

## ***An Environmental Permitting Risk Management Framework for States to Reduce Risk of Civil Rights Violations and Address Environmental Justice***

**Introduction:** The Environmental Council of the States (ECOS) Environmental Justice (EJ) Steering Committee and Workgroup presents a Risk Management Framework (RMF) to aid ECOS Member States in understanding state compliance with civil rights laws and Title VI as they relate to environmental permitting. The RMF identifies key actions to reduce state risk of civil rights violations and of being subjects in an U.S. Environmental Protection Agency (EPA) investigation and resolution process, as well as potential risk of industry litigation. The RMF considers actions such as identifying communities of interest, facilities, possible impacts, and ways to incorporate meaningful public engagement towards analysis and decision-making during the permitting process.

**Background:** All federal agencies are responsible for enforcing Title VI of the Civil Rights Act of 1964, which prohibits any program, including environmental permitting programs, that receives federal financial assistance from discriminating based on race, color, or national origin. The public can use the Title VI complaint process to report alleged discrimination by EPA funding recipients. EPA’s documents acknowledge that many people of color, low-income people, and indigenous populations have been disproportionately burdened by pollution and denied equal access to a healthy environment, which is an environmental justice issue. Executive Order 12898 directs EPA to address environmental justice and civil rights enforcement under the full extent authorized by law.

Federal publications do not explicitly direct federal, state, and local agencies on how to aptly ensure compliance with civil rights laws and environmental justice policies and principles, but rather offer guidance on how to conduct a civil rights analysis, if necessary, that assists in ensuring environmental program (e.g., permitting) compliance. States have chosen different policy responses to meet Title VI requirements and address environmental justice concerns, both working within existing authorities and, in some cases, enacting new state laws. In the case of environmental permitting, EPA recognizes that permits vary widely in purpose and effect, and that there is no single approach to an EJ analysis or assessment.

The following documents were reviewed for this strategy: “Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions”<sup>1</sup>, “EPA Activities to Promote Environmental Justice in the Permit Application Process Frequently Asked Questions”<sup>2</sup>, and “Promising Practices for EJ Methodologies in NEPA Reviews”<sup>3</sup>. ECOS further recommends that states consult EPA’s External Civil Rights Guidance and EPA Grantee forms,<sup>4</sup> aimed at recipients of EPA financial assistance and members of the public, to ensure adherence to federal Title VI civil rights obligations. Key documents for review include EPA’s Procedural Safeguards Checklist and EPA’s Pre-Award Compliance Review Report for All Applicants & Recipients Requesting Financial Assistance.

ECOS additionally acknowledges that there are other viable ways to comply with Title VI and address environmental justice concerns in permitting besides the actions outlined in this framework. While Title VI affords basic procedural safeguards, definitions of environmental justice and how it is implemented will vary across government and state agencies. This document itself does not have legal effect; determining legal risk is understood to be complex, dynamic, and informed by ongoing and pending litigation. ECOS intends to update and revise this resource periodically, as appropriate.

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<sup>1</sup> <https://www.epa.gov/system/files/documents/2022-08/EJ%20and%20CR%20in%20PERMITTING%20FAQs%20508%20compliant.pdf>

<sup>2</sup> <https://www.epa.gov/sites/default/files/2015-02/documents/2013-05-epa-actions-faqs.pdf>

<sup>3</sup> [https://www.epa.gov/sites/default/files/2016-08/documents/nepa\\_promising\\_practices\\_document\\_2016.pdf](https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf)

<sup>4</sup> <https://www.epa.gov/external-civil-rights/external-civil-rights-guidance>

