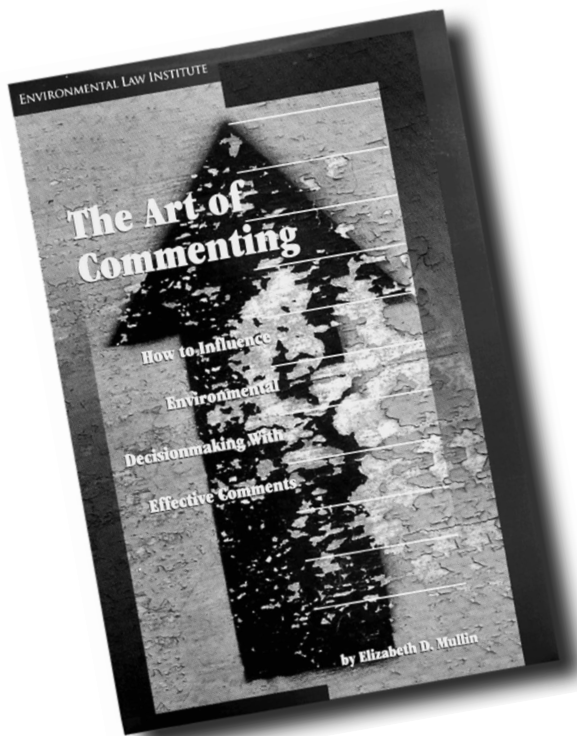
If you cannot find something in the record that shows they did this, assume they did not. Do not ask them about it, but state there is nothing in the record to indicate otherwise.

If you have a question, you should endeavor to get it answered *before* you write a comment letter. Only by having the necessary information can you put together the most effective communication possible.

For more information on writing public comments, we recommend you get a copy of “*The Art of Commenting*” by the Environmental Law Institute.<sup>30</sup> This is a valuable resource. Lastly, be sure to send copies of your com-

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ments to the U.S. EPA and to your local elected officials. It is important to let other decision-makers know you have concerns about a permit. You may need to draw them into the debate later if the permit needs to be challenged.



## 3.5 When Do I Request a Public Hearing?

Another important issue to consider when writing comments is whether to request a public hearing. While the Clean Water Act guarantees you that right, it does not specify the conditions that require your state to grant a hearing. If the situation warrants, agencies may hold a public hearing on the permit in question, but this will not happen unless people request one and there are important issues in need of consideration. Some states require a certain number of requests before they will grant a hearing. The occurrence of permit hearings varies from state to state, but it is still a good idea to request one.

A public hearing can help expose additional information. It can also be a valuable forum for making your concerns known to people outside your state agency, like other interested citizens, decision-makers and members of the press. Many states hold hearings during the comment period. Other states may hold the hearing after the comment period has closed and open up another comment period following the hearing.

As indicated earlier, states handle public hearings in different ways. At a minimum you will be allowed to make a

statement to the agency about concerns you have with the permit. The agency, and perhaps the discharger, will also make presentations about what decisions were made in the course of issuing the draft permit, what type of treatment technologies are/will be employed and other information used in evaluating the permit.

Some states allow members of the public to pose questions to agency staff. Staff do their best to answer those questions on the spot. This can be very useful.

What questions should be asked? Usually the best questions are those you already know the answers to. For instance, if you know for a fact there are endangered species present but the agency did not identify them, you may want to ask, “Where in the public record did the agency document the existence of endangered species?” They will have to respond that they did not document their existence. You can then submit evidence into the hearing that proves endangered species are indeed present. This is an effective means of 1) illustrating for members of the public the inadequacy of the review and 2) publicly adding valuable information to the record which the agency cannot deny.



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Try not to go on a “fishing trip” with your questions. Often you will be surprised by the results. The agency or discharger may give you an answer you disagree with, and you do not want to be caught without the information to refute them. Be careful what you ask for, because you may just get it!

Do not get into an argument with the agency or the discharger. It’s important to be courteous and act responsibly at a public hearing. The hearing will have an official transcript, and usually there is a court reporter who records all statements and comments. If you find it necessary to appeal the permit at a later date, or take some sort of legal action, it’s best not to have an embarrassing comment or heated argument on the transcript.

After the public hearing, there may be another public comment period. Always make use of this forum. It’s another opportunity to provide information and evidence you uncovered after your original comment letter. Even if your second comment simply reiterates the points of your first letter, send in a comment letter. A second comment period is also another opportunity to organize letters from other local citizens and organizations.



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***If the situation warrants, agencies may hold a public hearing on the permit in question, but this will not happen unless people request one and there are important issues in need of consideration.***

## 3.6 Important Permit Milestones

Every state follows a different timeline for their permit process. The following table describes different steps that may occur in your state. Talk to your state agency to find out the exact process. Consider getting involved throughout the process.

FORMAL PROCESS	ROLE YOU CAN PLAY
Permittees consult with state agency about an upcoming permit (“pre-application conference”).	You may be able to find out when a permit applicant has come in for this meeting. Keep in touch with your agency staff working on permits for the waters in which you are most interested.
Permittee submits application.	You can find out about pending applications at this point while the agency is working on them. Again, a relationship with agency staff will help you keep on top of applications.
State agency issues public notice on draft permit. Comment period usually lasts between 30-45 days.	You must request information, review information and submit written comments; you may request a public hearing before comments are due.
If requested and approved, state agency gives notice of and conducts a public hearing.	Hearings are only held when requested. Some states require that a certain number of people request a public hearing. Many states hold the public hearing during the comment period. Some states will hold it afterward and allow a second round of public comments.
State agency will respond to comments.	You may not get a formal response until the final permit is issued, but you should request agency feedback in some fashion before the permit is final. Go in and speak with the permit writer or the manager.
State agency issues final permit. This could take a long time; there are no restrictions on the agency to issue the permit within a specified number of days.	Keep in touch with the agency staff about where the permit is in the process. Changes in the permit that may warrant another public hearing can occur during this time.
Appeal the permit to the agency. This varies between 30-60 days after the issuance of the permit.	If a permit is issued and your concerns are not adequately addressed, you have the right to appeal the permit. Find out what your state appeal procedures are.
State agency process appeal. Most states don’t have time restrictions on this process.	Stay on top of this process. Don’t let the agency drag its feet, especially if the permit relates to an ongoing problematic discharge that is operating business-as-usual until the new permit is in place.
File lawsuit. Some must be filed within 60 days.	Find out what time restrictions are in place for lawsuits against discharge permits.
Reopen permit for modification.	Federal regulations allow for modifications of permits after they are issued. See discussion on page 16.