

# **Community Lawyering for Environmental Justice Part 9: Clean Air Act Permitting and Environmental Justice**

## **1. Introduction to the Pro Bono Clearinghouse**

The Environmental Law Institute's Pro Bono Clearinghouse works to connect communities who would otherwise be unable to access legal resources with pro bono attorneys and experts who can support resolution of their environmental legal issues.

Communities requiring pro bono support may contact the [Pro Bono Clearinghouse](#) directly. In addition, law clinics and other non-profits may submit viable environmental matters that they cannot take on due to resource limitations or because they are outside their scope of work. Clinics and non-profits can also post requests for Clearinghouse member attorneys to expand their capacity or provide expertise they lack in-house. The Clearinghouse does not post criminal matters.

Community lawyering, also known as empowerment lawyering, is key to meaningful environmental justice-oriented pro bono work. Community lawyering involves collaboration with community members as facilitative partners. As a result, it differs from the more traditional representational lawyering.

Learn more about the Pro Bono Clearinghouse here: <https://www.eli.org/probono>.

## **2. Clean Air Act Overview**

The Clean Air Act (CAA), 42 U.S.C. 7401 et seq., is one of roughly a dozen major environmental laws that provide the U.S. Environmental Protection Agency (EPA) with its statutory authorities and responsibilities. The CAA is the primary federal statute charged with mitigating the harmful effects of ambient air pollution. It applies to a wide swath of the U.S. economy, from power generation and transportation to manufacturing and industrial facilities. The law's major provisions include:

- (1) Directing EPA to establish minimum national standards for ambient air quality that state governments must help implement and meet (the National Ambient Air Quality Standards, or NAAQS, program);
- (2) Establishing federal standards for mobile sources of air pollution and their fuels (Title II of the CAA);
- (3) Establishing federal standards for the emission of 187 hazardous air pollutants (the National Emission Standards for Hazardous Air Pollutants, or NESHAP, program);
- (4) Establishing a cap-and-trade program for air pollution that causes acid rain (Title VI of the CAA); and
- (5) Creating a comprehensive permit system for all newly constructed or significantly modified major sources of air pollution and their continued operations (the New Source Review, or NSR, program and the Title V operating permits program).

This worksheet will focus on the last of these major provisions, covering the basics of the air permitting processes under the New Source Review (NSR) program and Title V before concluding with a discussion of the EPA’s 2022 guidance for addressing Environmental Justice (EJ) concerns in CAA permitting.

### 3. Clean Air Act Permitting – New Source Review Permits

The first category of CAA permits is *construction* permits for new sources of ambient air pollution issued under the NSR Program. Established under CAA Title I, the NSR program sets out to protect communities when a new polluting facility is being built or when an existing facility is being significantly modified. The NSR program primarily regulates the same criteria pollutants identified in the NAAQS (ozone, atmospheric particulate matter, lead, carbon monoxide, sulfur dioxide, and nitrogen oxides).<sup>1</sup> Congress’s intent in the NSR program was to ensure that new or significantly modified facilities do not significantly degrade air quality in NAAQS attainment areas and do not worsen air quality at all in NAAQS nonattainment areas.<sup>2</sup>

The program primarily achieves these protections by making construction permits conditional on installation of varying levels of pollution control technologies.<sup>3</sup> The CAA mandates that every state must design NSR permit programs as part of its “State Implementation Plan” (SIP) for achieving compliance with the NAAQS.<sup>4</sup> Federal regulations outline the mandated procedures for these state NSR permit programs.<sup>5</sup> Importantly, these regulations ensure that all NSR permits require public comment periods, public hearings, and rights of appeal.<sup>6</sup>

There are three main types of NSR construction permit, each of which has different requirements and conditions. These are: 1) Prevention of Significant Deterioration (PSD) permits, 2) Nonattainment NSR permits (NNSR permits), and 3) Minor NSR permits. The applicability of the PSD, NNSR, or Minor NSR permit to a source is a pollutant- and area-specific determination. Accordingly, the same facility may be subject to the PSD program for some pollutants, NNSR for some pollutants, and minor NSR for others.<sup>7</sup> The next subsections describe the requirements for each of the three NSR permits.