## ***Environmental Permitting Risk Management Framework (RMF)***

The major components of the RMF, as outlined below, focus on a. identifying communities of interest, b. identifying subject facilities, c. identifying impacts, d. incorporating meaningful public participation, and e. analyzing and delivering a decision. It is also understood that the capacity for each agency to adopt actions may be limited due to financial or staffing constraints and other state-specific circumstances. This framework therefore provides opportunities for state agencies to gradually assume actions under each component of the RMF, moving along a series of levels most appropriate for each state. As agencies move from Level 1 to Level 5 of the RMF, the potential risk of civil rights complaints being accepted by EPA due to non-compliance decreases; however, the risk of industry litigation may increase depending on the strength of applicable statutes. States are advised that levels are not entirely distinct; agencies may adopt actions from multiple levels at any given time. There also exists a range of potential intermediate steps between each level. Finally, potential legal risk is not static, and may change over time as statutes and guidance evolve. Within the RMF, Level 1 presents the highest risk of potential Title VI complaints due to non-compliance with major tenets outlined by the federal documents. Level 5 of this Table presents the lowest risk of Title VI complaints due to full adherence with the guidance outlined in the above documents, as well as lower risk of industry litigation due to the enactment of statutes which affirm suggested agency actions.

**Level 1** – This level is a baseline level in which states consider permit applications under existing environmental statutes, rules, and guidance; in this level, states accept and consider some public comment consistent with state administrative procedures. Level 1 includes no additional considerations relating to environmental justice, and environmental justice is not included in state statutes regarding the delivery of environmental agency programs or services. This level leaves the agency at the highest risk for EPA accepting civil rights complaints but at the lowest risk of industry litigation. It requires the least state resources.

**Level 2** – This level utilizes a Public Participation Plan or another method to determine communities that may need enhanced participation for permit applications for new facilities which require notice. While this level includes additional procedural safeguards, substantive review of permit applications is limited to existing environmental statutes, rules, and guidance. Agencies consider public comments submitted during a public comment period, follow their Public Participation and Language Access plans, and provide written responses to comments. At this level, no assessment of impacts or analysis is incorporated into the decision-making process. However, the agency encourages the applicant to proactively work with the community to minimize impacts. This level leaves the agency at high risk for EPA receiving civil rights complaints but at a low risk of industry litigation. It requires few state resources.

Note: Agencies' review of permit applications vary considerably, depending on the agency and type of authorization sought. In this document, an individual impact from a single source of emissions from a facility is one that is focused on a specific permitted environmental media (i.e., water, air, land use), as opposed to an evaluation which considers all environmental and public health stressors potentially caused by the facility. This may include elements not previously subject to the agency's media-based regulatory schemes, such as mobile sources of emissions.

**Level 3** – This level continues to utilize a Public Participation Plan as well as a mapping tool such as EJScreen to define communities of interest based on a selection of demographics including but not limited to race, color, language, and national origin, as well as underserved communities that have already been identified as priorities for the respective state. Agencies develop internal state guidance and regularly update guidance with the best available data to analyze cumulative impacts based on selected relevant environmental and public health indicators. Agencies continue to consider public comments submitted during a public comment period, follow their Public Participation and Language Access plans, and provide written responses to comments. In addition to reviewing permit applications under existing environmental law, the Agency uses their tool to assess possible impacts and to develop a comprehensive EJ Impact Statement (EJIS). Unlike level 2, agencies consider an EJ assessment when making decisions, including whether disproportionate and adverse impacts are present in communities of interest. If a disproportionate, adverse impact is present, agencies assess the provided justification and impose conditions (e.g., mitigation measures) to minimize the impact. This level leaves the agency at moderate risk for civil rights complaints being accepted by EPA and a high risk of industry litigation.

**Level 4** – Within this level, agencies develop an internal and more refined state-specific tool to identify communities of interest that is more comprehensive and relevant to their respective state than a federal tool such as EJScreen. Under this level, permit applications are subjected to a more comprehensive evaluation and all potential impacts from the proposed facility are assessed. To analyze whether disproportionate and adverse impacts are present, the internal and more refined state-specific tool includes a cumulative impacts assessment for environmental and public health indicators that are compared to state or county percentiles for comparison. The use of a more local geographic point of comparison, as opposed to EJScreen’s use of national percentiles, helps to ensure more state-specific relevance. To further avoid risk of civil right complaints being accepted by EPA, agencies continue to engage in more meaningful public participation strategies, including hosting public hearings in the host community and offering translation services. Agencies prepare a comprehensive EJIS that contains analysis of whether the community is already subject to disproportionate and adverse impacts, whether the facility will create net adverse stressors, and whether identified impacts can be avoided or minimized. If a disproportionate, adverse impact cannot be avoided, justification should be assessed, and conditions imposed to avoid or minimize the effect of adverse environmental and public health stressors. This level leaves the agency at a lower potential risk for civil rights complaints being accepted by EPA. However, this level could leave the agency at the highest risk of industry litigation because actions are not necessarily required by statute.

