

**PROPOSED REVISIONS TO THE MASSACHUSETTS CONTINGENCY PLAN**

**SUBPART E: PERMITS FOR TIER I SITES**

**ISSUES PRESENTATION AND DISCUSSION**

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**INTRODUCTION:**

In November, 1990, the Program Improvements and Long Term Funding Study Committee submitted its report to the Legislature titled "Interim Report: Waste Site Cleanup Program Improvements and Funding Recommendations", (the "Interim Report"). The report made several recommendations for improving the effectiveness and efficiency of the 21E program. One of the key recommendations was that a 21E permit program should be developed to enable potentially responsible parties (PRPs) to conduct assessment and cleanup activities with a level of oversight appropriate to the degree of contamination and complexity of site conditions, and to the PRP's ability to manage and implement the necessary response actions. The Bureau of Waste Site Cleanup (BWSC) would retain direct oversight of response actions at sites that posed the highest risks or were the most complex. All other permitted response actions would be overseen by Licensed Site Professionals (LSPs) with BWSC auditing compliance.

The Interim Report also proposed that permit and annual compliance assurance fees be instituted to provide the Department with revenue to operate a 21E permit and compliance program. Any fee program would be contingent on a reliable schedule or timeline for ruling on permit applications. If the final deadline in any schedule for the completion of permit review was missed by the Department, the permit application fee would be refunded to the applicant and the application would be processed as quickly as possible.

The purpose of this paper is to outline and discuss the important factors that will control any schedule the Department proposes for timely action on permits. The key factors are:

- 1) The level of site information and technical requirements needed in a 21E permit application as envisioned in the Interim Report,
- 2) The objectives, limitations, and scope of the BWSC's technical permit review process, and,
- 3) The procedural steps in addition to technical review that are needed to process permits in a regulatory permit program.

The goal of the Permit-Workgroup (the "Workgroup") at this point is to receive comments on the Workgroup's assumptions and conclusions about how these factors effect a schedule for timely action on permits. Once comments are evaluated, the Workgroup will propose a schedule and timeframes for processing 21E permit applications and submit it to the Waste Site Cleanup Program Advisory Committee (the "Advisory Committee") for review and comment.

The recommendations presented in this document are those of the Permit Workgroup and are not necessarily the final recommendations of the Bureau of Waste Site Cleanup or the Department.

#### **BACKGROUND:**

It will be helpful to introduce this permit discussion with a brief review of some of the pertinent program redesign proposals related to permitting. In the Tier Classification proposal dated January 27, 1992, BWSC proposed to establish a two-tier site classification system which would separate those sites which require some level of BWSC oversight due to their complexity or the risks they pose (Tier I) from those sites which may be less complex or may pose less risk (Tier II). All sites would be classified based on the "opinion" of an LSP.

All Tier I sites would require a 21E permit to proceed with site investigations. Tier II sites would not require a permit. Once sites were classified as Tier II by an LSP, response actions would be allowed to proceed with no 21E approvals or oversight by BWSC (other appropriate DEP or local permits would be required). Response actions at Tier II sites would be reviewed by BWSC by audit only.

Tier I sites would also have varying levels of BWSC oversight after permitting. The Interim Report described three types of Tier I permits that BWSC would establish and BWSC's oversight role in each case:

Category A permits would be required for sites posing high levels of risk, very complicated conditions (such as multiple

PRP's, commingled plumes of groundwater contamination, or many different types of contaminants), and/or where BWSC is concerned about the ability of the PRP(s) to manage the complicated response action. A permit for these sites would require that the PRP hire an LSP, and that BWSC staff oversee the response actions.

Category B permits would be required for sites that are somewhat less complicated than Category A sites, and are those where the PRP(s) have persuaded BWSC that the PRP is capable of carrying out the response action. A permit for these sites would require that the PRP hire an LSP to oversee the response actions and that a draft scope of work for the Comprehensive Site Assessment (Phase II) be submitted as part of the permit application. BWSC would audit response actions at a percentage of these sites annually.

Category C permits would be required for sites that are less complicated and pose less risk than the other two categories, usually involving a single PRP and less complicated site conditions. The permit for these sites would require that the PRP hire an LSP. BWSC will audit response actions at a percentage of these sites annually.

#### Do All Sites Require Permits?

Most sites will not require 21E permits. It has been said that the redesigned 21E program will be like a highway with exit ramps which will provide PRPs with several opportunities to exit the process before it becomes necessary to apply for a permit and begin the complete trip through the phased MCP site assessment and remediation process. For example, the first major exit occurs if a site is categorized pursuant to the proposed "Site Categorization" process (see 1/27/92 Site Categorization proposal). Site Categorization is intended to provide PRPs with regulatory alternatives to the Massachusetts' Contingency Plan's (the MCP's) Subpart E site remediation process. Certain "common" site problems would be directed to site management categories that best reflect the nature and extent of contaminant conditions (i.e., "removal" sites, lead, or construction sites). Separate regulatory requirements would be developed to suit the special management issues related to each common category.

The second exit will occur when a site is classified Tier II. Tier II sites would not need BWSC permits in order for LSPs to proceed to oversee and implement response actions (other appropriate DEP permits would be required; Tier II response actions must still meet the technical and risk standards of the MCP). More details on the Tier II process will be presented to the Advisory Committee on April 9, 1992.

Even for sites that are classified as Tier I, permits may not be necessary since there will be several opportunities for PRPs to exit the process should an LSP be able to make a "no further action" (NFA) finding before it is necessary to apply for a permit.

NFA opinions may be filed at "release notification" or after an emergency response action. (see details in 1/27/92 Notification Regulation proposal). For releases or sites that can't reach NFA within a specified timeframe, the program redesign will encourage prompt initial response actions to be taken in order to reduce a site's risk, prevent migration of contamination, and reduce long-term cleanup costs. These initial response actions may also lead to NFA findings. For example, pursuant to the present "Interim Measures" (IM) policy, IMs may be initiated for environmental, engineering or cost-effectiveness reasons after BWSC approval. Consultants must determine that there is no significant benefit to be gained by delaying these actions to accommodate further assessment and development of remedial alternatives, and that IMs are not inconsistent with the phased process as provided for in the MCP. The Interim Report proposes that, for Tier I sites, PRPs could make a proposal to BWSC to implement an IM before a decision has been made on their permit application. BWSC would review IM proposals and respond with any comments within 14 days. If BWSC did not respond within this period, an LSP could proceed to implement the IM. If the IM resulted in an NFA finding within a specified amount of time, the PRP would not have to file for a Tier I permit to continue with site work.

NFA findings could also result from the implementation of Short Term Measures (STMs) to deal with "imminent hazards" at Tier I sites. In many cases, STMs would be implemented before a Tier I permit application was made. BWSC would review and approve all STM proposals. As with IMs, if the STM resulted in an NFA finding within a specified amount of time, a PRP would not need to file for a Tier I permit.

