

# **Opportunities for Environmental Justice Review in Title V Permits Under the Tennessee Air Quality Act**

by

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Certification: I hereby certify that the author and this article complies with the terms of eligibility set forth in the rules for the Jon E. Hastings Memorial Award Writing Competition by the Environmental Law Section of the Tennessee Bar Association.

Tennessee is not immune from the issues involved in promoting environmental justice and ensuring clean air, water, and land for all of its inhabitants. Throughout the state, low-income and minority communities are exposed to higher levels of environmental toxins than those non-minority communities next door. One way to combat this disparity is through integrating environmental justice principles in existing Tennessee environmental law policies. Of particular concern is the air quality in metropolitan, urban areas where minorities are disparately impacted by nearby major industrial sources.

Title V permits under the Tennessee Air Quality Act regulate emissions by major air contaminating sources throughout the state. A narrow interpretation of the rules concerning Title V permits minimizes opportunities to further the goals of environmental justice. However, when interpreted flexibly, the rules provide permitting offices the opportunity to engage in environmental justice assessments and provide enhanced public participation activities for environmental justice communities. Tennessee should follow the flexible interpretation of Title V to further the goals of environmental justice and provide access to clean air for all Tennesseans.

## **I. An Overview of Environmental Justice**

Environmental justice encompasses the principle that no one sector of society should bear a disproportionate burden of the adverse environmental effects of industrial, government, or commercial development.<sup>1</sup> Every person has the right to clear air, clean water, and a clean landscape. When development could cause adverse environmental effects to any of these environmental areas, those most likely to be affected should have the opportunity for meaningful engagement in the decision-making process. Unfortunately, throughout the history of the United

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<sup>1</sup> *Environmental Justice – Basic Information*, EPA, <http://www.epa.gov/environmentaljustice/basics/index.html> (last visited May 1, 2015).

States, minority and low-income populations (also referred to as “overburdened populations”) have been disproportionately affected by environmental hazards in the air, water, and land surrounding their homes.<sup>2</sup> This disparity is in part due to the location of landfills, factories, highways, and other pollution emitting sources that often sit within the lowest socioeconomic corners of communities.<sup>3</sup> Those most affected by environmental harms have the least amount of resources to combat the harm or remove themselves and their families to a more desirable and healthy locale.

To combat this issue on a federal level, President Bill Clinton signed Executive Order 12,898 in February 1994 addressing the issue of health and environmental conditions among minority and low-income populations.<sup>4</sup> The order requires that all federal agencies make achieving environmental justice part of their mission and promotes the non-discrimination on the basis of race, gender, national origin, and socioeconomic standing in all programs affecting health and the environment.<sup>5</sup> Further, the executive order encourages public participation and increased public information involving such programs.<sup>6</sup> In the twenty years since Executive Order 12,898 was signed, the Environmental Protection Agency (“EPA”) has made environmental justice a main priority in its agency mission, but since the executive order does not apply to state environmental agencies, where most environmental decisions are made, the results of implementing programs have varied.

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<sup>2</sup> Shannon M. Roesler, *Addressing Environmental Injustices: A Capability Approach to Rulemaking*, 114 W. VA. L. REV. 49, 56-59 (2011).

<sup>3</sup> *Id.*

<sup>4</sup> Exec. Order No. 12,898, 3 C.F.R. 859 (1994).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

## II. State Implementation of Environmental Justice Programs

A 2007 study performed by the University of California Hastings College of the Law and the American Bar Association found that as many as forty-one states had incorporated environmental justice initiatives at the state level either through express environmental justice programs or full-time personnel dedicated to the issue.<sup>7</sup> The updated 2010 study showed further improvement through increased community outreach and the passing of statutes and executive orders bringing environmental justice to the forefront of state environmental agencies.<sup>8</sup>

In 2005, the Tennessee Department of Environment and Conversation (“TDEC”) created an Environmental Justice Program (“EJP”) to “ensure the full and fair participation by all potentially affected communities in the environmental decision-making process and emphasize quality of life and environmental protection improvements in all communities.”<sup>9</sup> Based on Title VI of the Civil Rights Act of 1964, the TDEC EJP focuses on eliminating discriminatory practices, promoting environmental equity, and providing translation assistance to limited English proficient persons throughout the agency’s activities.<sup>10</sup> While Tennessee is making significant steps in environmental justice through the investigation of brownfields and its focus on community education,<sup>11</sup> important areas of concern remain.

