

VIA ELECTRONIC FILING

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Office of Policy
Pennsylvania Department of Environmental Protection
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Harrisburg, PA 17101

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RE: Revised Draft Environmental Justice Public Participation Policy

On behalf of the Pennsylvania Chamber of Business and Industry, the largest, broad-based business advocacy organization in the Commonwealth, thank you for the opportunity to comment on the Department's revised draft Environmental Justice Public Participation Policy (EJ Policy). Our membership comprises more than 9,000 member businesses of all sizes and industry sectors throughout the state—from sole proprietors to Fortune 100 companies—representing nearly 50 percent of the private workforce in the Commonwealth. Our mission is to articulate and advocate on public policy issues that will expand private sector job creation and lead to a more prosperous Pennsylvania for all its citizens.

As our member companies engage in the permitting process for various projects that will enable such job creation and prosperity, we value both the opportunity for interested parties to participate in the public comment process, as afforded by the guiding statutes and regulation, as well as an efficient and effective permitting process that produces timely and durable decisions and that does not discourage much needed economic activity in areas of the state that have fallen behind. As such, we appreciate the Department's attention the comments of this organization, along with the many other stakeholders who are filing comments into the docket.

We request the Department to develop a comment response document for this matter and furnish it along with publication of the final policy.

1. Given that EPA has informed stakeholders it will not furnish guidance on environmental justice related to permitting and applications until September 2023, the Department should consider delaying finalizing this policy until such time as the federal government details what it expects of state environmental agencies, especially with regard to delegated permit or authorization regulatory obligations. Additionally, the effective date of the policy should be clearly stated.
2. The statutes cited in the EJ Policy's authorities section do not explicitly or implicitly speak to issues of equity and this policy may add more uncertainty, rather than reduce it, which is the general goal of policy documents. These statutes have not been amended by the legislature to speak to equities, and the revised draft policy does not sufficiently demonstrate these statutes grant DEP the authority to implement this policy. Further, it is imperative that the EJ Policy not create uncertainty with respect to the implementation of

existing statutes and regulations, nor impose additional procedural or substantive requirements that lack the force of law. To that end, we offer the following suggestions on the EJ Policy:

- a. **DEP Should Confirm Whether the EJ Policy Applies During a Pre-Application Meeting.** The EJ Policy acknowledges that in some cases DEP won't be able to confirm whether an applicant is subject to the EJ Policy until DEP completes its administrative completeness review. (EJ Policy, p. 9). By then an applicant has already invested significant effort into generating its application materials. The EJ Policy mandates that all applications subject to the EJ Policy have an open public comment period for at least 30 days. (EJ Policy, p. 12.) This means certain applicants will need to revise their expected permit timelines and potentially alter their application materials after they have completed significant work in support of their application. Whether an application is subject to the EJ Policy ought to be clear from the outset. Having to wait until DEP completes its administrative completeness review to determine whether the EJ Policy applies increases the odds that DEP will ask for more information that could have been more easily collected or compiled from the start. This would be inefficient and is not in line with the goal of policies, which is to increase transparency and certainty-in-process. We encourage DEP to revise the EJ Policy to provide applicants with an opportunity to confirm the applicability of the EJ Policy during a pre-application meeting.
- b. **DEP Review of Project Summaries Should be Prompt and Optional.** For projects covered by the EJ Policy, DEP states that an applicant should produce a project summary of the application "that explains the project in terms understandable to a considerable majority of readers within an EJ Area." (EJ Policy, p. 9.) The EJ Policy provides that the "project summary should be reviewed by DEP for accuracy." (EJ Policy, p. 10.) While we share DEP's objective of ensuring that permit applications include accurate information, we are concerned that DEP will not be able to timely respond to requests to review project summaries subject to the EJ Policy. This could further delay already lengthy permit reviews. If an applicant needs to wait to hear back from DEP on its project summary, it will delay the time in which the applicant can place the summary in publications widely read by residents within the EJ Area, which further pushes back any substantive decision on a permit application. Pennsylvania businesses that are working hard to submit environmentally protective applications shouldn't be subject to this additional procedure and time. Such DEP review is also unnecessary given the potential penalties under state law for submitting applications that do not contain truthful information. We encourage DEP to revise the EJ Policy to make DEP review of the project summary optional. If an applicant elects to submit a project summary to DEP for review, such review should be prompt and measured in two or three business days, not weeks. An applicant should not be penalized for DEP's failure to timely respond to a submission that is prompted by a policy that does not have the force of law.
- c. **DEP's Process for Responding to Public Comments Should be Discretionary and Flexible.** The EJ Policy provides that "DEP's responses to public comments will be provided to all commenters through a Comment-Response document, a Record of Decision, and other relevant documentation associated with the application decision." (EJ Policy, p. 14.) We are concerned that the time associated with DEP's preparation of these documents (when not otherwise required by statute or regulation) will further increase permit review times. We encourage DEP to revise the EJ Policy to reflect that