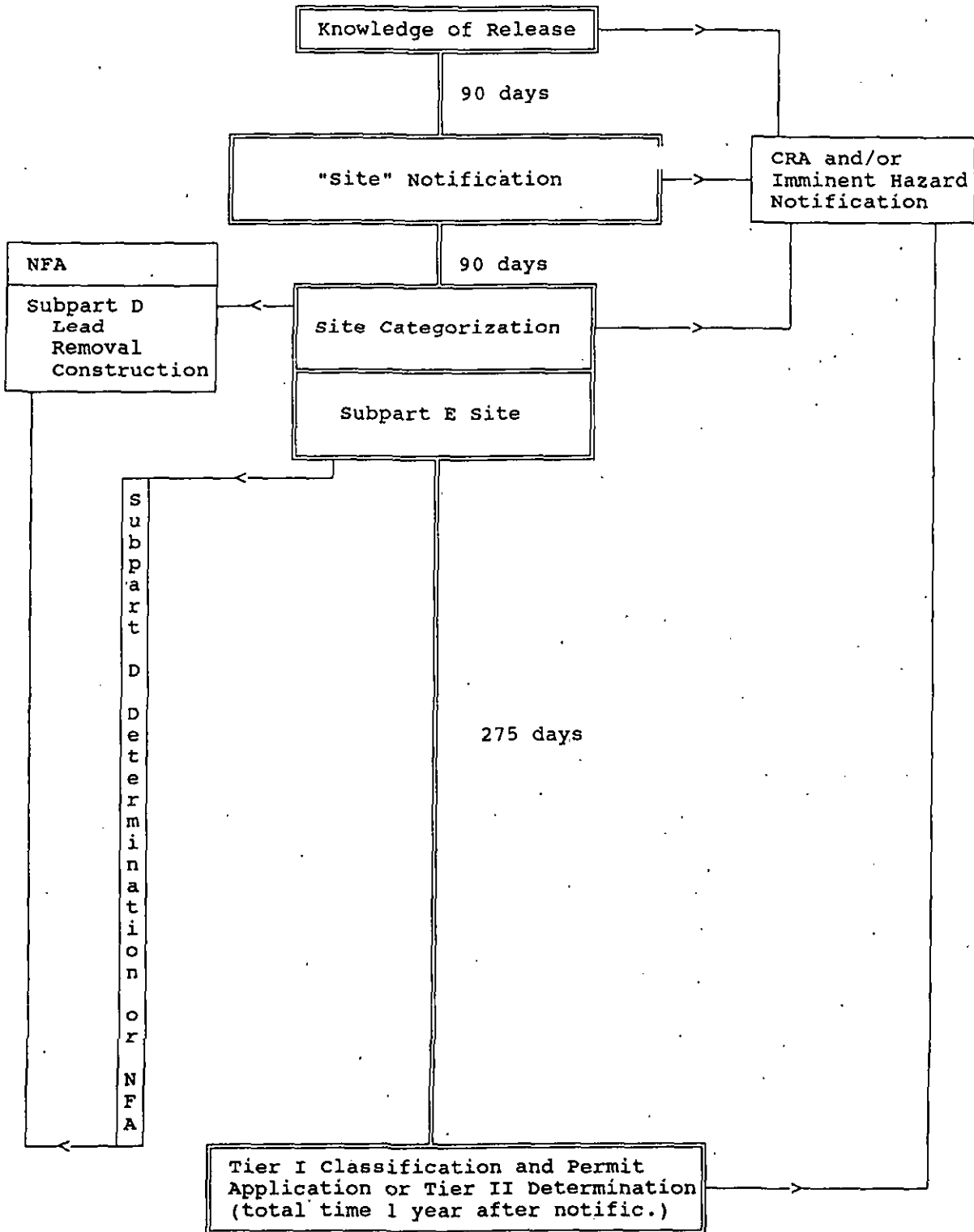
A specific proposal on IMs and STMs in the new program will be presented to the Advisory Committee by the MCP Rewrite Workgroup.

#### Timeline Review:

The following is a brief review of the program redesign process and timelines that precede permitting with additional information about "getting off the highway" (See Figure 1). For specific details, see the 12/26/91 Notification proposal and the 1/27/92 Tier Classification proposal. A PRP would have 90 days to notify the DEP of a historical release or 2 hours to notify of a "spill" or an imminent hazard. Site notification should include a Critical Resource Area (CRA) and imminent hazard evaluation. The PRP would then have an additional 90 days to complete "site categorization" to determine whether the site is subject to Subpart D or E of the MCP. If a Subpart D determination is made within ninety days of notification, the PRP would be directed to specific response actions procedures that fit the site category. Such sites would not have proceed ahead with Subpart E tier classification or permitting. (Note: it has yet to be determined what the specific review/approval process will be for sites categorized into subpart D.)

Figure 1. Permit Road Map for "Sites" - Notification to Permit Application

Note: figure does not include pathway for "2 hour reporting". See 12/26/91 Notification proposal for a more complete process flowchart.



Sites which can not "get off the highway" would be required to continue investigations subject to Subpart E. Within the first year, if such investigations indicate that the site meets the requirements for Subpart D, the PRP could recommend a Subpart D categorization. If a PRP did not submit a Subpart D determination, an NFA decision, a Tier II classification, or a Permit Application within one year after notification, the site could be listed as a Tier I site, and might be subject to a permit call or other enforcement actions.

In summary, it is important to remember that there will be several ways to exit the MCP process or to expedite response actions at Tier I sites should PRPs wish to do so. Should expedited response actions lead to NFA findings at Tier I sites within specific timeframes, the job would be done, and no Tier I permitting would be necessary.

#### **OBJECTIVES AND LIMITATIONS OF THE PERMIT PROCESS:**

The Interim Report describes the level of site information and technical requirements that would be needed in a 21E permit application. This is one of the most important factors that will control any schedule the Department proposes for timely action on permits. Specifically, the level of site information required in a permit application will define the boundaries or scope of BWSC's technical review. This boundary will also be the basis for defining what a "reasonable" timeframe for technical review should be. Lastly, the level of site information available at permitting will be used as the basis for defining the extent and type of any permit conditions.

#### **Technical Requirements for Permit Review:**

The Interim Report is clear about what level of information would be required in a permit application to support a permit category recommendation. It states that a 21E permit would "constitute permission from DEP for LSPs to *conduct comprehensive assessments of sites and associated risks*, and to plan and implement permanent solutions on the basis of these assessments." As in today's program, comprehensive assessments after the program redesign takes effect will occur during a "Phase II" site investigation. (A Phase II is defined as "a systematic investigation and assessment of the entire disposal site which shall characterize the type and quantity of oil or hazardous materials releases at or from the disposal site. Phase II shall also characterize and evaluate the risk of harm that the disposal site poses to health, safety, public welfare, and the environment.") Therefore, one can conclude that the minimum amount of information an LSP would provide in a permit application would be equivalent to that obtained by combining the elements of the current MCP's "Preliminary Assessment" (310 CMR 40.541), and the "Phase I - Limited Site Investigation (310 CMR 40.543), with whatever additional "pre - Phase II" permit application requirements are necessary as a result of the 21E amendments.

Section 3(d) of the 21E amendments provides some additional information about the criteria that would be addressed during the review of a permit application. It states that, in adopting regulations establishing categories of permits, "the department shall consider at least the following:

- (1) the existence, source, nature, and extent of a release or threat of a release of oil or hazardous materials;
- (2) the nature and extent of danger to public health, safety, welfare, and the environment;
- (3) the magnitude and complexity of the actions necessary to assess, contain, or remove the oil or hazardous material in question;
- (4) the extent to which there are legally enforceable standardized methods and criteria for the class or category of response action in question;
- (5) the extent to which the department needs to be persuaded, or is persuaded, or both, that persons who would obtain permits, ...have demonstrated that they are able and willing to carry out the response actions in question ...
- (6) the extent to which department oversight is necessary to ensure compliance with the provisions of this chapter."

#### Information Needed in a Permit Application:

The Permit Workgroup will be working with the MCP Rewrite Workgroup to update, improve, or consolidate, existing sections of the MCP as a result of the program redesign. In doing so, the Workgroups will need to make sure that the technical and informational needs of a permit application are incorporated into the revised MCP's pre - Phase II provisions.

In order for sites to move through the MCP process more quickly, PRPs will need to be able to address all of the information requirements of a permit application during the early stages of a site investigation. For example, it was proposed in the 1/27/92 Tier Classification paper that PRPs could submit a Tier I Classification and permit category recommendation (based on a numerical site score), and a permit application using the information obtained in a Phase I site investigation at the same time they notify DEP of a "release". This "one stop shopping" option would allow PRPs to begin cleanup actions quickly should they wish to. This proposal assumes that the revised MCP's Phase I will address all of the needs of the new permit application process.

In any case, what are the new areas that would need to be addressed in a permit application that aren't addressed in a traditional PA/Phase I investigation? The Interim Report provides some guidance on this. It states that:

"Permit applications should include sufficiently detailed information about the site condition to enable DEP to confirm or reject an LSP's recommendation categorizing a site as A, B, or C. The permit application should provide information about the actual and potential risk to health, safety, welfare and the environment a site poses based on preliminary site investigation (i.e., Phase I study), and a demonstration that the PRP will go forward with response actions once the permit is approved (i.e., a contract between the PRP and the LSP)." (note: category B permit applications must include a Phase II scope of work.)

The "purpose" of a Phase I in the current MCP is provided below since the Interim Report specifically mentions a Phase I study as the basis for defining relative risk. The current MCP states that the purpose of a Phase I investigation is to:

"confirm whether or not the location is a disposal site, if this was not established in the Preliminary Assessment. A Phase I - Limited Site Investigation is not intended to provide a comprehensive investigation of conditions at a location. A Limited Site Investigation shall build upon the information assembled in the Preliminary Assessment and provide the necessary information to develop a Phase II scope of work. The level of detail in a Phase I - Limited Site Investigation shall reflect the nature and complexity of the location or disposal site being investigated."