One especially important area of concern is the way that poor air quality in metropolitan areas disproportionately affects overburdened populations. Studies have repeatedly shown that counties with the worst air quality in the United States are located in major urban industrial areas

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<sup>7</sup> PUBLIC LAW RESEARCH INSTITUTE, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES, AND CASES 3 (3rd ed. 2007) [hereinafter “EJ FOR ALL 3RD”] *available at* <http://gov.uchastings.edu/public-law/docs/plri/EJ2007.pdf>.

<sup>8</sup> *See generally* PUBLIC LAW RESEARCH INSTITUTE, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES, AND CASES (4th ed. Feb. 15, 2010) [hereinafter “EJ FOR ALL 4TH”] *available at* <http://gov.uchastings.edu/public-law/docs/ejreport-fourthedition.pdf>.

<sup>9</sup> *Id.* at 188.

<sup>10</sup> *Title VI Plan*, TDEC, [http://www.tn.gov/environment/docs/policy/ej\\_titlevi\\_plan.pdf](http://www.tn.gov/environment/docs/policy/ej_titlevi_plan.pdf).

<sup>11</sup> EJ FOR ALL 4TH, *supra* note 8, at 188-90.

with significantly higher percentages of minority populations and people living in poverty.<sup>12</sup> In fact, a 2014 study of Memphis, Tennessee found that minority concentrated communities bear a 6% higher cancer risk burden than non-minority communities.<sup>13</sup> This disproportionate exposure to air toxins in minority communities is due to their locations beside industrial areas and heavily trafficked roads.<sup>14</sup> In other locations, such as the South Coast Air Basin in Southern California, the cancer risk is 50% higher among minorities.<sup>15</sup> While the state government is not in a position to relocate these minority communities, it can use the permits within its state-implemented plan for the Clean Air Act to help alleviate the burden felt by these communities.

### **III. Tennessee Air Quality Act, Title V Permits**

In Tennessee, the state-implemented Clean Air Act (“CAA”) is known as the Tennessee Air Quality Act (“TAQA”).<sup>16</sup> This Act enables TDEC to implement rules and regulations, including the issuance of permits, concerning air pollution in Tennessee in conjunction with the parameters set forth in the CAA.<sup>17</sup> Among the permits TDEC may issue are Title V permits for the operation of major air contaminant sources (generally industrial plants, pulp mills, and refineries).<sup>18</sup> Title V permits regulate the amount of hazardous air pollutants emitted by sources in regular operation and after major modifications to sources.<sup>19</sup> While sources may engage in the “trading” of emission credits with other sources under Tennessee rules, all such trades must also

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<sup>12</sup> Marie Lynn Miranda et al, *Making the Environmental Justice Grade: The Relative Burden on Air Pollution Exposure in the United States*, 8(6) INT’L J. ENVTL. RES. PUB. HEALTH 1755 71 (2011) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3137995/>.

<sup>13</sup> Chunron Jia et al, *Relationship of Racial Composition and Cancer Risks from Air Toxics Exposure in Memphis, Tennessee, U.S.A.*, 11 INT’L J. ENVTL. RES. PUB. HEALTH 7713 24 (2014) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4143828/>.

<sup>14</sup> *Id.*

<sup>15</sup> EJ FOR ALL 4TH, *supra* note 8, at xiv.

<sup>16</sup> T.C.A. §68-201-101, et. seq.

<sup>17</sup> T.C.A. §68-201-105(a)(1)(B).

<sup>18</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(a), (11)(b)(14) (2011).