#### a) Prevention of Significant Deterioration (PSD) Permits

PSD permits are used to permit construction of new major sources or significant modifications to a major source within a NAAQS *attainment* area. PSD permits require these facilities to install

---

<sup>1</sup> ENV’T PROT. AGENCY, FACT SHEET: NEW SOURCE REVIEW (NSR) (2015), <https://www.epa.gov/sites/default/files/2015-12/documents/nsrbasicsfactsheet103106.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *New Source Review*, HARVARD ENV’T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/2018/12/new-source-review/> (last visited Mar. 29, 2024).

<sup>4</sup> 42 U.S.C § 7410(a)(2)(C).

<sup>5</sup> *See* 40 C.F.R. §§ 51.165-166.

<sup>6</sup> *See e.g.*, 40 C.F.R. §§ 51.166, 52.21.

<sup>7</sup> Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Reconsideration of Fugitive Emissions Rule, 87 Fed. Reg. 62322, 62325 (Oct. 14, 2022), <https://www.federalregister.gov/documents/2022/10/14/2022-22259/prevention-of-significant-deterioration-psd-and-nonattainment-new-source-review-nnsr-reconsideration>.

the “Best Available Control Technology” (BACT).<sup>8</sup> BACT is an emissions limitation determined on a sector-by-sector, case-by-case basis, aiming to achieve the maximum feasible degree of pollution control for a new facility. However, in contrast to the “Lowest Available Emissions Rate” (LAER, covered below), BACT determinations allow for consideration of energy, environmental, and economic factors. These considerations typically make BACT a less stringent requirement than LAER.

In addition to BACT requirements, PSD permit applications also require an “air quality analysis” that models the predicted ambient concentrations resulting from the proposed project and an “additional impacts analysis” that assesses the impact the project’s emissions may cause on soils, vegetation, and visibility.<sup>9</sup>

#### b) Nonattainment NSR Permits

NNSR permits are used to permit construction of new major sources or significant modifications to a major source within a NAAQS *nonattainment* area.<sup>10</sup> Stricter than PSD permits, NNSR permits require the facility to meet the “Lowest Achievable Emission Rate” (LAER).<sup>11</sup> LAER is defined as either the most stringent emission limitation for a similar facility included in any state’s NAAQS implementation plan, or the most stringent limitation for a similar facility otherwise achieved in practice.<sup>12</sup> LAER does not consider energy, environmental, or economic factors, meaning it is typically more stringent and costly than the BACT.

In addition to the LAER requirements, NNSR must also present a plan for the new facility’s emissions to be offset by emission reductions from existing sources of air pollution in the area. This requirement ensures that newly permitted facilities do not add to the air pollution in NAAQS nonattainment areas.<sup>13</sup>

#### c) Minor NSR Permits

Finally, Minor NSR permits are used to permit new “minor sources” of air pollution or minor modifications of existing sources in *both* attainment and nonattainment areas.<sup>14</sup> Minor NSR permits aim to ensure that smaller sources of air pollution do not combine to interfere with NAAQS compliance in attainment areas or with the prospective compliance strategies of nonattainment areas. Understanding Minor NSR permits requires understanding the definitions of major and minor modifications, as well as major and minor sources.

---

<sup>8</sup> ENV’T PROT. AGENCY, FACT SHEET: NEW SOURCE REVIEW (NSR) (2015), <https://www.epa.gov/sites/default/files/2015-12/documents/nsrbasicsfactsheet103106.pdf>; 42 U.S.C. § 7475(a)(4).

<sup>9</sup> *Prevention of Significant Deterioration Basic Information*, ENV’T PROT. AGENCY, <https://www.epa.gov/nsr/prevention-significant-deterioration-basic-information> (last visited Mar. 29, 2024).

<sup>10</sup> ENV’T PROT. AGENCY, FACT SHEET: NEW SOURCE REVIEW (NSR) (2015), <https://www.epa.gov/sites/default/files/2015-12/documents/nsrbasicsfactsheet103106.pdf>

<sup>11</sup> 42 U.S.C. § 7503(a)(2).