After reviewing the Interim Report's guidance and the current MCP, the following changes or additions would be made to the "pre - Phase II" provisions of the MCP to facilitate the one stop shopping approach to permitting:

1) The technical and informational requirements of today's Preliminary Assessment and Phase I - Limited Site Investigation sections of the MCP would be combined, including more specific guidelines and criteria for evaluating "imminent hazards" at this stage of the MCP,

2) Regulations and/or guidelines for developing a Phase II scope of work for a full technical site assessment and risk assessment would be developed,

3) Information requirements specific to permit applicants would be developed, i.e., is the permit applicant a PRP?, are there other PRPs?, what are the potential complications if the applicant is not the site owner, etc.?,

3) Information requirements and criteria would be developed for PRPs to demonstrate "ability and willingness" to complete permitted response actions,

4) Information requirements specific to LSPs would be developed, i.e., criteria to demonstrate that an LSP has been retained to oversee response actions and that the



contractors who will conduct response actions are qualified and experienced to do so,

5) Directions for categorizing permits as A,B, or C would be developed. The 1/27/92 Tier Classification proposal included a proposed method for using Phase I information to calculate a numerical site score as the basis for making permit category recommendations;

6) Criteria for identifying site or PRP information that would indicate the need for specific permit conditions would be developed, i.e., standard conditions requiring submittal of milestone reports within specific timeframes to ensure that response actions are proceeding in a timely manner, or specific technical requirements for Phase II response actions, and,

7) Criteria for identifying site or PRP information that would indicate the need for targeting a site for audit would be developed.

It is obvious that today's Phase I requirements do not address all the needs of a permit application. However, it appears that the basic Phase I could be readily adapted to include any additional technical or informational requirements needed for permitting. In any case, the Workgroup has two options to merge the needs of the new program with the requirements of the old. Option one is to update the generic provisions of Phase I to make them more specific and clear, develop separate additional criteria for making Tier Classifications and permit category recommendations which may not be addressed in an updated Phase I (i.e., how to use Phase I information to score a site and make a permit category recommendation), develop Phase II scope guidance, and develop specific permit application forms, directions, etc., for incorporating the information in a permit application. Option two would be to merge all of the above into a combined "Tier Classification/Permit Categorization" section of the new MCP and essentially do away with the term "Phase I".

At this time, the Workgroup has no preferred option since both options will be developed more when the MCP revisions start to be drafted. The Workgroups are interested in any comments reviewers might have on this matter.

#### Limitations of Technical Review:

Since it is clear that permit decisions are to be based on preliminary site information, BWSC's permit review will be relying on "estimates" of the complexity or actual risks sites may pose. Since permit decisions will come before a complete assessment of a site is conducted, there will be a certain point of diminishing returns where, no matter how much Phase I information is provided or requested, or how much time is spent reviewing it, one would be no more certain that the site should require DEP oversight. Using

Phase I preliminary site information for permitting "by definition" places some limitations on BWSC's ability to determine with certainty which sites are the "worst" sites for oversight purposes. The important point is, in light of these limitations, permit applications must provide a "best estimate" of the potential risks and complexity of sites since the full nature and extent of site problems has yet to be defined.

In summary, it is clear that the Program Redesign intends for PRPs to commit the bulk of their resources to the important activities that occur after a permit is issued. This is also important for BWSC since the limitations caused by the technical boundaries of BWSC permit review emphasize the importance of BWSC's audit and enforcement program. It is here where cleanups will be reviewed to ensure that site conditions have been fully defined, that significant risk has been eliminated, that permanent or temporary solutions are in place, and that PRP's have complied with the MCP. Any uncertainty caused by the limitations mentioned can be diminished considerably if BWSC effectively oversees response actions and MCP compliance through the audit and enforcement process. However, it is important to reemphasize that permit review is an integral part of the Program Redesign. For many sites, it will be the only opportunity for BWSC to review site conditions, to evaluate potential site risks, and to assess a PRPs ability and willingness to conduct a response action. Therefore, permit decisions must be founded on as solid a base of information as can be reasonably made available at this stage of the process in order to minimize later complications for permit applicants, DEP, site neighbors and other PRPs, and to reduce the likelihood of BWSC reinvolvement after an audit.

Finally, the Workgroup is proposing that PRPs could provide more than Phase I information in a permit application if they wish to do so. PRPs could conduct additional limited site investigation activities which would more commonly occur in Phase II of the MCP today (more groundwater monitoring wells, test pits, sample analyses, etc.). However, the work would have to be "investigatory" only, could not make site conditions worse, and would be "at risk" (i.e., additional work may have to be done or work repeated after a permit for Phase II is received). Comments are requested on this proposal.

#### Focus of Permit Review:

In light of the previous discussion, BWSC should design its permit review process to key on specific site parameters or "risk factors" that are indicators of situations that warrant BWSC oversight. For example, permit review should focus on the contaminant types likely to be directly related to a site's historical use, a site's proximity to sensitive environmental receptors, and the existence of imminent hazards or other "red flags" such as the presence or likelihood of NAPL breakout, VOC partitioning from groundwater into dwellings, etc. (See the January 27, 1992, Tier Classification proposal. It describes a site scoring method which targets such

factors when making a permit category recommendation.)

Even with the limitations mentioned, there will be certain types of sites where a Phase I will provide more confidence about the need for DEP oversight than others. For example, it may be easier to evaluate potential risk factors associated with petroleum releases if a site history indicates that a location was always a gas station. In this case, the need for BWSC oversight would focus on a gas station's location in a critical resource area, likely contaminant migration pathways, and the site's proximity to sensitive receptors. In other cases, where historical site use indicates a long history of potential chemical releases, it may be more difficult for DEP to define site specific contaminant conditions based on a Phase I, therefore, it will be more difficult to determine what level of BWSC oversight is needed.

In any case, the Workgroup is proposing that the technical review of a permit application should be analogous to that done in today's Waiver program. The process would involve reviewing the Phase I material (and whatever other technical information an LSP may wish to provide), the Tier Classification/permit category scoring submittal, and may involve site visits, reviews of field monitoring techniques the construction of monitoring wells, reviews of laboratory QA/QC procedures, and the review of Phase II scopes of work for Category B sites. This level of review should lead to a good understanding of the need for DEP oversight at the preliminary information stage. It should also help ensure that permits reflect the complexity or potential risks of a site, thereby providing PRPs, LSPs, and BWSC auditors with more certainty about what a site cleanup will entail.

#### Checks and Balances:

If BWSC's permit review will be based on preliminary site information, should there be ways for BWSC to learn of changes in site conditions that may warrant BWSC becoming involved in the oversight of response actions? For example, there will likely be standard conditions in permits that require the discovery of an "imminent hazard" to be reported to DEP. In addition, "reopeners" could be included as permit conditions that require PRPs to notify BWSC if new site information found during Phase II warrants a change in the permit category, or the audit process could be used to verify that the site's permit category was indeed correct after the Phase II has been completed. The January 27, 1992, Tier Classification proposal included a recommendation to rescore both Tier I and II sites after a Phase II investigation has been completed. Pursuant to today's MCP, a Phase II site investigation must be completed to fully characterize the nature and extent of site contamination, exposure pathways, exposure points, and to develop a risk assessment. Under the Program Redesign, Phase II investigations for sites which do not get IA permits will not be overseen by BWSC. Since it is possible that Phase II information could change a site's Tier Classification or permit category up or down, the Tier Classification Workgroup proposed that all sites be

rescored after Phase II should *significant new and/or better site information become available*. The Workgroup proposed that a site rescoring would be submitted to DEP by an LSP only if it, 1), resulted in an upgrading of a permitted B or C site to category A, or, 2), resulted in a classified Tier II site being upgraded to Tier I.

PRPs may also wish to have sites downgraded after rescoring. Downgrading would only effect BWSC oversight for IA sites. For IB or IC sites, rescoring would occur after a permit had been issued and BWSC was in an audit mode. Therefore, BWSC may only need to be notified of the basis for the downgrading similar to the way BWSC would be notified of any project change. (The question of how downgrading may effect annual compliance fees will be addressed later by the Fees Workgroup.)

Comments are requested on this proposal or other checks and balances.

#### PRP's Ability and Willingness to Comply:

Both the Interim Report and the proposed 21E amendments (House Bill 2026) include requirements for evaluating a PRP's "ability and willingness" to complete response actions when determining the need for DEP oversight during permit review.