<sup>19</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(a) (2011).

be authorized in a Title V permit for purposes of ensuring a cap on all hazardous air pollutants within certain geographic areas.<sup>20</sup>

When applying for a Title V permit, sources must first provide detailed information concerning emitting activities, equipment, recent testing proving compliance with local and federal emission standards, accidental release standards, previous permits, and other information relevant to ensuring the source is in compliance with all applicable rules.<sup>21</sup> After providing such information, the permitting staff will review the submitted application for completeness and request additional information as needed.<sup>22</sup> If an application is deemed complete, the permitting office will then provide notice to the EPA,<sup>23</sup> any affected states,<sup>24</sup> and the public.<sup>25</sup> All permitting information is also made publically available for inspection and, if warranted, a public hearing may be held.<sup>26</sup> If a completed application is received that complies with the applicable emissions standards and the permitting office has complied with the notice requirements, a Title V permit may be issued to the source.<sup>27</sup>

1. A Narrow Interpretation of Title V Minimizes Opportunity for Consideration of Environmental Justice Issues.

Under a narrow interpretation of the Title V rules, where a proposed source is in compliance with the regulations and the permit application is complete, a permit should be issued. Since the rules do not expressly provide for an environmental justice review of the area where the source is located, the permitting office does not have to review health and population assessments in the area. Further, if it were to engage in such a review and deny a permit for

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<sup>20</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(a)(4)(i)(III) (2011).

<sup>21</sup> See TITLE V PERMIT APPLICATION, APPLICATION COMPLETENESS CHECK LIST, CN-1430 (APC 35), TDEC, <http://www.tennessee.gov/environment/permits/aioper.shtml> (last visited May 1, 2015).

<sup>22</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(d)(1)(ii) (2011).

<sup>23</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(g) (2011).

<sup>24</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(g)(2) (2011).

<sup>25</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(8) (2011).

<sup>26</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(8)(i)(II), (IV) (2011).

<sup>27</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(1) (2011).

environmental justice reasons, the office may be put through an appeals process whereby the source argues that since an environmental review is not mandated and the source meets all of the mandated requirements, a permit should justly be issued despite the environmental justice concerns.

Viewing the rules through this interpretation, the only opportunity for overburdened populations to be aware of the permitting application and respond with any concerns is through the mandated public participation provisions. The rules require public notice be given by “publication in a newspaper of general circulation in the area where the source is located” and persons on a mailing list.<sup>28</sup> To be on the mailing list, a person must “request to be on the list in writing on an annual basis” and “pay a fee of \$10.00 per year.”<sup>29</sup> Other opportunities for review of the permit include materials being placed in a public depository for inspection and/or a scheduled public hearing.<sup>30</sup> The public can also submit written comments or a file a petition under the federal Clean Air Act in opposition of the permit.<sup>31</sup>

While it can be argued these provisions are sufficient to keep the general public informed of the permits in their area, the provisions look different when applied to an environmental justice demographic. In many middle to higher-class areas when a permitting or siting issue occurs, the community will often engage in what is commonly referred to as a “Not In My Backyard” (“NIMBY”) protest to halt the permitting process.<sup>32</sup> To engage in NIMBY activism however requires significant resources in terms of time, money, negotiating skills, information, and political capital.<sup>33</sup> Those communities with access to these resources can successfully

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<sup>28</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(8)(i)(I) (2011).

<sup>29</sup> *Id.*

<sup>30</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(8)(i)(II), (IV) (2011).

<sup>31</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(8)(i)(V), (11)(g)(4) (2011).

<sup>32</sup> Joshua Glasgow, *Not in Anybody's Backyard? The Non-Distributive Problem with Environmental Justice*, 13 *BUFF. ENVTL. L.J.* 69, 94 (2005).

<sup>33</sup> *Id.*

navigate the public notice provision of TAQA and engage in meaningful conversation with the permitting office.<sup>34</sup>

But, as stated earlier, in areas where environmental justice is of grave concern, the population is generally minorities with low-income and a lack of education. The poor simply do not have the monetary resources to engage in the same form of activism as those in higher socioeconomic classes.<sup>35</sup> More importantly, the poor often lack the time and information needed for political participation as their time is usually consumed by work, transportation, and childcare, and their access to environmental information is limited since it is often written in scientific and legal jargon.<sup>36</sup> Specifically, under the Tennessee rules, for individuals to be notified they must either read the permit in the local paper or annually request to be notified of these issues and pay a fee.<sup>37</sup> The probability of the poor engaging in these behaviors is low given their time and monetary limitations. In light of these issues, it is unlikely that an environmental justice community will fully engage in the permitting process with only the mandatory public notice provisions implemented.