**Level 5** – This level offers the lowest potential risk of civil rights complaints being accepted by EPA as well as the lowest potential risk of industry litigation since associated actions are affirmed through supportive state legislation. Strategies include regulatory actions and meaningful engagement to incorporate public input into the decision-making process and subsequent outcomes for new and renewal/expanding permitted facilities. Within this level, communities of interest, facilities, and comprehensive environmental and public health indicators are identified and defined through **legislative action**. Agencies can identify communities of interest through the development of a public state specific tool that analyzes cumulative impacts based on environmental and public health indicators in communities using, for example, the conservative value between county and State non-EJ community 50th percentile for comparison. To further incorporate meaningful public engagement, agencies engage with communities during a specific pre-application stage as defined through legislative action. Agencies continue to utilize their Public Participation Plan to identify communities that may need enhanced participation and Language Access Plans and tailor outreach strategies to the specific host community. Comments received during the public comment period will inform and affect the permitting process, responses to comments (RTCs) continue to be posted publicly, and agencies provide oversight and review submissions from the applicant on process, EJIS, testimonies, and comments/RTCs to ensure due process. Applicants are required to submit an EJIS that summarizes whether the community is already subject to disproportionate and adverse impacts, whether the facility will create net adverse stressors, and whether identified impacts can be avoided or minimized. Agencies consider the EJIS, supplemental information, testimony, written comments, RTCs, and any other relevant information to determine if a facility can avoid a disproportionate, adverse impact. If a disproportionate and adverse impact can be avoided, agencies proceed with imposition of conditions to ensure protectiveness or a non-discriminatory alternative. If a disproportionate and adverse impact cannot be avoided, justification is assessed to confirm the infeasibility of avoidance, and the permit application is denied, as facilitated by state **legislative action**.

**Table 1: Environmental Permitting Risk Management Framework (RMF)**

Risk Level of EJ Complaint Accepted by EPA	Identify Communities of Interest	Identify Subject Facilities	Identify Impacts	Meaningful Public Participation	Analysis & Decision	Risk Level of Industry Litigation (if not backed by state or federal statutes)
1 Highest Risk	<ul style="list-style-type: none"> <li>Identify communities of interest based on existing environmental statutes, rules, and guidance.</li> </ul>	<ul style="list-style-type: none"> <li>Consider facilities who submit new permit applications.</li> </ul>	<ul style="list-style-type: none"> <li>Potential impact of facilities based on a single media.</li> </ul>	<ul style="list-style-type: none"> <li>Accept and consider public comments via written submission or electronic submission consistent with state administrative procedures acts.</li> </ul>	<ul style="list-style-type: none"> <li>No additional considerations related to environmental justice.</li> </ul>	1 Lowest Risk
2 High Risk	<ul style="list-style-type: none"> <li>In addition to identifying communities of interest based on existing environmental statutes, rules, and guidance, agency uses Public Participation Plan or another method to determine communities that may need enhanced participation.</li> </ul>	<ul style="list-style-type: none"> <li>Consider permit applications for new facilities which require notice.</li> </ul>	<ul style="list-style-type: none"> <li>Potential impact of facilities based on a single media.</li> </ul>	<ul style="list-style-type: none"> <li>Public notice sent to statutorily required as well as self-identified individuals.</li> <li>Accept and consider any public comments via written submission, electronic submission, or verbal submission during applicable public hearing/meeting when submitted during formal comment period.</li> <li>Applicant develops a Public Involvement Plan with Agency when in impacted community (based on Agency Public Participation Plan).</li> <li>Agency provides public meetings/hearings when requested by legislative members or when there is significant public interest.</li> <li>Agency provides or requires translation and interpretation services based on Agency Language Access Plan.</li> <li>Formal comment period with written responses to all comments (RTC) publicly posted.</li> </ul>	<ul style="list-style-type: none"> <li>While this level includes additional procedural safeguards, substantive review of permit applications is limited to existing environmental statutes, rules, and guidance. Agency considers impact based on single media as well as information formally provided by the public.</li> <li>Agency encourages applicant to proactively work with community to minimize impacts.</li> </ul>	2 Moderate Risk