The Interim Report states that, "In classifying sites and making permit determinations, DEP will seek to ensure that response actions are completed appropriately. In the past, DEP has found that, due to unexpected costs and other factors, many PRPs have failed to meet commitments made to complete response actions, even after entering into Consent Orders or Consent Decrees. Problems have included delays, need to redo work when the response action starts again, and lack of documentation for the work performed. Therefore, DEP believes that the permit review must focus not only on the technical issues presented by a particular site, but also on the PRP's demonstrated ability and willingness to carry response actions through to completion."

This is one of the most difficult issues for permit review. Some options for evaluating "ability and willingness" in the review process are to include review of the past compliance history with other permitted activities, consideration of whether the application was submitted voluntarily or as the result of a permit call, evaluation of expected costs and financial resources, and evaluation of the experience and qualifications of contractors.

Other factors which may affect the ability of the applicant to complete remedial response actions include site ownership, past ownership, multiple PRPs, off-property migration, off-property sources of contamination, the need for access agreements, public involvement, and other regulatory requirements.

"Ability and willingness" will be addressed in a subsequent submittal to the Advisory Committee.

## SUMMARY:

The Workgroup is seeking comment from reviewers about the level of information necessary for technical review, the limitations of technical review, and any other matters that were discussed that will effect the permit review process or schedule for timely action on permit applications. The next step for the Workgroup is to work with the MCP Rewrite group to develop the consolidated list of revisions needed for the "pre - Phase II" sections of the MCP, and to develop a final technical permit application review proposal with timelines.

The following is a summary of the key points of the technical permit review process.

- \* All Tier I sites which still pose significant risk to health, safety, public welfare, or the environment after any Interim Measures or Short Term Measures will need to be cleaned up in accordance with the MCP after receiving a Tier I permit.

- \* DEP will retain direct oversight of Category IA sites in a manner similar to today's "priority" sites.

- \* Unlike today's program, Category B and C permits will allow LSPs to proceed with comprehensive site assessments and to plan and implement "permanent" or "temporary solutions" with no direct DEP oversight at sites that in many cases would be "priority" sites pursuant to the present MCP. The proposed permit process will reduce the number of BWSC response action approvals that are required in the MCP from six to one for B and C permitted sites.

- \* DEP will audit compliance with permit conditions and the MCP at a percentage of category B and C sites annually.

- \* For Category B and C sites, BWSC's permit review will ensure that:

1. An adequate level of site information has been presented by and LSP in an application to support a category B or C permit,

2. The site information shows that conditions do not represent an imminent hazard that may require an STM,

3. For category B sites, the proposed scope of work for the Phase II comprehensive site investigation is adequate to ensure that site work can proceed without further direct BWSC oversight, and,

4. PRPs have demonstrated that they have retained LSPs and that they have the ability or willingness to do the site work without direct BWSC oversight.

\* BWSC must ensure that permits that are issued provide as much certainty and predictability to PRPs as possible so they can predict response action costs and better understand potential long term liability.

#### **PROPOSED PERMIT REVIEW PROCESS:**

So far, the focus of this paper has been on the technical requirements of a permit application. One of the Workgroup's other tasks is to define the procedural steps in addition to technical review that are needed to properly process permit applications. BWSC must develop new permit regulations, guidelines, and administrative procedures that will describe how permit applications must be submitted to BWSC and how they must be processed by BWSC. The regulations would include permit review timelines which will be the triggers for returning application fees to PRPs should BWSC fail to approve or deny permit applications on time.

There was no specific guidance or recommendations in the Interim Report about the regulatory permit process, however, it did recommend that BWSC should make permit decisions within 75 days of receipt of a "complete" application. In this proposal, the Workgroup has not dealt with review timelines. As mentioned in the Introduction, the type and number of procedural steps, the information requirements, and resultant review times for each will be controlling factors in the regulatory schedule for timely action on permit applications. In light of this, the Workgroup's objective at this point is to outline the proposed type and number of regulatory steps in BWSC's permit process, discuss the information requirements at each step, outline the procedures for responding to permit application deficiencies, and propose methods for incorporating public comment into the permitting process. After evaluating comments on these procedural steps, the Workgroup will develop a proposal for the entire process with timelines for review by the Advisory Committee.

The initial task of the Workgroup in developing a proposal for a permit review process was to examine all available guidance, recommendations, or directives from several sources of information. In addition to the Interim Report, the Workgroup reviewed the pertinent permit sections of the proposed 21E amendments (House bill 2026), and the permit regulations (310 CMR 4.00) and administrative and technical review procedures used by other DEP permit programs.

The following section provides an overview of the DEP's existing permit programs.

#### **DEP Permit Programs:**

On January 1, 1991, a permit program covering 128 permits was instituted in the Bureaus of Waste Prevention and Resource Protection. Timelines, permit fees, and standardized application

and review procedures were developed for all programs. Included with this proposal is a copy of a November 30, 1990, permit guidance document titled, "DEP Program Improvements and Fees Permit Fee Program Guidance". This guidance pertains to the permit fee regulations in effect today, 310 CMR 4.00, and may be useful as background information for reviewers of this proposal.

The regulations have "staged" or phased timelines for the first two years of the program. Approximately 102 of the permits have timelines implemented in two stages. The staged timelines decrease both the administrative and technical review periods in many cases in 1992. This approach was selected in recognition of the transition needs of the programs, staff adjustments and projected new hiring, and the likelihood that permitting efforts would become more efficient with time and experience. Public comment periods, where required, remained the same each year. The permit process includes six distinct steps. They are:

- \* Application receipt and fee verification,
- \* Administrative Completeness Review (AC),
- \* Technical Review 1 (T1),
- \* Supplemental Technical Review 2 (T2),
- \* Public Comment, and,
- \* Final permit preparation.

The regulations establish timelines within which each of the major review steps must occur. If at the end of the administrative or technical review period, the reviewer needs additional information to approve or deny the permit, the reviewer must issue a Statement of Deficiency to the applicant. The Department's review clock is stopped until the applicant submits the requested information. The applicant has specified time periods by which requisite information must be submitted. If the applicant misses the deadline then the application is considered withdrawn.

When DEP receives all the additional information, the review clock is restarted, and the Department has an additional specified period of time to rule on the application. It is important to note that the permit reviewer has the option to request additional information without stopping the review clock. If such information is relatively limited in scope and is delivered promptly, this would facilitate review of the application within the timeline.

If the final deadline is missed by the Department for the completion of review, the Department must refund the permit application fee and continue to process the permit application. The trigger point for the Department's refund is based on a cumulative total of all of the timelines in a permit process. For example, if AC = 30 days, T1 = 90 days, public comment = 30, and DEP time to review public comment = 30 days, the money back guarantee would be triggered if DEP did not render a permit decision within 180 days of receiving a permit application and fee.

The following table summarizes the technical review periods, fee ranges, and numbers of permits with public comment periods for permits in the Bureaus of Resource Protection and Waste Prevention.

Table 1. DEP permit program summary.

| Technical Review (days) | Number of Permits | Fees         |         | Number with Public Comment Period |
|-------------------------|-------------------|--------------|---------|-----------------------------------|
|                         |                   | Range        | Average |                                   |
| 20-50                   | 9                 | \$100-900    | \$200   | 0                                 |
| 50-100                  | 34                | \$100-4,900  | \$1000  | 1                                 |
| 100-150                 | 35                | \$50-9,800   | \$1700  | 15                                |
| >150                    | 42                | \$100-11,250 | \$2050  | 27                                |

The Proposed 21E Amendments:

Section 24 of the proposed 21E amendments describes the steps BWSC should have in regulations to establish a "schedule for timely action on permit applications." The following describes how the pertinent subsections of Section 24 have been interpreted by the Workgroup.

A) Subsection (1) of section 24 states that the "schedule shall begin when the application is received by the department and the application fee paid." The Workgroup interpreted this language to mean that BWSC must establish specific time periods for the entire permit review process and that a time clock for the entire process would start when an application fee was paid. This is similar to the way the other Bureaus' permit timeframes are calculated.

B) Subsection (2) states that the permit process must include "one or more periods of reasonable length, based on the nature and complexity of the review required of the department, at the end of which time, the department shall issue a decision to grant or deny the permit, or an identification of deficiencies in the application; provided, that the schedule may reasonably limit the amount of time to which the applicant may remedy such deficiencies". The Workgroup interpreted this to mean that the overall process could include both an administrative and technical completeness review with opportunities in each to notify PRPs of deficiencies.

C) Subsection (3) states that the permit process should include "a period of reasonable length, based on the nature and complexity of the review required by the department, beginning with receipt of materials submitted by the applicant



in response to the departments identification of deficiencies, at the end of which time the department shall issue a decision to grant or deny the permit". The Workgroup interpreted this to mean that BWSC should have a "T2" period in the process.