<sup>12</sup> ENV’T PROT. AGENCY, FACT SHEET: NEW SOURCE REVIEW (NSR) (2015), <https://www.epa.gov/sites/default/files/2015-12/documents/nsrbasicsfactsheet103106.pdf>.

<sup>13</sup> *Nonattainment NSR Basic Information*, ENV’T PROT. AGENCY, <https://www.epa.gov/nsr/nonattainment-nsr-basic-information> (last visited Mar. 29, 2024).

<sup>14</sup> ENV’T PROT. AGENCY, FACT SHEET: NEW SOURCE REVIEW (NSR) (2015), <https://www.epa.gov/sites/default/files/2015-12/documents/nsrbasicsfactsheet103106.pdf>.

First, NSR regulations define a major modification as any physical change or change in operation of an existing major stationary source that would result in a significant emissions increase of a regulated NSR pollutant.<sup>15</sup> Thus, Minor NSR Permits only apply to modifications that do not significantly increase emissions of an NSR pollutant.

Second, a new or existing source qualifies as a “major source” if it “emits or has the potential to emit” a regulated NSR pollutant in an amount greater than the annual thresholds specified in CAA regulations. However, these thresholds differ in attainment areas (under the PSD program) and nonattainment areas (under the NNSR program).

In attainment areas under the PSD program, the major source threshold is generally 100 tons per year for criteria pollutants under the NAAQs, and 250 tons per year for any other type of pollutant.<sup>16</sup> The major source threshold for nonattainment areas (under the NNSR program) is generally 100 tons per year for all pollutants and source categories, but can be even lower for some pollutants in nonattainment areas classified as “Serious, Severe, or Extreme.”<sup>17</sup>

#### d) Commenting on and Challenging NSR Permits

The CAA and its implementing regulations ensure that all PSD, NNSR, and Minor NSR permits must offer the public opportunities to engage in the permitting process.<sup>18</sup> These opportunities begin with a permit’s public comment period. Appeals processes of final NSR permits vary state by state, but communities can normally rely on the CAA’s citizen suit provision (below) as a fallback option to challenge a state’s NSR permit decision.<sup>19</sup>

Before issuing a permit, permitting authorities issue a public notice to inform the relevant community of an upcoming public comment period. These comment periods last 30 days.<sup>20</sup> Each state uses different methods for issuing public notice of draft permits and for collecting public comments, but they normally appear on the website of the state’s environmental regulator. For example, the Minnesota Pollution Control Agency maintains a webpage with all its active air quality permit public comment periods at the following link:  
<https://mpca.commentinput.com/comment/search>.

After the public comment period, the appeals process for NSR permits varies from state to state. However, communities that believe a facility did not obtain an appropriate NSR permit or are violating the terms of the NSR permit can use the CAA’s general citizen suit provision to challenge the permit.<sup>21</sup> Section 304 of the CAA allows citizens to sue to enforce the CAA’s requirements, and lawsuits may be filed against the state permitting authority or the EPA.<sup>22</sup>

---

<sup>15</sup> See 40 C.F.R. § 51.166(b)(2)(i).

<sup>16</sup> See 40 C.F.R. §§ 51.166(b)(1)(i)(a), 52.21(b)(1)(i)(a).

<sup>17</sup> See 40 C.F.R. § 51.165(a)(1)(iv).

<sup>18</sup> *Participate in the Permitting Process*, ENV’T PROT. AGENCY, <https://www.epa.gov/nsr/participate-permitting-process> (last visited Mar. 29, 2024).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 42 U.S.C. § 7604.

<sup>22</sup> *Id.*

#### 4. Clean Air Act Permitting – Title V and Operating Permits

The second category of CAA permits is *operating* permits issued under Title V. Compared to the CAA’s other major provisions, the Title V permitting program is relatively new. The Clean Air Act Amendments of 1990 first established Title V of the CAA. Before 1990, the CAA only required new or modified major stationary sources to obtain construction permits under the NSR program.<sup>23</sup> Without operating permits, the continuous enforcement of the CAA’s pollution control requirements depended on emission control technologies and reporting requirements that “were scattered throughout numerous, often hard-to-find provisions of state plans or various federal regulations.”<sup>24</sup>