<p><b>3</b> Moderate Risk</p>	<ul style="list-style-type: none"> <li>• In addition to identifying communities of interest based on existing environmental statutes, rules, and guidance, agency utilizes Public Participation Plan and/or a mapping tool to identify communities.</li> <li>• Define communities based on a selection of demographics such as race and language, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• Identify facilities and consider multiple sources of emissions.</li> <li>• Consider permit applications for new facilities.</li> </ul>	<ul style="list-style-type: none"> <li>• Utilize EJSscreen or other screening tool to assess the presence of individual disproportionate, adverse impacts and a supplemental demographic index to develop an EJ Supplemental index value.</li> <li>• Develop internal state specific guidance to analyze cumulative impacts based on selected relevant environmental and public health indicators using either county or state percentiles for comparison.</li> <li>• Regularly update guidance with best available data.</li> </ul>	<ul style="list-style-type: none"> <li>• Accept and consider any public comments via written submission, electronic submission, or verbal submission during public hearing/meeting when submitted during formal comment period.</li> <li>• Applicant develops a Public Involvement Plan with Agency when in impacted community (based on Agency Public Participation Plan).</li> <li>• Agency hosts public meeting/hearing with applicant in host community in communities where threshold met (e.g., based on Public Participation or other applicable plan).</li> <li>• Agency provides or requires translation and interpretation services based on Agency Language Access Plan.</li> <li>• Public notice with formal comment period provided as required statutorily, to self-identified people, and to local organizations.</li> <li>• Formal comment period with written responses to all comments (RTC) publicly posted.</li> </ul>	<ul style="list-style-type: none"> <li>• In addition to review of permit applications under existing environmental law, the agency prepares a comprehensive EJ Impact Statement (EJIS) that contains analysis of whether the community is already subject disproportionate and adverse impacts, whether the facility will create net adverse stressors, and whether identified impacts can be avoided or minimized, when threshold is met.</li> <li>• If disproportionate and adverse impact cannot be avoided, assess justification then impose conditions (e.g., mitigation measures) to avoid or minimize contribution of adverse environmental and public health stressors.</li> </ul>	<p><b>3</b> High Risk</p>
<p><b>4</b> Lower Risk</p>	<ul style="list-style-type: none"> <li>• Develop public state-specific mapping tool to identify communities and incorporate into a Public Participation Plan.</li> </ul>	<ul style="list-style-type: none"> <li>• Identify facilities and consider multiple sources of emissions.</li> <li>• Consider permit applications for both new facilities and renewals/expansions.</li> </ul>	<ul style="list-style-type: none"> <li>• Define environmental indicators (pollution sources) and public health indicators (health impacts) via regulatory action.</li> <li>• Develop public state-specific tool that analyzes cumulative impacts based on comprehensive environmental and public health indicators in communities using the more conservative value between county and State non-EJ community 50<sup>th</sup> percentile for comparison.</li> <li>• Regularly update tool with best available data.</li> </ul>	<ul style="list-style-type: none"> <li>• Accept and consider any public comments via written submission or electronic submission during formal comment period.</li> <li>• Applicant develops a Public Involvement Plan with Agency when in impacted community (based on Agency Public Participation Plan).</li> <li>• Agency hosts public meeting/hearing with applicant in EJ community to present EJ Impact Statement.</li> <li>• Public notice with formal comment period provided as required statutorily, to self-identified people, and to local organizations using community specific outreach methods.</li> <li>• Agency provides or requires translation and interpretation services based on Agency Language Access Plan.</li> <li>• Formal comment period with written responses to all comments (RTC) publicly posted.</li> <li>• Allow for comment period extension requests based on threshold/agency policy.</li> <li>• Agency provides oversight and reviews submission from applicant on</li> </ul>	<ul style="list-style-type: none"> <li>• Permit applications are subjected to a more comprehensive evaluation and all potential impacts from the proposed facility are assessed.</li> <li>• Agency requires applicant to prepare a comprehensive EJ Impact Statement (EJIS) that contains analysis of whether the community is already subject to disproportionate and adverse impacts, whether the facility will create net adverse stressors, and whether identified impacts can be avoided or minimized.</li> <li>• Agency considers the EJIS, supplemental information, testimony, written comments, RTCs, and any other relevant information to determine if facility can avoid a disproportionate, adverse impact.</li> <li>• If disproportionate and adverse impact can be avoided, proceed with imposition of conditions to ensure protectiveness or less discriminatory alternative.</li> <li>• If disproportionate and adverse impact cannot be avoided, assess justification then impose conditions (e.g., mitigation</li> </ul>	<p><b>4</b> Highest Risk</p>