It should be noted that the Interim Report recommended that PRPs should be provided two opportunities to complete inadequate applications. It stated that, "when an application was found to be incomplete or otherwise inadequate, DEP would return it to the PRP with a list of deficiencies. If the application was not completed after two attempts, the application would be rejected, and DEP could take enforcement action against the PRP(s)." The Report added that a rejected application could be resubmitted, but would have to be accompanied by another permit fee.

D) Subsection (4) states that the permit process must allow for "applicable state or federal public participation requirements". The Workgroup interpreted this to mean that the public involvement provisions would apply to response actions seeking permits.

E) Subsection (5) states that "the permit process must include a provision extending the time periods set forth in clauses (2) and (3) when action by another ...government agency is required..., when judicial proceedings affect the ability of the department or the applicant to proceed with application, when the department has commenced with enforcement proceedings which could affect the application, or when the applicant provides written assent extending any applicable time period." The Workgroup interpreted this to mean that permit applications could be put on hold for various reasons including upon request of an applicant.

In summary, the provisions of the 21E amendments pertaining to the schedule for permit reviews repeats verbatim a portion of the relevant language of MGL c.21A, s. 18, the "Permit and Compliance" statute. The intent of the repetition of these provisions in the 21E amendments is to have BWSC's permitting process function in an independent but parallel manner to the existing DEP permitting and compliance programs.

#### **PROPOSED PERMIT PROCESS:**

In consideration of the above guidance and recommendations, the Workgroup is proposing that BWSC adopt a permit process that is similar to that which is in effect in the other Bureaus of DEP.

The permit process would include six steps (see figure 2). They are:

- 1) Application Receipt and Fee Verification: The application would be received and logged in at the permitting location (i.e., regional office) and the fee would be received at the

lock box at DEP Boston Office and logged in at the Bureau of Administrative Services (BAS). Verification that the fee had been received would trigger the review process and timelines.

2) Administrative Completeness Review (AC): In this step the application would be checked to determine if all of the necessary information had been submitted using formats and procedures set forth by BWSC for classifying sites and for making permit category recommendations.

The AC review would result in a determination of administrative completeness, or a statement of administrative deficiency. If material was missing, BWSC would issue a notice of deficiency and the review clock would stop until the applicant submits the requested information. A second Administrative review would be done only after a deficiency notice is issued and the applicant provides the additional information.

Applications would be approved for technical review or denied at the end of this phase.

3) Technical Review (T1): In this step, BWSC staff would determine if the information submitted in a permit application was accurate, properly documented or supported, and was a true representation of the conditions at the site at the level of knowledge reasonably expected at this stage in the process. The minimum material needed for this review would be a Phase I - Limited Site Investigation and site score.

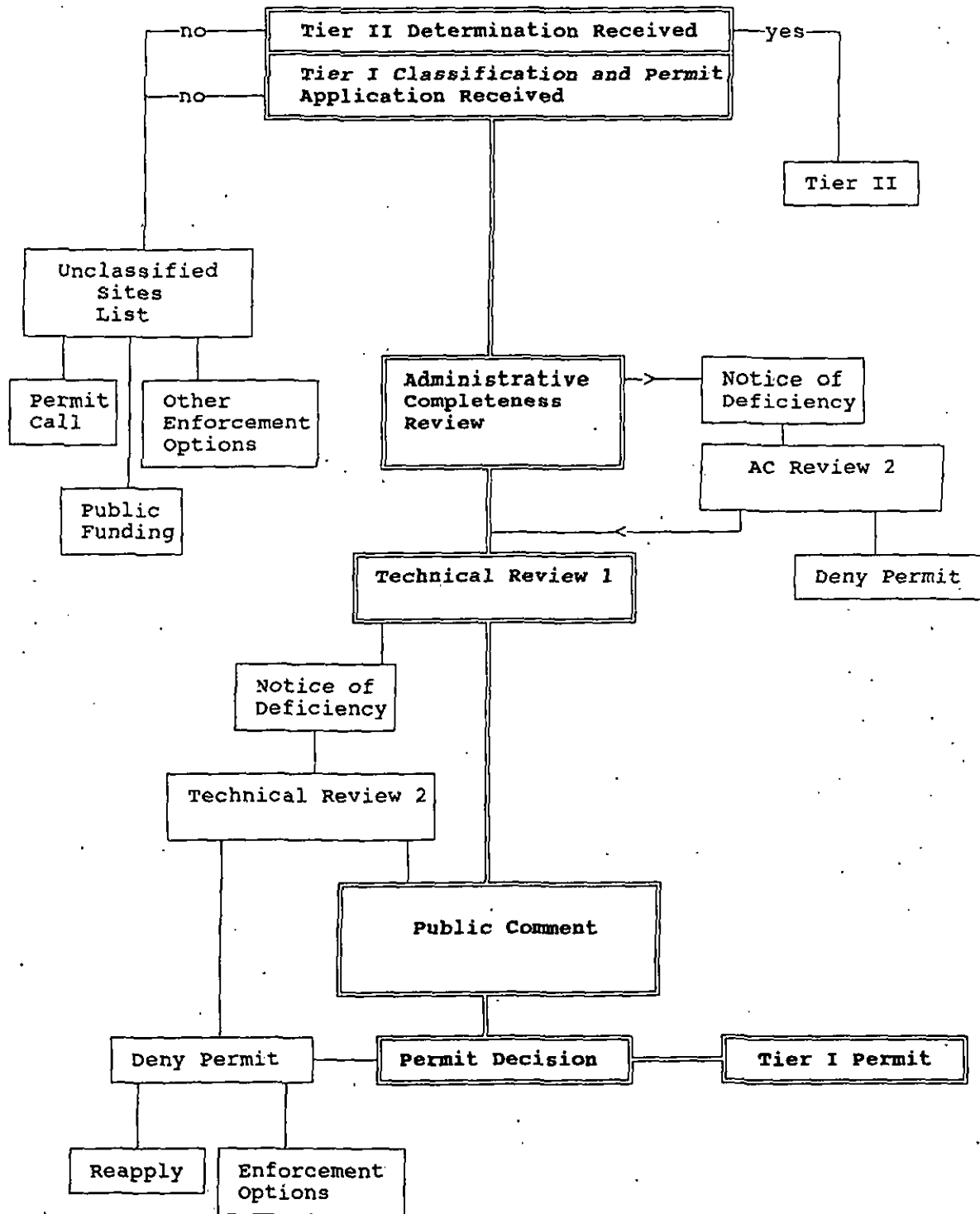
The result of an initial technical review would be a decision that a permit application was technically "complete" and accurate, or that the permit application was technically deficient. If deficient, the PRP would be sent a notice identifying technical or other substantive deficiencies in the application process and the review clock would stop until the applicant submits the requested information. It is proposed that more information could be requested without stopping the clock during a technical review. It is also proposed that an applicant could decline to provide additional information in response to a notice of deficiency and obtain a decision based on the record at the time.

Applications would be judged deficient, be denied, or a "draft" permit would be approved for public comment (if applicable) at the end of this step.

4) Supplemental Technical Review (T2): this period would be provided to review the merits of the permit application and supporting materials as supplemented, modified, or amended as a result of a deficiency in T1.

If the application was again found to be deficient, the PRP would be sent a notice identifying technical or other

Figure 2. Permit Road Map - Permit Application to Approval



substantive deficiencies in the application process and the review clock would not stop unless the applicant requests that the review be put on hold in order to provide the required information. If the applicant does not submit the requested information within the remaining review time and a hold has not been requested, the application would be deemed deficient and would be denied. Additional technical information may be requested during the review without stopping the clock.

Applications would be judged deficient, be denied, or a "draft" permit would be approved for public comment (if applicable) at the end of this step.

The Interim Report stated that applicants would be provided two opportunities to complete inadequate applications. When an application is found to be incomplete or otherwise inadequate after two attempts, the application would be rejected and BWSC may take enforcement action against the PRP(s). A rejected application could be resubmitted, but it would have to be accompanied by another permit fee.

5) Public Comment: A public comment period would be provided. The details of public involvement in the revised 21E program as a whole are being dealt with by the MCP Rewrite Workgroup. Some options for public comment in the permit process are presented for review and comment later in this paper.

6) Final Permit Preparation: This period would be used to address public comments, develop terms and conditions of a permit, determine ability and willingness to conduct work, and resolve any agreements (i.e., access) that may be needed for work to be carried out, and to prepare a final permit.