While 35 states or localities had self-imposed air permit operating programs before 1990, these varied considerably and were not all comprehensive.<sup>25</sup> Through Title V, Congress intended to standardize air pollution operating permit programs to 1) better enforce the requirements of the CAA by applying operating permits to individual sources and improving compliance tracking, and 2) provide a streamlined process for implementing new pollution control requirements by amending and renewing operating permits.<sup>26</sup>

##### a) Clean Air Act Title V – Sections 502 & 504 (State Permit Programs and Permit Requirements)

Title V’s permitting program – modeled after the Clean Water Act’s Federal National Pollution Elimination Discharge System permitting program – similarly employs state governments as the primary entities issuing, monitoring, and enforcing permits that carry out the title’s mandates.<sup>27</sup> Section 502 of Title V requires every state to develop an operating permitting program with processes for ensuring transparency and uniformity that meet minimum federal requirements. These process requirements are primarily established in Section 502 and the EPA’s implementing regulations at 40 C.F.R. Part 70.<sup>28</sup> They include:

- A standard application form;
- A requirement under state law that the owners or operators of all sources pay an annual fee sufficient to cover the expenses of the state’s permit program;
- Established procedures for making any permit application, compliance plan, final permit, and monitoring and compliance reports publicly available;
- Established procedures for processing permit applications that include providing public notice, opportunities for public comment, and public hearings on the permit application;

---

<sup>23</sup> RICHARD LATTANZIO, CONG. RSCH. SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS (updated 2022), <https://crsreports.congress.gov/product/pdf/RL/RL30853/31>.

<sup>24</sup> CLAUDIA COPELAND, CONG. RSCH. SERV., RL33632, CLEAN AIR PERMITTING: IMPLEMENTATION AND ISSUES (updated 2016), <https://crsreports.congress.gov/product/pdf/RL/RL33632>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (citing U.S. Congress, Senate, Committee on Environment and Public Works, “Clean Air Act Amendments of 1989, report to accompany S. 1630,” S. Rept. 101-228, 101st Congress, 1st session, pp. 346-348).

<sup>27</sup> *Id.*

<sup>28</sup> 40 C.F.R. Part 70; 42 U.S.C. § 7661a.

- An opportunity for judicial review in state court of the final permit action by the applicant or any person who participated in the public comment process; and
- A requirement that state permitting authorities retain authority to revise existing operating permits to incorporate new standards or regulations promulgated under the Clean Air Act.

Title V also spells out requirements for the contents of CAA operating permits. These requirements are primarily established in Section 504 and the regulations at 40 C.F.R. Part 70 (in fact, these permits are often called “Part 70 permits”). Under these provisions, state Part 70 permits must include:

- Clear emissions limits and operational requirements that ensure compliance with applicable CAA mandates (such as New Source Performance Standards and the state’s NAAQS implementation plan);
- A specified permit duration not to exceed five years;
- The sources’ monitoring, recordkeeping, and reporting obligations; and
- A condition prohibiting any emissions that would exceed allowances the source holds under the Clean Air Act’s acid rain cap-and-trade program (Title IV).<sup>29</sup>

Finally, the regulations at 40 C.F.R. Part 70 further specify the facilities that require Title V operating permits. They include:

- Any “major source” (defined in the CAA as stationary facilities that emit or have the potential to emit 100 tons of any regulated pollutant or combination of pollutants);
- Sources located in areas that are out of compliance with the NAAQS and that emit at least 10 tons per year of volatile organic compounds;
- Sources subject to the CAA’s New Source Performance Standards (NSPS); and
- Sources that emit, in the aggregate, more than 10 tons per year of a single hazardous pollutant or more than 25 tons per year of any combination of hazardous pollutants.<sup>30</sup>

According to the Congressional Research Service, each year, about 100 new sources apply to obtain initial Part 70 operating permits and about 3,000 sources apply for renewal permits nationwide.<sup>31</sup> Facilities must submit initial permit applications within 12 months after the source becomes subject to the permit program and must submit renewal applications at least six months before the existing permit’s expiration.<sup>32</sup>