Through a narrow interpretation of the Title V permitting rules and TAQA, it is difficult to fulfill the goals of environmental justice without requesting that the rules be modified to expressly include an environmental justice review. If Tennessee wished to expressly include environmental justice language and maintain a narrow interpretation, it could follow the lead of California<sup>38</sup> by enacting legislation or by issuing an executive order making environmental

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 95.

<sup>37</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(8)(i)(I) (2011).

<sup>38</sup> *See generally* EJ FOR ALL 4TH, *supra* note 8, at 16-19.

justice a main priority in the environmental agencies and creating working groups to find and remedy gaps in current rules, such as Title V permits.<sup>39</sup>

B. A More Flexible Interpretation of Title V Allows for Better Consideration of Environmental Justice Issues.

Under a more flexible interpretation of the rules for Title V permits, an environmental justice review can be intertwined with the existing permitting provisions. This interpretation of the Title V permitting process would allow permitting offices to engage in socioeconomic and health assessments in the communities where sources are located as part of the permit review. Further, this interpretation creates a broader context for the permitting office to involve environmental justice communities in meaningful involvement in the decision-making process.

*1. Statutory Flexibility for Environmental Justice*

When writing TAQA, the authors included a set of factors that may be considered when exercising power under the Act.<sup>40</sup> The statute reads in part:

In exercising power to prevent, abate, and control air pollution, the board or department shall give due consideration to all pertinent facts, including, but not necessarily limited to:

- (1) The character and degree of injury to, or interference with, the protection of the health, general welfare and physical property of the people;
- (2) The social and economic value of the air contaminant source; [and]
- (3) The suitability or unsuitability of the air pollution source to the area in which it is located.<sup>41</sup>

While not explicit, these factors can be interpreted as allowing for review of environmental justice issues within the context of TAQA. Since Title V permits are part of the exercise of controlling air pollution, the statute allows for the factors to be considered as part of the permitting process.

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<sup>39</sup> In 2000, TDEC published a draft strategic plan for environmental justice on its website, but the plan was removed after a change in government administration. EJ FOR ALL 3RD, *supra* note 8, at 88.

<sup>40</sup> T.C.A. §68-201-106.

<sup>41</sup> *Id.*

First, to properly consider the factors, an environmental justice assessment of the area where the proposed source is located should be performed. To determine whether the source will interfere or injure a population, it is proper for the department to assess where the population currently stands in regards to its health and general welfare. This assessment would allow the department to identify environmental justice communities through health and property data and evaluate whether they are at higher risk for potential harm.

Second, whether a proposed source has social or economic value is inherently related to the nature of the area in which the source is located. For instance, the social and economic value may be high for an industrial plant in rural Tennessee where the plant can provide jobs and has a significant buffer from housing areas. But a plant occupying a space in a metropolitan, urban industrial area located next to government housing would have a significantly lower social and economic value. This determination of value involves a case-by-case analysis of the permit application and could be helpful in lowering the potential exposure of air pollution in environmental justice communities.

Third, determining the suitability or unsuitability of the air pollution source to an area can provide an overall evaluation of whether the source furthers the goal of environmental justice. The main tenet of environmental justice is to provide the same degree of protection from environmental hazards to every community regardless of race, color, national origin, or income. To achieve this goal, communities that have historically received less protection should receive a more detailed review than other areas to ensure the source will not further increase the community's risk for adverse environmental effects.

Through application of an environmental justice review of the socioeconomic condition of the community in which the source is located, the permitting office can provide an informed

and fair result in its permitting decisions. Further, since this review is within TDEC's discretion but not mandated by the statute, permitting offices may decide to save such a review for those areas identified by EPA as environmental justice areas.<sup>42</sup> This discretion would also allow the office to minimize costs in areas without environmental justice issues, while still performing the assessments in key communities.

## *2. Enhanced Public Participation in Environmental Justice Communities*

The simplest way to encourage environmental justice in Title V permits is through enhanced activities concerning the public participation of the overburdened population. As previously discussed, the rules mandate public participation in the permitting processes by requiring public notice of the proposed permits. However, the rule only states the *minimum* notice that is required to comply with the permitting process. The rule states that public notice may be given by publication in a newspaper "or by other means... if necessary to assure adequate notice to the affected public."<sup>43</sup> This language gives the permitting office discretion to address public participation issues in varying degrees dependent on the "affected public." For environmental justice areas, this could allow for enhanced methods of public participation to meaningfully engage the community.