If significant public comment was received, it is proposed that BWSC could stop the review clock so that the PRP could address the comments or, if the clock was not stopped, and if the permit review timeframe was nearing expiration, BWSC could ask that the applicant request an extension of time to address the public comments rather than have the permit application denied on the basis of unresolved public comment issues.

The Workgroup is seeking comment on this proposed permit process. There is additional discussion later in this paper about several pertinent process issues.

#### **ROLE OF THE PERMIT PROCESS:**

In order to help reviewers get a better understanding of the unique nature of the 21E permit program, the Workgroup developed the following analysis of what the 21E permit process might mean to the many different parties who may be effected by or have some interest in a proposed response action. The Bureau has learned that the existence of a disposal site can effect many people in many different ways. For example, Chapter 21E makes a variety of parties potentially liable for carrying out response actions, any one or

more of whom may or may not decide to accept responsibility for cleaning up the site. Another common situation is for a release of oil or hazardous materials to spark a wide range of interest in a community. For example, a site may effect a large number of adjacent properties or a large number of "receptors" (i.e., as a result of contamination of a water supply).

Due to the unique nature of a 21E permit program, the Workgroup felt that it was important to: 1) identify the parties that are traditionally interested in or effected by a 21E response action (i.e., PRPs, neighbors, local officials, etc.), 2) define where and how BWSC's permit process should address concerns they may have, and, 3), ensure that the permit process had adequate provisions or checks and balances in place to address their concerns. Determining who is responsible and who is liable, obtaining access agreements, coordinating cleanup efforts at nearby sites, and responding to public concerns about potential hazards and remedial response actions will be factors in the new permit system just as they are in the current program. The Bureau's ability to take these factors into account will be important to the success of the new permit program.

Tables 2 and 3 list potentially effected persons, their potential concerns, and how the permit process might address those concerns. They list numerous factors that may influence an applicant's willingness and ability to complete remedial response actions, BWSC's decision to retain oversight of a site or, the type and number of permit conditions required by BWSC. They address the following: Who are the persons or groups who would likely have some need to know (direct interest, Table 2) or want to know (indirect interest, Table 3) about a proposed response action that BWSC is reviewing?, why would they be interested in a permit?, and, how can the permit process meet their needs?

The Workgroup is seeking comment on the completeness of this list and whether issues that would be of concern are properly identified.

**Table 2. Groups or individuals responsible for permit implementation (direct interest).**

|   |  |
|---|--|
| WHO: Permit Applicant   |  |
| WHY are they interested in a permit?<br>* Legal and financial responsibilities and liabilities;<br>* Property values, transfers, and financing;<br>* Environmental and health concerns. | HOW can the process meet needs?<br>* Allows for more rapid cleanup of Tier I sites; PRPs are out of the process sooner.<br>* Provides information requirements and site investigation guidance;<br>* Provides some certainty about level of future site investigation effort due to approval conditions;<br>* Defines responsibilities, and permitting and compliance costs;<br>* Ability to proceed at own pace within specified time limits. |

table 2 continued:

|   |  |
|---|--|
| WHO: Other PRPs   |  |
| <p>WHY interested in permit:</p> <ul style="list-style-type: none"> <li>* Legal and financial responsibilities and liabilities;</li> <li>* Appeals or grievances;</li> <li>* Role as lead or other PRP.</li> <li>* Contamination may originate off-site.</li> </ul> | <p>HOW can process meet needs:</p> <ul style="list-style-type: none"> <li>* Defines responsibilities of multiple PRPs;</li> <li>* Defines costs or potential costs;</li> <li>* Provides appeal process if PRP a party to the application;</li> <li>* Procedures for adding or dropping PRPs.</li> <li>* Provides opportunity for comment on draft permit if not party to response action.</li> </ul> |

|   |   |
|---|---|
| WHO: Licensed Site Professionals (LSP)  |   |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>*LSP is required to oversee 21E response actions by law.</li> <li>*Permit is the vehicle for LSPs to manage response actions for PRPs without DEP oversight.</li> <li>* LSPs have legal responsibilities for conducting proper response actions.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Permit application guidance, information requirements, approval conditions, etc., define LSPs performance standards.</li> <li>* Defined responsibilities better allow LSP to perform work and minimize possible audit exceptions.</li> </ul> |

|   |  |
|---|--|
| WHO: BWSC   |  |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>*Permit process defines level of BWSC oversight.</li> <li>* Must ensure permitted actions are in compliance with MCP.</li> <li>* Must ensure that response actions do not cause adverse impact on public health, safety, welfare and the environment;</li> <li>* Must maintain public process to maintain public trust.</li> <li>* Must ensure permit program meets and maintains statutory responsibilities;</li> <li>* Must craft permits to simplify audit and enforcement;</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Establishes oversight based on complexity of site and potential risks posed.</li> <li>* Has public notification requirements and public comment periods;</li> <li>*Permit conditions will include specific actions and/or timeframes to ensure response in timely manner and to facilitate audit.</li> <li>* Information tracking systems will track PRP compliance;</li> <li>* Permit fees support program.</li> </ul> |

table 2 continued:

|   |   |
|---|---|
| WHO: Public Officials   |   |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>* Impact on public health, safety, welfare or the environment of sites, people in their communities.</li> <li>* Response actions may affect foreseeable use of property.</li> <li>* Local permits (building, conservation commission, fire department, etc.) are needed.</li> <li>* Public officials have an obligation to be aware of sites in their communities.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Provides public comment process.</li> <li>* Permit process will have standardized information which will rank all communities' sites on a common basis.</li> <li>* Approval conditions could incorporate specific community concerns;</li> <li>* Accessible site information.</li> <li>* PIP process remains.</li> </ul> |

|  |  |
|--|--|
| WHO: Other DEP Programs  |  |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>* Other necessary permits;</li> <li>* Regulatory overlap.</li> <li>* Response actions may be due to enforcement activities of other programs.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Requires identification of other necessary permits;</li> <li>* LSP oversight may facilitate enforcement compliance.</li> <li>* Failure to pay fees may affect other permits for PRP.</li> </ul> |

Table 3. Groups or individuals that want to know if a permit is to issued (indirect interest).

|   |  |
|---|--|
| WHO: Public Officials   |  |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>* Citizen concerns;</li> <li>* Development of the site or surrounding area;</li> <li>* Opportunity for public comment.</li> <li>* Town may be PRP in some way.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Information requirements;</li> <li>* Public comment process;</li> <li>* Accessible site information;</li> <li>* Notification requirements.</li> </ul> |

|   |   |
|---|---|
| WHO: Public Interest Groups and Individuals   |   |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>* Environmental and health concerns;</li> <li>* Public involvement plans;</li> <li>* Freedom of information requests;</li> <li>* Requests for DEP involvement.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Public comment and review process;</li> <li>* Accessible site information;</li> <li>* Appeal process;</li> <li>* Approval conditions.</li> </ul> |

table 3 continued:

|   |   |
|---|---|
| WHO: Abutters   |   |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>* Potential liability;</li> <li>* Property values, transfers, financing;</li> <li>* Health and environmental hazards;</li> <li>* Site boundaries;</li> <li>* Off property migration;</li> <li>* Access;</li> <li>* Opportunity to comment.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Accessible site information;</li> <li>* Access agreements;</li> <li>* Site definition;</li> <li>* Public comment process.</li> </ul> |

|  |   |
|--|---|
| WHO: PRPs for Other Sites  |   |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>* Commingled plumes;</li> <li>* Multiple sources;</li> <li>* Shared responsibilities;</li> <li>* Coordinated investigation and remediation;</li> <li>* Site boundaries.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Multi-PRP permits possible.</li> <li>* Comment periods provided.</li> <li>* Information requirements;</li> <li>* Notification requirements;</li> <li>* Approval conditions;</li> <li>* Access agreements;</li> <li>* Site definition.</li> </ul> |

|  |  |
|--|--|
| WHO: Future owners or operators  |  |
| <p>WHY interested:</p> <ul style="list-style-type: none"> <li>* Potential liability;</li> <li>* Permit transfers;</li> <li>* LSP transfers;</li> <li>* Property development;</li> <li>* Future use.</li> </ul> | <p>HOW process meets needs:</p> <ul style="list-style-type: none"> <li>* Process is public; information about sites and opportunities to comment on response plans are available.</li> <li>* Process would allow for permit transfer to new PRP;</li> <li>* Approval conditions;</li> <li>* Institutional controls;</li> <li>* Accessible site information.</li> </ul> |

**ISSUES AND ADDITIONAL TASKS:**

There are many issues that need to be resolved and many tasks that remain ahead as the Bureau begins developing a final permitting proposal in the next several months. The following section highlights many of these for review and comment.