Most facilities require a renewal permit once every five years. Facilities can apply to change their operating permits. However, any proposed change that cannot be met through an “administrative permit amendment” (reserved for correcting typographical errors, changing names or addresses, or changes in ownership where no other change to the facility occurs) or a “minor permit modification” (reserved for changes that do not alter monitoring/recording

---

<sup>29</sup> 40 C.F.R. § 70.6

<sup>30</sup> CLAUDIA COPELAND, CONG. RSCH. SERV., RL33632, CLEAN AIR PERMITTING: IMPLEMENTATION AND ISSUES (updated 2016), <https://crsreports.congress.gov/product/pdf/RL/RL33632>; ; 40 C.F.R. § 70.3

<sup>31</sup> *Id.*

<sup>32</sup> 40 C.F.R. § 70.5

requirements or any emission limitations that were determined on a case-by-case basis) requires the facility to essentially restart the permitting process.<sup>33</sup>

Once EPA approves a state's Title V permitting program, implementation of CAA operating permit requirements primarily falls to state and local air quality agencies. However, the CAA provides EPA with continuing oversight authority, and EPA has the right to review and reject specific Part 70 permit applications "if any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of [the Clean Air Act], including the requirements of an applicable implementation plan."<sup>34</sup>

#### a) Challenging Part 70 Permits

Title V itself creates specific opportunities for communities to engage in the air permitting process. The first of these opportunities is during the public comment period for a particular permit. As mentioned above, Title V requires all state Part 70 permit processes to ensure public notice of a draft permit, a 30-day public comment period, and a public hearing with at least 30 days of advance notice.<sup>35</sup> Many of the CAA's prescribed opportunities for challenging Part 70 permits require challengers to have participated in a particular permit's public comment process, so communities must be aware of these processes as they occur.

The second opportunity for communities to challenge Title V air permits is by petitioning the U.S. EPA to object to a state's issuance of a Part 70 permit. If EPA does not object to the issuance of the permit within 45 days, Section 505(b) provides that any person may petition EPA to reject or modify the permit in question.<sup>36</sup> These petitions can only raise the objections to the permit that were raised with reasonable specificity during the permit's public comment period, "unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period."<sup>37</sup> EPA has 60 days from receipt to grant or deny these petitions.<sup>38</sup> The Agency keeps a database of all the Title V petitions received at the following link:  
<https://www.epa.gov/title-v-operating-permits/title-v-petition-database>.

The last opportunity for communities to engage in the Title V permitting process is by appealing for judicial review. Section 502(b)(6) requires an opportunity for judicial review in state court of all final permit actions on Part 70 permits.<sup>39</sup> In addition to any person who could obtain judicial review of the permit action under general state law or the CAA's general citizen suit provision, Title V adds a guaranteed right of judicial review by "any person who participated in the public comment process" for the relevant Part 70 permit.<sup>40</sup>

---

<sup>33</sup> 40 C.F.R. § 70.7

<sup>34</sup> 42 U.S.C. § 7661d(b)(1).

<sup>35</sup> 40 C.F.R. § 70.7(h).

<sup>36</sup> 42 U.S.C. § 7661d(b)(2).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 42 U.S.C. § 7661a(b)(6).

<sup>40</sup> *Id.*

## 5. Permitting Authorities' Ability to Consider Environmental Justice Concerns in CAA Permitting Processes

An important component of any challenge to a CAA permit on EJ-related grounds is establishing the permitting agency's authority to consider EJ in the permitting process. The language authorizing the NSR program and Title V itself does not explicitly mention EJ as a factor for permitting authorities to consider when processing permit applications. However, environmental law scholars have pointed out that throughout the history of U.S. environmental law, "broadly worded statutory language or regulations have been successfully enlisted in support of arguments that the federal government has authority or obligations beyond those initially contemplated by the regulated entities..." including, some argue, authority to consider EJ in the CAA context.<sup>41</sup>

In Title V permitting, Richard Lazarus and Steph Tai point to Section 504(a)'s broad authorization for EPA and state permitting authorities to issue permits that include "such other conditions as are necessary to assure compliance with applicable requirements of [the CAA]."<sup>42</sup> From this authorizing language, Lazarus and Tai argue that:

A major component for achieving compliance assurance under the CAA is the citizen suit provision of that statute. Without that provision acting as a credible enforcement threat, there is no assurance of compliance. Therefore, Section 504(a) may authorize EPA to impose upon those receiving CAA permits the condition that they take certain steps to enhance an affected community's ability to ensure that the permitted facility complies with applicable environmental protection laws.<sup>43</sup>

Further, Section 504(b) authorizes EPA to prescribe "procedures and methods for determining compliance,"<sup>44</sup> and Section 504(c) requires that each Part 70 permit "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions."<sup>45</sup> Lazarus and Tai argue that "[t]here is nothing on the face of the statute to preclude either Section 504(b)'s 'procedures and methods' or Section 504(c)'s 'requirements to assure compliance' from extending to permit conditions that enhance the community's own capacity to oversee the permitted facility's compliance."<sup>46</sup>

EPA has also periodically acknowledged legal authorizations under the CAA to consider EJ in air quality permitting. For example, in a 2011 memo concerning the Agency's legal authorities to advance EJ, EPA Office of General Counsel concluded that the agency's authority to review and comment on Part 70 permits "presents an opportunity for EPA to advance E by focusing the

---

<sup>41</sup> Richard Lazarus & Steph Tai, *Integrating Environmental Justice in EPA Permitting Authority*, 26 ECOLOGICAL L. Q. 617, 620 (1999).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 42 U.S.C. § 7661c(b).

<sup>45</sup> *Id.* § 7661c(c).

<sup>46</sup> Richard Lazarus & Steph Tai, *Integrating Environmental Justice in EPA Permitting Authority*, 26 ECOLOGICAL L. Q. 617, 622 (1999).



state’s consideration on potential disproportionate environmental burdens in determining that the permits comply with applicable requirements.”<sup>47</sup>

EPA has also issued guidance documents encouraging consideration of EJ across all of its permitting activities. EPA published formal guidance summarizing the actions EPA regional offices can take to promote EJ in their permit activities, which included providing “enhanced public involvement opportunities” for priority permits that may have significant public health or environmental impacts (such as New Source Review Permits under the CAA).<sup>48</sup> In its “EJ 2020 Action Agenda,” EPA also established the goal of “build[ing] through engagement in ‘mutual learning’ with state and local co-regulators and other stakeholders, a shared set of tools, best practices and approaches for considering environmental justice concerns in permitting.”<sup>49</sup>

## 6. EPA’s 2022 Environmental Justice Guidance for Clean Air Act Permitting

In the most recent acknowledgement of its authority to consider EJ issues in CAA permits, EPA’s Office of Air and Radiation released a guidance document titled “Principles for Addressing Environmental Justice in Air Permitting” in December 2022.<sup>50</sup> The guidance created an “interim operating framework” for EPA personnel to evaluate EJ issues in the CAA permitting process.<sup>51</sup> This framework establishes eight principles for EPA’s regional air permitting staff to employ when considering permitting actions. While the guidance is directed toward EPA regional staff, EPA regions are “encouraged to share these principles with state, tribal, and local partners and to work proactively and collaboratively with those partners to facilitate consideration and application of these principles in their permitting actions.”<sup>52</sup>

The following list (adapted from Beveridge & Diamond’s summary of EPA’s guidance and the guidance document itself),<sup>53</sup> summarizes these eight guiding principles:

- 1) **Identify Communities with Environmental Justice Concerns:** EPA encourages permitting authorities to utilize EPA’s EJSCREEN or similar mapping tools to pinpoint EJ communities for engagement before and during the permitting process.

---

<sup>47</sup> EPA OFFICE OF GENERAL COUNSEL, PLAN EJ 2014, LEGAL TOOLS (Dec. 2011),

<https://www.epa.gov/sites/production/files/2016-07/documents>

<sup>48</sup> See EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27220 (May 9, 2013).

<sup>49</sup> EJ 2020 ACTION AGENDA: THE U.S. EPA’S ENVIRONMENTAL JUSTICE STRATEGIC PLAN FOR 2016-2020, ENV’T PROT. AGENCY 16-17 (2016), [https://www.epa.gov/sites/default/files/2016-05/documents/052216\\_ej\\_2020\\_strategic\\_plan\\_final\\_0.pdf](https://www.epa.gov/sites/default/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf).