As part of its Environmental Justice 2014 program, the EPA issued a notice to "Promote Environmental Justice in the Permit Application Process."<sup>44</sup> One of the main provisions of the notice included enhanced public involvement opportunities for priority permits.<sup>45</sup> The EPA lists a priority permit as one that "may have a significant public health or environmental impacts on

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<sup>42</sup> The EPA is currently creating a screening tool, EJSCREEN, that contains environmental and demographic data to help identify environmental justice communities through the United States. It is probable that the EPA will share the information gathered by this tool with state permitting offices in furtherance of the EPA's environmental justice mission. EPA Region 4, *Environmental Justice Permitting Implementation Plan* (April 16, 2013) <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/permitting/2013-05-region-04-plan.pdf>.

<sup>43</sup> TENN. COMP. R. & REGS. 1200-03-09-.02(11)(f)(8)(i)(I) (2011).

<sup>44</sup> EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 FR 27220 (May 9, 2013).

<sup>45</sup> *Id.* at 27232.

overburdened communities.”<sup>46</sup> Forms of enhanced public involvement may include lengthening the public comment period, designating points of contact in the community, using plain language in brochures and public notices, notice on websites, offering translation services, and holding public meetings at times and places where the community has the best chance to attend.<sup>47</sup>

TDEC already offers translation services to members of the community through its environmental justice program<sup>48</sup> and publishes public notices for permits along with the draft permit and statement of basis on its website.<sup>49</sup> By implementing the other approaches suggested by the EPA, the barriers to public participation by environmental justice communities could be broken down. Providing environmental information in plain language provides access to information for communities who may not be well versed in scientific or legal terminology. Meeting with community leaders ensures that notice will be further disseminated throughout the community and the leaders can encourage the community to come to the public hearings. Further, the community leaders can guide the permitting office on when and where to hold public hearings and better inform the office about issues that matter the most to their communities.

The enacted rules for Title V permits leave room for discretion in tailoring the public participation process to overburdened populations. While these enhanced public participation activities are small steps, they can make a vast difference in engaging environmental justice communities and further involving them in the permitting process. It is important to note that enhanced outreach activities for public involvement will not subject the permit applicant to stricter emission limits or disqualify it from obtaining a permit; these decisions are governed by

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 27236-27248.

<sup>48</sup> *Title VI Plan, supra* note 10.

<sup>49</sup> Letter from Env'tl. Prot. Agency to TN Div. of Env't & Conservation, Div. of Pollution Control, Tennessee Title V Program Review, (September 29, 2009) [http://www.epa.gov/region4/air/permits/programevaluations/TN\\_FinaReport2.PDF](http://www.epa.gov/region4/air/permits/programevaluations/TN_FinaReport2.PDF).

TAQA and the enacted rules. The main objective of the enhanced activities is not to stop the permit from being obtained, but to fully involve the community in the permitting process.

Through a flexible interpretation the rules of Title V permits, the goals of environmental justice can be better fulfilled by allowing for more thorough assessment of environmental justice issues in the permitting office and by encouraging the office to tailor its public participation approach to individual communities. This approach does not require that every Title V permit be put through the more detailed permitting process, but would allow a permitting office greater discretion in its activities when working with environmental justice areas.

#### **IV. Conclusion**

Ensuring clean air throughout the State of Tennessee is the governing principle behind the Tennessee Air Quality Act; however, many persons in minority and low-income communities are burdened by a disproportionate air quality compared to neighboring non-minority communities within the State. To combat this problem and promote clear air for all, Title V permit rules should be interpreted flexibly to allow permitting offices to perform environmental justices assessments in certain communities to aid in their permit decisions. Further, through discretionary enhanced activities for public participation, permitting offices can engage minority and low-income communities in a meaningful discussion about potential permits that will affect their area. Through this flexible interpretation, Tennessee can improve environmental justice throughout the state and achieve clear air for all.