Permit Conditions:

The Workgroup will be developing a proposal for standard permit conditions to be submitted to the Advisory Committee at a later date. As background information, Section 20 of the proposed 21E amendments allows DEP to establish and implement intermediate deadlines for each disposal site in permits for individual sites.



Response action timelines for all Phases of the MCP are being reviewed by the MCP rewrite group. However, for discussion purposes, BWSC permits are likely to include certain "standard" conditions of the type that are in today's waiver approval or those that are in Wetland's program Superseding Order of Conditions. MCP timelines or timeframes for completion of MCP phases could become standard permit conditions as well. For example, House Bill 2026 requires BWSC to ensure that in each year, 100 permits are issued that require sites to be cleaned up within 5 years. This requirement could become a permit condition.

Site specific permit conditions could require that response actions involving specific treatment technologies such as groundwater treatment, some types of bioremediation, or other actions which may require several years to reach desired cleanup levels, be started within specific time periods or that BWSC be provided with a reason why they cannot be.

Other standard permit conditions may require submittal of specific response action reports. For example, the Interim Report recommended that BWSC should require that, at a minimum, reports documenting response actions be filed with the agency at the following points in the assessment/cleanup process:

- \* A notice and schedule for implementation of field investigation activities, including any well drilling and major excavation (e.g., test pits),
- \* A report which combines the results of the current Phase II comprehensive site assessment and the Phase III final remedial response plan,
- \* A notice of the start of implementation of the final remedial response plan, including an expected schedule of work,
- \* A report summarizing the results of the remedial response and the LSP's opinion that a permanent solution has been achieved, and,
- \* Reports documenting LSP's opinions that "no further action is needed" at a site at points in the process other than at the completion of remedial measures.

**PUBLIC COMMENT:**

The opportunity for the public to be informed of, and afforded opportunity to be involved in decision making is included as one of the five basic principles of the Program Redesign in the Interim Report. Given that the permit review process will be the only opportunity for the Department to be involved in the reviewing/overseeing response action proposals at Tier I sites (other than IA sites), it follows that this would be the only logical point for the public or other parties identified in the

preceding "Role of A Permit" section to be made aware of "disposal sites" and to have an opportunity to raise or comment on specific site concerns they may have.

Another important use of a public comment period will be in developing an "Administrative Record" for cost recovery for critical BWSC response action decisions. Section 5A of the draft 21E revisions includes specific Administrative Record requirements for notice to potentially effected persons, opportunity to comment, right to response to significant comments, and description of selected response action(s). The Workgroup is proposing that the "routine" public comment period afforded during the permit review process would satisfy the needs of an Administrative Record public comment provisions.

An examination of other DEP programs to determine the frequency and timing of public comment periods reveals that a formal public comment opportunity is provided when DEP's technical permit review has been completed in almost every instance where a permit involves "waste" handling, disposal, processing, etc. The programs primarily involved with these activities are Solid Waste, Water Pollution Control, and Industrial Wastewater.

The Workgroup's proposal is to include in the permit review process an opportunity for public comment which does not unduly delay the conduct of response actions while ensuring that all interested parties have the chance to raise issues and to make informed comments on a permit proposal.

#### Public Comment Period Options:

Of the alternatives explored in the workgroup the following are considered the most viable:

Option 1-One comment period at some point during the initial technical review period (T1);

Option 2-One comment period only after draft permit prepared;

Option 3A- Informal comment period during technical review with formal comment period after draft permit prepared;

Option 3B- Informal comment period during technical review with an option for comment after a draft permit has been prepared if there was any public interest shown during the early technical review comment period.

A brief discussion of each option follows:

Option 1- After the administrative review has been completed, the applicant would be required to notify the public by the Department (means to be determined) that a permit application has been submitted to a Region and that BWSC will be receiving comments on the application for a specified time period. A copy of the permit

application would be made available at a public location in the community. Any comments BWSC receives would be incorporated into our review of the application.

Advantage: Concurrent comment/review period reduces permit issuance time, since no backend public comment period would be needed. Public afforded chance to get into process upfront.

Disadvantage: No opportunity to see additional or revised information that would come in through BWSC review and request for additional information. BWSC's final decision on permit category, conditions, or scope (Tier IB) would not be available before technical review is complete; Administrative Record unlikely to be satisfied.

Option 2- For all Tier I permits, after the technical review has been finished and a permit application has been ruled complete and the draft permit has been prepared, a notice would go out to the public (to be defined later) allowing opportunity for formal public comment to be given on the Department recommendation.

Advantage: Everyone would be commenting on the draft permit application. Use for Administrative Record would be improved. Consistency with all other DEP programs using public comment periods.

Disadvantage: No opportunity for public to be involved early in the process. Would extend timeline or use up a portion of the time allotted for BWSC's time to develop a final permit approval.

Option 3- This option addresses the concern that the public may wish to be involved early in the process, as well as at the end. It is intended that at end of the Administrative Completeness review, the applicant would send out a general notice informing the public that a permit has been submitted and a copy is available at a location in the community as well as the DEP regional office.

Option 3 has two versions. In option 3A, it would be stated in the notice that an opportunity for formal comment would be provided at the end of the technical review when a draft permit was prepared. BWSC would offer the public comment opportunity regardless of whether any interest was shown when comment was provided after AC review.

In option 3B, if DEP receives no notice of interest for public comment as a result of the general notice after AC review, BWSC could waive the second public comment notice after technical review is completed.

Advantage: For 3A and B, the public would be afforded the opportunity for early involvement. 3A assures that they can see and comment on a final draft before a decision is made and would appear to enhance public involvement opportunities, create strong Administrative Record and enhance likelihood

that subjects of potential appeals get resolved during the process. 3B would shorten the timeframe for final permitting decisions by eliminating the need for the second comment period if no public interest was shown in the site after the initial comment period.

Disadvantage: 3A would extend timelines for final approval of permits, perhaps unnecessarily. 3B would not allow for public comment on applications that may have changed significantly as a result of BWSC review.

Recommendation: It was generally agreed that two issues were most important in this area- opportunity for the public to be involved early if they so desired, and opportunity to be involved, if they so desired, after technical review was complete and a draft permit was developed. This leaves Options 3A and 3B as the most reasonable ways to address these concerns. Please provide comments.

#### PERMIT CALLS:

Permit calls will be used by the Department to: 1) accelerate completion of a "Phase I" investigation and submittal of a permit application, 2) as an enforcement tool after a regulatory time limit for submitting a permit application has been exceeded, or, 3), to comply with the provisions of House 2026 that require DEP to ensure that 100 cleanup actions are initiated per year. In order to call permits, the Department may issue special orders which require PRPs to either apply for a permit or to carry out response actions for listed sites. These special orders are not subject to immediate appeal by PRPs. Section 40 of House No. 2026 lists conditions under which special orders may be issued. Section 40 states:

(B) An order to any person described in paragraph (a) of section five to apply for a permit to carry out, or to carry out, or both, response actions at or for the site provided that the following conditions are met:

(i) The site in question has been listed pursuant to subsection (b) of section three A; and

(ii) The department has given the person in question reasonable opportunity to voluntarily apply for a permit or carry out the response actions in question; and

(iii) The department makes a finding which appears in the order, together with a brief concise statement of the department's reason for making said finding, that it would be contrary to the public interest for needed or appropriate response actions to be deferred any longer or to force the government to use government funds to pay so that such response actions are not deferred any longer; and

(iv) The order contains a brief, concise statement of notice of the rights of reimbursement and review set forth in this subsection.

According to the "Interim Report":

All notifications of Tier I sites received by DEP will be listed in a quarterly publication, and made available to local officials (Boards of Health and Chief Municipal Officer) and the public.

DEP will review all Tier I sites identified and evaluate them on the basis of their risks to health, safety, public welfare, and the environment. For sites posing the highest risks, DEP will identify potentially responsible parties, and inform the PRP(s) that they must submit a permit application within 120 days.

The current site notification proposal states that PRPs would be required to evaluate whether the site is within a critical resource area (CRA) or whether an imminent hazard exists. This information would be submitted at notification. Either of the two conditions would cause an initial Tier I classification and, based on other site information, might justify a permit call.