				process, EJIS, testimonies, comments/RTCs to ensure due process.	measures) to avoid or minimize contribution of adverse environmental and public health stressors.	
5 Lowest Risk	<ul style="list-style-type: none"> <li>• Develop public state-specific mapping tool to identify communities and incorporate into a Public Participation Plan.</li> <li>• Define communities by legislative action based on at least income and race.</li> </ul>	<ul style="list-style-type: none"> <li>• Identify facilities via legislation and consider multiple sources of emissions.</li> <li>• Consider permit applications for both new facilities and renewals/expansions.</li> </ul>	<ul style="list-style-type: none"> <li>• Define environmental indicators (pollution sources) and public health indicators (health impacts) via legislation.</li> <li>• Develop public state-specific tool that analyzes cumulative environmental and public health indicators in communities using the more conservative value between county and State non-EJ community 50<sup>th</sup> percentile for comparison.</li> <li>• Regularly update tool with best available data.</li> </ul>	<ul style="list-style-type: none"> <li>• Engage communities during a defined pre-application stage, as required by state legislation.</li> <li>• Accept and consider any public comments via written submission or electronic submission during formal comment period.</li> <li>• Applicant develops a Public Involvement Plan with Agency when in an impacted community (based on Agency Public Participation Plan).</li> <li>• Agency hosts public meeting/hearing with applicant in EJ community to present EJ Impact Statement</li> <li>• Public notice with formal comment period provided as required statutorily, to self-identified people, and to local organizations using community specific outreach methods.</li> <li>• Agency provides or requires translation and interpretation services based on Agency Language Access Plan.</li> <li>• Formal comment period with written responses to all comments (RTC) publicly posted.</li> <li>• Allow for comment period extension requests based on threshold/agency policy.</li> <li>• Agency provides oversight and reviews submission from applicant on process, EJIS, testimonies, comments/RTCs to ensure due process.</li> </ul>	<ul style="list-style-type: none"> <li>• Agency requires applicant to prepare a comprehensive EJ Impact Statement (EJIS) that contains analysis of whether the community is already subject to disproportionate and adverse impacts, whether the facility will create net adverse stressors, and whether identified impacts can be avoided or minimized.</li> <li>• Agency considers the EJIS, supplemental information, testimony, written comments, RTCs, and any other relevant information to determine if facility can avoid a disproportionate and adverse impact.</li> <li>• If disproportionate impact can be avoided, proceed with imposition of conditions to ensure protectiveness or less discriminatory alternative.</li> <li>• If disproportionate and adverse impact cannot be avoided, assess justification then deny both new and renewal/expansion permit application for facilities, as facilitated by state legislative action.</li> </ul>	5 Lowest Risk