DEP *may* (as opposed to “will”) provide responses to all commenters when such responses are not otherwise required by statute or regulation. This is particularly important since Pennsylvania law does not require DEP to create a formal record in support of its permitting decisions. 35 P.S. § 7514(c) (“The department may take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A,” referring to hearings and records before Commonwealth Agencies.) Committing DEP to respond “to all commenters through a Comment-Response document, a Record of Decision, and other relevant documentation” will impose an expectation upon DEP that is not reflected under existing law. We must also note that we are aware the Department has expressed opposition to legislative proposals that would grant DEP the discretion to limit the scope of appeals at the EHB to a Record of Decision, as is currently the case for the Hazardous Sites Cleanup Act and some federal environmental statutes. It would appear arbitrary for the Department to oppose in one context a discretionary Record of Decision standard and in another impose on itself a requirement to produce one in every permitting decision involving environmental justice.

3. Given that EPA has filed civil rights investigations into state agencies over environmental justice and has filed comments into proposed state permits on similar grounds, it is recommended the Department, as a recipient of federal funding prohibited under Title VI of the Civil Rights Act from discriminating on the basis of race, delete statements in the EJ policy that could be construed to be an admission of discrimination by the Department.
4. The policy should clearly state that permit conditions be uniform across the state based upon the type of facility and their relevant regulatory obligations. Further, enforcement and penalties that vary based upon the demographics of the nearby community may raise equal protection issues.
5. Absent further justification, a half-mile radius of affected communities is arbitrary and capricious. The draft EJ policy does not discuss what monitoring or modeling of air dispersion, groundwater flow, or other effluent or emission flow supports such a radius as a basis for enhanced regulatory scrutiny. Provided the Department justifies a geographical radius, we also request clarity whether the center of that radius is the point source of discharge, the fence line or some other location of a facility. We also recommend the final EJ policy provide for a flexible approach for permittees to conduct an alternative analysis in determining an Environmental Justice area or area of concern. Additionally, the policy should allow for a project to opt-out of the EJ policy procedures based upon the use of air dispersion modeling with respect to the NAAQS. With respect to an alternative approach for air quality, we would not recommend a full “PSD” type NAAQS modeling but simply modeling of the site with respect to NAAQS to demonstrate that the site is not likely to have a significant environmental impact on the surrounding area. With respect to water quality permits, the alternative analysis would provide for a demonstration of no significant impact to the receiving stream or surface waters.
6. The PA Chamber, as we commented in 2018, supports the use of census block data versus a census tract analysis. This is consistent with the approaches used by EPA and other states.
7. The policy conflicts with the Governor’s Executive Order 1996-1, which remains in effect and which directs agencies, in implementing regulations, to “not exceed federal standards unless justified by a compelling and articulable Pennsylvania interest or required by state law” and in a

manner that “shall not hamper Pennsylvania’s ability to compete effectively with other states.” The revised EJ Policy is silent with respect to this directive and as such is in conflict with it.

8. The revised EJ Policy is in conflict with enacted statutes providing municipalities to make decision on land use through planning and zoning determinations and in particular with statutes, such as Acts 67 and 68 of 2000, which were attempts to resolve and minimize conflicts between DEP’s permitting decisions and local land use. This policy threatens the balance that the legislature has sought to strike between affording local governments the lead role in deciding where certain facilities may be cited and the Department’s role in limiting the impact of certain activities.
9. By noting that existing facilities may later have additional requirements imposed on them, the revised EJ Policy appears to undermine the tenet of administrative finality in permitting decisions in cases where a sited, permitted, operational facility is later found to be in an environmental justice area or area of concern due to changing demographics that occurred after operation commences. The policy should clearly state that the EJ policy will not result in a re-evaluation of a permitting decision once issued by the Department.

In closing, the PA Chamber also supports and endorses the comments of the Marcellus Shale Coalition and the Pennsylvania Aggregates and Concrete Association. Thank you for the opportunity to comment on the draft revised EJ Policy. We appreciate the attention and consideration of our comments by Department staff and look forward to continuing to work with you on policy that protects the environment and enhances economic opportunity for the citizens of this state.

Sincerely,



Kevin Sunday
Director, Government Affairs