It has been proposed that the site scoring package could be used to identify sites for permit calls. However, if the scoring package and the permit application are submitted at the same time, the scoring package will not serve this purpose.

The following issues concerning permit calls are discussed below:

1. Listing of sites;
2. Opportunities to voluntarily submit a permit;
3. Information requirements necessary to justify a permit call;

#### Listing:

The Interim Report states that notification that a site is Tier I will be listed. Option 4 below lists how this may effect BWSC's ability to call a permit.

#### Voluntary permit applications and calls:

For the purpose of this discussion, it would be useful to divide permit calls into two categories based on whether the permit call is issued before or after the regulatory deadline for submitting a permit application. Prior to the regulatory deadline, a PRP must be given the opportunity to voluntarily comply with the permit call. Enforcement actions would follow refusal to comply. For cases where the regulatory deadline has been exceeded, other enforcement actions may precede or be implemented with the permit call.

#### Information Requirements:

Section 40 of House Bill 2026 states that the department must provide justification for permit calls. The Interim Report states that sites posing the highest risks to public health, safety, welfare and the environment will be subject to permit calls. Information requirements for calling a permit might include the location of the site and sensitive receptors, and information about

the magnitude of contamination in various media. If limited information is available at site notification, the Department may have to depend on location information (i.e. CRAs, schools, etc.) and the LSP's opinion as to whether an imminent hazard exists in order to make permit calls. Possible options include issuing permit calls for:

1. all sites within CRAs;
2. sites within CRAs which meet other criteria based on the media, type, and levels of contamination;
3. all sites which cannot complete an STM within a specified time period;
4. sites with a site scoring value above a specified number;
5. sites which exceed the regulatory time limit for submitting a permit application.

Option 1 appears unnecessarily broad. However, the alternative, Option 2, requires a level of information that may not be available between notification and completion of a permit application. Successful application of Option 2 would require additional pre-permit information requirements for sites located within CRAs.

Option 3 is based on the assumption that all STMs must be completed within some timeframe. If they are not, a PRP would obtain a permit to complete the remedial action. While this appears reasonable, the practical value of this criteria for permit calls may be limited depending upon the length of time which the STM may operate prior to triggering a permit call, the permit call period, and the regulatory time limit for completing a permit application. In cases where an STM could result in either an NFA decision or a Tier II designation, calling a permit would be unwarranted.

Option 4 assumes that a Tier Classification submittal based on a site score has been submitted without a permit application. Since the site score would also be used to tell if a Tier I site was likely to be permit category A, B, or C, BWSC could use the Tier Classification score as the basis for making a permit call.

Option 5 may be the most important in terms of the number of sites subject to permit calls. It is assumed that no information beyond what was included with a "release" notification will have been submitted for the majority of these sites.

Prioritizing permit calls may require significant Department resources. Minimal information may be available for many sites, particularly those included under Option 5, and permit calls may have to be based primarily on a site's location.

Comments are requested on this issue.

#### **TRANSITION ISSUES:**

The transition between the current and proposed programs will require reclassifying and permitting confirmed Tier I sites and categorization, classification and permitting if necessary of

locations to be investigated (LTBIs).

As stated in the Interim Report:

A key ingredient in starting up the new program will be identifying the appropriate place in the process for each site and location to be investigated that DEP is now working on.

Prerequisites for this effort are standards for site notification, criteria for categorizing Tier I and Tier II sites, and determining whether further action is necessary at a site.

Based on when standards are codified in regulation, the Interim Report continues:

DEP will start to review each site and location to be investigated which are assigned to staff for oversight of response actions. The review will determine whether the site or location meets the criteria for notification, what tier the site or location should be assigned to, and whether further action is needed.

.... DEP will inform PRPs for sites/locations that are currently assigned to agency staff that they may proceed to file a permit application developed by a licensed site manager.

.... In establishing schedules for permit fees and compliance audits, DEP will consider prorating fees for sites which have been assigned to DEP staff and where substantial progress has been made toward a permanent solution.

In regard to unassigned sites and locations, the Interim Report states:

Those who have already been granted a waiver of approvals under the current MCP may complete the response action under their approved waiver. DEP will audit a portion of sites granted waivers to ensure that response actions are adequate.

At any time licensed site managers are available, PRPs of sites which are not assigned to DEP staff for oversight of response actions may hire a licensed site manager to determine whether further action is needed. If so, the licensed site manager may determine whether the site belongs in Tier I or II. For Tier I sites, permit applications can be submitted once DEP starts accepting them.

Existing notifications already submitted to DEP may be reviewed by the Site Discovery Program as resources permit. PRPs would be notified of the results of these reviews.

This discussion examines assigned priority sites, unassigned priority sites, non-priority and unclassified sites, waiver sites, locations to be investigated (LTBI), short term measures, and publicly funded sites. As of February, 1992, a total of 5,270 locations and sites had been listed. Of these 2,517 are LTBIs, 703 are waiver sites, 1,117 are confirmed non-priority disposal sites, and 475 are confirmed priority disposal sites. Remediation is complete at 266 sites and 145 locations have been deleted from the list.

#### Assigned priority sites:

Assigned priority sites would most likely be equivalent to Tier IA sites in the proposed program. Transition could be as simple as issuing a Tier IA permit for assigned priority sites or notifying a PRP that he could voluntarily reclassify his site pursuant to the new regulations. In certain cases, reclassification as a Tier IB or C may be warranted. This decision would be based on the work already completed, potential risks, and the willingness and ability of the PRP(s) to continue work without oversight.

The advantage to assigning a Tier IA status to priority sites is that it is simple and would require minimal additional resources for transition purposes. Remedial response actions could continue at assigned sites with minimum disruption. The disadvantage is that certain sites may be at stage where work could proceed without DEP oversight. Classifying these sites as Tier IA sites would tie up DEP resources where they are not needed. If work can continue under a Tier IB or C permit, DEP resources can be reallocated, and the PRP could continue without oversight and with a smaller or prorated compliance fee.

#### Unassigned priority sites:

One option is that the DEP review unassigned priority sites to make permit calls or request updated information sufficient to reclassify the site. As a result of a permit call or a request for information, PRPs and LSPs could make a NFA decision, submit a Tier designation, or, if necessary, submit a permit application within a specified time limit. Since these sites have triggered interim site classification criteria, DEP review may be warranted.

However, review of unassigned priority sites may require resources that are not available and, in many cases, current information may not be sufficient to classify the site or warrant calling a permit. Allowing LSPs to reclassify these sites, within specified time limits, would satisfy the needs for timely action without involving additional Department resources.

#### Non-priority and unclassified sites:

Non-priority and unclassified sites would not be reviewed by the DEP for the purpose of Tier classification or permit calls. PRPs would be responsible for submitting a NFA decision, a Tier classification, and/or a permit application within timeframes that will depend on the number of sites and locations, DEP resources allocated to the review of permit applications, and the number of LSPs preparing permit applications.

#### Waiver sites:

According to the Interim Report, waiver sites could complete remedial response actions under the approved waiver. If such is the case, it may create a strong incentive to apply for a waiver during the transition period. Waiver sites would pay a lower



application fee (\$1200).

LTBIs:

LTBIs would be similar to unassigned priority sites with the added possibility of making a Subpart D or NFA determination prior to being confirmed as a disposal site.

Short Term Measures:

Sites at which STMs are operating or approved during the transition period would in most cases be assigned sites. Department review of these sites will be important to determine whether a permit call is necessary. Since classification and categorization may change when the STM is completed, no blanket presumption as to tier or category can be made.

Publicly Funded Sites:

Publicly funded sites would continue as at present. However, the Department intends to review all publicly funded sites to determine whether a Tier IA, B, or C classification might be appropriate.

Timeframes:

Timeframes for the transition between the current system and the permit system will need to be based on the number of sites and locations currently in the system, DEP resources allocated to review of permit applications, and the number of LSPs preparing permit applications.

**FOLLOW-UP ISSUES:**

The following issues have been identified in work group meetings as requiring further consideration in the development of BWSC's permit program. Many of these involve provisions in the proposed 21E amendments. Formal presentation of these issues to the SAC will occur once the Workgroup receives the final adopted amendments. The Workgroup group welcomes additions to the list.

Ability and willingness of applicant to carry out response actions.

Access agreements.

Permit Appeals.

Enforcement options.

LSP transfers.

MEPA.

Multiple PRPs.

21E amendment provisions in section 4A that allow PRPs to get participation from other PRPs in response actions independent of DEP.

Permit application form.

Permit regulations.

Permit transfers.