<sup>50</sup> *EJ in Air Permitting – Principles for Addressing Environmental Justice Concerns in Air Permitting*, ENV’T PROT. AGENCY, <https://www.epa.gov/caa-permitting/ej-air-permitting-principles-addressing-environmental-justice-concerns-air> (last visited Mar. 29, 2024).

<sup>51</sup> *Id.*

<sup>52</sup> Env’t Prot. Agency, Memorandum on Principles for Addressing Environmental Justice in Air Permitting (Dec. 22, 2022), <https://www.epa.gov/system/files/documents/2022-12/EJ%20in%20Air%20Permitting%20Memo.pdf>.

<sup>53</sup> Maddie Boyer et al., *EPA Issues Environmental Justice Guidance for Clean Air Act Permits*, BEVERIDGE & DIAMOND (Jan. 5, 2023), <https://www.bdlaw.com/infrastructure-and-project-development-and-permitting/publications/epa-issues-environmental-justice-guidance-for-clean-air-act-permits/>.

- 2) **Ensure Early Engagement:** EPA encourages permitting authorities to ensure early engagement between themselves and impacted communities – ideally before permit submission – to facilitate meaningful participation and equitable treatment.
- 3) **Facilitate Enhanced Public Involvement:** EPA recommends permitting authorities look for ways to go beyond basic engagement, by providing adversely affected communities with necessary resources to effectively participate in the process. For example, permitting authorities can offer training on public commenting procedures, facilitate access to public data, and encourage communities to use translation and interpretive services.
- 4) **Conduct a Comprehensive “Fit for Purpose” EJ Analysis:** When a permitting action may result in disproportionately high human health or environmental effects on a community, EPA urges permitting authorities to conduct a thorough EJ analysis that fulfills two main policy objectives: 1) investigates the communities’ fair treatment concerns by modeling the permitting action’s potential environmental impacts, and 2) documents steps taken to ensure meaningful community involvement in the ultimate permitting decision.

While an EJ analysis will vary according to the specific circumstances of any permitting decision, the analysis should generally include elements such as:

- a. An evaluation of demographic and public health data indicating vulnerabilities in the affected population;
  - b. An establishment of baseline existing environmental data;
  - c. An evaluation of the facility or company’s compliance record; and
  - d. An evaluation of the permitting action’s potential health and non-health adverse effects.
- 5) **Minimize and Mitigate Disproportionate Adverse Effects:** EPA urges permitting authorities to use all available discretionary authorities to develop permit terms and conditions to address or mitigate identified air quality impacts to the extent feasible.
  - 6) **Provide Federal Support Throughout the Air Permitting Process:** For permitting by state partners, EPA promises “to be available to collaborate with the permitting authority to provide technical support, guidance, and recommendations to address these effects on the community, including cumulative effects.”
  - 7) **Enhance Transparency:** EPA urges permitting authorities to provide transparency throughout the permitting process, specifically by making supportive administrative records available.
  - 8) **Capacity Building for EJ Consideration:** Finally, EPA stresses the importance of collaboration among regulatory authorities, regulated facilities, and communities to share best practices to address EJ concerns.

EPA’s guidance document carries no formal legal authority. Further, the guidance is consistent with the more generalized directives and established best practices for EJ issues that EPA had

previously published. Still, the guidance is notable for the emphasis it places on integrating EJ concerns specifically within air permitting processes and for the order that EPA Regions must actively disseminate the guidance to state and local regulators. This emphasis reflects the Biden Administration’s commitment to using its oversight authority to ensure state and local authorities consider EJ concerns in all environmental decision-making.<sup>54</sup>

---

<sup>54</sup> *Id.*

**7. Notes**

Presentation #1: Keri Powell – Southern Environmental Law Center

---

---

---

---

---

---

---

Presentation #2: Meredith Hankins – Natural Resources Defense Council

---

---

---

---

---

---

---

Presentation #3: Taylor Lilley – Chesapeake Bay Foundation

---

---

---

---

---

---

---