

PADEP Publishes and Requests Comments on Draft Environmental Justice Policy

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On March 12, 2022, the Pennsylvania Department of Environmental Protection (PADEP) published a revised draft of its Environmental Justice Policy (Draft EJ Policy) for public comment. See 52 Pa. Bull. 1537 (Mar. 12, 2022); PADEP, Draft EJ Policy (Mar. 12, 2022). Publication of the Draft EJ Policy comes approximately four years after PADEP published a revised version of its then-current EJ Policy focused on enhancing public participation during permit reviews in identified environmental justice (EJ) areas. PADEP withdrew that revision after public comments indicated that the proposed revisions were beyond the scope of PADEP's stated focus. See 50 Pa. Bull. 5920 (Oct. 24, 2020). With the withdrawal, PADEP indicated that it intended to develop and integrate a broader EJ policy into its policies and practices. *Id.* The Draft EJ Policy incorporates, refines, and expands on the withdrawn 2018 revisions, relying on many of the developments that have occurred in the intervening years, and proposes to make significant changes to the current EJ Policy. See PADEP, Environmental Justice Public Participation Policy (Apr. 24, 2004). Below are some of the most significant changes.

Incorporation of Executive Order and Expansion of OEJ's Role

The Draft EJ Policy incorporates Governor Tom Wolf's October 28, 2021, executive order on EJ by citing it as an authority and addressing the requirements of the order. See Executive Order 2021-07, "Environmental Justice" (Oct. 28, 2021); Draft EJ Policy at i; see also Vol. XXXVIII, No. 4 (2021) of this Newsletter (Pennsylvania—Oil & Gas report). The executive order aligns the commonwealth with federal EJ initiatives and directs PADEP and executive agencies to address EJ across all programs. The executive order also formally established the Office of Environmental Justice (OEJ) and the Draft EJ Policy expands upon and clarifies the roles and responsibilities of the OEJ. Draft EJ Policy at 4–6. OEJ's responsibilities include carrying out the Draft EJ Policy requirements and leading an interagency council on EJ for the commonwealth. *Id.* at 4.

Trigger and Opt-in Permits Are More Inclusive

The Draft EJ Policy expands the applicability of the policy to more permits, including "trigger permits," defined as permits that "may lead to significant public concern due to potential impacts on human health and the environment." *Id.* at 3. Trigger permits listed in the policy will automatically fall under the Draft EJ Policy if the project is in an "EJ Area." *Id.* at 3, 6, 19–20. Trigger permits listed include surface and underground mining permits, coal refuse disposal, and large coal preparation facilities. *Id.* at 19. Unconventional oil and gas permits are also listed in the Draft EJ Policy as trigger permits and unconventional oil and gas permit holders must adhere to unique public participation requirements, including generating annual reports on active and anticipated drilling operations in EJ Areas. *Id.* at 15–16, 20.

Permits not listed as trigger permits or permits outside an EJ Area may still be considered "opt-in permits," defined as "[a] permit that otherwise does not qualify as a public participation trigger permit, but [PADEP] believes warrants special consideration and enhanced public participation based on identified community concerns, present or anticipated environmental impacts, or reasonably anticipated significant adverse cumulative impacts." *Id.* at 2. PADEP maintains broad discretion to apply the Draft EJ Policy to opt-in permits, which may include a permit for a listed opt-in facility type (appendix A of the Draft EJ Policy); a permit that "warrants special consideration," a phrase undefined in the Draft EJ Policy; or any permit that warrants special consideration based on its "reasonably anticipated significant adverse cumulative impacts," also undefined in the Draft EJ Policy. *Id.* at 2; see also *id.* at 20.

The Draft EJ Policy moves the definition of an “EJ Area” outside of the policy to a supplemental document, which has not yet been drafted or circulated. *Id.* at 1–2. According to PADEP, this supplemental document should allow for more frequent updates to data and methods used to determine “the geographic location where [PADEP’s] EJ Policy applies.” *Id.* at 1. Further, the Draft EJ Policy requires use of the new and frequently updated EJ Areas Viewer mapping tool, which includes environmental, demographic, and health data for use in all decisions regarding EJ in the commonwealth. *Id.* at 2, 5, 7. Because the EJ Areas Viewer will be frequently updated and the definition of an EJ Area will live in a supplemental document, it may prove difficult for permit applicants to predict when the Draft EJ Policy, if finalized, will apply to a project.

Enforcement and Grant Priority, Harmony with Climate Change Initiatives, and Future Updates

The Draft EJ Policy requires PADEP to prioritize inspections and compliance in EJ Areas or areas where environmental and public health conditions warrant increased attention. *Id.* at 16. PADEP must also develop grant guidance to prioritize EJ projects and create tracking/reporting systems for EJ projects. *Id.* at 17–18. The Draft EJ Policy also prompts PADEP to harmonize EJ initiatives with climate change initiatives. *Id.* at 17. If finalized as drafted, PADEP’s Secretary must review the EJ Policy at least every four years to determine whether revisions—via public comment and engagement processes—are necessary. *Id.* at 18.

PADEP accepted written comments on the Draft EJ Policy through May 11, 2022, and has suggested that the supplemental document defining “EJ Area” will be issued for public review sometime later this year. For more information on the Draft EJ Policy and how to submit comments, visit PADEP’s website at

<https://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/Policy-Revision.aspx>.

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